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The United Nations Security Council, terrorism and the rule of law

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1. Introduction

The United Nations Security Council is in a unique position amongst interstate bodies. It is entrusted by an institution with almost universal membership – the United Nations – with maintaining international peace and security. To carry out its mandate, the Council enjoys an extraordinary power: if it finds a threat to the peace, a breach of the peace or an act of aggression, the Council is empowered by Chapter VII of the UN Charter to issue mandatory resolutions – resolutions which states are obliged, under the Charter, to implement.[1] An example is the imposition of a mandatory arms embargo against apartheid South Africa in November 1977.[2]

The focus of this chapter will be the extensive anti-terrorism programme which the Security Council has created under Chapter VII of the Charter. In particular, I will be examining two central phenomena: the so-called 'listing' system and the Security Council's creation of global 'legislation'.

2. Listing

A. *Description*

Originating in Security Council Resolution 1267 of 1999,[3] listing imposes sanctions on individuals and entities connected to the Taliban,

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[1] Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS XVI (UN Charter), art. 39.

[2] SC Res. 418 (1977), 4 November 1977, UN SCOR, UN Doc. S/RES/418, art. 2.

[3] On the situation in Afghanistan, SC Res. 1267 (1999), 15 October 1999, UN SCOR, UN Doc. S/RES/1267 (1999), art. 4; On the situation in Afghanistan SC Res. 1333 (2000), 19 December 2000, UN SCOR, UN Doc. S/RES/1333 (2000), art. 5.

and through a later resolution, on individuals connected to al-Qaeda.[4] The founding resolution set up a committee, the 'Al-Qaida and Taliban Sanctions Committee' or '1267 Committee',[5] to determine which these entities are[6] and to monitor states' compliance with the sanctions against them.[7]

Once persons or entities have been listed by this Committee, states are obliged under Chapter VII of the UN Charter to implement three types of sanctions against them: freezing of assets, a travel ban and an arms embargo. The freezing of assets applies to all assets within the state's jurisdiction, excluding funds exempted for humanitarian reasons. States must freeze assets controlled by the listed person, as well as those owned or controlled by persons acting on their behalf or at their direction.[8] The travel ban is meant to prevent listed persons from entering or passing through the territory of any state.[9] The arms embargo imposes on states an obligation to prevent listed nationals from selling and supplying military equipment, even if the sales are conducted outside their territories.[10]

Initially, listing provided neither criteria nor avenues for affected parties to challenge listing decisions.[11] While states could assist their listed nationals or residents through normal diplomatic channels, these states also had no access to the information behind listing decisions unless they were on the Security Council. None of the Committee members had to provide reasons for any of their decisions, and the Committee as a whole had no obligation to communicate reasons for its decisions to bodies outside the Committee, whether these were states or listed persons.

Listing has been reformed extensively in recent years, a process that will be analysed further below. Even in its newest form, however, it remains

[4] SC Res. 1333, art. 8(c).

[5] The website of the Committee is available at www.un.org/Docs/sc/committees/1267Template.htm.

[6] SC Res. 1267, art. 6(e). [7] *Ibid*., arts. 6(a), 6(b), 6(d) and 6(g) and 9.

[8] SC Res. 1452 (2002), 20 December 2002, UN SCOR, UN Doc. S/RES/1452 (2002), art. 1; SC Res. 1267, art. 4(b); SC Res. 1333, art. 8; SC Res. 1390 (2002), 16 January 2002, UN SCOR, UN Doc. S/RES/1390 (2002), art. 2(a); SC Res. 1526 (2004), 30 January 2004, UN SCOR, UN Doc. S/RES/1526 (2004), art. 1(b); SC Res. 1617 (2005), 29 July 2005, UN SCOR, UN Doc. S/RES/1617 (2005), art. 1(a); SC Res. 1735 (2006), 22 December 2006, UN SCOR, UN Doc. S/RES/1735 (2006), art. 1(a); SC Res. 1822 (2008), 30 June 2008, UN SCOR, UN Doc. S/Res/1822 (2008), art. 1(a); SC Res. 1904 (2009), 17 December 2009, UN SCOR, UN Doc. S/Res /1904 (2009), art. 1.

[9] SC Res. 1390, art. 2(b), SC Res. 1526, art. 1(b); SC Res. 1617, art. 1(b); SC Res. 1735, art. 1(b); SC Res. 1822, art. 1(b); and SC Res. 1904, art. 1(b).

[10] SC Res. 1390, art. 2(c); SC Res. 1526, art. 1(c); SC Res. 1617 of 2005, art. 1(c); SC Res. 1735, art. 1(c); SC Res. 1822, art. 1(c); and SC Res. 1904, art. 1(c).

[11] Neither of the two founding resolutions (SC Res. 1267 and SC Res. 1333) nor the resolution which consolidated the two sets of sanctions (SC Res. 1390) provided any criteria.

extremely problematic.[12] There is no advance warning of listing. Criteria have now been provided for it, but they are extremely broad.[13] The delisting procedure, set up in 2002, has provided an Ombudsperson since 2009. This person can communicate with the listed person directly, attempt to acquire information on that person's behalf and advise the Security Council on the delisting request. However, the states on the Security Council remain the sole arbiters of which information can be released, even to the Ombudsperson. It is therefore conceivable that petitioners will have no idea at all of the evidence on which the suspicion against them is based.[14]

The Ombudsperson also has no power to change listing decisions. The 1267 Committee – including the state that suggested the listing of the individual in the first place – therefore retains sole discretion on whether or not to delist. Removal from the list is still possible only with the consent of all 1267 Committee members[15] – and they, in turn, bear no obligation to give reasons for their refusal.

[12] *Yassim Abdullah Kadi and Al Barakaat International Foundation* v. *Council of European Union and Commission of the European Communities* (C-402/05 P; C-415/05 P), judgment of 3 September 2008, available at curia.europa.eu/ (*Kadi*); *HM Treasury* v. *Mohammed Jabar Ahmed and others*, *HM Treasury* v. *Mohammed al-Ghabra*, *R (on the application of Hani El Sayed Sabaei Youssef)* v. *HM Treasury*, judgment of 27 January 2010 [2010] UKSC (*Ahmed*), 2; P. Gutherie, 'Security Council sanctions and the protection of individual rights' (2004) 60 *NYU Annual Survey of American Law* 491, 503–6; E. de Wet and A. Nollkaemper, 'Review of Security Council decisions by national courts' (2002) 45 *German Yearbook of International Law* 166, 176–7; C. Harlow, 'Global administrative law: the quest for principles and values' (2006) 17 *European Journal of International Law* 187; Christopher Michaelson, 'Kadi and al Barakaat v. Council of the European Union and Commission of the European Communities: the incompatibility of the United Nations Security Council's 1267 sanctions regime with European due process guarantees' (2009) 10 *Melbourne Journal of International Law* 329; Craig Forcese and Kent Roach, 'Limping into the future: the 1267 terrorism listing process at the crossroads' (2010) 42 *George Washington International Law Review* 217.

[13] The term 'associated with' covers:

'(a) 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;

(b) supplying, selling or transferring arms and related material to;

(c) recruiting for; or

(d) otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof' SC Res. 1822, art. 2.

[14] See Forcese and Roach, 'Limping into the future', for the problem of secret evidence. See also *Abdelrazik* v. *Canada (Foreign Affairs)*, 2009 FC 580 (CanLII), [53] on the requirement that petitioners establish why they 'no *longer*' meet the criteria for listing.

[15] 1267 Committee, *Fact Sheet on Listing* (2008), [11], available at www.un.org/sc/committees/1267/fact_sheet_listing.shtml.

B. *Objections*

Controversial from the beginning, listing has run into considerable resistance in recent years. In 2005, the 1267 Committee's monitoring body[16] began to note complaints against it[17] from states and non-state actors.[18] It has also faced legal challenges[19] and has been strongly criticised in academic literature and jurisprudence.[20] The European Court of Justice (ECJ) has recently annulled a number of listings, as implemented by the European Union,[21] as did the UK Supreme Court in *Ahmed*.[22]

Objections draw on three main areas of law. First, from a human rights perspective, listing threatens or infringes the right to judicial review, the right to procedural fairness, the right to be heard, the right to a judicial remedy and the right to property.[23] Second, listing has also been strongly criticised, even in its more recent forms, from the perspective of administrative law and the common law of some Anglo-American systems.[24] Finally, listing has been criticised as a threat to the rule of law for the uncontrolled power it confers on the executive arm of government.[25]

3. Legislation

A. *Description*

It is not unknown for international bodies to influence the creation of international law norms, and the Security Council's authority on some areas of

[16] The Security Council established monitoring bodies to assist the 1267 Committee. The 'Monitoring Group' established by SC Res. 1363 (2001), 30 July 2001, UN SCOR, UN Doc. S/RES/1363 (2001), was later replaced by the 'Monitoring Team' set up by SC Res. 1526.

[17] A first reference to the need for humanitarian exemptions was, however, made in the September report of 2002 (S/2002/1050, [42]).

[18] S/2005/83, [54].

[19] By 2006, legal challenges had become an established, detailed section of the Monitoring Team's reports. Examples include the annex to S/2006/154 and annex III to S/2006/750.

[20] See above note 12; Erika De Wet, *Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004); and Mariam Aziz, 'Implementation as the test case of European Union citizenship' (2009) 15 *Columbia Journal of European Law* 281, 290.

[21] *Kadi* (above note 12). See also *Omar Mohammed Othman* v. *Council and Commission*, judgment of the Court of First Instance, case number T-318/01, available at curia.europa.eu/.

[22] *Ahmed* (above note 12). This case dealt with the UK's own list of terrorist suspects as well as its implementation of the 1267 Committee's list.

[23] See above note 12 and *Abdelrazik* (above note 14).

[24] Aziz, 'Implementation as the test case of European Union citizenship', 290; *Ahmed* (above note 12).

[25] See *Ahmed* (above note 12), [45]. See also David Dyzenhaus 'The rule of (administrative) law in international law' (2005) 68 *Law and Contemporary Problems* 127; and C. H. Powell,

international law is already well-entrenched,[26] particularly in questions on the legality of the use of force.[27] However, in this chapter, the term 'legislation' refers to a specific type of resolution by which the Council purports unilaterally to create general norms of law binding on all states, irrespective of their consent. Taken in this narrower sense, Security Council 'legislation' must meet four criteria: that the Council be acting unilaterally when it legislates;[28] that it intends its norms to be mandatory (by which the use of Chapter VII of the Charter is generally implied);[29] that the norms in the legislative resolution be general;[30] and that these norms be new.[31]

'The legal authority of the UN Security Council', in Benjamin Goold and Liora Lazarus (eds.) *Security and Human Rights* (Oxford: Hart Publishing, 2007); *Kadi* (above note 12).

[26] J. Alvarez, *International Organisations as Law-Makers* (Oxford University Press, 2005); Powell, 'The legal authority of the UN Security Council'; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963).

[27] For extensive reliance on the Security Council on questions of the legality of force, see J. Murphy, 'Force and arms', in C. Joyner (ed.), *The United Nations and International Law* (Cambridge: American Society of International Law and Cambridge University Press, 1999), p. 99; Thomas M. Franck, 'Terrorism and the right of self-defense' (2001) 95 *American Journal of International Law*, 839–40, 841, 842; D. J. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 6th edn, 2004), pp. 889, 913, 925, 938, 930, 932, 940 footnotes 71–2, 940, note 1; D. Bowett, 'Reprisals involving recourse to armed force' (1972) 66 *American Journal of International Law* 1.

[28] F. Kirgis, 'The Security Council's first fifty years' (1995) 89 *American Journal of International Law* 506, 520; P. Szasz 'The Security Council starts legislating' (2002) 96 *American Journal of International Law* 901–2; A. Marschik, 'The Security Council as world legislator? Theory, practice and consequences of an expanding world power', IILJ Working Paper 2005/18; S. Talmon, 'The Security Council as world legislature' (2005) 99 *American Journal of International Law* 175, 176–8; M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 539, 596–8; and Masahiko Asada, 'WMD terrorism and Security Council Resolution 1540: conditions for legitimacy in international legislation', IILJ Working Paper 2007/9 (Global Administrative Law Series), pp. 15–19.

[29] Szasz, 'The Security Council starts legislating', 901–2; Marschik, 'The Security Council as world legislator?', 5–6; A. Marschik, 'Legislative powers of the Security Council', in Ronald MacDonald and Douglas Johnston (eds.), *Towards World Constitutionalism* (Leiden: Martinus Nijhoff, 2005), p. 461; Happold, 'Security Council Resolution 1373', 596–8.

[30] Kirgis, 'The Security Council's first fifty years', 520; Szasz, 'The Security Council starts legislating', 901–2; Marschik, 'The Security Council as world legislator?', 5–6; Talmon, 'The Security Council as world legislature', 176–8; Happold, 'Security Council Resolution 1373', 596–8; Asada, 'WMD terrorism and Security Council Resolution 1540', 15–19.

[31] The Security Council must therefore have modified existing norms and introduced new law. Kirgis, 'The Security Council's first fifty years', 520; Szasz, 'The Security Council starts legislating', 901–2; Marschik, 'The Security Council as world legislator?', 5–6; Happold, 'Security Council Resolution 1373', 596–8; Asada, 'WMD terrorism and Security Council Resolution 1540', 15–16. See further C. H. Powell, 'The role and limits of global administrative law in the Security Council's anti-terrorism programme' (2009) *Acta Juridica*.

The criterion of generality requires elaboration, as its meaning changes depending on whether it relates to the subject matter or to the addressees of the resolution. To fulfil the criterion, it is not sufficient that the Security Council issues instructions to all states on particular issues. Otherwise, all sanctions would become legislation because they are 'directed to all member states and sometimes even to nonmembers'.[32] Sanctions, however, constitute specific instructions with respect to specific problems. They are also designed to resolve the specific problem, after which they would fall away. They are therefore limited with respect both to subject matter and to period of application. In Szasz's terms, they are not legislation but 'mere commands relating to a particular situation'.[33]

This interpretation of generality has also been adopted by all commentators writing after 28 September 2001. Thus Marschik requires of 'legislative' norms that they 'do not enforce the peace in a specific political crisis, but regulate rights and obligations of States on a wider issue with long-term or indefinite effect'.[34] Similarly, Happold argues that, because sanctions relate to a specific incident or problem, they are not 'applicable to all persons or particular classes of persons (rather than to specified individuals), in all circumstances or in all situations where particular criteria have been satisfied (rather than to specific situations or conduct)'.[35] This chapter will therefore follow Happold's approach that legislation must consist of 'abstract legal propositions'.

B. *Legislative resolutions*

The two resolutions widely accepted[36] as legislation are Security Council Resolution 1373 of 2001,[37] and Security Council Resolution 1540 of

[32] Kirgis, 'The Security Council's first fifty years', 520.
[33] Szasz, 'The Security Council starts legislating', 902.
[34] Marschik, 'The Security Council as world legislator?', 5.
[35] Happold, 'Security Council Resolution 1373', 597.
[36] Szasz, 'The Security Council starts legislating'; Talmon, 'The Security Council as world legislature'; R. Lavalle, 'A novel, if awkward, exercise in international law-making: Security Council Resolution 1540 (2004)' (2004) *Netherlands International Law Review* 411; Marschik, 'The Security Council as world legislator?'; E. Rosand, 'The Security Council as "global legislator": *Ultra Vires* or Ultra Innovative?', (2005) 28 *Fordham International Law Journal* 542; Asada, 'WMD terrorism and Security Council Resolution 1540'; M. Koskenniemi, 'International legislation today: limits and possibilities' (2005) 23 *Wisconsin International Law Journal* 61, 74.
[37] Threats to international peace and security caused by terrorist acts, SC Res. 1373 (2001), 28 September 2001, UN SCOR, UN Doc. S/RES/1373 (2001).

2004.[38] The preamble of both resolutions makes it clear that each is aimed at a general and ongoing problem. Resolution 1373 was passed in the wake of the terrorist attacks of 11 September 2001 and refers to them in its preamble. However, it states that 'such' attacks, as opposed to 'these' attacks, are threats to international peace and security and notes the concern of the Council about the rise of terrorism globally, thereby focusing on terrorism in general, rather than specific incidents. Reaffirming the duty of all states to refrain from supporting terrorism, it calls on the General Assembly's,[39] and its own, previous resolutions.[40] Resolution 1540 addresses another general problem: the 'proliferation of nuclear, chemical and biological weapons',[41] declaring the proliferation of the weapons and of their means of delivery to be threats to international peace and security. The preamble of Resolution 1540 then focuses specifically on terrorism and the risk presented by non-state actors who gain access to nuclear, chemical and biological weapons. Both resolutions then proceed expressly under Chapter VII of the UN Charter.

Security Council Resolution 1373 contains three sets of general obligations for states. The first two are phrased as mandatory ('[The Security Council] decides')[42] and the third in hortatory terms ('[The Security Council] calls upon all States to …').[43] Of the mandatory obligations, one deals entirely with financing, requiring states to criminalise the collection of funds which support terrorism in any form, to freeze resources of persons who commit, or attempt to commit, terrorist acts, also freezing the funds of any entities controlled by such persons or acting on their direction, and finally to prevent their nationals and any person on their territory from providing any form of financial or related service to terrorists, attempted terrorists, or any entities under their control or direction.[44] The second mandatory article requires states themselves to refrain from providing any form of support to terrorists, and also to prevent terrorist acts from occurring through a number of steps set out in the article. These steps include suppressing recruitment to terrorist groups,[45] denying safe haven

[38] Non-proliferation of weapons of mass destruction, SC Res. 1540 (2004), 28 April 2004, UN SCOR, UN Doc. S/RES/1540 (2004).

[39] Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, G A Res. 2625 (XXV), UN GAOR, Supp. No. 28, UN Doc. A/5217 (1970), 121.

[40] SC Res. 1189 (1998), 13 August 1998, UN SCOR, UN Doc. S/RES/1189 (1998).

[41] Preamble, SC Res. 1540, para. 1.

[42] SC Res. 1373, arts. 1–2. [43] Ibid., art. 3.

[44] Ibid., art. 1. [45] Ibid., art. 2(a).

to anybody connected to terrorism,[46] prosecuting terrorists and punishing them in a manner that reflects the seriousness of their crimes,[47] and ensuring that their border controls prevent terrorists from moving between states.[48] There is a strong emphasis on international co-operation, as states are required to exchange information in order to provide early warning to one another of planned acts of terrorism,[49] and in order to assist one another in criminal investigations, including the gathering of evidence.[50]

Security Council Resolution 1540 similarly contains a number of binding and hortatory provisions, which together focus on restricting the access of non-state actors to nuclear, chemical or biological weapons. States are instructed not to support non-state actors in their attempt to develop, acquire, transfer or use such weapons,[51] and to adapt their domestic laws in order effectively to block non-state actors from access to such weapons, 'in particular for terrorist purposes'.[52] Article 2 focuses on the criminal law of states, requiring them to deal with attempt, participation, financing and accomplice liability. A final mandatory provision, art. 3, provides other precautions, requiring states physically to protect the weapons,[53] to develop measures to account for and secure the weapons during their production, use, storage and transport,[54] and to devise forms of border control which will detect and deal with illicit trafficking of such items[55] as well as to keep control of their legal export and shipment.[56]

Commenting on the legislative nature of Resolution 1373, Szasz noted that the binding character of the resolution was underscored by the mechanism that Resolution 1373 creates to monitor compliance,[57] that is, the Counter-Terrorism Committee (CTC).[58] The Security Council has subsequently used the committee infrastructure to support the implementation of both binding and non-binding resolutions on terrorism, with the result that a number of committees now promote and oversee the Security Council's anti-terrorism regime as a whole.[59]

Both Resolutions 1373 and 1540 created new obligations for states. In Resolution 1373, these were closely aligned with obligations which had already, to some extent, been adopted by the international community. Resolution 1373 consisted largely of provisions taken from

[46] Ibid., art. 2(c). [47] Ibid., art. 2(e). [48] Ibid., art. 2(g). [49] Ibid., art. 2(b).
[50] Ibid., arts. 2(b), (f). [51] SC Res. 1540, art. 1. [52] Ibid., art. 2.
[53] Ibid., art. 3(b). [54] Ibid., art. 3(c). [55] Ibid., art. 3(c). [56] Ibid., art. 3(d).
[57] Szasz, 'The Security Council starts legislating', 902.
[58] SC Res. 1373, art. 6.
[59] See the website of the Committee, available at www.un.org/en/sc/ctc/.

the International Convention for the Suppression of the Financing of Terrorism,[60] a treaty which had, at the time of the resolution, been annexed to a General Assembly Resolution,[61] but had had insufficient ratifications to come into force.[62] In Resolution 1540, however, the Security Council introduced obligations which had not yet been approved or even considered by the majority of the international community, and part of its very rationale was the closing of gaps in the existing international law against the proliferation of weapons of mass destruction.[63] It pre-empted the consensual treaty process by more than a year.[64]

Furthermore, both resolutions are general in nature. They are aimed at general problems: terrorism and the use of weapons of mass destruction by non-state actors respectively. The measures imposed by both resolutions are general, relating not to a specified situation, state or non-state actor, but to a whole class of persons in all situations where particular criteria have been satisfied.[65] Neither has a time limit, but is phrased such that it may continue indefinitely. Both resolutions can therefore be seen, in Szasz's terms, to 'establish new binding rules of international law – rather than mere commands relating to a particular situation'.[66]

C. *Objections*

Security Council 'legislation' is different from other institutionalised forms of decision-making at the global level. Where treaty bodies allow one group to propose new rules for the membership of the whole, the group in question is a plenary body representing all the states parties to the treaty.[67] Although the consent of the states parties may in some cases be assumed, members of the treaty have the option to opt out either of the

[60] International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, entered into force 10 April 2002, 2178 UNTS 229 (Financing Convention). See Szasz, 'The Security Council starts legislating', 902–3; Happold, 'Security Council Resolution 1373', 594–5, 608; Asada, 'WMD terrorism and Security Council Resolution 1540', 17.

[61] Financing Convention; Asada, 'WMD terrorism and Security Council Resolution 1540', 18.

[62] Rosand, 'The Security Council as "global legislator"', 549.

[63] Ibid., 580; Asada, 'WMD terrorism and Security Council Resolution 1540', 19. See also Marschik, 'The Security Council as world legislator?', 18–19.

[64] See the International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, in force 7 July 2007, 2445 UNTS 89.

[65] See the description of legislation by Happold, 'Security Council Resolution 1373', 597.

[66] Szasz, 'The Security Council starts legislating', 902.

[67] Jutta Brunnée, 'International Legislation', in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (Oxford University Press, 2008).

rule or of the treaty body itself and therefore can ultimately not be bound without their consent. Third, the plenary bodies were created expressly to develop the treaties and propose changes to the law, and the process whereby consent is expressed is also accepted by member states when they join the treaty body.[68]

The Security Council, by contrast, consists of just fifteen states. Combined with the veto power of the five permanent members, this unbalanced structure ensures that the programme followed by the Security Council will never be at odds with the interests of any state holding the veto, and also that it is likely positively to further the interests of these states.[69] Second, the UN Charter does not allow states to opt out of Chapter VII decisions. Third, the current legislative practice by the Security Council was not anticipated when the UN Charter was drawn up, and was unheard of for the first fifty-four years of its existence. Most member states cannot therefore be said to have mandated the Security Council to create new law, or even to have foreseen that it would do so.[70] Two aspects of the programme, in particular, might surprise and disturb: the institutional support for the programme and its serious human rights implications. The anti-terrorism programme enjoys the support of an infrastructure created specially to monitor implementation[71] – one which faced severe criticism for its lack of transparency.[72] That the Council would itself threaten or violate international human rights law was also not foreseeable and has raised serious concerns both for states and for international human rights bodies.[73]

[68] The European Union is something of an exception. It does allow for international legislation; that is, it allows its central organs to issue regulations which create rights directly for the citizens of each member state, without the member state's consent. For these particular measures, states do not have the option to 'opt out'. However, this legislative process is provided for by treaty and the legislation drawn up by a number of representative plenary bodies, one of which is directly elected.

[69] M. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (Washington, DC: United States Institute for Peace, 2006), pp. 239–40.

[70] The only possible exceptions in this regard would be states which joined the United Nations after the Security Council began to legislate.

[71] See J. Alvarez, 'Hegemonic international law revisited' (2003) 97 *American Journal of International Law* 874, 875 and Alvarez, *International Organisations as Law-Makers*, pp. 199–217. In the early stages of listing, the committee structure created to implement SC Res. 1373 was strikingly effective: see Rosand, 'The Security Council as "global legislator"', 548–9.

[72] See www.un.org/News/Press/docs/2009/sc9788.doc.htm for an acknowledgement of this problem and some proposed solutions.

[73] See the critics of listing cited above (above note 12); Andrew Hudson, 'Not a great asset: the UN Security Council's counter-terrorism regime: violating human rights' (2007) 25

Finally, legislation by the Security Council has the potential to dictate all areas of law for all states. Unlike treaty bodies, which deal with specific issues, such as trade or environmental protection, or apply only in specific territories, the Security Council has no geographical limits and, depending on its interpretation of art. 39, may have very few subject matter limits as well. Recently, the Council's interpretation of art. 39 has widened considerably. It has used Chapter VII in the absence of obvious threats to the peace[74] or to achieve goals not related to international peace and security. These include providing humanitarian relief,[75] assisting UN personnel on site and promoting democracy.[76]

States have come to see the new capacity which the Security Council has arrogated to itself as an annexation of a function belonging to the international community as a whole. This is apparent from state comments on the two legislative resolutions, and on related debates dealing with the Council's duties towards the wider group of states represented in the General Assembly.

Although initially welcomed, Security Council Resolution 1373 was resisted by states once its legislative character was recognised. The timing of the first General Assembly debates on Security Council Resolution 1373,[77] and the emotional intensity that followed in the wake of 9/11, may have obscured the qualitative distinction between Resolution 1373 and its predecessors. Thus many states praised the Council resolution as

Berkeley Journal of International Law 101; and also the report of the United Nations High Commissioner for Human Rights of 2 September 2009 (A/HRC/12/22).

[74] Kirgis, 'The Security Council's first fifty years', 513; Marschik, 'The Security Council as world legislator?', 10.

[75] Humanitarian interventions have increased to such an extent that Österdahl, writing in 2005, described such interventions as 'routine'. See I. Österdahl, 'The exception as the rule: lawmaking on force and human rights by the UN Security Council' (2005) *Journal of Conflict and Security Law* 1, 2.

[76] Examples include: the later 1992 resolutions on Somalia (SC Res. 733, UN SCOR, 47th Sess., Res. & Dec. at 55, UN Doc. S/INF/48 (1992) and SC Res. 794, UN SCOR, 47th Sess., Res. & Dec. at 63, UN Doc. S/INF/48 (1992)); and the interventions in Haiti (see SC Res. 841, UN SCOR, 48th Sess., UN Doc. S/INF/49 (1993), and SC Res. 940, UN SCOR, UN Doc. S/RES/940 (1994)) and Angola (see SC Res. 864 (1993) UN SCOR, UN Doc. S/Res/864 (1993)). Here the civil unrest and conflict had minimal regional impact and intervention was justified partly for the sake of democracy. See also Alvarez, 'Hegemonic international law revisited', 171–3.

[77] The first GA debate, 'Measures to eliminate international terrorism' (the 12th plenary meeting on Monday, 1 October 2001) took place on the morning of the first working day after SC Res. 1373 had been passed. The meeting which passed SC Res. 1373 was held late on Friday night, 28 September 2001. See S/Agenda/4385.

an administrative measure,[78] which would improve the implementation of the anti-terrorism system designed and driven by the larger international community.[79] These early debates proceeded on the assumption that the General Assembly should still draw up a global instrument against terrorism,[80] but praised the Security Council for contributing a 'framework'[81] or 'general direction'[82] to the larger, anti-terrorism project.

However, within a month, the import of the new resolution became evident.[83] In October 2001, the General Assembly debated the annual report of the Security Council. In this debate, the term 'legislation' was used to describe Resolution 1373, and the measure was resisted as an illegitimate extension of Security Council powers.[84] In this and subsequent debates, states suggested requirements for legitimate Security Council legislation: namely, that the Council consult widely before crafting a new norm,[85] keep its workings transparent,[86] remain accountable to the global community[87] (in particular, by explaining its decisions to the broader body of states[88]) and not legislate in its own interests.[89]

In 2004, when the Security Council debated Security Council Resolution 1540, a large number of non-members of the Security Council asked for permission to address the Council. This time there was no doubt as

[78] A/56/PV.12: Croatia, p. 25; Belgium, p. 10; Belarus, p. 21. The only reference made by the European Union to SC Res. 1373 is to 'note with interest' that it establishes a monitoring committee, p. 10.

[79] The Algerian representative commented: 'On a different level, that of international law, there is an entire panoply of legal instruments that serve as a normative basis for all efforts to codify or draft a common global anti-terrorism strategy'. (A/56/PV.12, p. 13).

[80] A/56/PV.12: Belarus, p. 22; the President of the General Assembly, p. 2; the Secretary-General, p. 3; Nicaragua, p. 6; Belgium, p. 10; Algeria, p. 13; United Kingdom, p. 18; and Equitorial Guinea, p. 4.

[81] Nicaragua praised SC Res. 1373 as a framework while simultaneously calling for a multilateral Convention on Terrorism (A/56/PV.12, p. 6). See also Egypt (A/56/PV.12, p. 23).

[82] A/56/PV.22: Switzerland, p. 6.

[83] A/56/PV.25: Singapore, p. 10.

[84] A/56/PV.25: Algeria, p. 8; and Singapore, p. 10.

[85] S/PV.4950: Spain, p. 7.

[86] S/PV.4950: Philippines, p. 2; China, p. 6; Romania, p. 14; Russian Federation, p. 16; United States, p. 18; Canada, p. 20; and South Africa, p. 22.

[87] A/56/PV.25: Singapore, p. 13.

[88] A/56/PV.28: Ghana, p. 16.

[89] A/56/PV.25: Colombia, p. 5. In a later debate on a resolution limiting the jurisdiction of the International Criminal Court, delegates emphasised that the Council is meant to act for the international community as a whole. See S/PV.4568: Iran, p. 15; Jordan, p. 16; Mongolia, p. 19; S/PV.4772: Iran, p. 10; Pakistan, p. 21.

to the legislative nature of the resolution,[90] and it was greeted with widespread unease. Proponents of the resolution offered special justifications for bypassing the normal, interstate law-making process. They argued that the problem in question – the possibility that non-state actors might obtain access to weapons of mass destruction – was urgent, leaving no time for the usual channels of multilateral negotiation.[91] They also insisted that it did not interfere with the established treaty regime in any way.[92]

These justifications did not convince many opponents, who found the thought of unilateral law creation by the Council unacceptable. States pointed out that the Security Council should not be imposing its decisions on sovereign states.[93] Thus India refused to 'accept externally prescribed norms or standards, whatever their source, on matters pertaining to domestic jurisdiction of [the Indian] Parliament, including national legislation, regulations or arrangements which are not consistent with its constitutional provisions and procedures which are contrary to its national interests or which infringe on [Indian] sovereignty'.[94] The Indian representative also expressed India's concern that 'the exercise of legislative functions by the Council, combined with recourse to Chapter VII mandates, could disrupt the balance of power between the General Assembly and the Security Council, as enshrined in the Charter'.[95]

Many states also noted that the draft resolution separated two obligations which had hitherto – in the treaty regime – been interlinked; that is, non-proliferation and disarmament. While adding obligations on non-proliferation, the resolution disregarded the disarmament aspect.[96] Noting the one-sidedness of the resolution, Pakistan commented: 'The Security Council, where five States, which retain nuclear weapons, also possess the right veto any action, is not the most appropriate body to be entrusted with the authority for oversight over non-proliferation or nuclear disarmament.'[97]

[90] S/PV.4950. The terms 'legislation', 'legislate' or 'legislative' were used by Angola, p. 10; Pakistan, p. 15; India, p. 23; Singapore, p. 25; Switzerland, p. 28; Indonesia, p. 31; and Iran, p. 32.

[91] S/PV.4950: Philippines, p. 2; Algeria, p. 5; Spain, p. 7; Angola, p. 9; United Kingdom, p. 11; New Zealand, p. 21; India, p. 24; Singapore, p. 25; Sweden, p. 27; Japan, p. 28; Switzerland, p. 28.

[92] S/PV.4950: Philippines, p. 3; United Kingdom, p. 11; Romania, p. 14; United States, p. 18; Germany, p. 18; and New Zealand, p. 21.

[93] S/PV.4950: Brazil, p. 4; Algeria, p. 5; Pakistan, p. 15; Peru, p. 20; Cuba, p. 30; Indonesia, p. 31; and Iran, p. 32.

[94] S/PV.4950, p. 24. [95] Ibid.

[96] S/PV.4950: Brazil, p. 4; Algeria, p. 5; Peru, p. 20; South Africa, p. 22; India, p. 24; and Cuba, p. 30.

[97] S /PV.4950: Pakistan, p. 15.

Finally, Sweden noted that people whose rights were affected by Resolution 1540 had not been provided with the protection of a judicial process. The Swedish representative suggested that 'an individual who claims that his rights have been violated as a consequence of the implementation of this resolution should be guaranteed access to courts at the national level, and States have a duty to ensure that this happens'.[98] Resisting the notion that the Security Council could unilaterally change the international legal system, Sweden added that states which took measures to implement this resolution remained bound by international law and the United Nations Charter.[99]

The question of the role of the Security Council within the UN as a body, and its duty to the member states, brings to the fore the underlying theme of power and its relationship with law. In these debates, states are aware that a single body is aggregating power to itself, and they are attempting to contain it. They do so partly by insisting on their own autonomy – their national sovereignty – in an attempt to restore the theoretically horizontal structure of the international arena. But they also invoke constitutional features, like democracy, transparency, consultation and justification. Such features come into play when a polity has assumed a hierarchical structure; one in which an institution is exercising governmental functions on behalf of the broader membership.[100]

4. Prognosis: the Security Council and the rule of law

Listing has run into considerable opposition in recent years, forcing the Security Council to reform it. As noted above, the reform is still inadequate, and the ongoing co-operation of states is by no means certain.

Legislation, by contrast, seems not to have been opposed as vocally, and what opposition there has been seems not to have produced any visible results. Admittedly, the Security Council has, for the meanwhile, stopped at two pieces of 'legislation' and not produced a third. However, both existing legislative resolutions are still supported by the Council's committee structure, which monitors states' compliance with them. While not imposing sanctions for non-compliance, committees add to the

[98] S /PV.4950: Sweden, p. 27. [99] Ibid.

[100] Karl Zemanek, 'Was kann die Vergleichung staatlichen öffentlichen Rechts für das Recht der internationalen Organisationen leisten?' (1964) 24 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 454.

pressure on smaller states, in particular, to co-operate with the Council's programme.[101]

In this final section, I investigate what current responses to the Council's anti-terrorism programme, and to listing in particular, suggest for the future of both listing and legislation. The strength of the fight against listing, compared to the tepid discomfort evoked by legislation, might lead us to expect the listing reforms to stay just that: reforms to listing, which have no bearing on the future of legislation. However, my analysis of these reforms suggests they demonstrate a more fundamental change in the global arena. The principles which, I argue, are emerging from listing reform bear out Fuller's theory on the rule of law.[102] My analysis suggests that the Council is slowly being drawn into the constraints which the fundamental principles of law impose on any exercise of power. If my theory is correct, then the rule of law will have an influence on legislation as well. I conclude with a suggestion of what that effect might be.

A. *The process of listing reform*

As noted above, individuals and listed entities initially had no avenues whatsoever to engage with and challenge listing decisions of the 1267 Committee. Listed persons had no information on either the criteria for listing or the facts to which the criteria were being applied. States attempting to assist listed nationals were similarly handicapped by little or no information, no established appeal procedure and the ability of any one member of the Council to veto delisting without having to explain why.

Security Council Resolution 1390, the resolution which adopted the current three-part sanctions formula for listed persons,[103] also contained a request of the 1267 Committee: that it produce guidelines for inclusion in its list.[104] The guidelines, produced in November 2002, included a procedure for both listing and delisting. The listing procedure focused on clarifying the identity of listed persons and gathering more information on them.[105] The guidelines required of states which proposed a new listing that they provide a statement of the basis for the designation as well

[101] See C. Oxtoby and C. H. Powell, Chapter 22, this volume for examples of the 'gentle' coercion which African states experience to co-operate with anti-terrorism measures.

[102] Lon C. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, revised edn, 1969).

[103] SC Res. 1390, art. 2. [104] Ibid., art. 5(d).

[105] See note 16 above and the first report of the Monitoring Team (S/2004/679), [37].

as identifying information which the national authorities would need to implement the sanctions.[106]

The early delisting procedure required that persons wishing to be delisted approach their own states of residence or nationality for assistance, after which the state so petitioned should approach the state which initially proposed the listing of the individual (the 'designating state'). Through this process, the petitioned government should obtain additional information relating to the listed individuals. If the petitioned government still wished to have its citizen or resident delisted after reviewing the information, it should seek to persuade the designating government to submit a request for delisting to the 1267 Committee. Once the Committee received a request for delisting from both governments, it decided the delisting request by consensus – a procedure which allowed the chair of the Committee to continue consultations if consensus could not be reached. On the other hand, if the petitioned state could not get the designating state to agree to request delisting, it could submit its own request. However, that request was still decided by the no-objection procedure, which allows a single state to block the delisting request without giving reasons.[107]

On 20 December 2002, Security Council Resolution 1452[108] introduced humanitarian exceptions to the sanctions, allowing states to grant listed persons access to their funds for their daily needs as well as legal costs.[109] The new exemptions procedure established by Resolution 1452 required states to obtain the approval of the 1267 Committee for every exemption granted. The 1267 Committee was, as before, not obliged to offer any reasons for its decisions.

These early reforms of the listing system were precipitated by Sweden's attempt to get its nationals, Adirisak Aden, Abdi Abdulaziz Ali and Ahmed Ali Yusuf, delisted, and to ensure that the freezing of their assets did not threaten their survival.[110] The resolution containing the Security Council's request to the 1267 Committee for guidelines and criteria to

[106] Decisions of listing and delisting are guided by the 1267 Committee Guidelines: The Al-Qaida and Taliban Sanctions Committee, UN, *Guidelines of the Committee for the Conduct of Its Work* (2008), available at www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf (Guidelines).

[107] Gutherie, 'Security Council sanctions and the protection of individual rights', 512–13.

[108] SC Res. 1452, art. 1.

[109] Per Cramer, 'Recent Swedish experiences with targeted UN sanctions: the erosion of trust in the Security Council', in E. de Wet and A. Nollkaemper (eds.), *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003), p. 85.

[110] *Adirisak Aden, Abdi Abdulaziz Ali, Ahmed Ali Yusuf and the Al-Barakaat Foundation* v. *Council of the European Union and Commission of the European Communities*, case no. T-306/01, filed on 10 December 2001. See Gutherie, 'Security Council sanctions and

regulate listing and delisting, Security Council Resolution 1390, was passed four days after Sweden lodged its request that the Committee delist its three nationals. The delisting procedure set out in these guidelines reflected the procedure which Sweden had already followed.[111]

In the following years, the Council then tried to ensure that listed persons were informed both of their status and the measures open to them to challenge their listing. Security Council Resolution 1526 of 30 January 2004 'strongly encourage[d]' states to communicate with listed persons, without, however, binding them to do so.[112] This request was finally transformed into an obligation five years later, when Security Council Resolution 1822 obligated states to inform listed persons of their status if possible, and to alert them to both the listing and delisting procedures.[113]

Recognising the difficulty of answering accusations one has not heard, Security Council Resolution 1735 required the 1267 Committee to release a narrative summary of the case against each listed person or entity. However, the evidence on which this case was based could be released only with the consent of the state which provided it. The other weakness which the Council attempted to meet at that time was the individual's lack of access to the delisting procedure. Security Council Resolution 1730[114] established a 'focal point' within the UN Secretariat's Security Council Subsidiary Organs Branch. This focal point, which serves all sanctions committees of the Security Council, was designed to receive delisting requests directly from individuals who were affected by the sanctions regimes.[115] This allowed listed parties to submit their requests even in the absence of their governments' diplomatic protection. However, the focal point simply conveyed petitioners' requests to the states which were to deal with them, without engaging with the merits of the application itself – leading Hovell to describe the mechanism as 'little more than a glorified switchboard operator'.[116]

the protection of individual rights', 511 and Cramer, 'Recent Swedish experiences with targeted UN sanctions', for discussions of these cases.

[111] Ibid. All the people represented by Sweden were eventually delisted: see www.un.org/News/Press/docs/2002/sc7490.doc.htm and www.un.org/News/Press/docs/2006/sc8815.doc.htm.

[112] SC Res. 1526, art. 18. [113] SC Res. 1822, art. 17.

[114] SC Res. 1730, UN SCOR, 61st sess, 5599th mtg, UN Doc. S/Res/1730 (19 December 2006).

[115] The 1267 Committee runs one of many targeted sanctions regimes: see www.un.org/sc/committees/.

[116] Devika Hovell, 'Comment on Kadi', available at www.ejiltalk.org/a-house-of-kadis-recent-challenges-to-the-un-sanctions-regime-and-the-continuing-response-to-the-ecj-decision-in-kadi/#more-1258.

Security Council Resolution 1822 put further pressure on states to provide as much information on their listing proposals as possible, and expressly to indicate which sections of their proposals could be publicised. It directed the 1267 Committee to release the narrative summary behind each listing on its website, asked it to ensure fair and clear procedures and introduced regular reviews of listing decisions, even if those decisions were not appealed.[117]

The latest and most significant reform of the listing process is contained in Security Council Resolution 1904 of 17 December 2009. This resolution once again required review and reform of the listing and exemption procedures to ensure transparency and speed. It also required that the Committee extend the notice period for objections to listing proposals. But by far its most important change was its introduction of an Ombudsperson – an office independent of the Security Council with the mandate to receive listing appeals and promote dialogue between the various parties involved in it, including the individual, listed person.

The process which the Ombudsperson is required to follow differs markedly from that carried out by the 'focal point', which remains in place for other sanctions committees of the Security Council. When receiving a listed person's petition for delisting, the focal point is required merely to 'inform the petitioner on the general procedure for processing that request'. The focal point then passes on the listed person's request, along with the extra information required of such a request, to a closed list of specific governments (the designating government(s) and to the government(s) of citizenship and residence). Any discussion that follows at this stage is restricted to an exchange between the designating state(s) and any state which intends to recommend delisting – an exchange which the designating state can refuse, as it has the option to remain anonymous. From these discussions, any of the states concerned might lodge a recommendation for delisting with the Committee. Without such a recommendation, the listed person's request is considered rejected after a certain period without further discussion. The focal point would then convey the final decision to the listed person. There is no provision that any reasons be given.

The Ombudsperson, on the other hand, must not only 'inform the petitioner on the general procedure for processing [a delisting] request', but also '[a]nswer specific questions from the petitioner about Committee

[117] As a preliminary measure, it also required a review of all listing decisions not reviewed in the past three years.

procedures'. The Ombudsperson then communicates the petitioner's request not only to the designating government(s) and the government(s) of citizenship and residence, but also to the Committee itself, the Monitoring Team, 'relevant United Nations bodies, and any other States deemed relevant by the Ombudsperson'. The Ombudsperson is required to go through a three-stage process, set out in detail in the resolution. First, he or she collects a wide range of opinions and information from the bodies who have received the delisting request. During this first stage, the Ombudsperson communicates their requests for further information and clarification back to the petitioner. One of the forms of input required expressly from the Monitoring Team is 'court decisions and proceedings, news reports, and information that States or relevant international organizations have previously shared with the Committee or the Monitoring Team'. The second stage, headed 'Dialogue', provides for a two-month, extendable period, in which the petitioner may be involved. The Ombudsperson then drafts and circulates a report summarising the main arguments for and against delisting. In the third stage, the Ombudsperson presents the report to the Committee and answers its questions. The decision to approve or reject the request lies, once again, exclusively with the Committee, but in this case it must discuss the request whether or not that request is supported by a state. Furthermore, if the request is refused, the Ombudsperson is required to explain the refusal to the extent possible – within the restrictions imposed by the confidentiality of the information – when communicating that refusal to the petitioner.

This last wave of reform was triggered by the *Kadi* case,[118] which presented the Security Council with the possibility that the entire European Union might refuse to co-operate in listing. Security Council Resolution 1617 of 2005, which clarified the listing criteria and referred to the delisting procedure for the first time, was passed on 29 July 2005, while the Court of First Instance was considering its judgments in the *Yusuf* and *Kadi* cases.[119] Security Council Resolution 1822, which attempted to improve the information available to the listed person, was similarly produced during the course of the Grand Chamber proceedings. Security Council Resolution 1904, which introduced the Ombudsperson, was passed in the wake of the Grand Chamber's firm rejection of listing in its

[118] *Kadi* (above note 12).

[119] *Yusuf and the Al-Barakaat Foundation* v. *Council and Commission* (above note 110); *Kadi* v. *Council of the European Union and Commission of the European Communities* (Case T-315/01) (2005), printed in [2006] *European Court Reports* II-02139, and also available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:281:0017:0018:EN:PDF.

Kadi decision of 3 September 2008. The reforms suggested by the monitoring bodies, and implemented by the Council, during this period included the introduction of narrative summaries[120] and the establishment of the 'focal point'.[121]

The Security Council has recently acknowledged that listing threatens human rights, and the then chair of the 1267 Committee, Jan Grauls, acknowledged publically that the reforms of Security Council Resolution 1822 had been insufficient to 'ensure that the right individuals and entities were targeted'.[122] The following resolution, Security Council Resolution 1904, 'takes note' of the domestic challenges to listing, 'legal and otherwise', and expresses its intent to 'continue efforts to ensure that procedures are fair and clear'.

I will argue below that these developments demonstrate the slow emergence of rule of law principles. However, this should not be seen as a defence of listing in its present form. Listing still does not comply with rule of law requirements, and this can be confirmed by the most recent *Kadi* developments. After the Grand Chamber of the ECJ invalidated Kadi's listing for its procedural defects, the Commission adapted its procedure to allow Kadi to comment on the 'narrative summary' of the case against him.[123] Having heard Kadi's response, the Commission relisted him. When Kadi challenged his relisting, the Grand Chamber found the latest reforms inadequate:[124]

> The considerations in this respect … remain fundamentally valid today, even if account is taken of the 'Office of the Ombudsperson'… In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombusdperson affects the principle that removal of a person from the Sanctions Committee's list requires consensus within the committee. Moreover, the evidence which

[120] See S/2005/83, [55].

[121] SC Res. 1730. See also Thomas J. Biersteker and Sue E. Eckert, *Strengthening Targeted Sanctions through Fair and Clear Procedures* (Watson Institute for International Studies, Brown University White Paper, 30 March 2006).

[122] globaladminlaw.blogspot.com/2009/05/kadi-recent-developments.html.

[123] He was not given access to any of the evidence on which the summary was based. For the problems presented by secret evidence, see Forcese and Roach, 'Limping into the future'.

[124] *Kadi* v. *Council of the European Union and Commission of the European Communities* (Case 85/09) [2010], available at curia.europa.eu/.

> may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee's list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively … For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.

I am not, therefore, arguing that the listing process complies with the rule of law. Instead, I am merely identifying the direction that the reforms are taking. They may never go far enough to validate listing[125] but, by introducing the principles I discuss below, they may perform the fundamental function of subjecting the Council to law.

B. The march of the rule of law

To find the rule of law aspects of this process, we must note that Fuller saw the rule of law as a set of principles, but also as an activity – a process whereby the law is established and maintained. His vision of the rule of law can be summarised as a requirement of publicised, non-retroactive, understandable and internally consistent rules, which do not demand the impossible and are administered congruently with how they are announced.[126] On their content, these requirements overlap closely with those of other rule-of-law theorists; that is, that there be predictable, reliable rules and equality and consistency in their application.[127] However,

[125] See the prognosis of Forcese and Roach, 'Limping into the future'.

[126] Fuller's eight specific requirements of the rule of law were that there be (1) rules, which are (2) publicised, (3) understandable, (4) not retroactive and (5) internally consistent (that is, not contradictory). The rules must also be (6) relatively consistent over time; that is, they may not change so frequently that the legal subjects can no longer orient their conduct in compliance with the rules. In addition, (7) compliance must not be physically impossible; that is, law cannot demand that legal subjects act beyond their powers. Finally, (8) the administration of law must reflect the rules as announced: Fuller, *The Morality of Law*, p. 39.

[127] Judith Shklar, 'Political theory and the rule of law', in Allan C. Hutcheson and Patrick Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), p. 1; Jeremy Waldron, 'Is the rule of law an essentially contested concept (in Florida)?' (2002) 21 *Law and Philosophy* 137; Lon L. Fuller, *The Morality of Law*, p. 39; A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1961), pp. 188 and 193; F. A. Hayek, *The Road to Serfdom* (London: Routledge, 1944), p. 54; Joseph Raz, 'The rule of law and its virtue', reprinted in *The Authority of Law* (Oxford: Clarendon, 1979), pp. 214–18; John Rawls, *A Theory of Justice* (Oxford University Press, 1971); Colleen Murphy, 'Lon Fuller and the moral value of the rule of law' (2005) 24 *Law and Philosophy* 239, 241.

whereas many theorists see this list as a wish list – which law as a system may or may not fulfill – Fuller saw them as essential for legality, that is, the quality of being law.[128]

Beyond being a set of prerequisites, however, Fuller's eight elements were also meant to show how law works. For Fuller, law was not a top-down process whereby the body in power imposed rules on the subjects of the legal system, but a reciprocal process in which the power-wielder and subject remain in dialogue while fashioning a system to which all participants can bind themselves. His eight rule-of-law requirements therefore give expression to the underlying principles of reciprocity, congruency and agency.[129] The reciprocity of the law-making process relies on and encourages the agency of the subjects, who are, in turn, able to hold the power-wielders to a congruent application of the laws they have accepted as their own. Together, these three principles are the elements through which system remains – or even becomes – a legal system.

The reform of the listing system provides an effective example of the rule of law at work in Fuller's conception, because the 'fit' between the reforms and his underlying requirements is strong. The programme in its current form has been shaped through interaction with the subjects of the legal system, as their assertion of their agency has forced the Council to soften the managerial[130] character of the initial listing system. Second, as set out in Security Council Resolution 1904, listing is designed to encourage and respond to further interaction. The wide range of bodies from whom the independent arbiter may gather facts, opinions and case law relevant to a delisting request factors the views of states and other international actors into the analysis from the very outset.

But perhaps the most significant development has been the (tentative) embrace of legality by the Council. The Council, the Monitoring Team and 1267 Committee representatives have increasingly depicted law as a facilitator of, rather than a hindrance to, the listing process. Thus Grauls, on admitting the shortcomings of Security Council Resolution 1822, asserted that respect for fair and clear procedures would increase the effectiveness of the sanctions regimes.[131] Similarly, the Monitoring

[128] Fuller, *Morality of Law*; cf. Raz, 'The rule of law and its virtue', pp. 219–25.
[129] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press, 2010), pp. 21–6.
[130] See Lon L. Fuller, 'A reply to critics' in Fuller, *The Morality of Law*, pp. 209–10 for the central distinction between law and a managerial system.
[131] globaladminlaw.blogspot.com/2009/05/kadi-recent-developments.html.

Team described the Council's reforms as steps to create a 'more legal character',[132] noting that '[w]eak listings undermine the credibility of the sanctions regime, whether or not they are subject to legal challenge'.[133] Indeed, such is the glamour of legality that the Monitoring Team has even claimed that domestic review of listing decisions should be seen as a strength of the 1267 Committee's system.[134]

C. *Legislation under the rule of law*

The Security Council has long been seen as a primarily political body. Because of its expertise and powers, some commentators have argued that it must work outside of the law in order to respond to pressing emergencies which only it can recognise and counter.

Listing has shown the dangers of such thinking, and the response to listing has helped to demonstrate law's proper place in the Council. The growing legal paradigm suggests two main limits to Security Council powers. The first limitation emerges in the public law discourse, which now treats as self-evident that the Security Council is situated not only within a flat structure of sovereign states but also at the apex of a hierarchy of states and individuals. These vertical power relationships require public law principles, including constitutional, administrative and human rights law, to protect the persons at the lower levels of the hierarchy.[135]

But second, it emerges in the very idea that persons affected by the exercise of power must be able to shape the form it takes. In this sense, it is law pure – in Fuller's conception – that is limiting the Council. Listing reforms demonstrate the Council's return to law as it attempts to make listing acceptable to law's subjects. These reforms, while unsatisfactory, are evidence of a slow nudging towards Fuller's underlying principles of reciprocity, congruency and agency. Thus listed persons have gradually obtained the ability to engage in some form with decisions of the 1267 Committee. Through the Ombudsperson, the 1267 Committee can be drawn into an interaction with listed persons, as each is given the opportunity to raise issues with the other. The Ombudsperson's report,

[132] See S/2009/502, [40]. The Monitoring Team thus praises the addition of 'associated with' criteria, the introduction of narrative summaries of reasons for listing and the review mechanisms contained in SC Res. 1822.

[133] S/2009/502, [40].

[134] S/2009/245, [18]. See also [23], [27]–[30], [35], [37].

[135] Zemanek, 'Was Kann die Vergleichung staatlichen öffentlichen Rechts für das Recht der internationalen Organisationen leisten?'.

drawing on case law, academic comment and the views of states, also encourages the Committee to engage with and respond to the legal convictions of the subjects of international law. Whether the listing system ever attains the status of law will depend on the extent to which the Ombudsperson manages to attain genuine accountability on the part of the Committee. Should the Ombudsperson manage this, it is not impossible that the Committee might one day justify its decisions adequately, engage meaningfully with objections and act in congruence both with its own criteria and the existing framework of international law – including fundamental rights. At this point, listing may have attained enough congruency and reciprocity that it accommodates the agency of states and individuals and may claim to be law.

If law limits the Security Council's exercise of power, it remains to consider how law will limit the Council's legislative capacity. On the global level, the subjects of law include states and non-state bodies.[136] The Council's limited membership and the imbalance of power within that membership discourage it from creating rules through interaction with the subjects of the legal system. Without widespread consultation by the Council, it will generally be incapable of producing rules that satisfy the minimum requirements of the rule of law.

This is not to exclude the possibility that the international community may accept the Council's rules and confer on them the status of law. But it does suggest that the Council needs to be in an ongoing process of engagement and justification with the broader community.[137] The level of justification the Council has hitherto offered for its legislation has been negligible.[138] It has relied instead on a largely unstated premise that any action it takes in the name of anti-terrorism is automatically legitimate.

This premise no longer holds. And as it cracks, legal requirements are emerging which limit the Council's power to carry out large portions of its anti-terrorism programme. Thus, while listing continues to be critiqued for its violation of particular individual's rights, other voices have begun to question the institutional competence of the Council to impose

[136] Although states bear full legal personality in international law, individuals, organisations and even corporations have attained limited personality through the conferment of rights and duties by international law.

[137] On justification and the rule of law, see David Dyzenhaus, 'Law as justification: Etienne Mureinik's conception of legal culture' (1998) 14 *South African Journal on Human Rights* 11; Etienne Mureinik, 'A bridge to where?' (1994) 10 *South African Journal on Human Rights* 10.

[138] See the complaints of states listed in section 3 above, and Marschik, 'The Security Council as world legislator?', 22.

either its individual decisions or its general norms on the global community. Thus Martin Scheinin, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, recently questioned the Security Council's use of Chapter VII to enact its anti-terrorism programme, arguing that the prerequisites for the use of Chapter VII had not been met. His report emphasises the need for accountability in international organisations and insists that the anti-terrorism treaty regime has precedence over the Council's programme.[139] This argument echoes the protests of states when the Council claimed unilaterally to override the existing processes of international law-making.[140] As noted above, the protesting states also set conditions for the valid use of such a power: wide consultation,[141] transparency,[142] accountability,[143] and the ongoing justification of exercises of power to the broader community.[144]

These conditions rephrase Fuller's essential prerequisites of reciprocity, congruency and respect for the agency of law's subjects. If it does not fulfill them, the Council will not produce law.

[139] www.un.org/News/briefings/docs/2010/101026_Scheinin.doc.htm and www.un.org/News/Press/docs/2010/gashc3988.doc.htm.
[140] S /PV.4950, p. 24. [141] S/PV.4950: Spain, p. 7.
[142] S/PV.4950: Philippines, p. 2; China, p. 6; Romania, p. 14; Russian Federation, p. 16; United States, p. 18; Canada, p. 20; and South Africa, p. 22.
[143] A/56/PV.25: Singapore, p. 13. [144] A/56/PV.28: Ghana, p. 16.