

RESOLUTION 1267 COMMITTEE IN THE WAR ON TERROR

A Ticking Time Bomb on Human Rights

by

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ABSTRACT

The United Nations Security Council's efforts to suppress and to halt the acts of international terrorism resulted in the adoption of resolution 1267 in 1999 pursuant to chapter VII of the *Charter of the United Nations*. This resolution was originally worded against the Taliban administration in Afghanistan for its alleged support and involvement in the bombing of the embassies of the United States of America in Kenya and Tanzania by Osama Bin Laden and his Al-Qaeda Network. The resolution places a 'no assets' and a 'no-fly' ban on the Taliban government or any of its representatives. The third category of the sanction places arm embargo on the Taliban and the designated individuals and entities.¹

As a result of the rising incidence of transnational terrorism, the resolution was made applicable to private individuals who are suspected to be affiliated with Osama Bin Laden or his Al-Qaeda organization. Worthy of note also is the establishment of the Resolution 1267 Committee which was saddled with the duty, *inter alia*, of putting the names of the suspected individuals on a list known as 'the Consolidated List' and requiring states to freeze these individuals' assets and refraining them from flying in and out of their territories.

Using the experience of Mr. Abousfian Abdelrazik as documented in the recent Canadian case of *Abousfian Abdelrazik v. Minister of Foreign Affairs & Attorney General of Canada* as a case study and with the aid of a discussion of some established principles of international criminal law, this thesis will place the activities of the Resolution 1267

¹ The arm embargo was not contained in the resolution 1267 which was adopted in 1999 but is part of the other resolutions adopted by the SC in furtherance of resolution 1267.

Committee on the scale of compatibility with the well established principles of natural justice and due process under international criminal law. The thesis will determine whether the working guidelines of the resolution 1267 committee conform with the centuries of jurisprudence on natural justice, equity and good conscience. It will examine whether the United Nations or any of its organs is bound to comply with due process or natural justice principles even in the face of threat to international peace and security.

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CHAPTER ONE

THE WAR ON TERROR AND HUMAN RIGHTS: AN OVERVIEW

1. Introduction

The aim of this work is to see through into the working guidelines of the United Nations Security Council Resolution 1267 Committee with a view to establishing whether these working guidelines conform with due process and natural justice. The Resolution 1267 Committee was created pursuant to *Security Council Resolution 1267*² in 1999 and was given the responsibility of ensuring that States enforce the sanctions contained in the resolution. The resolution issues two categories of sanction against Taliban administration in Afghanistan in that it mandates States to freeze the assets of this administration and also forbids States from allowing it to fly in or out of their territories.³

In the year 2000, the Security Council expanded the scope of the application of the sanctions contained in resolution 1267 to Osama Bin Laden as well as individuals and entities associated with him or his Al-Qaeda organization.⁴ By this, States are required to submit names of individuals and entities suspected to be associated with Osama Bin Laden or Al-Qaeda Network to be included in a designated list called the ‘*Consolidated List*’ or ‘*Sanctions List*’.⁵ To date, pursuant to Resolutions 1267 and 1333, approximately four hundred and ninety individuals and entities have been

² *S.C. Res. 1267*, UN SCOR, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

³ *Ibid.* at para. 4(a) & (b). It should be noted that an additional sanction which deals with arm embargo was also added by subsequent SC resolutions on the issue to the earlier two sanctions put forward by resolution 1267. The scope of this thesis will however not cover much discussion or effects of this sanction. My attention therefore will be on the first two sanctions.

⁴ See *S.C. Res. 1333*, UN SCOR, U.N. Doc. S/RES/1333 (Dec. 19, 2000) para. 8(c). See also *S.C. Res. 1390*, UN SCOR, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

⁵ *Ibid.*

placed on the Sanctions List,⁶ the vast majority of which were submitted by the United States shortly following the September 11, 2001 terrorist attacks.⁷

The 1267 Committee is made up of the members of the Security Council.⁸ States, including those which the members of the Security Council represent may submit, for the purpose of putting on the Sanctions List, names of individuals and entities suspected to be affiliated or associated with Taliban or Osama Bin Laden. These individuals and entities are listed solely on the information provided by the requesting state. An opportunity does not arise for hearing their own side of the matter except where they request, by means of a petition, that their names should be delisted from the Consolidated List.⁹

This thesis intends to answer several complex questions associated with the working guidelines of the 1267 Committee.¹⁰ It intends to examine, whether there is anything wrong at law, for any member of the 1267 Committee to request an individual or entity's name to be listed and at the same time sit in judgment over that request. I would also explore the human rights implications of the economic sanctions regime. Can an individual or entity be punished without a finding of guilt by an independent

⁶ Jimmy Gurule, "The Demise of the U.N. Economic Sanctions Regime to Deprive Terrorist of Funding" (2009) 41:1 Case W. Res. J. Int'l. 19.

⁷ *Ibid.* at 36.

⁸ United Nations, *Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaeda and the Taliban and Associated Individuals and Entities*, online: United Nations <<http://www.un.org/sc/committees/1267/information.shtml>>.

⁹ United Nations, *Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaeda and the Taliban and Associated Individuals and Entities, Guidelines of the Committee for the Conduct of its Work* (New York: UN Security Council 1267 Committee, 2008) at para. 7(d), online: UN Security Council 1267 Committee <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

¹⁰ United Nations, *Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaeda and the Taliban and Associated Individuals and Entities, Guidelines of the Committee for the Conduct of its Work* (New York: UN Security Council 1267 Committee, 2008) 1, online: UN Security Council 1267 Committee <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

and impartial tribunal? Is the United Nations bound to respect due process guarantees and human rights norms in carrying out its activities under the Charter?

An attempt will be made in this work to answer the above questions using the experience of Mr. Abousfian Abdelrazik as documented in the case of *Abousfian Abdelrazik v. Minister of Foreign Affairs & Attorney General of Canada*.¹¹ Mr. Abousfian, a Sudanese Canadian fled Sudan in the year 1990 and was granted citizenship in Canada in the year 1995.¹² He was arrested in September 2003 in Sudan, apparently on the prompting of the Canadian Security Intelligence Service (CSIS), without any notification or information as to the offence he had committed.¹³ He was detained indefinitely, severely tortured and dehumanized.¹⁴ He was denied access to his wife and children in Canada as he was disallowed from travelling back to ‘his country of citizenship’ on the ground that his name was listed on the United Nations Consolidated List made pursuant to Security Council Resolution 1267 of 1999.

Prior to his name being listed, Mr. Abousfian was not informed of any charge against him neither was any attempt made at prosecuting him or securing a conviction against him. Simply put, judgment was meted out on him only on the basis of ‘suspicion’. The human rights implication of Resolution 1267 among others in that category as well as the activities of Resolution 1267 Committee became pronounced in the case under reference. Mr Abousfian was denied entry into his country of citizenship and became destitute¹⁵ as no financial assistance could be offered to him by anyone because of the resolution 1267 economic sanctions.

¹¹ Unreported, 2009 FC 580.

¹² *Ibid.* at 5 para. 10.

¹³ *Ibid.* at 29 para. 66-91.

¹⁴ *Ibid.* at 7 para. 16 & 21.

¹⁵ The facts of this case as recounted by Honourable Mr. Justice Zinn at p. 13 para. 30 narrate how Mr. Abousfian fled his home in Sudan to take up a temporary residence at the Canadian Embassy in

The facts of the above case are intriguing. They raise a lot of vexed questions on the war on terrorism, state security and human rights protection. They also raise questions as to the validity of the *audi alterem partem*¹⁶ and *nemo judex in causa sua*¹⁷ rules of natural justice and the applicability of these rules to the Security Council. Using this case as a case study, this thesis will proceed on the ground that if the age-long natural justice principles of *audi alterem partem* and *nemo judex in causa sua* are anything to go by coupled with the international criminal law principle of presumption of innocence, then the listing of Mr. Abousfian by the 1267 Committee in utter disregard of these principles is a ticking time bomb on his fundamental human rights and this ‘time bomb’ needs to be defused as soon as possible.

This chapter will be introductory in nature. Issues that will aid an understanding of the purport of the thesis will be discussed generally. I will briefly trace the history of terrorism from ages past to the present day. I will also briefly discuss the phenomenon of “war on terror” in modern day discussion on terrorism as well as the ordeal which human rights have been through in the war on terror. The methodologies to be adopted in writing this thesis will be discussed in this chapter. I will also make room for a small portion of the chapter to adumbrate the scholarly significance of this work.

1.1 Terrorism

Few words are plagued by so much indeterminacy, subjectivity and political disagreement as ‘terror’, ‘terrorize’ and ‘terrorism’.¹⁸ Like law itself, the term terrorism has defied a universally or generally accepted definition. The inability of the

Khartoum where his basic necessities were provided at the expense of the Canadian Embassy. He was given the sum of \$400 per month as well as a monthly loan of \$100. His Lordship actually described him as ‘destitute’. The Canadian Embassy was able to offer this assistance to Mr. Abousfian pursuant to a clearance which the Embassy sought and obtained from the Resolution 1267 Committee.

¹⁶ This is a Latin expression which means that the other party to a dispute should be heard and judgment should not be passed based on the testimony of one party to the dispute alone.

¹⁷ This Latin expression means no one should be a judge in his own case.

¹⁸ Ben Saul, *Defining Terrorism in International Law* (New York: Oxford University Press, 2006) 1.

world community to reach a consensus on what terrorism means for the purpose of the adoption of a comprehensive treaty on the subject has amplified the challenges confronting the international community at finding a lasting legal solution to this crime.

An attempt was made at defining terrorism in the year 1937 by the League of Nations following the assassination of King Alexander I of Yugoslavia. This definition was contained in a draft *Convention for the Prevention and Punishment of Terrorism* though the Convention did not enter into force as there were not sufficient ratifications from states.¹⁹ The same fate befell the work of the Committee set up by the United Nations General Assembly in 1972 to define and prohibit terrorism.²⁰ The Committee could not agree on the distinction between ‘freedom fighters or national liberation movement’ and ‘terrorists’ and this was the major stumbling block for the work of the Committee.²¹ Under the *International Convention for the Suppression of the Financing of Terrorism*²² which was adopted by the United Nations General Assembly in December 1999 and came into force in 2002, some States entered reservations with respect to article 2(1) (b) which describes terrorist acts.

These States are Egypt, Jordan and Syria. They maintained that some group of persons will not be considered as falling within the definition of ‘terrorist’ as defined in the convention.²³ Jordan’s reservation, for example, stated that its government ‘does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people’s right to self-determination as terrorist acts within the context of

¹⁹ League of Nations Doc.C.546 (1).M.383 (1).1937.V.

²⁰ Robert Cryer, *et al.*, *An Introduction to International Criminal Law and Procedure* (New York: Cambridge University Press, 2007) 284.

²¹ *Ibid.* at 285.

²² In (2000) 39 ILM, 270, with an introductory note by CM Johnson.

²³ *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, online: United Nations Treaty Collection <<http://untreaty.un.org>>.

paragraph 1 (b) of Article 2 of the Convention'.²⁴ Egypt and Syria's reservation were the same in substance as that of the State of Jordan. Argentina and twenty three other States however objected to this reservation contending, *inter alia*, that the reservation negated the letters and the spirits of the Convention.

Despite these seemingly unending disagreements about the legal definition of terrorism, it has been suggested that there is indeed an understanding among states on what constitutes terrorism and who a terrorist is.²⁵ In the light of different reasoning which states have put forward in justifying some terrorist acts,²⁶ this suggestion might not be totally correct as the on-going disagreements on the definition of terrorism seem to be interminable.²⁷ The practice of the United Nations therefore has been to encourage States to negotiate specific multilateral treaties that define certain criminal acts as subject to extradition or national prosecution.²⁸

²⁴ Henry J. Steiner, Phillip Alston & Ryan Goodman, *International Human Rights In Context – Law, Politics, Morals*, 3d ed. (New York: Oxford University Press, 2008) 377.

²⁵ See Antonio Cassese, *International Criminal Law*, 2d ed. (New York: Oxford University Press, 2008) 164 – 165. The author argues that many factors are indicative of the formation of substantial consensus on a definition of terrorism in time of peace. He states that the Conventions on terrorism adopted by the Arab League, the Organization of African Union, and the Conference of Islamic States, all lay down a definition that is to a large extent in line with that enshrined in other international instruments. Again, he argues that both the 1999 United Nations Convention for the Suppression of the Financing of Terrorism and various United Nations General Assembly resolutions contain a similar notion which is also shared in the Draft Comprehensive Convention on Terrorism that is being negotiated. And finally, it is his opinion that most national laws, as well as national case law take the same approach.

²⁶ Some states for example are of the view that the reasons which necessitated some acts of terrorism should be investigated and addressed rather than tagging the perpetrators of such terrorist acts as 'terrorists'. Most Islamic states belong to this school of thought. The other reasoning, as has earlier being discussed, is the belief by some states that some attack might not be properly described as terrorist attack but act of national liberation as one state's terrorist is another state's freedom fighter.

²⁷ *Supra* note 17 at 4 where the author argues that "in the light of the kaleidoscopic uses of the term, it is fallacious to assert pragmatically that terrorism is recognizable without difficulty, or to claim intuitively that 'what looks, smells and kills like terrorism is terrorism'. Disagreements about terrorism runs much deeper than technical disputes about drafting; it reflects doctrinal, ideological, and jurisprudential arguments about who is entitled to exercise violence, against whom, and for what purposes."

²⁸ Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (Australia: LexisNexis Butterworths, 2006) 631.

Twelve out of the thirteen conventions rely on an “operational” definition, based on specific terrorist “activities”. Thus, separate treaties exist to address issues such as bombings, hijackings; hostage-taking and covert financing of terrorist activities, but a universal definition is yet to be adopted.²⁹ Pending the adoption of a comprehensive treaty on terrorism which might hopefully provide a better definition, the definition which seems to be widely in use by legal commentators is that adopted by the Security Council in *Resolution 1566* which:

...[r]ecalls that acts, including against civilian, 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 organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature...³⁰

Terrorism is by no means a new phenomenon in the global order. In fact, the growth of the incidence and importance of terrorism in the contemporary international system has been mirrored by a prodigious outpouring of literature on the subject.³¹ The use of terror is as old as human existence itself. The massacre of the inhabitants of a captured city was a common feature of warfare until the last two centuries. A would-be conqueror could expedite conquest by proclaiming that cities that refused to yield immediately would be razed and their inhabitants killed.

²⁹ See generally, B. Broomhall, “State Actors in an International Definition of Terrorism From A Human Rights Perspective” (2004) 36 *Western Reserve Journal of International Law* 421-441.

³⁰ *S.C. Res. 1566*, UN SCOR, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

³¹ See for example, H. Henderson, *Global Terrorism* (New York: Facts on File, Inc., 2004); J. Stevenson, *Counter-Terrorism: Containment and Beyond*, (Oxford: Oxford University Press, 2004); J. Barker, *The No-Nonsense Guide to International Terrorism* (Oxford: New Internationalist Publishers, 2003); W. Ze’ ev Laqueur, *Terrorism* (London: Weidenfeld and Nicolson, 1977); M. E. Houle, *Terrorism* (San Diego, CA: Greenhaven Press, 2005).

In battle, given the hand weapons and massed formation used, most casualties were inflicted only after one side broke and ran.³² The conduct of politics through assassinations was also common place and resulted, for example, in the short terms of office of many later Roman Emperors.³³ Non-governmental groups also practiced early forms of terrorism. The September 11, 2001 attack in US however constituted a turning point in modern day international law on the relationships between law, global institutions and terrorism. It was indeed, a ‘black Tuesday’ in US when two of the four commercial jets hijacked by nineteen members of Al Qaeda crashed into the 110-storey twin towers of the World Trade Centre killing nearly 3,000 souls. This attack and several others particularly the most recent Mumbai attacks in India on the 26th November, 2008 therefore made terrorism a topical issue under international law and several efforts have been made by global actors to combat it.

1.2 The War on Terror

One phrase more than any other captures the reaction of the international community to the catastrophic events of September 11, 2001: the “war on terror.”³⁴ This phrase has been on for a long time. The mistake however is to assume that it was a coinage of the former US President, George W. Bush. The truth is that the phrase only gained prominence during his tenure; particularly after the 9/11 attack and was never his invention. It might therefore be correct to assert that the phrase never attained the status of notoriety as much as it does now prior to the 9/11 attack.

History has it that the phrase was first used in the late 1940s to describe efforts used by the British colonial administration to put an end to violent activities by Zionist

³² H. Henderson, *Global Terrorism* (New York: Facts on File, Inc., 2004) 10.

³³ *Ibid.*

³⁴ Craig Forcese, “De-militarizing Counter-Terrorism: Anti-terrorism, Human Rights, and the Use of Force” in LaViolette, Nicole & Forcese, Craig, eds., *The Human Rights of Anti-terrorism* (Toronto: Irwin Law Inc., 2008) 165.

Jews in Palestine. The administration considered these series of attacks to be terroristic and consequently declared a “war on terror” to clamp down the activities of the Zionist Jews. The phrase was gradually going out of use when US President Ronald Reagan brought it back to usage in connection with his administration’s policies against Nicaragua and Libya in 1986. President George W. Bush, adopting the same approach after the 9/11 attacks declared that the United States was at war with Al-Qaeda. Perhaps even more radically, he declared that in reacting to the calamities of 9/11, the United States would “make no distinction between the terrorists who committed the attacks and those who harbour them.”³⁵

The phrase thus entered into common usage notwithstanding heavy criticism that instead of using it as a metaphor, as in the case of ‘war on poverty’ or ‘war on drugs’; terminology which has primarily served a rhetorical purpose, the United States views the struggle against Al-Qaeda and associated terrorist groups and individual as a real war.³⁶ The United States would seem to have been strengthened in its view by *Resolution 1368*³⁷ which was passed by the United Nations Security Council on September 12, 2001. By this Resolution, the United Nations Security Council determined that the attacks constituted a ‘threat to international peace and security’ and also recognized the ‘inherent right of individual or collective self-defence in accordance with the UN Charter.

Accordingly, the resolution implicitly recognized that the acts of 11 September 2001 constituted an ‘armed attack’ under Article 51 of the UN Charter. Although the United States and other countries had experienced and responded to terrorist attacks with

³⁵ George W. Bush, Presidential Address to the Nation on the Terrorist Attacks, 37 Weekly Comp. Pres. Doc. 1301 (11 September 2001).

³⁶ Ved P. Nanda, “Introductory Essay: International Law Implications of the United States’ “War on Terror”” (2009) 37:4 Denver Journal of International Law and Policy 513.

³⁷ S.C. Res. 1368, UN SCOR, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

force in the past, the Security Council had never before issued such a finding. Also unprecedented is the fact that both the North Atlantic Treaty Organization and the Organization of American States formally considered 11th September an ‘armed attack’ and invoked the collective self-defence provisions of their respective treaties.

*Resolution 1373*³⁸ was adopted by the Security Council on the 28th of September, 2001. The resolution was adopted under Chapter VII of the UN Charter which obligates States to implement more effective counter-terrorism measures at the national level and to increase international cooperation in the struggle against terrorism. The Security Council under this resolution required all States to take financial, penal and other regulatory measures against individuals and organizations involved in terrorist activities. The resolution created the Counter-Terrorism Committee (CTC) to monitor action on this issue and to receive reports from States on measures taken. What followed was a flurry of international, regional and domestic efforts to tackle terrorism “head on”.³⁹

Resolution 1267 had earlier been adopted by the Security Council in 1999. This resolution, among other matters, called for the Taliban to hand over Bin Laden, who had been indicted in connection with the 1998 bombings of the United States embassies in Kenya and Tanzania.⁴⁰ The resolution also called for the freezing of the various assets associated with the Taliban. Just like resolution 1373, resolution 1267 also created its own committee widely now known as ‘the 1267 Committee’ to consider reports from states on compliance with the Resolution.

³⁸ S.C. Res. 1373, UN SCOR, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

³⁹ The Bali bombings, the targeting of children in Beslan, hostage-taking in Moscow and the execution of hostages in Iraq have also been reflected in extensive measures adopted by national legislatures to counter terrorism.

⁴⁰ Kent Roach, “Sources and Trends in Post-9/11 Anti-terrorism Laws” in Benjamin J. Goold & Liora Lazarus, eds., *Security And Human Rights* (Oregon: Hart Publishing, 2007) 227 at 232.

As the face of terrorism changed from State sponsored to what is now commonly known as transnational terrorism⁴¹ involving non-state actors, the Security Council in a bid to meeting up with this challenge has extended the scope of Resolution 1267. The Security Council has adopted Resolutions 1333 of 19th December 2000,⁴² 1390 of 16th January 2002,⁴³ 1526 of 30th January 2004,⁴⁴ 1617 of 29th July 2005,⁴⁵ 1730 of 19th December 2006,⁴⁶ 1735 of 22nd December 2006⁴⁷ and 1822 of 30th June, 2008.⁴⁸ The Security Council took its efforts at combating terrorism to a new height when Resolution 1333 was adopted. This Resolution mandates the listing of individuals and entities associated with Al-Qaeda and also authorises the freezing of the assets of Bin Laden and those of individuals and entities associated with him wherever these assets could be found in the world.

It is not in doubt that the primary responsibility of the Security Council is the maintenance of international peace and security.⁴⁹ Article 39 of the *UN Charter*⁵⁰ also places an obligation on the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression and to make recommendations or decide what measures to be taken in accordance with Articles 41 and 42 of the *UN Charter* to maintain or restore international peace and security. Article 25 of the *UN Charter* enjoins members of the United Nations to accept and carry out the decisions of the Security Council. In line with this provision, resolutions of the Security Council

⁴¹ Monika Heupel, "Adapting to Transnational Terrorism: The UN Security Council's Evolving Approach to Terrorism" (2007) 38 Security Dialogue 477 at 484.

⁴² *S.C. Res. 1333*, *supra* note 3.

⁴³ *Ibid.*

⁴⁴ *S.C. Res. 1526*, UN SCOR, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

⁴⁵ *S.C. Res. 1617*, UN SCOR, U.N. Doc. S/RES/1617 (Jul. 29, 2005).

⁴⁶ *S.C. Res. 1730*, UN SCOR, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

⁴⁷ *S.C. Res. 1735*, UN SCOR, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

⁴⁸ *S.C. Res. 1822*, UN SCOR, U.N. Doc. S/RES/1822 (Jun. 30, 2008).

⁴⁹ Article 24 of the *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI (entered into force 24 October 1945) [*UN Charter*].

⁵⁰ *Ibid.*

are enforceable by States.⁵¹ In Canada for instance, the *United Nations Act*⁵² has been enacted in order to fulfil its obligations under article 25 of the *UN Charter*. As a corollary, the *United Nations Al-Qaeda and Taliban Regulations*⁵³ was made in order to make resolution 1267 applicable in Canada.⁵⁴

The above captures the efforts of the United Nations Security Council to combat terrorism and achieve international peace and security in line with its mandates under the charter. In heeding to the clarion call by the Security Council to combat terrorism, states adopted several measures and legislations aimed principally at achieving national security and peaceful co-existence of their citizens. The quickest responses to Security Council Resolution 1373 in Australia, Canada and the United Kingdom for example, were the promulgation of regulations under existing United Nations Acts that incorporated or built on the listing process started by the 1267 Committee.⁵⁵

President Barack Obama has been careful of using the phrase ‘war on terror’.⁵⁶ In fact, Secretary of State, Hillary Clinton reportedly said in March 2009 that the new administration had dropped “war on terror” from its lexicon.⁵⁷ Record however has it that President Obama has used the phrase, at least on two occasions despite the fact

⁵¹ Reich Johannes, “Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999)” (2008) 33:2 Yale Journal of International Law, 505 at 506.

⁵² R.S.C 1985, c. U-2.

⁵³ SOR/99-444.

⁵⁴ In UK, this resolution was domesticated by the *Al-Qaeda and Taliban (United Nations Measures) Order 2006* while in the US; it was made applicable by Executive Orders.

⁵⁵ *Supra* note 41. These Regulations respectively are: *United Nations Suppression of Terrorism Regulations*, SOR/2001-360 (2 October, 2001); *Terrorism (United Nations Measures) Order 2001*, SI 2001 No 3365 (10 October 2001); *Charter of the United Nations (Anti-terrorism Measures) Statutory Rule No 297 of 2001* (8 October, 2001).

⁵⁶ This might not be unconnected with the barrage of criticism which the phrase has attracted to the policy of the United States on terrorism. See for example, the views of UK Attorney General from 2001 to 2007 on the phrase ‘war on terror’ in “Justice and the Rule of Law” (2009) 43 Int’l Lawyer 27 at 29 where he says that “...the war on terror then justifies holding people without trial after the international armed conflict has come to an end until this amorphous ‘war on terror’ has come to an end – and who is going to say when it has? And secondly, it has a powerful impact on legal questions, like whose job it is to deal with. My perception reading US Supreme Court decisions is that calling it ‘war on terror’ is designed to give the Executive powers without the control of Congress because as military action, it falls to the President as Commander-in-Chief to make decisions.”

⁵⁷ *Supra* note 36.

that the Defense Department in March 2009 officially dropped the phrase ‘Global War on Terror’ and substituted it with ‘Overseas Contingency Operation.’⁵⁸ Specifically, during his Inaugural address on January 20, 2009, President Obama stated that “Our nation is at *war*, against a far-reaching network of violence and hatred.”⁵⁹ He was also reported to have said in May, 2009, during his National Security remarks that the United States was at war with Al-Qaeda and its affiliates.⁶⁰

For every war, there is always a starting and an end date. The war on terror however seems to take a different approach. Like a recurring decimal, its rhetoric keeps playing out in the agenda of various national governments, regional and international Organizations. President George W. Bush was reported to have said that the war on terror will not end until every terrorist group of global reach has been found, stopped, and defeated.⁶¹

1.3 Human Rights in the War on Terror

In *Resolution 1456* of 20th January 2003,⁶² the Security Council declared that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." Human rights law has sought to strike a fair balance between legitimate national security concerns and the protection of fundamental freedoms.

⁵⁸ Wilson, Scott & Al Kamen, “Global War on Terror is Given New Name” The Washington Post (25 March 2009) A04.

⁵⁹ President Barack Obama, *Inaugural Address* online: ABC NEWS Politics <<http://abcnews.go.com/Politics/Inauguration/story?id=6689022&page=1>>.

⁶⁰ President Barack Obama, “Remarks by the President on National Security” White House (21 May 2009), online: <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09>.

⁶¹ George W. Bush, President’s Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1348 (20 September, 2001).

⁶² S.C. Res. 1456, UN SCOR, U.N. Doc. S/RES/1456 (Jan. 20, 2003).

Addressing this point, the International Commission of Jurists' Eminent Jurists Panel in its Report on *Terrorism, Counter-Terrorism and Human Rights*⁶³ states that:

...if one were to judge from the public debates, and the stance taken by many governments, there is a tension between upholding human rights or ensuring people's security in the face of the terrorist threat. It is a basic tenet of this report that any implied dichotomy between securing people's rights and people's security is wrong. Upholding human rights is not a matter of being "soft" on terrorism. On the contrary, countering terrorism is itself a human rights objective, since States have a positive obligation to protect people under their jurisdiction against terrorist acts...⁶⁴

The extensive measures briefly described above, taken by states and regional and international organizations to fight terrorism has come with a price- a heart-rending tale of disregard and subversion of those fundamental human rights and beliefs which took the world community many years to foster. Many anti-terrorism laws and measures have been adopted by many states of the world, which have disregarded human rights. The US *Patriot Act* is an example of this. This Act allows the detention of terrorist suspects. The act not only gives officers the discretion to arrest and describe anyone they feel is a suspect, it also fails to define clearly what or who is a suspect. The end result is a violation of the basic rights of so many people who have been arrested and tortured as suspects. Rosemary Foot was referring to this when she wrote that:

...some 1,200 non-citizens, mostly Muslim men, were detained in the US immediately after the 2001 terrorist strikes, with estimates of above 5,000 in US custody as of May 2003... these men were held in harsh confinement, often without access to lawyers, and denied all chances of bail. Some at a facility in Brooklyn, New York, were held in highly restricted 23-hour 'lockdown'

⁶³ International Commission of Jurists, *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (Geneva: ICJ, 2009), online: International Commission of Jurists <<http://ejp.icj.org/IMG/EJP-Report.pdf>>.

⁶⁴ *Ibid.* at 16.

conditions, only being allowed to move outside of their cells once they had been handcuffed or strapped with leg irons and heavy chains...⁶⁵

Also in the United Kingdom, the Parliament in 2001 passed into law the *Anti-Terrorism, Crime and Security Act*.⁶⁶ This legislation provides for the *indefinite* detention of non-nationals suspected of involvement in international terrorism. The legislation was subsequently used as a basis for the long-term detention of a number of individuals at Belmarsh prison and other high-security facilities.⁶⁷ Many countries have followed the lead of the Security Council and used immigration law as anti-terrorism law. International and domestic organizations often draft anti-terrorism initiatives on the fly, engaging in bricolage with what is at hand, but with limited information about the effects of various measures on security or human rights. Other deplorable arrangements and legislations have been passed by several other countries over the decade under the guise of fighting terrorism.

The afore stated efforts by states and international community have however resulted in violation of some human rights. The International Commission of Jurists has listed a number of fundamental rights that have been violated in the pursuit of counter-terrorism efforts: freedom from torture; the right to life; freedom from arbitrary detention; the right to a fair trial by an independent and impartial tribunal established by law; freedom of association and expression; and the rights to asylum and non-discrimination. Arrests and deportations carried out in the United States and other countries after 11 September, 2001 highlight some of the issues that have arisen.⁶⁸

⁶⁵ Rosemary Foot, *Human Rights and Counter-Terrorism In America's Asia Policy* (Oxford: Oxford University Press, 2004) 12.

⁶⁶ *Anti-Terrorism, Crime and Security Act* (U.K.), 2001. Part 4 of this Legislation which has generated a sort of controversy vis-à-vis UK's obligation under international human rights treaties has now been replaced in 2005 with *Prevention of Terrorism Act*.

⁶⁷ Susan Marks & Andrew Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005) 355.

⁶⁸ *Ibid.* at 347.

According to Marks and Clapham; the war on terror has resulted in the detention without charge of large numbers of people by United States authorities in Afghanistan and Iraq as well, and in recourse to the practice of targeted killing or assassination.⁶⁹

The fight against terrorism has affected the right not to be subjected to torture or to cruel, inhuman treatment. A very good example of this is the transfer of prisoners by the United States from Afghanistan and elsewhere to *Guantanamo Bay* in Cuba. In *Rasul et al. v George W. Bush, President of The United States et al.*,⁷⁰ the detainees testified before the court that they were held in extremely harsh conditions, without charge and with only very limited access to lawyers and the outside world, deprived for over two years of the chance to challenge the legality of their detention. Also in *Aksoy v. Turkey*,⁷¹ the applicant was held incommunicado for at least 14 days and during this time, he was tortured. The court held that notwithstanding the offence of the applicant, his rights not to be subjected to torture or inhuman treatment were non-derogable.

In discussing how the fight against terrorism has affected refugee and asylum law, it is imperative to mention the case of *Mohamed v President of the Republic of South Africa*⁷² where the Government of South Africa wrongfully extradited a Tanzanian Asylum seeker to the United States on allegation of his participation in a terrorist attack on the United States' Embassies in Nairobi and Dar Es Salaam. Identifying the applicant as a terrorist beclouded the South African Government's sense of human rights who immediately handed the applicant over to the Government of the United

⁶⁹ *Ibid.* at 348.

⁷⁰ Supreme Court of the United States, 28 June 2004, Part IV.

⁷¹ (1996), 26 E.C.H.R. (Ser. A) 68, 23 E.H.R.R. 553.

⁷² [2001] ZACC 18, online: Southern African Legal Information Institute <<http://www.saflii.org/za/cases/ZACC/2001/18.html>>.

States under a process adjudged to be wrong by the South African Constitutional Court to face death penalty.⁷³ This and several other cases in the world over lend credence to the fact that the fight against terrorism has brought human rights under serious threat.

Apart from the very dangerous approaches which States have adopted in fighting terrorism pursuant to a number of resolutions of the Security Council, of interest in this regard are the activities of the Resolution 1267 Committee which was established by Section 6 of Security Council Resolution 1267 of 1999. The Guidelines of the Committee for the Conduct of its work which was adopted on 7 November, 2002⁷⁴ have risen to a level that deserves an appraisal. The Report of the United Nations Office of Legal Affairs commented on the workings of the Resolution 1267 Committee as follows:

“Targeted individual and entities are not informed prior to their being listed and accordingly do not have an opportunity to prevent their inclusion in a list by demonstrating that such an inclusion is unjustified under the terms of the respective Security Council resolution(s). There exist different de-listing procedures under the various sanctions regimes, but in no case are individuals or entities allowed directly to petition the respective Security Council Committee for de-listing. Individuals or entities are not granted a hearing by the Council or a Committee...no legal rule rules exist that would oblige the committee or the council to grant a request (for de-listing) if specific conditions are met”⁷⁵

The matter becomes worse for several persons whose names are on the list as no opportunity exists by which such listings could be challenged before a national court

⁷³ *Ibid.*

⁷⁴ These Guidelines have been amended on 10 April, 2003; 21 December, 2005; 29 November, 2006; 12 February, 2007 and 9 December, 2008.

⁷⁵ B. Fassbender, Targeted Sanctions and Due Process, Study commissioned by the United Nations Office of Legal Affairs – Office of the Legal Counsel, March 2006, online: United Nations, <http://www.un.org/law/counsel/Fassbender_study.pdf> [*Fassbender, Targeted Sanctions and Due Process*].

or tribunal as the UN enjoys absolute immunity from every form of legal proceedings before national courts and authorities.⁷⁶ From the foregoing therefore, there is the delicate balance that needs to be struck between having an expedited listing process to ensure that legitimate targets do not escape sanctions and putting minimum evidentiary standards and a transparent listing process into place to ensure that due process and other human rights standards are respected.⁷⁷

2. About the Thesis

2.1 Structure of the Thesis

The principles of natural justice will be explored. This will lead to an extensive discussion of the due process right or the right to fair trial. The due process right will be used as a yardstick for measuring the compliance or otherwise of the working guidelines of the Resolution 1267 Committee with the current legal structures under international law in order to determine whether the activities of this committee are valid under international human rights law.

To this end, the thesis shall be divided into four chapters. As noted earlier, chapter one will be introductory in nature. It will examine the various attempts to define terrorism and the complexities involved in defining terrorism. The chapter will also discuss how human rights have been violated while fighting terrorism. Chapter two will deal with the foundation of human rights and natural justice in international law. The chapter will make statements about the natural justice principles and due process rights under international law. It will further examine whether the right to a fair trial or due process

⁷⁶ Section 2 of the *Convention on the Privileges and Immunities of the United Nations*, UNTS Vol. 1 p. 15.

⁷⁷ Eric Rosand, "The Security Council's Efforts to Monitor the Implementation of Al-Qaeda/Taliban Sanctions" (2004) 98 *American Journal of International Law*, 745 at 750.

right has attained the status of customary international law which binds all subjects of international law including the United Nations. Chapter three will focus its search light on the United Nations Security Council. Issues that bother on powers and duties of the Security Council as well as the general responsibility of the United Nations for wrongful acts will be thoroughly examined.

A full discussion of the facts of the case of *Abousfian Abdelrazik v. Minister of Foreign Affairs & Attorney General, Canada*⁷⁸ will engage my attention in chapter four of this work. A thorough discussion of Resolution 1267 Committee will also be made in this chapter. We will examine the nature of the sanction regime created by resolution 1267 and determine whether it is preventive or punitive. We will also examine other human rights apart from the right to a fair trial which the sanction regime violates with particular reference to the case study. The chapter will end with a general conclusion.

2.2 Objectives

The main objective of this work is to cast a spotlight on the activities of the Resolution 1267 Committee, particularly as reflected in the case study. Defying the risk of prosecution,⁷⁹ over 100 Canadians made contributions in cash and kind to secure a travel ticket for Mr. Abousfian with which he flew back into Canada on 27th June, 2009. After much pressure, the Canadian government also applied for an exemption under the present United Nations Resolution 1267 legal regime which fostered the home coming of Mr. Abousfian.

⁷⁸ *Supra* note 11.

⁷⁹ Section 3 of the *United Nations Al-Qaeda and Taliban Regulations* forbids Canadians from making any sort of financial assistance to anyone whose name has been listed on the Resolution 1267 Committee list. Out of pity for Mr. Abousfian, several Canadians ignored this provision and dared its consequences.

However, there seems to be no cause for celebration yet as Resolution 1822 of June 30, 2008 has practically robbed Mr. Abousfian of his entire human dignity and basic fundamental freedoms. He can neither work nor associate freely with others. It is also doubtful if he can be freely associated with or if he can freely embark on a major journey outside Canada. He is condemned to a total life of deprivation, mental anguish and emotional trauma. This work will observe the activities of Resolution 1267 Committee. It will also deal with natural justice principles and presumption of innocence in details with a view to determining whether the working guidelines of Resolution 1267 Committee conform with these principles of law.

2.3 Methodology

The particular methodology that the work adopts is the ‘case study’ approach. The case of Mr. Abousfian will be used as a *litmus test* for determining whether or not the activities of Resolution 1267 Committee are compatible with centuries of jurisprudence on the natural justice principles and the right to a fair trial. As a starting point, I will trace the principles of natural justice back to the old English Common Law Courts and establish in details that these principles have metamorphosed into what is generally known as due process rights or the right to a fair trial in human rights parlance. I will also establish that an accused deserves full dignity and respect under international law until proven guilty. This discussion will be aided by a robust exposition into the principles of fair trial and presumption of innocence which are undoubtedly well entrenched in international law.

The thesis will be analytical and critical in its approach when dealing with the Security Council. I will explore the status and responsibilities of the Security Council in the global human rights order. Being a work that is largely case study based, all the

findings made in this research will be applied to the case at hand to observe the activities of the Resolution 1267 Committee and further, to determine how well the Security Council has fared in its approach at balancing the war on terrorism with the fundamental values and liberties of man which States have built over the years.

2.4 Scholarly Significance

It is ironic to discover that the United Nations; especially the Security Council which stands as a harbinger of peace and rule of law will find itself at a cross-road with human rights. The Preamble to the *UN Charter*⁸⁰ summarises the stance of the United Nations to human rights and rule of law in general. The relevant part of the Preamble reads:

“...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom...”

In view of the above stated declarations, we need to determine the compatibilities of Resolution 1267 and others with the present bodies of law governing human rights and fundamental freedom. Here lies the academic significance of this research. It will be established that the current *modus operandi* of the Resolution 1267 Committee does not meet up with respect for human rights and fundamental freedoms. This working pattern of the Committee has wreaked havoc to the life of Mr. Abousfian and several others and a study, such as this, needs to be conducted. Above all, the research work will undoubtedly be an additional material for scholarship in the field of

⁸⁰ *Supra* note 49.

international law and at the same time serve as a springboard for further research particularly in relation to controversial issues which the thesis intends to address.

CHAPTER TWO

**THE FOUNDATION OF HUMAN RIGHTS AND JUSTICE IN
INTERNATIONAL LAW: AN EXPLORATION**

2.1. Introduction

This chapter traces the principles of natural justice from the old English Common Law courts and shall conclude *inter alia* that these principles have metamorphosed into what is generally referred to as the right to a fair trial or due process of law. It will also determine whether the right to a fair trial or due process of law has attained the status of customary international law that could be binding on States and other subject of international law like International Organizations which are not parties to several international human rights treaties proclaiming this right. This becomes necessary so as to determine whether the Security Council has an obligation to respect this right whenever it is carrying out its responsibilities under the *UN Charter*.⁸¹ Global events in the civil and criminal hemisphere have continued to put a big question mark on the commitment of States and International Organizations on this fundamental human right. The sheer disregard of this right, however, has led to harrowing cases of miscarriage of justice in both the administrative and criminal justice systems.

The natural justice principle or what is nowadays referred to as fair trial guarantees or due process of law pervades both the civil and criminal processes of adjudication. These terms form part of the guarantees upon which the whole doctrine of justice is based and there is, according to Lon L. Fuller, no law unless certain minimal requirements of procedural justice are met.⁸² Due process of law like the natural justice principles cuts across civil and criminal undertakings where the rights and

⁸¹ *Supra* note 49.

⁸² Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1965).

liabilities of individuals are concerned. It is a term relevant to even *ad hoc* and administrative committees in the discharge of the legal mandates given to them by the applicable enabling authorities.

One area of endeavour that is on collision with the principles of natural justice or due process of law is the provision and maintenance of security by states and international organizations to their subjects against terrorism. Security is so powerful an aspiration that it tends to trump all other considerations and silence countervailing concerns.⁸³ Its capacity to licence draconian measures is fuelled both by the impossibility of knowing precisely against which threats security measures must protect and by sheer weight of numbers – not least when mass public protection is juxtaposed against loss of individual rights for few.⁸⁴

Humanity is engulfed in a new order of threat.⁸⁵ The world is contending with the challenges of terrorism and human wickedness. The global security order is being reshaped intermittently to meet the demands of the twenty first century civilization which brings with it unending perpetration of violence or perhaps vengeance sometimes in the name of God. Barely one day passes by without bomb blasts somewhere on this planet and their innocent victims make headline news while communities keep counting their dead. Security has therefore become a major project to be executed by most governments of the world. It has risen to the top of the list on the agenda of most national governments and international organizations.

⁸³ Lucia Zedner, “Seeking Security by Eroding Rights: The Side-stepping of Due Process” in Benjamin J. Goold, & Liora Lazarus, eds., *Security And Human Rights* (Oregon: Hart Publishing, 2007) at 257.

⁸⁴ Ronald Dworkin, “Terror and the Attack on Civil Liberties” (2003) 50:17 *The New York Review of Books* 37.

⁸⁵ C. Warbrick, “Emergency Powers and Human Rights: The UK Experience” in Wouters Jan Fijnaut Cyrille, & Frederik Naert, eds., *Legal Instruments in the Fight Against International Terrorism: A Transatlantic Dialogue* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) 361 at 392.

Whilst this trend is generally good and worthy of commendation, the desire to provide adequate security in the midst of global incidence of terror now has implications for individual liberties because they circumvent the procedural requirements of the civil and criminal laws to impose prospective constraints in respect of remote harms. A heavy burden has consequently been given to the legal profession and its actors to determine the compatibility of emergency security measures, especially those relating to counter terrorism with established jurisprudence which advocates respect for human rights as a precondition to a civilized society. This task is enormous. Torn between the ends of public security and effective administration of justice on one side, and the interests of an individual justly or unjustly accused or suspected of perpetrating a crime on the other side, the law becomes a key actor in the search for fruitful approaches to adequately regulate the natural imbalance of power in administrative and criminal proceedings as well as the confrontations of the lone suspect with the vast machinery of the state.⁸⁶

The current framework under international criminal law supports meting out punishment to whoever has been found guilty of any crime by a court of competent jurisdiction.⁸⁷ It is however not in support of any kind of punishment or maltreatment to criminal suspects during the criminal justice administration periods as they are presumed innocent until proven guilty.⁸⁸ This is so, as the law intends to eliminate every form of bias against the suspect which may adversely affect his trial and thus leads to miscarriage of justice. The law leans heavily in favour of criminal suspects to such an extent, *inter alia*, that they cannot be forced or tortured to give testimonies or

⁸⁶ Roza Pati, *Due Process and International Terrorism: An International Legal Analysis* (Leiden/Boston: Martinus Nijhoff Publishers, 2009) 1.

⁸⁷ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90, art. 25, (entered into force 1 July 2002) [*Rome Statute*].

⁸⁸ *Ibid.* at art. 66.

make confessions except by their own willingness.⁸⁹ In fact, the right not to be tortured under international human rights law admits of no exception.⁹⁰

What then are the safeguards put in place under international criminal law to ensure that criminal suspects are afforded their fundamental rights even in the face of trial? Are these safeguards amenable to exceptions? Are there instances where the rights of a criminal suspect could be violated under the law? In order to answer these questions and more, this chapter will be divided into four parts. The first part will explore the idea of human rights. It will examine its evolution and meaning under international law.

The second part of this chapter will examine what is meant by natural justice. This is a very slippery term. Experience has shown that what could be justice to the State could be injustice to the accused. The quest therefore, in the criminal justice system, is to ensure that the right balance is maintained between parties to a particular proceeding. Hence, the usual saying that justice is a three way traffic; justice to the victim, justice to the State and justice to the accused. The key principles of *audi alterem partem* and *nemo iudex in causa sua* which are the twin pillar upon which the natural justice principle stands will be considered. Since the natural justice principles are traceable to the English common law doctrine, some cases that have been considered under these principles at common law will be examined.

It will be argued in Part three of this chapter that the age-long principles of natural justice have metamorphosed through the years into what is popularly known

⁸⁹ *Ibid.* at art. 67(g).

⁹⁰ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

nowadays as the principles of fair trial or due process of law. Part three therefore will be devoted to a discussion of the core requirements of due process of law. It will examine the aim of this principle and its significance in the criminal or administrative justice system. What is the minimum evidentiary standard expected from administrative tribunals and courts in the dispensation of justice and fostering of security? Are there rules to be followed or the quest for the protection of the mass majority of people necessarily demands that due process of law could be suspended at some point in time? These questions will be unravelled in this part of the chapter.

Having taken the natural justice principles to imply the present day notion of fair trial or due process of law, it becomes imperative to determine whether these principles are binding on entities that are not parties to international treaties that proclaim them. Example of an entity that might not be a party to international treaties proclaiming the fair trial or due process principles is the Security Council of the United Nations in particular and the United Nations itself in general as an international organization. One of the binding forces under international law that are applicable to parties and non-parties to international treaties proclaiming certain rights is what is called 'customary international law'. Thus, this part of the chapter will establish whether the fair trial or due process principles have been recognized as customary international law so as to bind entities that are not parties to the applicable international instruments proclaiming these principles, including the United Nations. The chapter will culminate with a conclusion.

2.2 The Idea of Human Rights

The general idea of human rights is to give practical effect to an intuition or a feeling which, it is believed, all reasonable human beings share and which marks out our

common humanity. This intuition or feeling is that in whatever we do, we need to accord proper respect to the dignity of all human beings.⁹¹ States and governments, in particular, must ensure that individual dignity is respected in their laws and practices. No matter how noble or popular a cause, no matter how much a policy may contribute to the overall wealth, security or common good of society, it is necessary to limit our actions in such a way as to respect the human dignity of all the individuals affected. The need to respect human dignity applies when states and governments act for the general good; the need applies all the stronger when government policies are oppressive, dictatorial or simply negligent.⁹²

There is no unified agreement amongst human rights experts as to the exact origin of human rights. However, the existence of a body of basic rights can be traced back to the early thirteenth century in Europe and has featured in various predominantly European schools of thought since that time.⁹³ The concept is brought to the fore in philosophical discourse with the use of terms like ‘liberty’ and ‘rule of law’. The natural law theories and religious doctrines also influenced the early thoughts on the phenomena of rights and their importance.

In ancient times, as much as people expected to be ruled by identified sovereigns who had the responsibility of running the affairs of the given territory and regulating social relations, inherent in their expectations from the sovereign were duties of fairness and reasonableness in conducting the affairs of the state. The people traditionally expected that their liberties will not be unreasonably tampered with by the sovereign and any

⁹¹ Rob Buitenweg, *Human Rights, Human Plights In A Global Village* (Atlanta, GA: Clarity Press, 2007) at 82-113.

⁹² Wiktor Osiatyński, *Human Rights and Their Limits* (New York: Cambridge University Press, 2009) at 1.

⁹³ Rhona Smith, *Textbook on International Human Rights* (New York: Oxford University Press, 2003) at 5.

undue interference from the state or fellow citizen will be adequately redressed by the sovereign entity.

The foregoing notwithstanding, the idea of human rights did not attain much prominence until the twentieth century. The twentieth century was the bloodiest in human existence, not only because of the total number of deaths attributed to wars but because of the fraction of the population killed by conflicts which was more than ten times more than during the sixteenth century.⁹⁴ Between 1880 and 1920, Congo lost about ten million people as a result of holocaust which was presided over by King Leopold II of Belgium.⁹⁵ From 1915 to 1923, the Ottoman Turks, who were Muslim, committed genocide against the Armenian minority who were Christian.⁹⁶

The gruesome events of the twentieth century particularly gave rise to deep thoughts about the inherent attributes possessed by man by virtue of his being. One of the attributes was that every human being has inherent dignity.⁹⁷ Flowing from this dignity is an obligation to respect and not to violate human beings. Inviolability in this sense means that an individual should not be liable or allowed to suffer violence and that he should be kept sacredly free from profanation, infraction or assault. The assurance of this guarantee was entrusted to the state. The state was accepted as an

⁹⁴ Kim A. McDonald, "Anthropologists Debate Whether War Is Inevitable among Humans" (1999) *Chronicle of Higher Education*.

⁹⁵ Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Boston: Houghton Mifflin, 1998) at 225-234. The causes of death were murder, starvation, exhaustion, exposure, disease and a plummeting birth rate. These deaths were also related to the system of slave labour.

⁹⁶ Israel Charney, ed., *Encyclopedia of Genocide* (Santa Barbara, California: ABC-CLIO, 1999) at 61-105; Peter Balakian, *The Burning Tigris: The Armenian Genocide and America's Response* (New York: HarperCollins, 2003).

⁹⁷ Vicki Jackson, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse" (2004) 65 *Montana L. Rev.* 15.

organization well-suited to promote the interest of its members in the never-ending fight for resources among different communities.⁹⁸

By the end of World War II, a profoundly important development was made by states in recognising and documenting what we now refer to as ‘human rights’. Coming together under the aegis of the United Nations, states acting through the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights*⁹⁹ on 10 December, 1948. This adoption opened a new chapter in the history of human rights at the national and international scenes. The *UDHR* comprises in one consolidated text nearly the entire range of what today are recognized as human rights and fundamental freedoms.¹⁰⁰

The General Assembly decided to go further in its goal to guarantee and protect human rights in the world over. It was decided that the normative aspirations encoded in the *UDHR* should be translated into a legally binding document but this idea was not fully supported by the generality of states.¹⁰¹ This decision to translate the contents of the *UDHR* into a legally binding international instrument was particularly seen by the Western states, jurists and politicians as the language of the communist states.¹⁰²

The General Assembly decided to divide the rights enshrined under the *UDHR* into two categories of rights¹⁰³ proclaimed into two international treaties.

⁹⁸ Christian Tomuschat, *Human Rights: Between Idealism and Realism* (New York: Oxford University Press, 2008) at 8 [*Christian Tomuschat, Human Rights*].

⁹⁹ GA Res 217A(III) (1948), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [*UDHR*].

¹⁰⁰ Asbjorn Eide & Allan Rosas, “Economic, Social and Cultural Rights: A Universal Challenge” in Asbjorn Eide, Catarina Krause & Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff Publishers, 2001) at 3.

¹⁰¹ *Ibid.* The Western states were particularly opposed to the idea of creating any legally binding obligations toward the provision and protection of economic, social and cultural rights.

¹⁰² Michael Kirby, “Human Rights: An Agenda for the Future” in Brian Galligan & Charles Sampford, eds., *Rethinking Human Rights* (Sydney: The Federation Press, 1997) at 2.

¹⁰³ These categories are the Civil and Political Rights and the Economic, Social and Cultural Rights. The first is contained in the *International Covenant on Civil and Political Rights* and the second is proclaimed in the *International Covenant on Economic, Social and Cultural Rights*. These treaties became effective in 1976.

Thus, the *UDHR* as well as the *ICCPR*¹⁰⁴ and the *International Covenant on Economic, Social and Cultural Rights*¹⁰⁵ form the International Bill of Human Rights, which now stands at the core of the universal human rights system as membership of these instruments is open to states from all parts of the world. It is instructive to note that human rights have grown to a level that they have also been categorized into first, second, third and perhaps; fourth generational rights which categorization reflects different stages of their conception, institutionalization and achievement.¹⁰⁶

2.3 The Principles of Natural Justice

The natural justice principle is rooted in antiquity. There is no single definition of natural justice that is both authoritative and comprehensive though, it is possible to enumerate with certainty the main principles of which it is, in modern times, referred to. The qualification as to modern times is made because the expression “natural justice” was until the eighteenth century often used interchangeably with the expression “natural law” and other synonymous phrases but has in recent years acquired a restricted meaning and has come to be used as a compendious phrase to describe certain rules of judicial procedure. Since the history of natural justice is traceable to the English common law, most of the authorities that will be referred to are quite very old and they indeed serve as veritable sources of information and authority on the issue in discourse.

¹⁰⁴ *Supra* note 90.

¹⁰⁵ 16 December 1966, 993 U.N.T.S. 3, 6 ILM 368 (entered into force 3rd January 1976) [*ICESCR*].

¹⁰⁶ *Supra* note 98 at 25. According to this author, “human rights of the first generation are ‘negative’ human rights, or civil liberties, which enjoin states to abstain from interfering with personal freedom. Freedom and security of person or freedom of speech are paradigmatic examples of this class of rights. When referring to human rights of the second generation (or ‘positive’ rights), the speaker has in mind economic or social rights such as the right to work or the right to social security, which entitle individuals or collectivities to the provision of certain goods or social services. Human rights of the third generation are highly complex composite rights like the right to development, the right to peace, and the right to a clean environment”. See also Hillary Charlesworth, “Taking the Gender of Rights Seriously” in Brian Galligan & Charles Sampford, eds., *Rethinking Human Rights* (Sydney: The Federation Press, 1997) at 38; Asbjorn Eide, & Allan Rosas, “Economic, Social and Cultural Rights: A Universal Challenge” in Asbjorn Eide, Catarina Krause & Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff Publishers, 2001) at 4.

Confusion of earlier English judges over the exact precision of natural justice could be gleaned through the cases. Hamilton L.J for instance has described the phrase as an expression sadly lacking in precision,¹⁰⁷ while Lord Shaw took a rather critical view of the expression and opined that:

In so far as the term ‘natural justice’ means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and in so far as it is resorted to for other purposes it is vacuous.¹⁰⁸

Without doubt, Lord Shaw’s dictum has further compounded the definitional crisis to which natural justice was undergoing. Succour however came from the Earl of Selbourne L.C. in *Spackman v. Plumstead District Board of Works*,¹⁰⁹ a case where a Superintendent Architect of the Metropolitan Board of Works was exercising judicial functions. It was held that:

No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the *substantial requirements of justice* shall not be violated. He is not a judge in the proper sense of the word, but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to *the essence of justice*.¹¹⁰

The two italicised words in the quotation above serve as guideposts to what natural justice means. Lord Wright, in quoting these words in *General Medical Council v.*

¹⁰⁷ *R. v. Local Government Board, ex parte Arlidge* [1914] 1 K.B 160 at 199. This case was appealed and reported as *Local Government Board v. Arlidge* [1915] A.C. 130 where Lord Haldane L.C quoted the dictum of Hamilton L.J with approval. Still pronouncing on the complexity of the word ‘natural justice’, Channell J. in *Robinson v. Fenner* [1913] K.B. 835 at 842 stated that “there really is very little authority indeed as to what it does mean”.

¹⁰⁸ *Local Government Board v. Arlidge, Ibid.* at 138.

¹⁰⁹ [1885] 10 App.Cas. 229 at 240.

¹¹⁰ *Ibid.*

Spackman,¹¹¹ remarked that he has italicised the two phrases which the Earl of Selbourne seems to him to use as meaning what is generally meant by natural justice. He stated further that:

“...the statements which I have quoted may at least be taken to emphasise the essential requirements that the tribunal should be impartial and that the medical practitioner who is impugned should be given a full and fair opportunity of being heard.”¹¹²

Finally, Bowen L.J. said in *Leeson v. General Council of Medical Education*:¹¹³

The statute imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what is accused. He must have an opportunity of being heard and the decision must be honestly arrived at after he has had a full opportunity of being heard.¹¹⁴

The above quotations are all insightful to understanding the two essential elements of natural justice. The first is that a person should not be a judge in his or her own case¹¹⁵ and the second is that a decision affecting the rights or interests of an individual should not be made until he or she has been given an opportunity to be heard. As such, these principles derive from the Latin tags *audi alteram partem* and *nemo iudex in causa sua* and have been held, in the common law itself, to be general principles of law common to civilized communities, belonging indeed to the common consciousness of mankind rather than to the science or specialized tradition of law.¹¹⁶

¹¹¹ [1943] A.C. 641.

¹¹² *Ibid.* at 644.

¹¹³ [1889] 43 Ch.D. 366 at 383.

¹¹⁴ *Ibid.*

¹¹⁵ The principle that no man shall be a judge in his own cause is not confined to the case where a judge is an actual party to a cause but applies to a cause in which he has a pecuniary interest or real likelihood of favour or bias. See the dicta of Blackburn J. in *R. v. Rand* (1866) L.R. 1 Q.B. 230 at 232; Lush J. in *Serjeant v. Dale* (1877) 2 Q.B.D 558 at 567; Stephen J. in *R. v. Farrant* (1887) 20 Q.B.D 58 at 60 and Bowen L.J in *Leeson v. General Council of Medical Education* (1889) 43 Ch.D 366 at 384.

¹¹⁶ In most common law jurisdictions and indeed, in modern day adjudicatory process before national and international courts and tribunals, these rules are well entrenched as ‘fair trial’ or ‘due process’. They form the minimum standards for testing the fairness of courts and tribunals in adjudicatory processes. They have also been enshrined in the constitutions of most countries and organizations. See J.D., Ogundare, “The Philosophy of Justice, the Parameter and Ends of Justice, *Jus Naturale*: Natural

Natural justice is linked with the concept of justice as fair trial. This concept of justice as a fair trial linked with and promoting the more general conception of justice as fairness, is indeed for the administration of justice a *sine qua non*. Other principles which have been stated to constitute elements of natural justice, for example, are that the parties must have due notice of when the judge or tribunal will proceed, that the tribunal should not act under the dictation of other persons who have no authority and that if the tribunal consists of several members, all must sit together all the time. It should be noted that these and many other rules are merely extensions or refinements of the two main principles of natural justice.

The natural justice principles are not rigid common law rules. In proceedings before administrative tribunals for instance, the hearing is not expected to be a copy of a formal court trial, but hearings should reflect basic court procedures in such a way that due process is served.¹¹⁷ In administrative law, the concept of fairness emanates from due process or natural justice principle.¹¹⁸ Fairness relates to whether the outcome of a process advances the right goal. There is obviously a general societal interest in a public program being applied to individuals according to its goals. In a case where the strict rules of natural justice are not applied however,¹¹⁹ an individual is more likely to feel fairly treated when an administrative action affecting him is consistent with societal goals.¹²⁰

Justice and Unjust Laws” in Professor Emmanuel G. Bello & Prince Bola A. Ajibola, eds. *Essays in Honour of Judge Taslim Olawale Elias*, Vol. II (Dordrecht: Martinus Nijhoff Publishers, 1992) at 803.

¹¹⁷ Kenneth F. Warren, *Administrative Law in the Political System* (St. Paul: West Publishing Company, 1988) at 322 [*Kenneth Warren, Administrative Law*].

¹¹⁸ Richard J. Pierce, Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law and Process*, 4th Edition (New York: Foundation Press, 2004) at 474 [*Richard Pierce, Administrative Law and Process*].

¹¹⁹ Like in national security context, it may seem reasonable for immigration executives and public prosecutors, for example, to possess powers sufficient to allow them to seize and detain persons ***for very limited periods of time*** so that they can perform adequately their administrative duties in the public interest ***pending when the suspect is charged to court***. For further reading on this point, see Kenneth Warren, *supra* note 117 at 528.

¹²⁰ Alfred C. Aman, Jr & William T. Mayton, *Administrative Law*, 2nd Edition (St. Paul: West Group, 2001) at 171 [*Alfred Aman, Administrative Law*].

The natural justice principles are subject to some exceptions. The first principle of *nemo iudex in causa sua* for instance is subject to three exceptions. The first exception is that of necessity. A judge who would otherwise be disqualified may act in a case of necessity where no other judge has jurisdiction.¹²¹ The second exception is that of statutory authority. There were a number of statutes in the old English law system which authorise justices to hear and adjudicate on cases although the justices had interest in such cases as ratepayers, or members of local authorities or members of other interested bodies.¹²² Under this head of exception however, justices will be barred from acting as judges in their own cause if they were parties to instituting the case.¹²³ The last exception is that of waiver. An objection to an interest or a favour which is known or disclosed to the parties to a cause may be waived by them.¹²⁴

The *audi alteram partem* principle of natural justice is limited by *ex parte* rule. As stated by Blackburn J. in *R. v. Cheshire Lines Committee*¹²⁵ that:

“The general rule is that every man before a decision is given against him in a judicial proceeding is entitled to be heard, although the legislature may by enactment (not necessarily by express words, if their intention can be otherwise clearly gathered) authorise a proceeding *ex parte*...”¹²⁶

The *ex parte* exception notwithstanding, it should be noted that the rule that no man should be condemned unheard is so potent that some conditions must be fulfilled before a matter can proceed *ex parte* and it is doubtful whether this exception is

¹²¹ *Serjeant v. Dale*, *supra* note 113 at 566. It should be noted that the necessity rule has been several times defended but the occasions on which it has been put into operation are few. The aim of the courts and of the legislature has usually been towards finding or establishing an alternative forum. See Blackburn J. in *R. v. Allan* (1864) 4 B. & S. 915 at 924.

¹²² *R. v. Justices of Essex* (1816) 5 M. & S. 513; *R. v. Bolingbroke* [1893] 2 Q.B. 347.

¹²³ *R. v. Milledge* (1879) 4 Q.B.D. 332 at 333 (Cockburn C.J.).

¹²⁴ *R. v. Commissioners of Cheltenham* (1841) 1 Q.B. 467 at 476; *Wakefield Local Board of Health v. West Riding and Grimsby Railway Company* (1865) L.R. 1 Q.B. 84 at 86.

¹²⁵ (1873) L.R. 8 Q.B. 344 at 348, 349, 351.

¹²⁶ *Ibid.*

applicable to criminal proceedings.¹²⁷ Above all, the potency of some of these exceptions applicable to the natural justice principle may have been weakened in the modern day discussion of due process of law by the *jus cogens* or the customary international law principles. A detailed exposition of whether the fair trial principles or due process of law, which are undoubtedly offshoots of the natural justice principles are customary international law will be considered later in this chapter.

It is instructive to note that the rules of natural justice in the technical common law sense are not an adequate statement of the canons of a fair trial before courts and tribunals. They enunciate, rather, the minimum standard that the law sets for all manner of hearings and tribunals, public or domestic, or international, that have a duty to act judicially or quasi-judicially or that make determinations which affect the lives, significant interests and property rights of citizens. These principles have grown to include other fair trial or due process guarantees such as the presumption of innocence, the right to defend oneself in person or with the assistance of a legal practitioner, the right in full equality to a fair and public hearing by an independent and impartial tribunal, the right to cross-examine witnesses, the right to the free assistance of an interpreter where necessary and so on.

The next section below will be devoted to a discussion of some of these core requirements of the right to a fair trial or due process of law. This discussion is necessary because any research work conducted on the principles of natural justice without reference to the right to a fair trial or due process of law is incomplete. The right to a fair trial is an offshoot of the principles of natural justice. As earlier stated,

¹²⁷ For a detailed discussion of Injunctions and the necessary conditions that must be fulfilled, see David Stockwood, *Injunctions: A Practical Handbook* (Toronto, Ont.: The Carswell Company Limited, 1985). See also *The Law of Injunctions: An Update* (Toronto, Ont.: Canadian Bar Association-Ontario, Continuing Legal Education, 1999).

reference to the right to a fair trial or due process rights nowadays is as good as reference to the old English principles of natural justice. Again, because this is a human rights research, there is the need to use human rights language to call the principles of natural justice and that language is the ‘right to a fair trial or due process of law.’

2.4 The Core Requirements of Fair Trial or Due Process of Law

In recent years, the natural justice principles have been gradually substituted with a single, less formal concept of acting fairly or acting in accordance with due process of law, which in turn has made it easier to import a wider body of common law attitudes and principles, if not formal canons, on the subject of due process. Within the work of the common law courts themselves, the due process of law or the notion of a fair trial has had a more specific content. It is not easily derivable from the Latin maxims alone or from the common opinion of mankind, it presupposes the forms and procedures that have been evolved in England. As earlier noted, the notion of fair trial has been summed up as involving the independence of judge and jury and the absence of personal interest in both the hearing of both parties to the case and consideration of all evidence. This evidence must be properly put before the court and not hearsay which by the rules of evidence law is inadmissible.¹²⁸

At common law, the notion of fair trial has further been interpreted to guarantee the presentation of strong cases from both parties to the dispute, the personal integrity, incorruptibility and impartiality of the judge, the carrying out of their proper roles by counsel with propriety in the search for truth and the giving of reasons by the judge for his decision,¹²⁹ reasons that show he is deciding on the evidence according to rules

¹²⁸ *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 965.

¹²⁹ Alfred Denning, *The Road to Justice* (London: Stevens & Sons, 1955) at 1-44.

and doctrine and not caprice. The case must be heard in public, the parties to the case must be treated as equals, the judge must be identified and personally responsible in the moral sense for his decision and appeals to a higher judicial tribunal from a court of first instance or judicial review be in principle possible.

The fair trial guarantees have not been empty phrases. They, like the rules of natural justice, have been given flesh, applied in detail to a wide range of circumstances, to new situations and new types of hearings and determinations by a vast body of case law and affected, for particular purposes, by statute. In the United States for instance, under the ‘due process’ clause of the Federal Constitution, they have had even more technical discussion and a more formal, though not necessarily greater general influence. It is undisputed that due process rights lie at the heart of the protection of substantive rights. Without procedural rights substantive rights would clearly be meaningless. As English human rights lawyer once remarked that the protection of procedural due process is not, in itself, sufficient to protect against human rights abuses, but it is the foundation stone for substantive protection against state power.¹³⁰

It is necessary to clarify what constitutes due process rights. Whatever disagreement there may be as to the scope of the phrase “due process of law,” there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.¹³¹ As noted in the preceding paragraph, among the first legal documents containing the concept of due process rights is the United States Constitution. The Fifth Amendment to the US Constitution proclaims that no person shall be deprived of

¹³⁰ Richard Clayton & Tomlinson Hugh, *The Law of Human Rights* (New York: Oxford University Press, 2009) 705.

¹³¹ *Frank v. Mangum*, 237 U.S 309 at 347 (1915).

life, liberty or property without due process of law.¹³² Later, the rights of an accused person were specified in the Sixth Amendment, which states that in criminal proceedings, the accused shall enjoy a right to a public and speedy trial and it describes the core requisites of such a trial.

In the second half of the twentieth century the international community of States was the initiator of the adoption of several universal as well as regional human rights treaties the implementation of which was claimed to put an end to widespread human rights violations. In 1948, the first ever international human rights document came into being — the *Universal Declaration of Human Rights* adopted by the General Assembly. This is when the common law concept of natural justice which is nowadays referred to as the right to a fair trial was universally recognized. The link between the common law principles of natural justice and the idea of an independent and impartial tribunal in international human rights documents can be noticed in the consideration of specific provisions reflecting these principles in international human rights documents. Just like the common law concept of natural justice requires that a person must be heard¹³³ in any matter involving the determination of his civil rights and obligations before an independent and impartial tribunal,¹³⁴ the *UDHR* provided for everyone a right in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.¹³⁵

¹³² There are two different types of due process law. These are substantive due process and procedural due process. Substantive due process refers to limits on what government or authority vested with power could regulate while procedural due process refers to the procedures by which the government or authority vested with power may affect individuals' rights. See William F. Funk & Richard H. Seamon, *Administrative Law: Examples and Explanations* (New York: Aspen Publishers, 2006) at 103.

¹³³ This is established in the latin maxim 'audi alterem partem'.

¹³⁴ This is established in the latin maxim 'nemo iudex in causa sua'.

¹³⁵ *UDHR*, *supra* note 99 at art. 10.

The link between the common law concept of natural justice and fair trial could further be seen in the consideration of some human rights treaty articles. The first human rights treaty to elaborate on the concept of natural justice and to specify fair trial rights was the *Convention for the Protection of Human Rights and Fundamental Freedoms*.¹³⁶ The Convention states that:

“in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹³⁷

Additional guarantees available exclusively to a person charged with a crime are, among others, the presumption of innocence, right to cross-examine the witnesses, a right to the free assistance of an interpreter and others.¹³⁸ The *International Covenant on Civil and Political Rights* used the *ECHR* as a model and its provisions demand that “in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law,”¹³⁹ followed by an extensive enumeration of additional guarantees available to individuals charged with a crime. The right to know the case against oneself and the right to answer is expressly stated in article 14(3) of the *ICCPR*.

A right to a fair hearing, first of all, implies that there should be access to a judicial authority, where an individual or an entity could challenge any decision made against him which he considers unjust. It is true, that neither article 6 of the European Convention nor article 14 of the Covenant explicitly speaks about access to court as

¹³⁶ 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [*ECHR*].

¹³⁷ *Ibid.* at art. 6(1).

¹³⁸ *Ibid.* at art. 6(2) & 6(3).

¹³⁹ *ICCPR*, *supra* note 90 at art. 14(1).

such. However, the right to access to court was developed through the practice of the European Court of Human Rights and the Human Rights Committee. In its landmark *Golder v. United Kingdom*¹⁴⁰ judgment, the European Court held that:

it would be inconceivable that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.¹⁴¹

In the opinion of the Court, access to court constitutes an element which is inherent in the right stated by Article 6 para. 1 of the Convention.¹⁴²

The Human Rights Committee also spoke of the access to court. In the case of *Bahamonde v. Equatorial Guinea*,¹⁴³ the applicant asserted that all his attempts to obtain judicial redress before the courts of Equatorial Guinea have failed. The Committee held that the notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual's attempts to seize the competent jurisdiction of his/her grievances are systematically frustrated runs counter to the guarantees of article 14(1).¹⁴⁴ The right of access to court was addressed in *Mahuika v. New Zealand*.¹⁴⁵ In this case, the Committee firmly noted that article 14(1) encompasses the right to access to court for the determination of rights and obligations in a suit at law.¹⁴⁶ From this it may be concluded that a person is definitely guaranteed access to court 'in the determination of any criminal charge'

¹⁴⁰ (1979-80), 18 E.C.H.R. (Ser. A) 524, 1 E.H.R.R. 524.

¹⁴¹ *Ibid.* at para. 35.

¹⁴² *Ibid.* at para. 36.

¹⁴³ Communication No. 468/1991, U.N. Doc. CCPR/49/D/468/1991 (1993).

¹⁴⁴ *Ibid.* at para. 9.4.

¹⁴⁵ Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

¹⁴⁶ *Ibid.* at para. 9.11.

against him or her.

The combination of all the guarantees discussed in this part of the chapter undoubtedly forms the core requirements of due process of law or fair trial. They are so important to judicial and quasi-judicial proceedings that their violation could sometimes nullify the entire process.¹⁴⁷ Discussing about fair trial and its importance, the famous English judge; Lord Denning once said that:

When you set out on this road you must remember that there are two great objects to be achieved: one is to see that the laws are just; the other that they are justly administered. Both are important, but of the two, the more important is that the law should be justly administered. It is no use having just laws if they are administered unfairly by bad judges or corrupt lawyers... [A] country cannot long tolerate a legal system which does not give a fair trial.¹⁴⁸

2.5 Due Process As Customary International Law

The goal of this section is to analyze whether due process rights, or at the very least, its core principles enjoy the status of customary international law. It is important to carry out this analysis because of the important feature that custom possesses. Customary law, unlike treaty law, is known to be able to bind not only states and organizations that have given their consent to be bound by the provisions of the treaty, but on all others irrespective of their consent. For example, article 38 of the *Vienna Convention on the Law of Treaties*¹⁴⁹ stipulates that nothing precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

¹⁴⁷ *Jones v. National Coal Board* [1957] 2 Q.B 55. In this case, while upholding the sanctity of the principles of fair trial, the learned judge ordered a new trial when it found that the trial judge, with the best of motives and intentions, in order to clarify the issues before the court and expedite the conduct of the trial had interfered frequently in the course of argument by counsel on both sides and had taken upon himself the function of examining witnesses.

¹⁴⁸ *The Road to Justice*, *supra* note 129 at 6-7.

¹⁴⁹ 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M 679 (entered into force 27 January 1980) [VCLT].

Article 38 of the *Statute of the International Court of Justice*¹⁵⁰ stipulates that while deciding disputes between States, it shall apply among other things, international custom, as evidence of a general practice accepted as law. Before we start identifying customary human rights norms, we should first of all, discuss the process of formation of a norm of customary law. Custom as source of law is usually defined as a consistent pattern of state behavior (practice) accompanied by an elusive psychological element, most frequently covered by the latin expression *opinio juris sive necessitatis*.¹⁵¹ Meron observes, that the North Continental Shelf Cases contain the *locus classicus* of the constitutive elements of international customary law:¹⁵²

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally purely conventional rule, an indispensable requirement would be that within the period in question, short as it may be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked.

Not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief, *i.e.*, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.¹⁵³

The emergence of numerous multilateral treaties and intergovernmental organizations in the twentieth century has precipitated a debate in international law over the comparative weight to be given to the two dimensions of customary international law,

¹⁵⁰ 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945) [*ICJ Statute*].

¹⁵¹ Vojin Dimitrijevic, "Customary Law as an Instrument for the Protection of Human Rights" ISPI (*Instituto per gli Studi di Politica Internazionale*) 2006 at 4, online: ISPI <http://www.ispionline.it/it/documents/wp_7_2006.pdf> [*ISPI Working Papers*].

¹⁵² Theodor Meron, *Human Rights and Humanitarian Law as Customary Law* (Oxford: Clarendon Press, 1989) at 107 [*Human Rights as Customary Law*].

¹⁵³ *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark)*, [1969] I.C.J. Rep. 3 at para. 74.

namely, general state practice and *opinio juris*.¹⁵⁴ The approach of the Permanent Court of International Justice in the *S.S. Lotus case*¹⁵⁵ was to give more weight to the actual practice of states, while using *opinio juris* as a secondary means of proof of existence of a customary international rule. Several decades later, the Court in the *Nicaragua*¹⁵⁶ decision adopted a somewhat different approach towards the formation of a rule of customary law. The Court focused not on state practice, but on *opinio juris* found in verbal statements by governmental representatives to international organizations, the content of resolutions, declarations and other normative instruments adopted by such organizations, and the consent of states to such instruments.¹⁵⁷ This approach emphasizes the importance of General Assembly resolutions and de-emphasizes the importance of practice as one of the two elements necessary for the formation of customary international law.¹⁵⁸

Unlike international treaties, the content of provisions of which is usually comprehensible due to the fact that it is a written text, the content of customary norm is difficult to grasp. Indeed, proving the existence of a customary rule of international law can be quite challenging. As Kammerhofer puts it, customary law is not written and has no authoritative text, which has an inherent ‘thereness’ and whose meaning need only be extracted.¹⁵⁹ In order to come to the conclusion, that a new rule of customary international law has evolved, one needs to scrupulously study many possible indicators.

¹⁵⁴ Francisco F. Martin *et al*, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge: Cambridge University Press, 2006) at 29.

¹⁵⁵ *S.S. Lotus case (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10.

¹⁵⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 1 at 14.

¹⁵⁷ *Human Rights as Customary Law*, *supra* note 152 at 107.

¹⁵⁸ *Ibid.*

¹⁵⁹ Jorg Kammerhofer, “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems” (2004) 15 *European Journal of International Law*, 523-553 at 524.

Brownlie suggests the following sources of custom: correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and practices, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.¹⁶⁰ Before turning to the examination of the question of whether a right to a fair trial (or at least its core requirements) can be said to reflect customary norms, we shall first consider whether and to what extent human rights norms are viewed as falling under the category of customary rules of international law.

Schachter insists that the process of formation of a customary human rights norm differs from that of customary norms in other areas:

Whether human rights obligations have become customary law cannot readily be answered on the basis of the usual proof of customary formation. States do not usually make claims on other States or protest violations that do not affect their nationals. In that sense, one can find scant State practice accompanied by *opinio juris*. Arbitral awards and international judicial decisions are also rare except in tribunals based on treaties such as the European and Inter-American courts of human rights. The arguments advanced in support of a finding that rights are a part of customary law rely on different kinds of evidence.¹⁶¹

Schachter also suggests certain indicators that may be useful. He refers to the need to assess general statements on human rights by international bodies by reference to actual practice and the intensity and depth of third-party condemnations of

¹⁶⁰ Ian Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 5.

¹⁶¹ Oscar Schachter, *International Law in Theory and in Practice* (London: Martinus Nijhoff Publishers, 1991) at 336.

violations.¹⁶² Meron prefers the following indicators. First, the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws. Countering such positive indicators is the degree to which a particular right is subject to limitations and the extent of contrary practice.¹⁶³

Time and again there come statements that the provisions of the *UDHR* constitute customary international law. Twenty years after the adoption of the Declaration two important international gatherings, the Assembly for Human Rights in Montreal and the Tehran International Conference on Human Rights, adopted statements and proclamations to the effect that they believed that the *UDHR* has become a part of customary international law.¹⁶⁴ The International Law Institute adopted a declaration in December 1969 which affirms that there is an “obligation” on states to guarantee respect for human rights that flows from the recognition of human dignity in the *U.N. Charter* and the *Universal Declaration of Human Rights*.¹⁶⁵ In 1994, the International Law Association observed that the Declaration “is universally regarded as an authoritative elaboration of the human rights provisions of the United Nations Charter” and concluded that “many if not all of the rights elaborated in the Declaration are widely recognized as constituting rules of customary international law.”¹⁶⁶

Many authoritative scholars consider the *UDHR* as a part of customary international law. They either consider the whole Declaration to be customary or its first 21

¹⁶² See Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995/96) 25 *Georgia Journal of International and Comparative Law*, 289-392 [*The Status of the UDHR*].

¹⁶³ *Human Rights as Customary Law*, *supra* note 152 at 94.

¹⁶⁴ *ISPI Working Papers*, *supra* note 151 at 8.

¹⁶⁵ *The Status of the UDHR*, *supra* note 162 at 323.

¹⁶⁶ *Ibid.*

articles.¹⁶⁷ However, insisting that all rights enunciated in the Declaration are customary would not be very convincing. Otherwise, a right to rest and leisure, a right to education, a right to social security would inevitably fall under the category of customary human rights norms. This, definitely, would be an overstatement. It is certainly true, that being enumerated in such a significant human rights instrument as the *UDHR* is a strong indicator of the right having attained the nature of custom. However, it is not sufficient. Further investigation is necessary to show whether or not a right to a fair trial has become customary in nature.

Following the method suggested by Meron we will at first compare the provisions of the *UDHR* with those of the subsequent international as well as regional human rights covenants and other human rights treaties and the degree of incorporation of the right to a fair trial into national laws. The right to a fair trial has been fixed in a large number of international human rights documents of both binding and non-binding nature. First pronounced in the *UDHR* itself,¹⁶⁸ the right to a fair trial was subsequently fixed in the authoritative *ECHR*.¹⁶⁹ The first international human rights treaty, the *ICCPR*¹⁷⁰ includes detailed provisions on a right to a fair trial. The majority

¹⁶⁷ One of the Declaration's principal drafters concludes that, since its adoption, "the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states. The Declaration has become what some nations wished it to be in 1948: the universally accepted interpretation and definition of the human rights left undefined by the Charter". Waldock similarly concludes that the widespread recognition of the principles of the Declaration "clothes it ... in the character of customary international law". Sohn considers that the Declaration is not only "an authoritative interpretation of the Charter obligations but also a binding instrument in its own right". Thornberry recently concluded that "there is ... strong evidence that the Universal Declaration has become part of customary international law, and that it is the most valid interpretation of the human rights and freedoms which the Members of the United Nations pledge to promote". Alston stated in 1983 that "there is a large and growing body of evidence to support the proposition that at least the first twenty-one articles of the Declaration are part of customary law". Robertson and Merrills agree that the Declaration, "by reason of its constant reaffirmation by the General Assembly and in numerous other texts, both international and national, can now, more than forty years on, be taken as a statement of customary international law, establishing standards which all States should respect". Cited from Hurst Hannum, *The Status of the Universal Declaration of Human Rights*, *supra* note 162 at 323.

¹⁶⁸ *UDHR*, *supra* note 99 at arts. 10 & 11.

¹⁶⁹ *ECHR*, *supra* note 136 at art. 6.

¹⁷⁰ *ICCPR*, *supra* note 90 at art.14.

of States in the world are now parties to the *ICCPR*. As of March 9, 2010 the *ICCPR* has 72 signatures and 165 states parties.¹⁷¹

Additionally, the *African Charter on Human and Peoples' Rights*¹⁷² proclaims that every individual shall have the right to have his cause heard, which comprises among other things the right to be tried within a reasonable time by an impartial court or tribunal.¹⁷³ The *American Convention on Human Rights*¹⁷⁴ also contains a provision guaranteeing to every person a right to a hearing, with due guarantees and within reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.¹⁷⁵

The *Convention on the Rights of the Child*¹⁷⁶ contains several provisions relevant to the right to a fair trial for children. The Convention states that “no child shall be deprived of his or her liberty unlawfully or arbitrarily”.¹⁷⁷ Furthermore, article 37(d) of the Convention provides that “every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.

¹⁷¹ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, online: United Nations Treaty Collection < <http://treaties.un.org/Pages/Home.aspx?lang=en>>. It is worthy of note that all the 47 member states of the Council of Europe have ratified the European Convention. See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, online: Council of Europe <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>>.

¹⁷² 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (entered into force 21 October 1986) [*ACHPR*].

¹⁷³ *Ibid.* at art. 7.

¹⁷⁴ 22 November 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force 18 July 1978) [*ACHR*].

¹⁷⁵ *Ibid.* at art. 8.

¹⁷⁶ 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990) [*CRC*].

¹⁷⁷ *Ibid.* at art. 37(b).

The fact that the members of the world community view due process rights as cornerstones of every society and as indispensable for the protection of substantive rights is strengthened by different statements, recommendations and commitments issued by different international bodies and organs of organizations, including the General Assembly of the UN.¹⁷⁸ The Council of Europe, comprised of 47 member States, issued multiple recommendations with regard to the right to a fair trial. In 1981 the Committee of Ministers adopted a Recommendation on measures facilitating access to courts in which the Committee acknowledged that a right to access to justice and to a fair hearing is the essence of a democratic society.¹⁷⁹ This Recommendation was followed by a series of others, each reaffirming the high importance of the right to access to justice, and suggesting measures to facilitate access to court and to simplify the procedures as much as possible.¹⁸⁰ The 56 States from Europe, Caucasus, Central Asia and North America participating in the Organization on Security and Cooperation in Europe (OSCE) committed themselves to provide for fair trial rights in several of the documents, although non-binding in nature.¹⁸¹

Analysis of such a large number of international instruments regulating due process

¹⁷⁸ United Nations Standard Minimum Rules for the Administration of the Juvenile Justice adopted by the General Assembly Resolution 40/33 in 1985 contain provisions on fair and just trial relating to juvenile offences. Basic Principles on the Independence of Judiciary endorsed by the General Assembly resolutions 40/32 of the 29 November and 40/146 of the 13 December 1985 help assure the right to a fair trial by preserving the independence and impartiality of the judiciary.

¹⁷⁹ Council of Europe, Committee of Ministers of the Council of Europe, *Measures Facilitating Access to Justice, Recommendation No. R (81) 7* (Paris: Council of Europe, 1981), online: Council of Europe <[http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation\(81\)7.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(81)7.asp)>.

¹⁸⁰ See *Recommendation No. R (84) 5 on Principles of Civil Procedure Designed to Improve the Functioning of Justice, Recommendation No. R (86) 12 on Measures to Prevent and to Reduce the Excessive Workload in the Courts; Recommendation No. R (87) 18 Concerning the Simplification of Criminal Justice; Recommendation No. R (95) 12 on Management of Criminal Justice; Recommendation No. R (95) 5 Concerning the Introduction and Improvement of the Functioning of Appeal System and Procedures in Civil and Commercial Matters and others*, online: Legislationline <<http://www.legislationline.org/topics/organisation/4/topic/8/subtopic/27>>.

¹⁸¹ The Organization for Security and Co-operation in Europe, *Concluding Document of the Vienna Meeting 1986 of the Participating States of the Conference on Security and Co-operation in Europe* (Vienna: OSCE, 1989) at para. 13(9), online: Organization for Security and Co-operation in Europe <http://www.osce.org/documents/mcs/1989/01/16059_en.pdf>; The Organization for Security and Co-operation in Europe, *Conference for Security and Co-operation in Europe, Charter of Paris for a New Europe*, (Vienna: OSCE, 1990) online: <http://www.osce.org/documents/mcs/1990/11/4045_en.pdf>.

rights in the form of binding treaties, non-binding resolutions, recommendations, declarations and guidelines is a clear evidence of a special role the right to a fair trial plays. The international community undertook many attempts to strengthen the efficiency of due process rights and does not see the promotion and protection of other rights without a right to a fair trial, including the right to access to court and the right to be heard before independent and impartial tribunal. As Schachter noted, the weight of general statements of international bodies as evidence of custom cannot be assessed without considering the actual practice of states, and national constitutions and legislation incorporating international human rights also require a measure of confirmation in actual behaviour.¹⁸²

The incorporation of the fair trial provisions into national legislation is also practically universal. Virtually every State constitution or a bill of rights contains a clause on fair trial. One of the first and earliest documents laying down some sort of due process guarantees was the *Magna Carta* of 1215, which stipulated that no freeman shall be taken or imprisoned or [...] exiled or in any way destroyed except by the lawful judgment of his peers or by the law of the land. The Bill of Rights of the United States dating back to 1791 (the first 10 amendments to the *American Constitution*) contains a detailed list of due process rights, including the right to a speedy and public trial by an impartial jury in all criminal prosecutions, the right of a trial by jury in suits at law when the value in controversy shall exceed 20 dollars, the presumption of innocence, the right to assistance of counsel, etc.¹⁸³

The *Constitution of Mexico*, adopted in 1917 already contained provisions relating to

¹⁸² Schachter as quoted by Theodor Meron, *Human Rights as Customary Law*, *supra* note 152 at 89.

¹⁸³ U.S. Const. amend. V, VI, VII.

due process rights. Article 14 stipulates that [n]o person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act, while article 20 contains a detailed list of rights available for the person charged with a crime, including the right to a public trial by a judge or a jury of citizens.¹⁸⁴

After the Second World War, European States undertook an endeavour to spell out fundamental rights which resulted in the *ECHR*. The *ECHR* laid down the basic rights, including among others, the right to a fair trial in civil and criminal proceedings. These values were given high priority in those western European constitutions introduced or updated after the Second World War. Some countries — Austria, Denmark (1953), the Irish Republic, Italy, Switzerland — included a formal bill of rights in the constitution conforming to these accepted standards, fair trial being one of them.¹⁸⁵ The *Constitution of the Netherlands of 1983*, for example, reads as follows: “No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law”.¹⁸⁶ The *Finnish Constitution* (section 21 thereof) guarantees to everyone a right to have his or her case dealt with appropriately and without undue delay by a legally competent court in law [...] and to have a decision reviewed by a court of law or other independent organ for the administration of justice”.¹⁸⁷

¹⁸⁴ *Constitution of Mexico*, online: Organization of American States <http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf>.

¹⁸⁵ Patricia Hogwood & Geoffrey Roberts, *European Politics Today* (Manchester: Manchester University Press, 2003) at 181.

¹⁸⁶ As quoted in Francesco Francioni, *Access to Justice as a Human Right*, (Oxford: Oxford University Press, 2007) at 181.

¹⁸⁷ *The Constitution of Finland*, online: Ministry of Justice, Finland <<http://www.om.fi/21910.htm>>.

Additionally, the right to a fair trial is fixed in the following world constitutions: the *Constitution of Bosnia and Herzegovina* (art. II, para. 3 (e)),¹⁸⁸ the *Constitution of East Timor* (art. 26),¹⁸⁹ the *Constitution of Iran* (art. 34),¹⁹⁰ the *Constitution of Republic of Equatorial Guinea* (item 13),¹⁹¹ *South African Constitution* (sec. 34),¹⁹² the *Constitution of the Russian Federation* (art. 47, 48-54),¹⁹³ the *Canadian Constitution Acts* (art. 11),¹⁹⁴ the *Constitution of Ghana* (art. 19)¹⁹⁵ as well as the *1999 Constitution of the Federal Republic of Nigeria* (sec. 36).¹⁹⁶

As has been demonstrated, the right to a fair trial is incorporated in many world's constitutions. States of different geo-political location (Europe, Americas, Asia, Africa, Middle East) with different legal and political systems (democratic, authoritarian), with different levels of economic development contain due process provisions, although some provide for more extensive and detailed guarantees than the others. However, it is not surprising that the national legislation of those States contains fair trial guarantees: all of them are Parties to the Covenant and, therefore, they were acting, presumably, in the application of the Covenant. In the *North Sea Continental Shelf* case,¹⁹⁷ the International Court of Justice suggested that one shall specifically look at the practice of the States not parties to the treaty.

¹⁸⁸ *Constitution of Bosnia and Herzegovina*, online: Constitutional Court of Bosnia and Herzegovina <http://www.ccbh.ba/eng/p_stream.php?kat=518>.

¹⁸⁹ *Constitution of the Democratic Republic of Timor-Leste*, online: Official Web Gateway to the Government of Timor-Leste <<http://www.gov.east-timor.org/constitution/constitution-Timor-Leste.pdf>>.

¹⁹⁰ *The Constitution of Islamic Republic of Iran*, online: Iran Chamber Society <<http://www.iranchamber.com/government/laws/constitution.php>>.

¹⁹¹ *Constitution of the Republic of Equatorial Guinea*, online: Kituo Chakatiba <<http://www.kituo chakatiba.co.ug/Constitution%20of%20EQUATORIAL%20GUINEA.pdf>>.

¹⁹² *Constitution of South Africa*, online: Constitutional Court of South Africa <<http://www.constitutionalcourt.org.za/text/constitution/text/ch2.html>>.

¹⁹³ *The Constitution of the Russian Federation*, online: Constitution <<http://www.constitution.ru/en/10003000-03.htm>>.

¹⁹⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁹⁵ *The Constitution of Ghana*, online: Parliament of Ghana <http://www.parliament.gh/constitution_republic_ghana.html>.

¹⁹⁶ *Constitution of the Federal Republic of Nigeria, 1999*, online: International Centre for Nigerian Law <<http://www.nigeria-law.org/index.html>>.

¹⁹⁷ *Supra* note 153 at para. 76.

China, Pakistan, Saudi Arabia, Oman, Qatar and United Arab Emirates are among the States not parties to the Covenant and, thus, they are legally not bound by its provisions. Further we will discuss whether a right to a fair trial is somehow reflected in national laws of the States concerned and we will see whether these rights are generally complied with. The Under Secretary for Democracy and Global Affairs of the U.S. Department of State, Bureau of Democracy, Human Rights and Labour issued detailed reports on human rights practices worldwide.¹⁹⁸ Each such report contains the analysis of human rights situation in a given country and, of course, the situation with due process rights received particular attention in the light of its special value.

The report on Qatar indicates that the Qatar law provides for the right to a fair trial, and the judiciary generally enforced this right. Trials are by jury and open to public although the presiding judge may exclude the public in sensitive cases. Defendants are presumed innocent and they may consult attorneys in a timely manner. The right to cross-examine the witnesses, present evidence and the right to appeal are also guaranteed. The independence of the judiciary may suffer, however, as all judges are appointed and hold their positions at the ultimate discretion of emir.

Article 22 of the *Constitution of Oman* provides for a right to a fair trial and, as the report on Oman states, judiciary generally complies with this requirement. The law provides for the presumption of innocence and the right to counsel. Defendants have the right to present evidence and confront witnesses. The ruling of the judge may be appealed within 30 days. Legal defence, however, is provided only for those who are facing a punishment of no less than three years of imprisonment.

¹⁹⁸ U.S. Department of State, *Under Secretary for Democracy and Global Affairs, Bureau of Democracy, Human Rights and Labour, Country Reports on Human Rights Practices* (Washington, D.C.: Department of State, 2007) online: <<http://www.state.gov/g/drl/rls/hrrpt/2006/>>.

The *Constitution of the United Arab Emirates*, although does not provide a defendant the right to a speedy trial, nevertheless, does provide for a fair trial. Defendants are presumed innocent until proven guilty. All trials take place before judges and are usually public except for state security cases or because of considerations of public morale. A defendant has a right to appeal the decision of the court.

The report on Pakistan demonstrates that the domestic law of Pakistan guarantees the independence of judiciary and in non-political cases the high courts and the Supreme Court may generally be considered credible. The practice of lower court is frequently corrupted though and is subject to external influences. The civil, criminal, family court systems provide for an open trial, the presumption of innocence, cross examination by an attorney, and appeal of sentences. Additionally, Max Planck Manual on Fair Trial Standards analyzed the Basic Law and jurisprudence of Pakistan and concluded that at the minimum due process rights included the right to be informed of charges, the right to be given opportunity to defend him/herself, the right to be tried before a court which gives reasonable assurances of its honesty and impartiality.¹⁹⁹

The above analysis indicates that the legislation of the States not parties to the *ICCPR*, nevertheless, contains guarantees of a fair trial, although in some countries there are more guarantees than in the others and more limitations may apply. It is not to say, of course, that these provisions are not violated in non-party States in operational practice. For example, Saudi Arabia is often heavily criticized for its failure to provide

¹⁹⁹ Alexandra Hilal Guhr, *et al*, *Max Planck Manual on Fair Trial Standards in the Afghan Constitution, the Afghan Interim Criminal Code for Courts, the Afghan Penal Code and Other Afghan Laws as well as in the International Covenant on Civil and Political Rights*, 2nd ed. (Heidelberg, Germany: Max Planck Institute for Comparative and International Public Law, 2005) at 52, online: <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/maxplanckfairtrialmanual2edengl.pdf>>.

for public trials and to allow those accused of crimes to consult their legal counsel.²⁰⁰ China has also been admonished for closing trials from the public eye too often, especially in the politically sensitive cases. The right to defence is frequently withheld as well.²⁰¹ Violations of the right to a fair trial also occur in the European states which are both parties to the *ICCPR* and the *ECHR* and are, consequently, under a double obligation. However, the statistics shows that in over 50% of its judgments, the European Court has found a violation of article 6 of the *ECHR* on the account of the length of the proceedings or the unfairness.²⁰²

Generally, however, States managed to establish elaborate court systems to adjudicate on civil, criminal, family and other matters and adopt legislation regulating courts' jurisdiction, admissibility requirements and procedure. It may be concluded, therefore, that access to court although subject to legitimate limitations in light of the fact that “the right by its very nature calls for regulation by the State, regulation that may vary in time and place according to the needs and resources of the community and of individuals”²⁰³ is in practice provided virtually in each State, although with a varying degree of fairness.

Additionally and although in the context of customary humanitarian law, Jean-Marie Hencaerts, the head of the International Committee of the Red Cross (ICRC) project on customary international humanitarian law, noted that even when violations of

²⁰⁰ Human Rights Watch, *Precarious Justice: Arbitrary Detentions and Unfair Trials in the Deficient Judicial System of Saudi Arabia*, Report, 24 March, 2008, Vol. 20, No. 3(E), online: <http://www.hrw.org/sites/default/files/reports/saudijustice0308_1.pdf>.

²⁰¹ U.S. Department of State, *Report on China*, (Washington, D.C: Department of State, 2007) online: <<http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>>.

²⁰² The European Court of Human Rights, *Facts and Figures 1998-2008*, online: <<http://www.echr.coe.int/NR/rdonlyres/ACF07093-1937-49AF-8BE6-36FE0FEE1759/0/FactsAndFiguresENG10ansNov.pdf>>.

²⁰³ *Ashingdane v. The United Kingdom*, (1985), 7 E.H.R.R. 528 at para. 57.

existing rules occur, that is all it is, a violation.²⁰⁴ It is argued that such violations do not modify existing rules; they cannot dictate the law.²⁰⁵ This, accordingly, explains why attacks against civilians are still banned and the principle of distinction is considered a custom despite multiple violations of this prohibition. The main thing is that such contrary practice should be considered to be a violation of the legal norm by the States. This can be derived from the way they are received by the international community through national and international case law, official statements and resolutions of the international organizations.²⁰⁶

Next we will discuss whether the international community of States considers a right to a fair trial a legal norm and whether it considers non-compliance with the norm to be a violation. Basically, we will purport to establish the existence of the *opinio juris* on the subject matter. In order for the norm to become an international custom, States must show that they act in a certain way because of the sense of a legal obligation and not merely as a matter of policy, courtesy or habit. *Opinio juris*, is therefore, an indispensable element of customary international law. *Opinio juris* may be deduced from the responses of States to violations of the right in question. For the present purposes the execution of Ken Saro-Wiwa and his eight co-defendants, causing international outcry will be used as an example of States' reaction to blatant disregard of human rights, first of all a right to a fair trial.

Saro-Wiwa was a Nigerian, a member of the Ogoni people, an ethnic Nigerian minority whose homeland, Ogoniland has been targeted for crude oil extraction since the 1950s and which has suffered extreme and unremediated environmental damage

²⁰⁴ Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, at 5, online: <http://www.asil.org/pdfs/USComments_Rejoinder_Final.pdf> [*Customary IHL*].

²⁰⁵ *Ibid.*

²⁰⁶ Henckaerts, *Customary IHL*, *supra* note 204 at 5.

from decades of indiscriminate oil waste dumping. Initially as spokesperson, and then as the leader, of the Movement for the Survival of Ogoni People (MOSOP) and Ethnic Minorities Rights Organization of Africa (EMIROAF), Saro-Wiwa led a campaign against environmental degradation of the land and natural waters of Ogoniland by the operations of multinational oil companies, especially Shell. He also criticized the Nigerian government, which he viewed as reluctant to enforce proper environmental regulations on the foreign oil companies operating in the area. At the peak of his non-violent campaign, Saro-Wiwa was arrested, hastily tried by a special military tribunal, and hanged on November 10, 1995 in the prison at Port Harcourt, Nigeria along with eight environmental activists of false charges of murder.²⁰⁷

Amnesty International in its annual report for Nigeria concluded that the trials of the executed persons fell short of international fair trial standards. First of all, Amnesty International asserts, that the defendants were detained illegally for about eight months before the first five were actually charged. They were held incommunicado in military custody in harsh conditions. They were deprived of adequate food, water and medical care.²⁰⁸ Multiple violations of article 14 of the *ICCPR* were said to have occurred during the trials.

First of all, the defendants were tried by the special military tribunal, composed of military officers, although the defendants were civil persons. Secondly, during the trial of Ken Saro-Wiwa and his associates, defence lawyers had been granted access to their clients but had never been allowed to spend any time alone with them. The accused had thus been denied the right to adequate facilities for the preparation of

²⁰⁷ Wikipedia, *Ken Saro-Wiwa*, online: <http://en.wikipedia.org/wiki/Ken_Saro-Wiwa#Arrest_and_death>.

²⁰⁸ Amnesty International, *Annual Report for Nigeria, 1996*, online: <<http://www.amnestyusa.org/annualreport.php?id=DAB8848813CC23DD80256A0F005BCCCA&c=NGA>>.

their defence and had not been allowed to communicate freely with their counsel; hence a violation of article 14 paragraph 3(b) had occurred.

The defence had also submitted two affidavits from prosecution witnesses who had claimed that security agents and others had bribed them to sign false statements. The Tribunal had refused to accept those affidavits without giving any reason. It seemed that, by refusing to admit the affidavits as evidence and thereby denying the accused to call prosecution witnesses, the Tribunal had violated article 14 paragraph 3(e) of the Covenant.²⁰⁹ Finally, the defendants were not allowed to subject the judgment of the Court to a higher judicial authority; its judgment was subject to review only by the Provisional Ruling Council, which was in no sense a higher judicial body.²¹⁰ Therefore, the defendants rights to appeal guaranteed by article 14(5) were breached.

Such unfair trials, violating all possible international standards, provoked international outcry. The response of the international community was swift. Nigeria was expelled from the Commonwealth Nations for the period of two years; loans were rejected. The United States, the 15 States of the European Union, South-Africa and a number of other States immediately recalled their ambassadors in response to the executions and a flood of other condemnations were announced from African countries and from the EU.²¹¹ The General Assembly of the United Nations adopted a Resolution in which it expressed deep concern about the human rights violations in Nigeria and “condemned the arbitrary execution, after a flawed judicial process, of Ken Saro-Wiwa and his eight co-defendants, and emphasizes that everyone charged with a penal offence has

²⁰⁹ Human Rights Committee, Summary Record of the 1494th Meeting: Nigeria, U.N. Doc CCPR/C/SR.1494 at *para.* 18 (1996).

²¹⁰ *Ibid.* *para.* 17.

²¹¹ Howard W. French, “Nigeria Executes Critic of Regime; Nations Protest” *The New York Times* (11 November 1995), online: <<http://www.nytimes.com/1995/11/11/world/nigeria-executes-critic-of-regime-nations-protest.html?pagewanted=2>>.

the right to be presumed innocent until proved guilty according to law in a public trial with all the guarantees necessary for defence”.²¹²

This illustrates the extremely negative reaction of the international community of States. Most States strongly criticized the military government of Nigeria for having failed to comply with basic requirements of the right to a fair trial. Such a reaction, in a way, demonstrates the commitment of States to adhere to their obligations undertaken in human rights treaties. It is also indicative of the agreement between States that the right to a fair trial in the context of criminal proceedings is a common value and under no circumstances can it be disregarded. The serious sanctions that Nigeria faced after the execution of Ken Saro-Wiwa after a flawed trial shows that States do believe a right to a fair trial to be law; the States condemned violations of fair trial standards in a present case because they believed it reflected a rule of law and not policy. If the provision of a right to a fair trial was inspired by non-legal consideration of convenience, comity or policy such serious sanctions would have never been adopted against Nigeria in the first place.

The opinion of legal scholars, although not being decisive, may strengthen the position that the requirements of a fair trial right can be regarded as customary. For example, Meron believes that at least the core of a number of the due process guarantees laid down in Article 14 of the *ICCPR* have a strong claim to customary law status. He further clarifies that such rights include the right to be tried by a competent, independent and impartial tribunal established by law, the right to presumption of innocence, the right of everyone to be tried in his or her presence and to defend

²¹² Resolution on Situation of Human Rights in Nigeria, GA Res. 50/199, UN GAOR, 22 December 1995, at *para.* 1. The resolution was adopted by a vote of 101 in favour to 14 against, with 47 abstentions.

himself or herself in person or through legal assistance, [...], and the right to have one's conviction and sentence reviewed by a higher tribunal according to law.²¹³

Hurst in his article "*The status of Universal Declaration in National and International Law*,"²¹⁴ carried out an investigation on the customary nature of rights laid down in the *UDHR* and came to the conclusion that the language of recently adopted constitutions very much resembles that of the *UDHR* and the *ICCPR* and further remarks that the right to a fair trial is regarded by some observers among those now guaranteed under customary law.²¹⁵

The conducted analysis shows that certain aspects of a right to a fair trial, such as access to court and a right to a fair hearing before competent, independent and impartial tribunal may be considered customary in nature and therefore binding on all States of international community and also on international organizations and their organs. Access to challenge the decisions of judicial or quasi-judicial bodies set up by States or international organizations must be available and it must conform to the basic requirements of a fair trial or due process of law.

2.6 Conclusion

Nowadays, the fair trial principles are increasingly coming under pressure from national and international actors involved in the dispensation of justice: governments seek, by statute or by powerful pleading of affairs of state, public interest and policy, convenience and desirability, to exempt some of the activities of their subjects from these principles. Both governments and citizens have urged, in the name of

²¹³ Theodor Meron, *Human Rights as Customary Law*, *supra* note 152 at 96-97.

²¹⁴ *Supra* note 162.

²¹⁵ *Ibid.* at 345.

substantive equality, that parties should not always be treated as equals, that the full protection afforded by these principles should be set aside, in part, to minimize delay or cost that hits one party more than another and that there are types of enquiry and decision-making involving important interests of citizens that are not best conducted on a legal basis.²¹⁶

The above propensities notwithstanding, the presumption of law is always in favour of natural justice and the principles of fair trial. These principles have come a long way and they still remain strong in national and international adjudicatory processes. As has been shown in the above analysis, these principles have arguably grown to the status of customary international law binding on states, international organizations and other subjects of international law. Justice must not only be done but be seen to be done. The principles of natural justice or fair trial enumerate certain forms for achieving justice and these forms must be observed publicly, visibly and they must stand as signs of a society's devotion to justice.

²¹⁶ See Lord Hewart, *Essays and Observations* (London: Cassell & Company Ltd, 1930) at 122-123. In this work, the words of Lord Hewart which satirize the current approach by state actors and international organizations in disregarding the fair trial or natural justice principles are worthy of note. The author states that: "the inhabitants of these islands are within measurable distance of an *El Dorado* where there will be no judges at all. In those isles of the blest...all controversial questions will be decided in the third floor back of someone or other government department; the decision so reached will not be open to appeal...by any means whatsoever; no party or other person interested will be permitted to appear or offer any evidence; the whole law will have been codified in a single interminable statute...no lawyers will be tolerated except a group of advisers, departmentally appointed; any questions likely to excite difference of opinion will be submitted to those advisers beforehand on hypothetical facts and behind the back of the parties; and the lord chancellor himself will have been exchanged for a minister of administration for whose office any knowledge of law, however slight, will be a statutory disqualification. Meanwhile, and until that happy day arrives, our fellow countrymen seem somehow to think not too unkindly of judicial decisions given in open court upon real cases by perfect independent and impartial judges, who are individually responsible and who have heard both sides."

CHAPTER THREE

THE SECURITY COUNCIL AND THE PROTECTION OF HUMAN RIGHTS

3.1 Introduction

In Chapter Two, an attempt was made at examining the transformation of the natural justice principles to what is popularly known nowadays, especially in human rights parlance as ‘due process’ or ‘fair trial’. Further attempt was also made to show that the guarantees of fair trial rights which are undoubtedly offshoots of the natural justice principles are customary international law from which no derogation is permitted in international law. It was pointed out in the Chapter under reference, that since the right to a fair trial is provided for mostly in international human rights treaties to which only States could be parties, international organizations, as a general rule, are not parties to some of these international instruments proclaiming this right and as such, are not bound by their provisions.

The quest to establish a point of bindingness of these treaties on international organization led to a detailed discussion of the customary international law principles especially as they relate to the right to fair trial. The two major elements which are ‘State practice’ and ‘*opinio juris*’ were extensively examined and it was concluded that even where a State or an international legal entity is not a party to most or all the treaties proclaiming respect for the right to a fair trial, such a State or international legal entity would nevertheless be bound by these international human rights treaties. Needless to say that international legal entity as used in this work subsumes international organizations.

In this present Chapter of the work, an attempt will be made to examine the United Nations and its mandates on the protection of human rights and fundamental freedom. The activities of the Security Council of the United Nations have over the years raised a number of concerns and sometimes, it is often believed that the Security Council could do as it pleases particularly because of the wide powers it possesses under article 24(2) the *UN Charter*.²¹⁷ A commentator also shares the belief that international organizations do not act as subjects of law but as an international organ and they are as such not accountable for their actions.²¹⁸ However, the veracity of these beliefs is doubtful in the light of a body of international jurisprudence and studies in these regards.

It will be shown in this Chapter that international organizations, particularly the United Nations are subjects of international law and should be accountable for breaches of human rights provisions. As a general rule, the United Nations is immune against any proceedings before national courts.²¹⁹ The appropriate measures or mechanisms to be employed by an aggrieved person against the United Nations or any of its organs are beyond the scope of this work. However, efforts will be made in this Chapter of the work to establish that the United Nations, just like all other international organizations, is a subject of international law. It will also be established that one of the foremost mandates of the United Nations is the protection of human rights and fundamental freedom. This by implication means that the United Nations or any of its organs is bound by human rights provisions especially the due process rights or what is colloquially known as the right to a fair trial.

²¹⁷ Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Dordrecht: Martinus Nijhoff Publishers, 1994) at 14 [*Mohammed Bedjaoui, The New World Order*].

²¹⁸ Reinhold Reutersward, "The Legal Nature of International Organizations" (1980) 49 *Nordisk TIR*, 14-30.

²¹⁹ *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, 1 U.N.T.S. 15 at s. 2.

3.2 The United Nations as an International Organization

Although States are the original, primary and universal subjects of international law, international organizations and the United Nations specifically are now well established subjects of international law. The possession of a legal personality by the United Nations is not questioned since the well-known *Reparation for Injuries Advisory Opinion*, in which the International Court of Justice²²⁰ stated that “the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.”²²¹

It is clear that subjects of law do not operate in legal vacuum. Their behaviour is governed by a system of legal norms which they must comply with. The ICJ ruled that “international organizations are subjects of international law and as such are bound by any international obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”²²²

The United Nations, however, is not a party to any of the universal or regional human rights documents. In accordance with the well-known provision of the *Vienna Convention on the Law of Treaties*,²²³ treaties only bind the parties. Therefore, the United Nations is not directly bound by any of the conventional human rights provisions. States are the primary bearers of human rights obligations. After the

²²⁰ Hereinafter usually but not invariably referred to as ICJ.

²²¹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174.

²²² *Interpretation of the Agreement of 25 of March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] I.C.J. Rep. 73.

²²³ *VCLT*, *supra* note 149 at art. 26.

horrors of Second World War, States were seen as the most probable oppressors of human rights, that is why all human rights documents were drafted with a view to the performance by States.²²⁴ Just some decades ago it was difficult to imagine that the acts of international organizations would have a direct impact on individuals, their rights and freedoms, and hence there was no practical necessity in making the UN a party to human rights treaties.

Moreover, even hypothetically, it would now be impossible for the United Nations to become a party to, for example, the *ICCPR* or the *ECHR*, because these documents are open to accession only by States, not international organizations.²²⁵ However, it seems unrealistic that the States which are obliged to abide by human rights norms, would be able to establish an international organization absolutely free of such obligations and allowing it to breach human rights standards during the performance of its functions. This would allow States to escape their human rights duties by means of creating inter-governmental organizations.

Though the United Nations is not itself a party to any of the human rights treaties, it has, nevertheless, greatly contributed to the development of the human rights law, through the adoption of such vital human rights documents as the *Universal Declaration of Human Rights*,²²⁶ the two International Covenants,²²⁷ *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or*

²²⁴ Christian Tomuschat, *Human Rights*, *supra* note 96 where the author states that “...the state has been accepted as an organization well-suited to promote the interests of its members in the never-ending fight for resources among different communities; on the other hand, it has also been identified as a lethal threat to the life and wellbeing of its members.”

²²⁵ See *ICCPR*, *supra* note 90 at art. 48(3); *ECHR*, *supra* note 136 at arts. 57(1) & 59(1).

²²⁶ *Universal Declaration*, *supra* note 99.

²²⁷ *ICCPR*, *supra* note 90 and *ICESCR*, *supra* note 105.

Punishment,²²⁸ *Convention on the Elimination of all Forms of Discrimination Against Women*²²⁹ and others.²³⁰ It also established international bodies to monitor the implementation of these conventions and make recommendations to member States. In connection with the establishment of the Human Rights Council in 2006, the General Assembly observed that “peace and security, development and human rights are the pillars of the United Nations system.”²³¹ Indeed, as was rightly noted, “the United Nations would contradict itself, if on the one hand, it constantly admonished its Member States to respect human rights, and on the other hand, it refused to respect these same rights when relevant to its own action.”²³²

Moreover, the recent developments in the United Nations practice of maintaining and restoring peace and security, such as the establishment of peacekeeping operations, exercising governmental functions in Kosovo and East Timor,²³³ the development of the ‘responsibility to protect’ concept,²³⁴ implies that the UN actions are far-reaching and involvement of the UN in such actions must necessarily entail its accountability in case of violations of human rights. One would agree with Brownlie who remarked that “although the United Nations might have a wide margin of appreciation in making dispositions to maintain international peace and security, it does not follow that the

²²⁸ 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987) [*Torture Convention*].

²²⁹ 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) [*CEDAW*].

²³⁰ Among other human rights document inspired by the UN are the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951) [*Genocide Convention*], the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969) [*Convention on Racial Discrimination*], the 1989 *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990) [*CRC*], the 2006 *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 993 U.N.T.S. 3 (entered into force 3 May 2008) [*CRPD*]. For more human rights documents visit online: Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/law/>>.

²³¹ See *General Assembly Resolution 60/251*, 15 March 2006, online: Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/bodies/hrcouncil/>>.

²³² Fassbender, *Targeted Sanctions and Due Process*, *supra* note 75 at 23.

²³³ See *Security Council Resolution 1244*, S/RES/1244 (1999) at *paras.* 9-10, and *Security Council Resolution 1272*, S/RES/1272 (1999) at *para.* 1.

²³⁴ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Report, December 2001, online: International Commission on Intervention and State Sovereignty <<http://www.iciss.ca/report-en.asp>>.

selection of the modalities of implementation is unconstrained by legality. Indeed when the rights of individuals are involved, the application of human rights standards is a legal necessity.”²³⁵

In the next sections, we will discuss whether the *UN Charter*²³⁶ which is perceived of as a constitution of the international legal order, contains any provisions with regard to human rights obligations and whether these provisions constitute a limitation to what the UN, and the Security Council specifically, can do.

3.3 Human Rights Mandates of the Security Council

The gruesome events of the twentieth century gave rise to deep thoughts about the inherent attributes possessed by human beings. One of the attributes was that every human being has inherent dignity.²³⁷ Flowing from this dignity is an obligation to respect and not to violate human beings. Inviolability in this sense means that an individual should not be liable or allowed to suffer violence and that he should be kept sacredly free from profanation, infraction or assault. The assurance of this guarantee was entrusted to the state. The state was accepted as an organization well-suited to promote the interest of its members in the never-ending fight for resources among different communities.²³⁸

As early as 1941, Prime Minister Churchill and President Roosevelt issued the Atlantic Charter, in which they declared that they “hope to see established a peace which will afford to all nations the means of dwelling on safety within their own

²³⁵ Ian Brownlie as quoted by *Fassbender, Targeted Sanctions and Due Process*, *supra* note 75 at 26.

²³⁶ *Supra* note 49.

²³⁷ Vicki Jackson, “Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse” (2004) 65 *Montana L. Rev.* 15.

²³⁸ Christian Tomuschat, *Human Rights*, *supra* note 98.

boundaries.”²³⁹ In the “Declaration of United Nations”, of 1 January 1942, twenty six signatory States adhered to the principles contained in the Atlantic Charter. These general expressions were developed into the “Proposals for the Establishment of a General International Organization” during the two Dumbarton Oaks Conferences in 1944.²⁴⁰ It was on the basis of these proposals that the United Nations Conference on International Organization (UNCIO) was convened during which the *United Nations Charter*²⁴¹ was drafted.²⁴²

The *UN Charter* was adopted by the Conference on 25 June 1945 and it entered into force on 24 October of that year. While it is true that international law recognized some forms of international human rights protection prior to the 1945 entry into force of the *UN Charter*, the internationalization of human rights and the humanization of international law begins with the establishment of the United Nations.²⁴³ The *UN Charter* ushered in a world-wide movement in which States, intergovernmental, and nongovernmental organizations are the principal players in an ongoing struggle over the role the international community should play in promoting and protecting human rights. Paragraph 2 of the Preamble to the *UN Charter* clearly contains the disposition of the United Nations to the dignity of the human person as well as to fundamental human rights in general. The text of that paragraph reads as follows:

“To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...”²⁴⁴

²³⁹ David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (The Hague: Kluwer Law International, 2001) at 26 [David Schweigman, *The Authority of the Security Council*].

²⁴⁰ *Ibid.*

²⁴¹ *UN Charter*, *supra* note 49.

²⁴² David Schweigman, *The Authority of the Security Council*, *supra* note 239.

²⁴³ Mark W. Janis & John E. Noyes, *Cases and Commentary on International Law* (St. Paul, MN: Thomson/West, 2006) at 378.

²⁴⁴ *UN Charter*, *supra* note 49 at Preamble *para.* 2.

In showing its commitments to championing the course of human rights and fundamental freedom in the world community, the human rights provisions contained in the *UN Charter* was taken beyond the Preamble and was indeed inserted in article 1(3) as one of the purposes and principles for the establishment of the United Nations. Article 1(3) of the *UN Charter* as such, states that the United Nations was established, among other purposes and principles clearly stated in the *Charter*, “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”²⁴⁵

The Security Council is a principal organ of the United Nations established together with the General Assembly, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat by article 7 of the *UN Charter*. Article 24(1) of the *UN Charter* essentially confers on the Security Council the primary responsibility for the maintenance of international peace and security. The article under reference states that “in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf.”²⁴⁶

Article 24(1) no doubt confers a wide power on the Security Council for the purpose of maintaining international peace and security. The length and breadth of this power are contained in Chapters VI, VII, VIII and XII of the *UN Charter*. Chapter VI of the *UN Charter* deals with the powers of the Security Council with respect to pacific

²⁴⁵ *Ibid.* at art. 1(3).

²⁴⁶ *Ibid.* at art. 24(1).

settlement of disputes; Chapter VII relates to the specific actions to be taken by the Security Council with respect to threats to the peace, breaches of the peace and acts of aggression; Chapter VIII relates to powers exercisable by the Security Council with respect to regional arrangements while Chapter XII deals with international trusteeship system.

In order to prevent tyranny and arbitrariness on the part of the Security Council in view of the wide powers conferred on it by article 24(1) of the *UN Charter*, article 24(2) was inserted to serve as a guidepost or yardstick for determining the legality or otherwise of the actions of the Security Council.²⁴⁷ Article 24(2) states that in discharging its duties under the *Charter*, the Security Council shall act in accordance with the Purposes and Principles of the United Nations. This article therefore places a mandate to promote and encourage respect for human rights and fundamental freedoms on the Security Council when exercising its powers under Chapters VI, VII, VIII and XII of the *Charter*.²⁴⁸

²⁴⁷ Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oregon: Hart Publishing, 2004) at 191. See however Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Dordrecht: Martinus Nijhoff Publishers, 1994) at 14 [*Mohammed Bedjaoui, The New World Order*]. In this book, the author shares a different view from the one stated above. Rather than see article 24(2) as a sort of check and balance on the actions of the Security Council, the author believes that the article under reference in fact promotes tyranny and arbitrariness on the part of the Security Council as the Council only needs to act 'in accordance with the purposes and principles of the United Nations and not 'in accordance with the provisions of the Charter'. The author states that "...it is not picky to remark that there is a difference of some magnitude between acting "in accordance with the Purposes and Principles of the United Nations" and acting "in accordance with the provisions of the Charter". The text adopted for Article 24 is less confining for the Security Council, which has only to keep in mind "the Purposes and Principles" of the United Nations *in their generality*, without apparently being constrained to observe the relevant provisions of the Charter *in their particularity*. In other words, the formula arouses some apprehension lest the Security Council might seem bound by the *final goals* of the United Nations (i.e. such purposes and principles laid down in Article 1 as the maintenance of international peace and security, friendly relations among nations and international co-operation) rather than by respect for the *specific exigencies* of this or that Charter article..."

²⁴⁸ *Case concerning Questions of Interpretation and Application of the Montreal Convention arising out of the Aerial Incident at the Lockerbie* (Provisional Measures), ICJ Reports 1992, dissenting opinion of Judge Weeramantry; Erika De Wet & Andre Nollkaemper, "Review of Security Council Decisions by National Courts" (2002) 45 *German Yearbook of International Law* 166, at 171-176.

Apart from the combined provisions of article 24(1) & (2) of the *UN Charter* which, among others, give human rights mandate to the Security Council, Ramcharan has identified some principles which further strengthen the human rights mandate that is bestowed on the Security Council by the *UN Charter*.²⁴⁹ According to Ramcharan, the practice of the Security Council suggests that the following principles have influenced the Security Council to address human rights situations: threat to international peace and security, the integration of human rights in conflict resolution, democratic legitimacy, the highest standards of human rights, the rights of women, international humanitarian law, the duty of the State, the duty of all concerned, non-use of violence, impunity and minority rights.²⁵⁰

Apart from identifying principles that have strengthened the human rights mandate of the Security Council, Ramcharan further noted some other principles which have also influenced the humanitarian mandate of the Security Council. Since both international human rights law and international humanitarian law form part of the active international laws in the affairs of the world community, it is important to highlight these principles in order to strengthen our conviction that the Security Council has, not just human rights mandate but also a measure of humanitarian mandate. The practice of the Security Council indicates that it may review any situation from the point of view of the maintenance of international peace and security; it may also investigate any situation from the point of view of maintenance of international peace and security.²⁵¹

Other human rights commitments that can be gleaned from the practice of the Security

²⁴⁹ See Bertrand G. Ramcharan, *Human Rights and Human Security* (The Hague: Martinus Nijhoff Publishers, 2002) at 21-29.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.* at 26.

Council is the unequivocal condemnation of terrorism and its establishment of international tribunals for dealing with grave breaches of international humanitarian and human rights law. The Council has also sought in recent years to integrate human rights into efforts for conflict prevention, peace-making, peace-keeping, and peace-building. All of this demonstrates that, through practice, the Security Council's work is taking on a significant human rights dimension, within the framework of its mandates for the maintenance of international peace and security in accordance with the *UN Charter*.

3.4 Is the Security Council bound to respect Human Rights?

The answer to the question raised by this section of the work may seem obvious, perhaps in the light of the discussion in the preceding section on the human rights mandates of the Security Council. However, it should be pointed out that having a mandate to carry out an act does not necessarily imply a mandate to 'respect such act'. In this section of the work, it will be shown that the Security Council does not only have human rights mandates but that it is bound to respect human rights in carrying out its responsibilities under the *UN Charter*.

It is true, that the Security Council, as the principal organ of the UN responsible for maintaining and restoring international peace and security, enjoys wide discretion in choosing the measures indispensable for such ends. Since the end of the Cold War, the Security Council became quite active and has been adopting many resolutions addressing threats to international peace and security. While just about a decade ago, the Security Council tended to apply measures under articles 40, 41 and 42 of the *UN Charter* to individual States and, in rare cases, to non-State actors, now the Security

Council's measures directly affect individuals and their rights. It is a new development and concern has already been raised that the Security Council in pursuit of its primary goal may somewhat disregard these rights.

Various UN bodies, for example, have become critical of the 1267 sanctioning regime in recent years and called for strict compliance with human rights norms. For further example, the UN High Commissioner on Human Rights noted that “while the system of targeted sanctions represents an important improvement over the former system of comprehensive sanctions, it nonetheless, continues to pose a number of human rights concerns related to the lack of transparency and due process in listing and de-listing procedures.”²⁵² The General Assembly in its 2005 World Summit Outcome document called on the Security Council to ensure that “fair and clear procedures exist for placing individuals and entities on sanctions list and removing them, as well as for granting humanitarian exceptions.”²⁵³

As Reinisch in his article pointed out; “remarkably, most commentators, with very few exceptions, simply assume the Security Council is obligated to respect human rights and humanitarian law...and do not analyze the origin, scope and existence of the obligation in any detail.”²⁵⁴ It is yet unclear to what extent the Security Council, as an organ of the international organization, is limited by human rights norms while carrying out its main function. There is therefore the need to explore and analyse certain human rights limitations that might exist with regard to the United Nations and

²⁵² Office of the United Nations High Commissioner on Human Rights, *Report of the UN High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc A/HRC/4/88, 9 March 2007 at *para.* 25.

²⁵³ GA Res. 60/1, 2005 at *para.* 109.

²⁵⁴ August Reinisch, “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions” (2001) 95 *American Journal of International Law* 851 at 863 [Reinisch, *Developing Human Rights and Humanitarian Law Accountability*].

the Security Council in particular.

The United Nations and the Security Council specifically act within a legal framework, under its constituent treaty — the *United Nations Charter* — which spells out its powers and functions. United Nations and all of its organs of course are bound by the provisions of the *Charter* and shall not violate it while carrying out its tasks. In 1948, in the *Admissions to the UN Membership Advisory Opinion*, the ICJ held with regard to the Security Council that “the political character of an organ cannot release it from the observance of the treaty provisions established by the *Charter* when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be held to the terms of its constitution.”²⁵⁵

Recently the International Criminal Tribunal for Former Yugoslavia²⁵⁶ reaffirmed this reasoning and stated that “the Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations.....In any case, neither the text nor the spirit of the *Charter* conceives of the Security Council as *legibus solutus* (unbound by law).”²⁵⁷ In order to answer the question whether the Security Council is subject to certain legal limitations in general and, specifically, whether human rights constitute any restraints on the Security Council's wide discretion to choose measures to address threats to peace and security, one shall look at the *UN Charter*.

²⁵⁵ *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, [1948] I.C.J. Rep. 57.

²⁵⁶ Hereinafter referred to as ‘ICTY’.

²⁵⁷ *Prosecutor v. Tadic*, Decision of the Appeals Chamber (2 October 1995) at *para.* 28 (International Criminal Tribunal for Former Yugoslavia, Appeals Chamber).

Article 24(2) of the *UN Charter* will be the starting point of the analysis. It determines that while discharging its duties, the Security Council “shall act in accordance with the *Purposes and Principles of the United Nations*.”²⁵⁸ United Nations purposes and principles are laid down in articles 1 and 2 of the *Charter*. It has been noted by Fassbender that the values and goals laid down in the Preamble to the *UN Charter* and its first two articles are standards of legality (or constitutionality) for legal acts passed by UN organs.²⁵⁹ Petculescu maintains that the resolutions of the Security Council adopted in violation of the fundamental norms of the *UN Charter* (and purposes and principles are certainly regarded as such) are to be considered *ultra vires* and, as a result, illegal.²⁶⁰ Of particular importance in the present context would be articles 1(1), 1(3) and 2(2) of the *UN Charter*.

Article 1(1) obliges the United Nations to act in conformity “with the principles of justice and international law.”²⁶¹ However, close reading of that provision reveals that the obligation to act “in conformity with the principles of justice and international law” literally refers only to the Security Council's function to settle disputes peacefully and that this qualification is not contained in the first part of article 1(1) which addresses the Council's function to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.²⁶² Nevertheless, one should not interpret this provision as meaning that the Security Council is not obliged to comply with the law while restoring peace and security.

²⁵⁸ *UN Charter*, *supra* note 49.

²⁵⁹ As quoted in David Schweigman, *The Authority of the Security Council*, *supra* note 239 at 168.

²⁶⁰ Ioana Petculescu, “Review of the United Nations Security Council Decisions by the International Court of Justice” (2005) 52 *Netherlands International Law Review* 167 at 171. This article contains discussion about the possibility of the review of the Security Council's decisions and the effects of the judicial review; whether it makes the decisions nullity or voidable.

²⁶¹ *UN Charter*, *supra* note 49 at art. 1(1).

²⁶² Reinisch, *Developing Human Rights and Humanitarian Law Accountability*, *supra* note 254 at 858.

In accordance with the rules of interpretation laid down in the *Vienna Convention*, recourse may be had to supplementary means of interpretation, including the preparatory works.²⁶³ The analysis of the preparatory works indicates that the drafters of the *UN Charter* did not intend the Security Council to be unbound by law. While the committee charged with preparatory work on the preamble, purposes and principles of the *UN Charter* rejected the inclusion of “in accordance with the principles of justice and international law” phrase in the first sentence of article 1(1), the committee on the structure and procedures of the *UN Charter* explicitly stated that this was not meant to free the Security Council completely from restraints of international law. It would not serve as a justification for the conclusion that the Security Council could deviate from international law in an unrestrained fashion when maintaining international peace and security.²⁶⁴

Provisions in the *UN Charter* that strengthen the view that the Security Council is restrained by human rights norms are articles 1(3) and 55 of the *UN Charter*. Article 1(3) as earlier noted, provides that the Purposes of the United Nations are “to achieve international cooperation in...*promoting and encouraging respect for human rights and for fundamental freedoms* for all without distinction as to race, sex, language, or religion.” Article 55 states that the United Nations shall promote not only respect for human rights, but also observance of human rights and fundamental freedoms.

The language of these provisions does not, however, suggest that the Organization

²⁶³ *VCLT*, *supra* note 149 at art. 32.

²⁶⁴ Erika De Wet, Andre Nollkaemper & Petra Dijkstra, *Review of the Security Council by Member States* (New York: Intersentia Antwerp, 2003) at 9 [Erika De Wet, *Review of the Security Council by Member States*].

itself is required to observe human rights while carrying out its tasks.²⁶⁵ In this connection, one shall look at the historical context of the adoption of the *UN Charter*. It was adopted at times when the United Nations in general, and the Security Council in specific, were not believed to be capable of violating human rights. It is rather unlikely, that the drafters considered violations by the UN and its organs permissible that they did not include any explicit and clear-cut duty of the United Nations to abide by human rights norms. To put it another way, it appears plausible to regard the United Nations as having violated its duty to promote respect for and observance of human rights, if it disregards these rights itself.²⁶⁶

Moreover, the second paragraph of the Preamble to the *UN Charter* reinforces this view and holds that the UN is determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person. This is the second biggest goal of the Organization and it is preceded only by the goal of preventing another world war. This provision, therefore, should be taken into consideration while interpreting the principles and purposes of the UN.

It is important to note that human rights obligations of individual States and those of the United Nations are not necessarily identical in scope. The United Nations was founded as an organization the primary goal of which is to maintain peace and security and was granted a wide margin of discretion to that end. Therefore, the UN when adopting coercive measures under chapter VII might inevitably engage in actions which will restrict the rights of people in the target state. And while individual member States may derogate from their human rights obligations in a situation that

²⁶⁵ Reinisch, *Developing Human Rights and Humanitarian Law Accountability*, *supra* note 264 at 857.

²⁶⁶ *Ibid.*

“threatens the life of the nation....to the extent strictly required by the exigencies of the situation”,²⁶⁷ it has been suggested that the Security Council may apply a more lenient proportionality test in order to enable itself to efficiently exercise its main role in the maintenance of international peace and security.²⁶⁸

It is argued by De Wet and Nollkaemper that, perhaps, the Security Council would be allowed to reverse the presumption of innocence of the listed individuals so that the burden would be on the listed subjects to contest their designation in light of the gravity of the threat posed by international terrorism and “difficulties involved in combating terrorism due to its hidden nature”,²⁶⁹ but individual member States, doing the same thing, would perhaps exceed its rights under article 4 of the Covenant. This argument sounds convincing but I respectfully disagree with it.

The reason for my disagreement with the position of De Wet and Nollkaemper above is because presumption of innocence is a hallowed principle lying at the very heart of criminal law.²⁷⁰ An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State or the Prosecution proves an accused’s guilt beyond reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice.²⁷¹

²⁶⁷ ICCPR, *supra* note 90 at art. 4.

²⁶⁸ Erika De Wet, *Review of the Security Council by Member States*, *supra* note 264 at 18.

²⁶⁹ *Ibid.*

²⁷⁰ Dickson, C.J.C, in *R v. Oakes* (1986) 24 C.C.C. (3d) 321 (S.C.C.).

²⁷¹ *Ibid.* On presumption of innocence, see generally James C. Morton & Scott C. Hutchison, *The Presumption of Innocence* (Toronto: The Carswell Company Limited, 1987).

It has been suggested in legal literature²⁷² that one more possible restriction deriving from the purposes and principles of the *UN Charter* may be the principle of good faith. The principle of good faith is somewhat related to the concept of equitable (promissory) estoppel which originally applied to inter-state relations only.²⁷³ Equally, however, this concept may also apply to international organizations in order to bind them to the legitimate expectations that they created by their actions.²⁷⁴

In accordance with the principle of good faith, the United Nations and its organs, including the Security Council will be estopped from actions that breach the human rights proclaimed in the principles and purposes. One can say that the notion of human rights referred to in the principles and purposes is too broad and vague. There is no list of human rights the Organization and its organs are bound to comply with and thus, it was argued, it cannot possibly result in any limitations on the Security Council's mode of action. From the analysis of the *UN Charter* it would only be possible to deduce that the Organization recognizes the right to be free from discrimination on the grounds of race, sex, language or religion.²⁷⁵

However, notwithstanding the breadth of the language, one can still try to identify the list of the human rights in question.²⁷⁶ It seems logical to suppose that at the very least the human rights which enjoy the status of non-derogable in accordance with article

²⁷²See Sir Michael Wood, "The UN Security Council and International Law: the Security Council's Powers and Their Limits", online: Hersch Lauterpacht Memorial Lectures, <http://www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_2.pdf>; Erika De Wet, *Review of the Security Council by Member States*, supra note 264; David Schweigman, *The Authority of the Security Council*, supra note 239.

²⁷³Erika De Wet, *Review of the Security Council by Member States*, *ibid.* at 10.

²⁷⁴Erika De Wet, *Review of the Security Council by Member States*, *ibid.* at 12.

²⁷⁵Article 1(3) of the *United Nations Charter* stipulates that one of the Organization's Purposes is to promote and encourage respect for human rights for all without distinction as to race, sex, language, or religion.

²⁷⁶Erika De Wet, *Review of the Security Council by Member States*, supra note 264 at 13.

4(2) of the Covenant are the basic rights that the UN cannot disregard. Thus a right to life, a right to be free from slavery, servitude and torture, a right to recognition as a person before the law and other rights are the core rights the UN shall respect and observe.²⁷⁷ Secondly, those rights that have attained the status of customary law (arguably, the right to a fair trial, the prohibition of prolonged arbitrary detention among others) or *jus cogens* (prohibition of genocide, for example) are definitely among those few which constitute the core rights subject to compliance.²⁷⁸

Moreover, because the adoption of the International Bill of Rights, comprised of the *Universal Declaration* and two Covenants, was inspired by the United Nations, the member States may have a legitimate expectation that the Organization itself will act in accordance with its provisions or “at the very least will not erode their core content.”²⁷⁹ The obligation to act in good faith thus obliges the member States when acting in the context of an organ of the UN, to fulfil legally relevant expectations that are raised by their conduct with regard to human rights standards accepted in the framework of the Organization.²⁸⁰ Therefore, even assuming that principles and purposes reflect a political programme rather than precise legal rules like some authors argued, the Security Council would be found to be violating the *UN Charter*, in case it disregarded the core provisions of human rights, which form part of the

²⁷⁷ The *ECHR*, *supra* note 136 contains a shorter list of non-derogable right: a right to life (art. 2), prohibition of torture (art. 3), prohibition of slavery (art. 4), prohibition of punishment without law (art. 7).

²⁷⁸ See the views of Judge Lauterpacht in the *Case concerning the Application of the Genocide Convention* thus: “[T]he prohibition of genocide...has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*...The relief which Article 103 of the *Charter* may give the Security Council in the case of conflict between one of its decisions and an operative treaty obligation cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus - that a Security Council resolution may even require participation in genocide - for its unacceptability to be apparent.” *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (1993) ICJ Reports 325, 440.

²⁷⁹ Andrew Hudson, “Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights” (2007) 25 *Berkley Journal of International Law* 203 at 211 [*Hudson, Not a Great Asset*].

²⁸⁰ *Erika De Wet, Review of the Security Council by Member States, supra* note 264 at 14.

purposes of the Organization.

3.5 Conclusion

There have been arguments and counter arguments amongst international law commentators as to whether the Security Council is bound by international human rights or even the provisions of the Charter in its activities.²⁸¹ Those who argue that the Security Council is bound by the international human rights regime point out that the Security Council, like the UN as a body, is bound by the Charter, which includes the protection of human rights as one of its fundamental principles.²⁸² On the other hand however, because article 103 of the Charter gives the Security Council decisions primacy over competing treaty obligations, it has been suggested that the Security Council is not bound by general norms of customary international law and some commentators have suggested that it is not even bound by norms of *jus cogens*.²⁸³ From the analysis above however, it has been shown that the Security Council is indeed bound to respect human rights especially the guarantees of fair trial and due process of law.

²⁸¹ See Mohammed Bedjaoui, *The New World Order*, *supra* note 247 where the author argues that article 24(2) of the *Charter* only enjoins the Security Council to “act in accordance with the Purposes and Principles of the United Nations” and not necessarily “in accordance with the provisions of the *Charter*”.

²⁸² Ch Powell, “The Legal Authority of the United Nations Security Council” in Benjamin J. Goold & Liora Lazarus, eds., *Security And Human Rights* (Oregon: Hart Publishing, 2007) 157 at 161.

²⁸³ *Ibid.* But see the decision in *Kadi v. EU* which has proved this assumption that the Security Council is not bound by *jus cogens* wrong: *Kadi v. European Union*, T-315/01, [2005] E.C.R. II-3649.

CHAPTER FOUR

CONFORMITY OF THE WORKING GUIDELINES OF RESOLUTION 1267 COMMITTEE WITH FUNDAMENTAL HUMAN RIGHTS

4.1 Introduction

This chapter discusses the main points of the thesis. Chapter One of this work identified the legal issues involved in the experience of Mr. Abousfian as documented in the case of *Abousfian Abdelrazik v. Minister of Foreign Affairs & Attorney General, Canada*.²⁸⁴ In that chapter, one of the major issues which were raised was whether the working guidelines of the Resolution 1267 Committee conform with the twin principles of natural justice which are *audi alterem partem*²⁸⁵ and *nemo iudex in causa sua*.²⁸⁶ We have established by reference to judicial authorities in the old English Common Law Courts as well as to the present day practice of States that these ancient principles have metamorphosed into what is colloquially referred to as due process rights or the right to a fair trial. Indeed, a discussion on fair trial will be hollow and baseless without reference to these principles of natural justice.

Chapters two and three were devoted to discussions of the applicable rules of law to the legal issues which were raised in chapter one. We extensively discussed the origin of the natural justice principles and their metamorphosis to the right to a fair trial. We also examined whether the right to a fair trial has attained the status of customary international law, in which case, States which are not parties to international human rights instruments proclaiming this right as well as international organizations like the United Nations which are not parties to several international human rights instruments on the right to fair trial would be bound by it. The outcome of our examination was

²⁸⁴ *Supra* note 11.

²⁸⁵ *Supra* note 16.

²⁸⁶ *Supra* note 17.

that the right to a fair trial or due process right has been widely acknowledged as customary international law and it is therefore binding on all States and international organizations.

A further examination was conducted in chapter three on whether the United Nations Security Council has any human rights mandate and whether it is bound to respect human rights in discharging its major responsibility of maintaining international peace and security. Opinions of accomplished authors in the field of the law of international organizations and human rights were reviewed and relevant provisions of international law were alluded to in coming to the conclusion that the Security Council would be found to be violating the *UN Charter*, if it disregards the core provisions of human rights, which form part of the purposes of the United Nations.

Having established these rules of law, it becomes imperative to apply them to the situation of Mr. Abousfian Abdelrazik. In this chapter of the work, we will lay out the facts of the case of *Abousfian Abdelrazik v. Minister of Foreign Affairs & Attorney General, Canada*.²⁸⁷ Thereafter, a close scrutiny of the Resolution 1267 Committee as well as its sanctions regime will be done. The category of persons that could be targeted by the Committee will be examined and attention will also be given to the procedure or the working guidelines of the Committee in order to determine their conformity with established human rights norms.

The 1267 Committee has continuously repeated that the sanctions regime is administrative rather than criminal in nature, the goal of the sanctions being

²⁸⁷ *Supra* note 11.

preventive and not punitive as may seem.²⁸⁸ To this end therefore, an attempt will be made to determine the true nature of the sanctions which Resolution 1267 Committee imposes on designated individual to determine whether these sanctions are truly preventive or punitive. After making all these analysis about the 1267 Committee and relating these analysis to the extensive legal expositions made earlier in this work in chapters two and three above, we will then determine whether the sanctions regime as introduced by resolution 1267 are international emergencies that need to be urgently addressed or they are situations which could conveniently be accommodated under international human rights law.

4.2 Summary of the facts of *Abousfian Abdelrazik v. Minister of Foreign Affairs & Attorney General, Canada*²⁸⁹

Abousfian Abdelrazik is a Canadian citizen of Sudanese origin. He fled Sudan in 1989 and came to Canada, where he was granted Convention Refugee status in 1990. In March 2003, Abdelrazik decided to travel back to Sudan to visit his ailing mother. Abdelrazik arrived in Sudan in March 2003. On September 12, 2003, not long before his anticipated return to Canada, Abdelrazik was arrested by Sudanese authorities. Upon his arrest, Abdelrazik was taken to a central holding area at the NSI Headquarters in Khartoum where he was stripped of his belongings and detained without being informed of the basis of his detention.²⁹⁰ He demanded to be informed of the basis of his detention and asked to speak with a Canadian official but his requests were denied.

²⁸⁸ Section 6(c), *Guidelines of the Committee for the Conduct of Its Work*, online: United Nations <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

²⁸⁹ For the full facts as well as complete history of this case, see *Abdelrazik v. Minister of Foreign Affairs et al*, online: Osgoode Hall Law School, York University, Nathanson Centre on Transnational Human Rights, Crime and Security, online: <<http://nathanson.osgoode.yorku.ca/databases/abdelrazik-v-minister-of-foreign-affairs-et-al-2/>>. See also *Abdelrazik v. Minister of Foreign Affairs & Attorney General of Canada*, *supra* note 11.

²⁹⁰ *Supra*, note 11 at 6 *para* 13.

After approximately 10-12 days of secluded detention, Abdelrazik was subjected to interrogation by the two NSI officials who had arrested him. The NSI interrogators asked Abdelrazik a series of questions about his knowledge of persons in Canada who were alleged to be involved in terrorist activities. Abdelrazik knew some of these names and he did not know some others. These interrogations lasted for approximately four hours each night and continued for approximately four nights.

Abdelrazik was imprisoned summarily. He was not allowed to return to Canada to see his family. On the 13th December, 2003, Abdelrazik was visited by the Canadian Head of Missions in Sudan; Mr. David Hutchings who brought with him letters and pictures from Abdelrazik's daughters in Canada. This brought nostalgic memories to him as he looked at the pictures and read the letters with tears. At the end of his meeting with the Canadian official, Abdelrazik was returned to the State Security Detention Facility where he was severely beaten by his jailers; tying his hands to a door frame and flogged with a rubber hose. Abdelrazik was subsequently transferred to Kober Prison notorious for its overcrowded population and extremely harsh living conditions. He was made to stand at attention facing the wall for several hours, deprived of sleep, subjected to verbal assaults, pummelled, kicked and flogged with a rubber hose.

In July 2004, Canadian government made attempts at repatriating Abdelrazik to Canada via a Lufthansa flight. However, the United States government prevented this scheduled flight when it informed the Canadian government that it had security concerns about Abdelrazik. Abdelrazik was released from Sudanese detention on the 20th July, 2004 in expectation that he would soon be flown back to Canada. All efforts at flying Abdelrazik back to Canada were continuously frustrated and it eventually led to the break-down of the marriage between Abdelrazik and his wife; Ms. St-Hilaire in

September 2004. The broken marriage further compounded the emotional distress of Abdelrazik during this period.

Abdelrazik was re-arrested sometimes in 2005 and taken to Dabak prison which is reputed as one of the most brutal and inhuman prisons in Sudan. There, he was severely tortured and eventually released on July 20, 2006. Thereafter, Abdelrazik was informed by Mr. Michael Pawsey; a Canadian Consular official that his name had been added to the United Nations Consolidated List under Security Council Resolution 1267. It was therefore explained to Abdelrazik that there was a permanent ban on his attempts at returning to Canada because of the inclusion of his name on the UN Security Council Consolidated List.

Mr. Abdelrazik sought temporary residence at the Canadian Embassy in Khartoum on April 30, 2008 in order to protect him from further arrest and threats to his life. For several weeks, he was forced to sleep on the floor in the embassy bathroom. He was later given a cot and was allowed to sleep in the gym. However, he had to leave the gym in the morning and was usually required to stay in the reception area for the rest of the day. Abdelrazik lived like this in the embassy from April 30, 2008 to June 26, 2009 when he finally left the premises to fly back to Canada.

4.3 The Resolution 1267 Sanctions Regime

The Security Council's efforts to suppress and to halt the acts of international terrorism resulted in the establishment of the '1267 terrorism list', which holds the names of individuals, groups, undertakings and entities that are thought to be associated with Al-Qaeda, Osama Bin Laden or the Taliban. The history of the list dates back to 1999. The Security Council had been dealing with the situation in

Afghanistan for quite some time. In the 1990s the territory of Afghanistan was taken over by the Taliban. Later on they were accused of providing a safe haven to terrorists. Osama Bin Laden and Al-Qaeda were known to be responsible for launching terrorist attacks especially against United States targets.

In August of 1998 United States Embassies in Kenya and Tanzania were attacked by terrorists. In its Resolution the Security Council strongly condemned the terrorist bomb attacks in Nairobi and Dar-es-Salaam which claimed hundreds of innocent lives, injured thousands of people and caused massive destruction to property.²⁹¹ In Resolution 1214 the Council demanded that the Taliban stop providing sanctuary and training for international terrorists and their organizations and that all Afghan factions would cooperate with efforts to bring indicted terrorists to justice.²⁹² In the same Resolution the Council expressed its readiness to consider the imposition of measures with the aim of achieving the full implementation of its relevant resolutions.²⁹³

In October 1999, acting under Chapter VII of the United Nations Charter, the Security Council insisted that Taliban cease the provision of sanctuary and training grounds for international terrorists and their organizations; it demanded the Taliban to ensure that the territory under its control was not used for preparations of terrorist acts.²⁹⁴ The Council also demanded that Bin Laden be turned over without delay to appropriate authorities with a view to bringing him to justice.²⁹⁵

In order to enforce this decision, the Council adopted a sanctions regime. As a result

²⁹¹ *S.C. Res. 1189*, UN SCOR, U.N. Doc. S/RES/1189 (1998) *para.* 1.

²⁹² *S.C. Res. 1214*, UN SCOR, U.N. Doc. S/RES/1214 (1998) *para.* 13.

²⁹³ *Ibid.* at *para.* 15.

²⁹⁴ *Supra* note 2 at *para.* 1.

²⁹⁵ *Ibid.* at *para.* 2.

of Resolution 1267, all States were obliged to deny permission for any aircraft to take off or land in their territory if it is owned or operated by the Taliban, to freeze funds and other financial resources that were directly or indirectly owned by the Taliban, as well as to ensure that these and other funds and financial resources were not made available to or for the benefit of the Taliban.²⁹⁶ In order to assist States with the implementation of the measures and to designate the aircraft, funds and other resources a Committee was established pursuant to Resolution 1267, also known as the “Al-Qaeda and Taliban Sanctions Committee.”

One year passed since the adoption of Resolution 1267, but the Taliban still refused to comply with the demands of the Security Council. As a response to this non-compliance the Security Council further adopted another Resolution 1333 where it reiterated its previous demands and imposed more sanctions on Taliban. Among other sanctions, the Council ordered the States to prevent the direct or indirect sale, supply or transfer to the Taliban-controlled Afghanistan of arms and related material and to minimise diplomatic relations with Taliban.²⁹⁷

Far more important, however, the Council obliged all States to freeze funds and other financial assets, directly or indirectly owned or controlled by Bin Laden and individuals and entities associated with him, including Al-Qaeda, and to ensure that neither these nor other funds and resources were made available to or for the benefit of Bin Laden and those affiliated with him.²⁹⁸ The Sanctions Committee was to undertake the task of establishing and maintaining a regularly updated list of

²⁹⁶ *Ibid.* at para. 4.

²⁹⁷ *S.C. Res. 1333*, UN SCOR, U.N. Doc. S/RES/1333 (Dec. 19, 2000) paras. 5(a) and 7.

²⁹⁸ *Ibid.* at para. 8 (c).

individuals and entities that it designated as having bonds with Bin Laden.²⁹⁹

Despite the multiple sanctions imposed on the Taliban, it still neglected to fulfil its obligations under previous Council's resolutions. In January 2002 the Security Council adopted Resolution 1390 where it reaffirmed the measures imposed by Resolution 1333 with respect to Bin Laden and those associated with him. At the same time, it took note of the continued application of the financial sanctions Resolution 1267 imposed on the Taliban, although the travel ban on Taliban-aircraft was terminated.³⁰⁰ Moreover, the Council imposed new travel restrictions and subsequently rephrased the regime in the threefold structure that is still used.

Security Council decided that all States take the following measures:³⁰¹

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory;

(b) Prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry into or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified;

(c) Prevent the direct or indirect supply, sale and transfer, to these individuals,

²⁹⁹ *Ibid.*

³⁰⁰ *S.C. Res. 1390*, UN SCOR, U.N. Doc. S/RES/1390 (Jan. 28, 2002) *para.* 1.

³⁰¹ *Ibid. para.* 2.

groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities.

This was the first Resolution of the Security Council that did not limit its application to a particular territory; it did not relate to a certain regime or State, nor was it limited in time.³⁰² It created an enduring sanctions regime with an unprecedented global reach.³⁰³ The Resolution left the task of implementation of the measures listed above to member States. The language of the adopted resolutions suggests that they are of a binding, and not of merely recommendatory, nature (the Council decides...) and therefore, the member States in accordance with article 25 of the UN Charter have an obligation to carry out these decisions of the Council.

The Security Council also requested all States to report to the Committee established pursuant to Resolution 1267 (1999) about the steps they had taken to implement the measures.³⁰⁴ The Committee received reports from 80 States. The majority of the reporting States indicated that they had sufficient authority, through legislation, executive decree or administrative regulations to comply with para. 2 of the Resolution 1390.³⁰⁵ Where these mechanisms were not yet available States informed

³⁰² Iain Cameron, "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights" (2003) 72 *Nordic Journal of International Law*, 159 at 164.

³⁰³ Steven Dewulf & Didier Pacquee, "Protecting Human Rights in the War on Terror: Challenging the Sanctions Regime Originating from Resolution 1267 (1999)" (2006) 24:4 *Netherlands Quarterly of Human Rights*, 607 at 613 [*Dewulf & Pacquee, Protecting Human Rights in the War on Terror*].

³⁰⁴ *Supra* note 300 at *para.* 6.

³⁰⁵ See Letter Dated 1 December 2005 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council, 6 December 2005, S/2005/761.

the Committee that they were in process of elaborating laws to rectify the situation.

In a letter dated 1 December 2005 from the Chairman of the Security Council 1267 Committee to the President of the Security Council, it is indicated that States mainly employ three methods in order to implement the freezing of assets. One third of the States have adopted specific legislation or regulations that automatically impose this measure upon the addition of a subject to the list by the Committee and issuance of a routine regulation by national authorities.³⁰⁶ Other States order the executive branch to designate the subjects with the UN list being a criterion. Remaining countries tend to rely on their criminal codes. In such a case, a State is under an obligation to present convincing evidence of a specific criminal offence to a judge in order to freeze assets. The last method was highly criticized by the Chairman of the Committee, who emphasized that member States have a duty to freeze assets as soon as the individual or an entity has been added to the list. He also noted that criminal proceedings are not necessary conditions to freeze the assets and that once an individual has been designated and put on the list, national authorities have no power or discretion to decide otherwise.³⁰⁷

4.4 Who can be targeted?

Before describing the procedure of putting individuals on the Committee's list, we should first consider who can be inserted in that list. Originally, Security Council in its resolution 1267 imposed sanctions on the Taliban only. After the tragic events of September 11th, the Council strengthened the sanctions regime by including on the list

³⁰⁶ *Ibid.* at 12.

³⁰⁷ *Ibid.* at 3.

Osama Bin Laden, members of Al-Qaeda and the Taliban and undertakings and entities associated with them. It should be kept in mind, however, that the sanctions are not restricted to a particular conflict or geographic area; sanctions can be imposed on individuals and entities everywhere.³⁰⁸

While it was clear what was meant by Al-Qaeda and the Taliban, it was not as much with regard to individuals and entities associated with them. As a result, some countries voiced concern about the ambiguity of the phrase “associated with” and insisted on the need to clarify this term. However, it was not until 2005 that the Council clarified by the adoption of Resolution 1617 of July 29, 2005 what “associated with” meant. The Resolution states that acts and activities, indicating that an individual, group, undertaking or entity is “associated with” Al-Qaeda, Osama bin Laden or the Taliban includes:³⁰⁹

1. 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 Al-Qaeda, Bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof;
2. supplying, selling or transferring arms and related material to Al-Qaeda, Bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof;
3. recruiting for Al-Qaeda, Bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof;
4. otherwise supporting acts or activities of Al-Qaeda, Bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

However, even this attempt to clarify the term did not eliminate all the questions. It follows from the enumeration that the group of individuals that potentially can be

³⁰⁸ Noah Birkhauser, “Sanctions of the Security Council Against Individuals — Some Human Rights Problems” online: Statewatch <<http://www.statewatch.org/terrorlists/docs/Birkhauser.PDF>> at 6. [*Noah Birkhauser, Sanctions of the SC Against Individuals*].

³⁰⁹ *Supra* note 46 at *para.* 2.

added to the list is very broad. Not only did the Security Council include indirect activities but it also used open terms and categories, which themselves too need additional explanation. The Council concluded in paragraph (d), saying that otherwise supporting acts or activities of Al-Qaeda and the Taliban counts as being associated with them. The impact of the regime is thus far greater than most would assume, and this makes the matter all the more relevant. More than that, it gives the Sanctions Committee an almost unlimited power to target an exceptionally broad category of individuals and entities.

4.5 The Working Guidelines of the Resolution 1267 Committee

The procedure of listing individuals and entities is described in the Sanctions Committee's Guidelines for the Conduct of Its Work and in Security Council's Resolutions. According to the Guidelines, any State may submit a name of an individual or entity whom it deems as meeting the requirements of being a member of Al-Qaeda or the Taliban or as associated with them.³¹⁰ The Committee, however, considers the submission and makes the final decision.

In accordance with Resolution 1390, the Committee updates its list regularly based on information provided by member States and regional organizations.³¹¹ All States, United Nations bodies and other organizations and interested parties are encouraged to work closely with the Committee and provide it with all relevant information. In its multiple resolutions the Council time and again noted the indispensable role the member States play in expanding and improving the list. Many States, however, are quite reluctant to designate new names and provide the Committee with new

³¹⁰ Section 6(a), *Guidelines of the Committee for the Conduct of Its Work*, online: United Nations <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

³¹¹ *Supra* note 300 at *para.* 5(a).

information.

In one of its recent reports, the Committee observed that the list still had far too few names on it.³¹² One of the reasons the member States show reluctance in proposing the addition of individuals and entities to the list is the conviction that having such persons operating on its territory is a stigma and it might damage a State's reputation. Some States may refuse to add the names of individuals and entities on the list because of the human right concerns that the regime raises. As the Monitoring Team notes in its report of 2005, some States hesitate to submit names for listing because of the alleged lack of a robust de-listing mechanism inherent in the system.³¹³ Lack of due process is the primary concern of the member States.

From the very inception of the regime, it was presumed that the Committee was extremely careful in making the list and that its decisions were accurate. An incident with the listing of nationals of Sweden raised some concern that people not related to Al-Qaeda or the Taliban could be added to the list. Abdirisak Aden, Abdi Abdulaziz Ali and Yusaf Ahmed Ali were the three Somali born Swedes whose names were listed on the sanctions list because of their alleged implication with the Somali banking network known as Al-Barakaat.³¹⁴ Al-Barakaat is an entity that is still listed on the sanctions list. It handles money transfers to Somali and is one of the biggest employers of the country. The United States suspected the company of channelling

³¹² See Letter Dated 13 January 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council, 17 January 2006, S/2006/22, Annex.

³¹³ See Third Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities, September 2005, S/2005/572.

³¹⁴ Security Council Press Release SC/7490 (Aug. 26, 2002).

money to terrorist groups.³¹⁵ The blocking of the company's assets had a devastating impact on innocent Somali citizens including these Swedes who had deposits in and had made money transfers to families in Somali through Al-Barakaat.³¹⁶ The methods and the way subjects were listed were questioned and in response, the Committee adopted its guidelines where the procedure of listing was described.

It is important to note that the Guidelines of the Committee do not mention on what basis decisions are made. Criteria for listing individuals and entities are unclear. Decisions are made in closed sessions of the Committee unless it decides otherwise. All decisions are made on the basis of consensus. However, in case consensus cannot be reached, and the Chairman is not able to facilitate an agreement through further consultations, the matter may be submitted to the Security Council.³¹⁷ In each case, the Committee strongly encourages the member States to pre-notify the States of residence and/or nationality of concerned individuals and entities before proposing their addition.³¹⁸ It is believed that this is important in order to speed up the cooperation between the States and to lead to higher chances of approval.

Since the criteria for listing are obscure, all that is known is that the list contains names of subjects proposed by one or more countries who are thought to be "associated with" Al-Qaeda or the Taliban by all 15 members of the Sanctions

³¹⁵ Serge Schmemmann, "A Nation Challenged: Sanctions and Fallouts - Swedes Take Up the cause of 3 on US Terror List", New York Times (26 January, 2002). Online: <<http://www.nytimes.com/2002/01/26/world/nation-challenged-sanctions-fallout-swedes-take-up-cause-3-us-terror-list.html>>.

³¹⁶ Tim Golden, Bill Berkeley & Donald G. McNeil, Jr., "A Nation Challenge: Money - 5 Months After Sanctions Against Somali Company, Scant Proof of Qaeda Tie", New York Times (13 April, 2002). Online: <<http://www.nytimes.com/2002/04/13/world/nation-challenged-money-5-months-after-sanctions-against-somali-company-scant.html?scp=2&sq=Al-Barakaat&st=cse>>.

³¹⁷ Section 3(a), *Guidelines of the Committee for the Conduct of Its Work*, online: United Nations <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

³¹⁸ *Ibid.*, at para. 6(c).

Committee. It is also emphasized that the criminal charge or conviction are not necessary preconditions for listing an individual or an entity, because as the Committee insists, the sanctions have merely preventive effect.³¹⁹

The 15 lawsuits that had been filed in five States before national courts, as well the European Court of Justice raised doubts about the accuracy and transparency of the Committee's work.³²⁰ Indeed, the Committee does not possess the characteristics of being a judicial body. It is a political organ composed of diplomats representing their States and their interests and certainly not all decisions are made with the same scrutiny.³²¹ The United States and the United Kingdom are notorious for proposing the largest number of individuals and entities to be included on the consolidated list.³²² And often times in the aftermath of 11 September 2001, many States trusted them and did not require to present strong convincing proof that certain individuals or entities belonged to Al-Qaeda or the Taliban.

The formal basis for this list is often public sources such as newspaper articles or company records. In practice, States presented very limited information and explanation as to the basis of inclusion. Intelligence considerations were invoked as an excuse for incapability to disclose more information and in the United States, intelligence agencies have since been heavily criticized for their flawed work.³²³ Thus, proof for an involvement in terrorist activities of the designated individuals and

³¹⁹ *Ibid.*

³²⁰ *Supra* note 305 at 15.

³²¹ Dewulf & Pacquee, Protecting Human Rights in the War on Terror, *supra* note 303 at 619.

³²² Noah Birkhauser, *Sanctions of the SC Against Individuals*, *supra* note 308 at 7.

³²³ Scott Shane & David E. Sanger, "Bush Panel Finds Big Flaws Remain in US Spy Efforts", *New York Times* (1 April, 2005). Online: <<http://www.nytimes.com/2005/04/01/politics/01intel.html>>.

entities is often shaky.³²⁴

Criticism of the Committee's listing procedures and member States' reluctance to propose names compelled the Committee and the Council to respond to it. In 2004 Resolution 1526 was adopted by the Security Council in which it requests the member States when submitting the names to also include to the greatest extent possible all the identifying and background information that indicates that individuals and entities proposed for listing have ties with Al-Qaeda and the Taliban.³²⁵ Later on, Resolution 1617 further ordered the member States to supply to the Committee a statement of case describing the basis of the proposal.³²⁶

In its Guidelines as amended on 9 December 2008, the Committee further elaborates on the procedure and specifies that the statement of case should provide as much detail as possible on the basis for listing, including specific findings demonstrating the association or activities alleged, the source of the evidence, for example, intelligence, law enforcement, judicial, media, admissions by subject and supporting documents and evidence that can be supplied. States are also requested to include details of connections with a currently listed individual or entity.³²⁷

One serious deficiency of the listing procedure lies in the fact that individuals are not heard before the decision is made. Individuals are not given a right to present evidence that speaks against the accusations of having connections with the Taliban or Al-Qaeda, nor are witnesses heard. The whole process of listing happens without any

³²⁴ Noah Birkhauser, *Sanctions of the SC Against Individuals*, *supra* note 308 at 7.

³²⁵ *Supra* note 45 at *para.* 17.

³²⁶ *Supra* note 46 at *para.* 4.

³²⁷ Section 6(d), *Guidelines of the Committee for the Conduct of Its Work*, online: United Nations <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

participation whatsoever of the individuals concerned, not allowing for any means of defense. Now, however, States are urged to notify, in accordance with their domestic laws, the listed entity or individual of the designation and to inform them in writing about the available de-listing procedure. The Committee itself does not directly inform individuals or entities of their designation. Notification also includes a copy of a publicly releasable portion of the statement of the case, reasons of listing and description of the effects of designation.

Individuals and entities should also be informed about the possible exemptions available to them in accordance with Resolution 1452. Timely notification is indispensable to procedural due process. Little information exists, however, whether and to what extent States actually notify individuals and entities of their designation. It is known, that by the end of 2005, only two States had informed the Committee that they complied with the listing procedure with regard to the notification, although more are believed to do so.³²⁸ In any case, since the basis of inclusion is not disclosed due to security and intelligence concerns, individuals and entities are not provided with any information as to the factual basis for their designation.³²⁹

As is indicated in the Committee's Guidelines, the mandate of the Committee consists, *inter alia*, in regularly updating the list of designated individuals and entities. The updated list is then communicated to member States, which afterwards must circulate them to banks, different financial institutions, border ports, airports, consulates, custom agents, intelligence agencies and charities.³³⁰ The list consists of four sections.

³²⁸ *Supra* note 20 at 17.

³²⁹ Dewulf & Pacquee, Protecting Human Rights in the War on Terror, *supra* note 303 at 621.

³³⁰ Section 5(c), *Guidelines of the Committee for the Conduct of Its Work*, online: United Nations <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

Sections A and B includes the names of the individuals, entities, groups and undertakings associated with the Taliban, whereas sections C and D contain the names of the subjects associated with Al-Qaeda. There are currently 142 individuals associated with the Taliban and 256 with Al-Qaeda, while 111 entities and groups are listed on the basis of their connections with Al-Qaeda and no entities or groups on the basis of their alleged ties with the Taliban.³³¹

The list has several identifiers. In order to accommodate the full range of naming conventions used in different cultures, four separate name fields have been provided. The Committee draws attention of the member States to the fact that there is no unified standard for transliterating Arabic and other names into Latin letters. As a result, multiple variations of spelling may exist. Moreover, commonly used names also require additional identifying information. The Committee therefore advises the States to cross reference the names with other available data contained in the list, like for example, title, designation, place and date of birth, nationality, address, passport number and other elements. For entities, it is advisable to additionally provide acronym, address, headquarters, subsidiaries, affiliates, and the nature of business leadership.³³²

Because of this difficulty, mistakes may happen and the risk of freezing the funds of and imposing the travel ban on innocent people whose names are spelled similar to designated individuals increases. Some States raised concern with regard to this deficiency in the List and expressed doubts on how to proceed in such a situation. The

³³¹ See Official Website of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities, online: United Nations <<http://www.un.org/sc/committees/1267/consolist.shtml>>.

³³² *Ibid.*

Monitoring Team, although acknowledged the concerns of the member States, nevertheless suggested that sanctions are to be imposed on individuals anyway. As the Monitoring Team stated in its Third Report, the public good for preventing terrorism is greater than the temporary inconvenience placed on the innocent subject.³³³ This is indeed a rather hypocritical statement in light of the indeterminate time-limit of the regime.³³⁴

4.6 The Nature of the Resolution 1267 Sanctions Regime

The nature of the sanctioning regime is of particular significance because it predefines the level of procedural guarantees enjoyed by individuals and entities included on the consolidated list on the basis of their affiliation with a terrorist organisation. The 1267 Committee has continuously repeated that the sanctions regime is administrative rather than criminal in nature, the goal of the sanctions being preventive and not punitive as may seem.³³⁵ However, this statement is just an assertion and is not decisive to the question whether the regime is criminal (or at least civil), triggering the application of due process rights.

As stated earlier, administrative hearings and procedures are not expected to provide formal, courtlike procedural protections to litigious parties because administrative agencies are not supposed to act like courts. The sole function of courts is to hear and decide controversies. This is their only constitutional obligation. On the other hand, the primary role of an administrative agency is to see to it that legislative statutes are

³³³ Third Report of the Monitoring Team, September 2005, S/2005/572 at 13.

³³⁴ At the very minimum, it is incorrect to claim that sanctions are temporary in nature. The well-known cases of *Mr. Kadi* and *Al Barakaat* prove quite the opposite — the long-term, if not indefinite, nature of the regime.

³³⁵ Section 6(c), *Guidelines of the Committee for the Conduct of Its Work*, online: United Nations <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

faithfully executed. Administrative agencies are not courts of law and to expect that they should function like courts is to expect too much from the administrative system. However, there seems to be an agreement amongst administrative law scholars as can be attested to in several textbooks on the subject, that administrative procedures, though not comparable to those of courts should be conducted in such a way that due process is served.³³⁶

Most administrative law scholars agree that a person would expect to be heard *before* he is deprived of liberty or property.³³⁷ Occasionally however, an administrative tribunal may wish to deviate from this norm, particularly in national security issues where it may wish to avoid the delay associated with a prior hearing. It should however be noted that in these cases, the agency may choose to not dispense *entirely* with a prior hearing but to instead provide a summary form of hearing and then after it has acted in the form of temporarily restraining the liberty of the individual concerned, then provide a full hearing.³³⁸ Even in the Canadian Supreme Court case of *Charkaoui v. Canada (Citizenship and Immigration)*,³³⁹ the court recognized that an individual deserves to know the case being made against him in order to prepare his defence.³⁴⁰ The court emphasized that while Canada's national security and related intelligence sources constitute a pressing and substantial objective, and non-disclosure of evidence at certificate hearings is rationally connected to this objective, less intrusive alternatives developed in Canada and abroad notably the use of *special counsel* to act

³³⁶ Kenneth Warren, *Administrative Law*, *supra* note 117 at 322; Richard J. Pierce, Jr., *Administrative Law and Process*, *supra* note 118 at 68, 231, 261 & 474; Anne Adams, *Basic Administrative Law for Paralegals*, 4th Edition (New York: Wolters Kluwer Law & Business, 2010) at 106 – 111, 237 – 261; Alfred Aman, Jr., *Administrative Law*, *supra* note 120 At 145 – 175.

³³⁷ Alfred Aman, Jr., *Administrative Law*, *supra* note 120 at 182.

³³⁸ *Ibid.*

³³⁹ 2007 SCC 9, [2007] 1 S.C.R. 350.

³⁴⁰ This signifies that a form of 'hearing' was endorsed by the court.

on behalf of the named persons would suffice to guarantee their rights to a fair trial.³⁴¹

Due process rights have always been viewed as indispensable for the protection of substantial rights. However, the analysis of international and regional human rights treaties allows us to make a conclusion, that due process rights are only as such guaranteed in case of a criminal charge being instigated against an individual or in the process of “determination of his civil rights and obligations”³⁴² or “the rights and obligations in a suit at law.”³⁴³ The application of due process rights to public law suits is not universally acknowledged and, therefore, public law suits, such as tax disputes, have been left out of the scope of application of due process rights.

It is necessary to note that so far, there has been no agreement whatsoever about what constitutes a criminal charge. There are as many criminal codes as there are States and different bases may be applied to determine whether a charge is criminal or not. Also Human Rights Committee in its General Comment on art. 14 (a right to a fair trial) of the International Covenant on Civil and Political Rights³⁴⁴ left the issue unresolved and failed to define the concepts of a criminal charge.

In this connection, the practice of the European Court of Human Rights (hereinafter ECtHR) may be useful. The Court held that relevant considerations to determine whether a certain measure qualifies as a criminal charge are: the nature of the offence charged, the severity of the sanction at stake and the group to whom the legislation is

³⁴¹ *Charkaoui v. Canada (Citizenship and Immigration)*, *supra* note 339 at paras. 66, 68, 70, 73, 85 & 87.

³⁴² *ECHR*, *supra* note 136 at art. 6(1). Online: <<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>>.

³⁴³ *ICCPR*, *supra* note 90 at art. 14(1).

³⁴⁴ Human Rights Committee, *General Comment 13*, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003) [*General Comment 13*].

applied.³⁴⁵ With regard to the concept of civil rights and obligation, it must be indicated, that ECtHR has not given general guidelines to determine whether civil rights or obligations are involved in a certain case; rather it has chosen to deal with this issue on a case by case basis.³⁴⁶

While the need for fair procedures is universally acknowledged, considerable debate remains as to the nature of listing/delisting proceedings and the proper scope of due process rights in such proceedings.³⁴⁷ First of all, it may be noted that the sanctions are imposed on those suspected to be involved in financing and otherwise supporting terrorism; a serious criminal activity under both international and national law. The issue of financing of terrorism was addressed in the Security Council's binding Resolution 1373 where the Council obliged all Member States to “prevent and suppress the financing of terrorist acts” and to “criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”³⁴⁸

Further on, the Security Council states that countries must ensure that those participating in financing, planning or perpetration of terrorist acts be brought to justice and, in addition to establishing such acts as serious criminal offences, the punishment imposed on such persons must “duly reflect the seriousness of such

³⁴⁵ *Engel & Others v. Netherlands* (1976), 22 E.C.H.R. (Ser. A) 41, 1 E.H.R.R. 706. at para. 81. This and other cases of the ECtHR are taken from the HUDOC Database of the ECtHR, online: ECtHR <<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>>.

³⁴⁶ Watson Institute for International Studies, Brown University, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, March 2006, p. 15, online: Watson Institute <http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf> [*Strengthening Sanctions*].

³⁴⁷ Hudson, *Not a Great Asset*, *supra* note 279.

³⁴⁸ *Supra* note 39 at para. 1(a) and (b).

terrorist acts.”³⁴⁹ Moreover, the States parties to the *International Convention for the Suppression of the Financing of Terrorism*³⁵⁰ agreed to criminalize the financing of terrorism under their domestic law and to “make those offences punishable by appropriate penalties.”³⁵¹ In addition, placement of an individual on the consolidated list may result in criminal investigations being started against him in his/her country of origin/residence.

The purpose of the penalty also serves as the criterion to “distinguish criminal sanctions from purely reparatory or compensatory sanctions.”³⁵² If the purpose of the penalty is deterrence and punitive in character, it clearly speaks about the criminal sanction and if, on the other hand, the measure of freezing funds is prevention, this is not necessarily true. As was mentioned above, the 1267 Committee insists that the goal of the sanctions is prevention and not punishment as such. However it is subject to doubts.

Firstly, of course, the measures adopted to be preventive must be proactive, not reactive. Current measures, in turn, tend to be a reaction to the increased terrorist attacks, particularly to September 11, 2001 attacks. Moreover, preventive measures must be effective;³⁵³ they must stop the objectionable behaviour. However, the freezing of assets did not bring about a positive change and did not cause the decrease in terrorist activity. The Monitoring Group noted that “despite initial successes in locating and freezing some US\$ 112 million in assets belonging to Al-Qaeda and its associates, Al-Qaeda continues to have access to a considerable amount of economic

³⁴⁹ *Ibid.* at para. 2(e).

³⁵⁰ *Supra* note 23.

³⁵¹ *Ibid.* at art. 4.

³⁵² P. Van Dijk, *et al*, *Theory and Practice of the European Convention on Human Rights* (Hague: Kluwer Law International, 1998) at 418.

³⁵³ See generally Economic and Social Council, *Effective Community-Based Crime Prevention*, 15 February 2002, E/CN.15/2002/4.

and financial resources.”³⁵⁴

Only about \$10 million in assets has been frozen additionally after the adoption of the 1390 Resolution.³⁵⁵ In light of such a small amount of financial funds having been frozen recently, it can hardly be said that the measures imposed are preventive. They simply do not contribute to the halt of terrorist activities. Plus, it has been estimated, that the cost of the 9/11 terrorist attack did not exceed \$500 thousand which is a very tiny sum of money and potential terrorists will not face any difficulties in finding such a small sum of money anyways.³⁵⁶ And of course, it is doubtful that the most money that terrorist organizations do receive comes from individuals. Rather terrorists enrich their funds through drug-trafficking activities, weapon sale or are sponsored by different governments.

Moreover, strictly speaking, preventive measures are usually of a slightly different nature: they are more general and not addressed to specific individuals.³⁵⁷ The ECtHR held in the *Lauko Case* that the sanction imposed may be regarded as punitive if “it was intended as a punishment to deter reoffending.”³⁵⁸ In the case of the 1267 sanctions regime it may be said that, indeed, the purpose of sanctions is to deter the listed subjects from getting involved in the financing of terrorism again by repressing them by means of financial sanctions. Additionally, freezing of assets and travel bans

³⁵⁴ See Letter dated 19 September 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Addressed to the President of the Security Council Containing the Second Report of the Monitoring Group Pursuant to Resolution 1390 (2002), 20 September, S/2002/1050.

³⁵⁵ *Ibid.*

³⁵⁶ See Investigators Say the Terrorist Attacks Cost Half-Million Dollars, 21 September 2001, online: <www.foxnews.com>.

³⁵⁷ For example, adoption of legislation, improving exchange of data between the secret services of different states, decreasing poverty, preventing illicit drug-trafficking and human-trafficking and etc. Prevention targets the very cause of a phenomenon.

³⁵⁸ *Lauko v. Slovakia* (1998), 88 E.C.H.R. (Ser. A) 1119 at *para.* 58.

are sufficiently serious and long-term (if not indefinite) so as to qualify the sanction as of punitive and thus, criminal character.

Indeed, the Committee places individuals and entities on the list without informing them about the duration of the restrictions having been imposed on them. Such indefinite freeze of financial resources of individuals and entities, if lasting too long, may basically amount to confiscation, a typical criminal law type of punishment. Exemptions to the assets freeze were introduced only in 2002 by the Security Council Resolution 1452, covering basic expenses and extraordinary expenses.³⁵⁹ Before that time *all* assets were frozen leaving the subjects without any funds whatsoever - quite a harsh preventive method, to say the least.

The group to whom sanctions apply may also be indicative of the nature of the regime. Closely defined groups of offenders are suggestive of a disciplinary or administrative rather than criminal offence.³⁶⁰ As was discussed in the first chapter, the target group of sanctions is potentially very broad, especially since association with the Taliban or Al-Qaeda became to be considered as the basis for the imposition of sanctions. And the concept “associated with”, although clarified in the Security Council's resolutions, is still vague and unclear, creating possibilities of targeting a wide range of individuals and entities.

The above analysis allows us to conclude that the nature of the sanctioning regime is criminal despite the constant statements that it is not. Here we have a criminal charge

³⁵⁹ *S.C. Res. 1452*, UN SCOR, U.N. Doc. S/RES/1452 (Dec. 20, 2002) as amended by *S.C. Res. 1735*, UN SCOR, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

³⁶⁰ *Ibid.*

which, in turn, results in the application of the whole package of due process rights, including the right to a fair hearing before an independent and impartial tribunal, the presumption of innocence, right to legal counsel, right to present evidence, *etc.* Thus, in the next section we will examine the categories of rights which the sanctions regime violates, particularly with reference to the case of Abousfian Abdelrazik and this analysis will be rounded up with a general conclusion.

4.7 Violated Human Rights

The approach of this work has been to dispassionately analyze the activities of the Resolution 1267 Committee in the light of established international law norms in order to determine whether these activities are compatible with human rights standards which are considered ideal in a democratic and civilized society. As has been shown throughout the work, one of the principles of law which the Security Council and or the Resolution 1267 Committee violates by its *modus operandi* in tackling international terrorism is the well established principle of natural justice which forbids a person from being punished unheard and also restrains anyone from being a judge in his own case.³⁶¹ Application of this principle to the travails of Abousfian Abdelrazik in the hands of the 1267 Committee brings us to an obvious conclusion; that this principle has been tampered with.

The modern day explanation of the principle of natural justice is the right to a fair trial. The two principles that no individual shall be a judge in his own cause and that both sides must be heard are so necessary for the fair administration of justice that

³⁶¹ *Day v. Savadge* (1614) Hobart 85 at 87; *R. v. Chancellor of Cambridge* (otherwise known as Dr. Bentley's Case) (1723) 1 Str. 557 at 567. In this case, Fortescue, J. stated as follows: "*Besides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any.*"

they have been accepted as fundamental for this purpose. In the practice of the Resolution 1267 Committee, most of the States which submit a person's name for the purpose of inclusion in the Consolidated List are also sitting members of the Committee. For example, the vast majority of the names on the sanctions list were submitted by the United States which is a permanent member of the Security Council as well as a member of the 1267 Committee.³⁶² In other words, the United States in this case is the accuser or complainant and since it sits in judgment over its complaints, it is correct to describe it also as the judge.

The above scenario violates article 10 of the UDHR which provides for everyone a right in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 6(1) of the ECHR, which the scenario above has also violated, provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law while article 14(1) of the ICCPR provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 9 of the ICCPR³⁶³ guarantees the right to liberty and security of person to all individuals. Specifically, article 9(1) provides that “everyone has the right to liberty

³⁶² Noah Birkhauser, *Sanctions of the SC Against Individuals*, *supra* note 308 at 7.

³⁶³ The text of article 9(1) has been reproduced below. Article 9(2) provides that “anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” Article 9(3) states that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subjected to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.” Article 9(4) provides that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Article 9(5) finally states that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The right to liberty of person is one of the oldest basic rights of an individual against the State, and its origins can be traced to the *Magna Charta Libertatum*.³⁶⁴ Other international and regional human rights instruments have also provided for the right to liberty and security of person in similar language to that of article 9 of the ICCPR.³⁶⁵

Abousfian Abdelrazik was detained at several points in time during his visit to Sudan without any cogent explanation of the nature and details of the crime for which he was being detained. Though neither the Security Council nor Resolution 1267 Committee was directly responsible for these phases of unlawful detention in contravention of article 9 of the ICCPR, it is sufficient however to note that he was detained largely on the suspicion of being a terrorist and being designated on the 1267 Sanctions List. Even if the Security Council or the 1267 Committee would be absolved of any blame or guilt in this case, suffice it to say that the State of Sudan violated her obligations under article 9(1) of the ICCPR.³⁶⁶

While a State has a clear sovereign right to deprive a person of liberty, it is equally clear that this right is limited. Arrest and detention are only permissible if the law authorizes the arrest with sufficient specificity.³⁶⁷ The detention must be carried out

³⁶⁴ Scott N. Carlson & Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (New York: Transnational Publishers Inc., 2003) at 81.

³⁶⁵ See for instance, article 9 of the *UDHR*, article 5 of the *ECHR*, article 7 of the *American Convention on Human Rights* as well as article 6 of the *ACHPR*.

³⁶⁶ *Monja Jaona v. Madagascar*, Communication No. 132/1982 (1 April 1985), CCPR/C/24/D/132/1982.

³⁶⁷ Yoram Dinstein, “Right to Life, Physical Integrity, and Liberty” in Louis Henkin, ed. *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) at 114.

according to established legal norms and the grounds upon which it is based must be legal. In *Domukovsky v. Georgia*, the State of Georgia asserted generally that an arrest was pursuant to international criminal cooperation agreement, but Georgian authorities failed to produce specific legal authority for the arrest. The Human Rights Committee held that the failure to prove a specific legal basis for the arrest constituted a violation of article 9(1).³⁶⁸

It may be argued on behalf of the State of Sudan that Abousfian's arrest and several detentions were executed in pursuance of national or international security in furtherance of the obligations passed to States by Security Council resolutions on combating terrorism. However, this argument would fail as his arrest and detention were largely based on suspicion; no concrete evidence existed in this case which clearly linked Abousfian to a particular terrorist attack or his affiliation with Osama Bin Laden or Al-Qaeda Network. Therefore, arrest and detention based on general terms such as 'national security' without a cogent legal basis may be held to violate article 9 of the ICCPR.³⁶⁹

Article 12 of the ICCPR guarantees, within established limits, freedom of movement; the right to leave any country and the right not to be arbitrarily deprived of the right to enter one's own country.³⁷⁰ In addition, the language implies that States parties are obligated to refrain from interfering with the rights granted therein and prevent such

³⁶⁸ *Domukovsky v. Georgia*, Communication Nos. 623/1995, 624/1995, 626/1995 & 627/1995 (29 May 1998) *para.* 18.2; CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, & CCPR/C/62/D/627/1995.

³⁶⁹ Human Rights Committee, Concluding Observations: Sudan, CCPR/C/79/Add.85 (1998) at *para.* 13.

³⁷⁰ ICCPR, *supra* note 90 at article 12(1)-(4).

interference by private parties.³⁷¹ The Human Rights Committee indicates that the basic condition protected by article 12, which is liberty of movement is indispensable to the free development of individuals.³⁷² With reference to the case of Abousfian, not only was article 12(1) of the ICCPR wantonly violated but so also was article 12(4) of the Covenant. Due to his name being listed on the Consolidated List, Abdelrazik was disallowed from returning to Canada his country of citizenship from Sudan. Some airlines also refused to fly him back to Canada in direct compliance with the letters and spirits of Security Council resolution 1267. It took the intervention of the Court for him to be successfully flown back to Canada, his country of citizenship on the 26th June, 2009.

Article 12(4) of the ICCPR was designed to recognize the special relationship between an individual and the country he or she considers his or her own.³⁷³ The concept of 'one's own' country implies, first, that one's own country may be different from one's country of nationality, and second, there is a general right to enter sovereign territory.³⁷⁴ One of the few exceptions that article 12(4) of the ICCPR has, according to the Human Rights Committee is that a State may require someone to prove some relationship with the country he or she has designated as his or her own. Proof of citizenship has been held to be valid in this regard.³⁷⁵ Applying the foregoing to the case at hand, Abdelrazik had all his citizenship documentations with him. It was not in dispute whether or not he was a Canadian citizen and despite this clear evidentiary status, he was nevertheless disallowed at one point or the other from flying back to his

³⁷¹ Sarah Joseph, *et al*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000) at 245.

³⁷² Human Rights Committee, *General Comment 27*, 67th Sess., U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999) at *para.* 1 [*General Comment 27*].

³⁷³ *Ibid.*, at *para.* 19.

³⁷⁴ *Stewart v. Canada*, Communication No. 538/1993 (16 December 1996) *paras.* 12.2, 12.3, 12.4, CCPR/C/58/D/538/1993.

³⁷⁵ *J.M v. Jamaica*, Communication No. 165/1984 (26 March 1986) CCPR/C/27/D/165/1984 at *paras.* 5.3, 7.

country of citizenship because he had been listed by the 1267 Committee.

The sanctions regime of the Security Council has brought so much devastation to the life of Mr. Abousfian Abdelrazik in several areas. An attempt has been made above to highlight some of these areas of life which though, not being directly responsible, the ordeal which Abousfian has suffered could be indirectly linked to the whole sanction regime initiated by resolution 1267 of 1999. Resolution 1822 of June 30, 2008 has tampered with Abousfian's right to work and freedom of association. By the provisions of this resolution and others in that category, especially by the provisions of section 3 of the *United Nations Al-Qaeda and Taliban Regulations* which was enacted in Canada to domesticate the UN Security Council resolution 1267, anyone who associates or makes any financial assistance to whoever has been listed on the Consolidated List shall be prosecuted.

The effect of the above is a situation where Abousfian cannot freely relate or associate with people; his friends, family members and well wishers and vice versa. The right to freedom of association is guaranteed in article 22 of the ICCPR. Article 22(1) of the ICCPR provides that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." This right is also provided for in other international human rights instruments.³⁷⁶ The Human Rights Committee has not issued a General Comment on article 22 of the ICCPR and it has considered only a few cases involving article 22 claims. Therefore, insights into how to interpret the scope and nature of article 22 of the ICCPR is to be found mostly in the text of the article, pertinent HRC Concluding Observations and scholarly commentary.

³⁷⁶ See UDHR, *supra* note 99 at art. 20; ECHR, *supra* note 136 at art. 11(1); ACHR, *supra* note 174 at art. 16 and ACHPR, *supra* note 172 at art. 8.

The right to freedom of association is not without exceptions. Article 22(2) states that “no restriction may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.” Resolution 1267 of 1999 and 1822 of 2008 and others in that category clearly fall within the permissible exceptions under the Covenant as they came into force, *inter alia*, in the interests of national security or public safety. The major issue of concern however is that the process leading to the listing of individuals on the Consolidated List must conform to the principles of natural justice and other established international human rights standards.

The essence of this work is not to support Abousfian or others who have been designated on the Consolidated List. Rather, this work is lending its voice to those fundamental principles which are considered necessary in a democratic and free society leading to the overall aims and purposes of justice. Where the ideals of due process and fair trial are not followed in meting out punishments which include forbidding people from freely relating with an individual, it cannot be denied that this is a clear case of violation of not just article 17 of the ICCPR on the right to private and family life but also article 22 of the ICCPR which spells out the right to freedom of association.

4.8 Establishment of the Office of an Ombudsperson for Delisting Requests

Following barrage of criticisms of the sanction regime and more importantly the working guidelines of the resolution 1267 committee, the Security Council in

December 2009 adopted resolution 1904³⁷⁷ pursuant to its powers under Chapter VII of the UN Charter. The Security Council in that resolution restates in part, its unequivocal condemnation of Bin Laden, the Taliban and Al Qaeda for ongoing and multiple criminal terrorist acts.³⁷⁸ In order to ensure that the procedures for the work of the 1267 committee are fair and clear, the Security Council has established, for an initial period of 18 months from the date of the adoption of the resolution, the office of an Ombudsperson to assist the 1267 committee in considering delisting requests.³⁷⁹

In June 2010, nearly six months after the adoption of the resolution 1904, the United Nations Secretary-General; Banki Moon, appointed Judge Kimberly Prost (Canada) to serve as Ombudsperson to receive requests for delisting from individuals and entities listed on the Consolidated List.³⁸⁰ There have been widespread reactions from human rights commentators to the establishment of the office of an Ombudsperson which the Security Council itself stated was necessary in order to bring clarity and fairness to the work of the resolution 1267 committee.³⁸¹ Professor Amir Attaran for example, has stated that the appointment of Ms. Kimberly Prost is “only a ‘face-saving’ effort for a fundamentally unfair UN process that has been struck down in the UK and some other

³⁷⁷ S.C Res. 1904, UN SCOR, U.N Doc. S/RES/1904 (Dec. 17, 2009).

³⁷⁸ Security Council Amends United Nations Al-Qaida/Taliban Sanctions Regime: Authorizes Appointment of Ombudsperson to Handle Delisting Issues, (New York: Security Council, 17 December 2009) online: United Nations <<http://www.un.org/News/Press/docs/2009/sc9825.doc.htm>>.

³⁷⁹ *Supra* note 377 at *para.* 20. Specifically, paragraph 21 of the resolution states that “...the office of the Ombudsperson shall receive requests from individuals and entities seeking to be removed from the Consolidated List in accordance with the procedures outlined in annex II of the resolution...”

³⁸⁰ Al-Qiada and Taliban Sanctions Committee Welcomes Appointment of Judge Kimberly Prost to serve as Ombudsperson, (New York: Security Council, 7 June 2010) online: United Nations <<http://www.un.org/News/Press/docs/2010/sc9947.doc.htm>>.

³⁸¹ *Ibid.* In this Press Release, the Security Council was reported to have stated that it considers the appointment of the Ombudsperson as an important step in ensuring that the Committee’s procedures for removing individuals and entities from the Consolidated List are fair and clear, as called for by the Heads of State and Government at the 2005 World Summit (A/RES/60/1, para. 109), and also in addressing the challenges, both legal and otherwise, to the sanctions measures implemented by Members States pursuant to paragraph 1 of Security Council resolution 1904 (2009).

countries, condemned by a group of UN countries and criticized by the UN's own Rapporteur on terrorism and human rights.”³⁸²

As laudable as the establishment of the office of the UN Ombudsperson for delisting request seems, it is my view that it cannot take the place of fair trial which the listed persons are entitled to under international human rights instruments even before the sanctions are applied to them. The matter is further compounded because the Ombudsperson is only empowered to make ‘recommendation’ which by its very nature is generally not binding as the Committee may reject the delisting request by the Ombudsperson.³⁸³ To know that the Committee had even rejected delisting requests from States especially concerning individuals who are already dead but still on the list says a lot about the essence of the creation of the office of an Ombudsperson and the extent and significance of her authority.³⁸⁴

4.9 Conclusion

This work is an attempt to examine the activities of the Resolution 1267 Committee which was established pursuant to Security Council Resolution 1267 of 1999 so as to determine whether the working guidelines of this committee conforms with the established principles of natural justice and due process of law. Since September 11, 2001, the nature of the efforts at national and international level to combat terrorism

³⁸² Juliet O’Neil, “Court Challenge of UN No-Fly List to Proceed despite Canadian UN Ombudsman” Canada.Com (8 August 2010), online: Canada.Com <<http://www.canada.com/news/Court+challenge+list+proceed+despite+Canadian+ombudsman/3374674/story.html>>.

³⁸³ *Supra* note 377 at Annex II *para.* 10 – 13. See also James Reintl, “No Fly List Appeals can be filed Online” *The National* (28 August 2010), online: *The National* <<http://www.thenational.ae/apps/pbcs.dll/article?AID=/20100716/FOREIGN/100719801/1002/NEWS>> where Letta Tayler, a terrorism expert for the New York based pressure group; Human Rights Watch also stated that because the Ombudsperson’s recommendations are not binding, there remains the risks that the position will become mere window-dressing.

³⁸⁴ Noah Birkhauser, *Sanctions of the SC Against Individuals*, *supra* note 308 at 8; UN Panel Removes 45 Names from Taliban Sanctions List After Reviewing Nearly 500, (New York: UN News Centre, 2 August 2010) online: United Nations <<http://www.un.org/apps/news/story.asp?NewsID=35512&Cr=taliban&Cr1>>.

has taken different dimension. The United Nations Security Council has adopted several resolutions in this regard and many subsidiary bodies have been established within the United Nations system to tackle this obvious threat to international peace and security.

With the coming into force of resolution 1267 in 1999 and the consequent establishment of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaeda and the Taliban and Associated Individuals and Entities, coupled with measures adopted by States in terms of laws and procedures for dealing with terrorism, tension is now heightened because of the overall implication which all these efforts are having on human rights and fundamental freedom. While the Security Council is principally responsible for the maintenance of international peace and security and is permitted by article 39 of the Charter to make recommendations or decide what measures shall be taken in accordance with article 41 and 42 to maintain or restore international peace and security, it has become imperative for the Security Council in the exercise of these powers to strike a balance between the exercise of these powers and due regard to rule of law and due process.

The recommendation above is not as easy as it sounds. It raises several complex topical issues in international law which need to be resolved in order to determine whether the Security Council is fulfilling its mandates under the law or violating it. One of the questions is whether the Security Council as an organ of the United Nations is bound by the provisions of international human rights instruments which proclaim fundamental human rights to all persons when it (the Security Council) is not a party to these instruments. This work has attempted to answer this and some other questions raised. The thesis has concluded that the Security Council though

empowered by some provisions in the Charter to discharge its duties by the adoption of measures it deems fit under articles 39-42 of the Charter is nevertheless enjoined by article 24(2) to discharge its duties in accordance with the Purposes and Principles of the United Nations which, among others, include respect for human rights.

The thesis has shown that Resolution 1267 Committee which was established by the Security Council has not discharged its duties with due regard to some fundamental human rights like the rights to a fair trial. Our case study; the experience of Mr. Abousfian as shown in the case of *Abousfian Abdelrazik v. Minister of Foreign Affairs & Attorney General, Canada*³⁸⁵ has shown that without adherence to the principles of natural justice and due process rights, fundamental human rights of people suspected to be affiliated or associated with Taliban or Osama Bin Laden are under threat. Abousfian's case has revealed the categories of rights that might be violated by simply putting an individual's name on the 1267 Sanctions List without giving these individuals an opportunity to be heard or defend themselves in person or by their legal representatives before punishment is meted out on them.

As noted in the body of this work, the 1267 Committee has contended that the measures put in place by the sanctions regime are preventive and not punitive in nature. The assertion has been disputed by this thesis. Reference has been made to the ECtHR case of *Engel & Others v. Netherlands*³⁸⁶ as well as the case of *Lauko v. Slovakia*³⁸⁷ to show that the sanctions put forward by resolution 1267 and expanded by resolution 1822 and others are punitive and not preventive as the Committee wishes us to believe. Even if we assume without conceding that that the procedure of the committee is administrative and not criminal, the procedure still falls short of the

³⁸⁵ *Supra* note 10.

³⁸⁶ *Supra* note 345.

³⁸⁷ *Supra* note 358.

usual norms and guarantees inherent in the operation of administrative tribunals. The committee does not hold any form of hearing before and even after listing individuals. This clearly negates administrative tribunal's *modus operandi*. Again, this is inconsistent with the *Ottawa Principles on Anti-terrorism and Human Rights* which state that administrative procedures that deprive a person of her liberty must ensure that the person has sufficient information to know and meet the case against her.³⁸⁸

Furthermore, the decision of the committee seems to be the final and there is no opportunity for appeal. The recent establishment of the office of the Ombudsperson only empowers the Ombudsperson to make *recommendation* and not *binding decisions*. The function of the Ombudsperson is clearly not in appellate capacity. Finally, there is no opportunity for binding judicial review of the committee decisions. Most national listing procedures, particularly in Canada as can be gleaned from subsection 5.4 of the *United Nations Al-Qaida and Taliban Regulations*³⁸⁹ provides that an applicant whose delisting request has been denied by the Minister may apply to a judge for judicial review of the decision. This is not the case with the 1267 committee. Finally, the thesis concludes that the sanctions regime of the United Nations Security Council as well as the activities of the Resolution 1267 Committee in combating terrorism without due regard to procedural fairness is putting human rights into crisis as the Security Council cannot build international law by breaking it.³⁹⁰

³⁸⁸ Lorne Waldman, "Guarding Individual Rights in Cases Involving National Security" in Nicole LaViolette & Craig Forcese, eds. *The Human Rights of Anti-terrorism* (Toronto: Irwin Law Inc., 2008) 205.

³⁸⁹ *SOR/99-444*. The text of this Regulation is also available online at <http://www.canlii.org/en/ca/laws/regu/sor-99-444/latest/>.

³⁹⁰ *Kadi v. Council of the E.U and Commission*, C-402/05, [2008] E.C.R. I at 40, 47-55; *Al Barakaat Int'l Foundation v. Council and Commission*, C-415/05, [2008] E.C.R. II-3533. In these cases, an Advocate General for the European Court of Justice issued an advisory opinion and stated that the regulations promulgated by the European Union to implement Security Council sanctions to freeze the assets of suspected terrorists infringed on international due process and human rights standards, including the right to be heard, the right to effective judicial review by an independent tribunal and the right to property. On September 3, 2008, the Grand Chamber of the European Court of Justice endorsed some of the opinion of the Advocate General and held, *inter alia*, that "With reference to an objective of public interest as fundamental to the international community as the fight by all means, in

accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organization and the Taliban cannot *per se* be regarded as inappropriate or disproportionate. In this respect, the restrictive measures imposed...constitute restrictions of the right to property which may, in principle be justified. The applicable procedures must, however, afford the person or entity concerned a reasonable opportunity of putting his or its case to the competent authorities, as required by Article 1 of Protocol No. 1 to the European Convention on Human Rights. Thus, the imposition of the restrictive measures laid down ...in respect of a person or entity, by including him or it in the list ...constitutes an unjustified restriction of the right to property, for that regulation was adopted without furnishing any guarantee enabling that person or entity to put his or its case to the competent authorities , in such a situation in which the restriction of property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him or it.” Also in the *Abdelrazik’s case*, *supra* note 11 at 22 *para.* 51; the Canadian Judge; Russel Zinn stated that “there is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness” and warned that it turns due process on its head: “The accuser is also the judge.”

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