Targeted Sanctions as a Counterterrorism Strategy

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I. INTRODUCTION

In its newly released National Security Strategy, the Obama Administration declares thusly: "We favor Security Council reform that enhances the U.N.'s overall performance, credibility, and legitimacy."[1] Now, it is not quite clear what sorts of reforms the Administration believes would achieve those goals. One rather doubts that the Administration has in mind reforming the veto power of the permanent five members or making the veto power available to a more representative body of the Council. Whatever the Administration had in mind, it is incontrovertible that reforms are needed if the Council is to enhance its legitimacy and credibility. Security Council reform has been on the agenda of many international meetings, including that of the General Assembly,[2] over the years, but with no agreement on what needs to be reformed and how it should be reformed.

Although formal reform has been elusive, that does not mean that there have not been changes in how the Council performs its functions. The Council has, for example, been expanding its authority to maintain

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1. BARACK OBAMA, PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 46 (2010) [hereinafter NATIONAL SECURITY STRATEGY].

2. *See* Adeno Addis, *Economic Sanctions and the Problem of Evil*, 25 HUM. RTS. Q. 573, 612 n.114, 615 (2003).

international peace and security without much fanfare and without much check. And this is done on the account that such expansion will enhance the effectiveness and credibility of the Council. A good example is the Council's counterterrorism policy, which has been shaped greatly by the United States. The fight against terrorism is transforming the Security Council in the same way that it has put under strain the institutions and the structures of governance of many Member States such as the United States. The issue is the same: How do we deal with "new" forms of security concerns within existing structures of governance and security arrangements?[3]

Two things have become obvious about the challenge terrorism poses to the international community. First, in the context of an international collective security system that assumes that relevant actors are states and their agencies, terrorism (at least, as it is currently understood[4]) is essentially carried out by individuals or other nonstate actors. Terrorism is partly a manifestation of the asymmetry of power between states and nonstate actors.[5] The complaint of asymmetry goes the other way as well. States often use tactics and procedures that are inconsistent with human rights laws and the laws of war as counterterrorism measures on the proposition that terrorists do not comply with human rights norms or the laws of war, and therefore, requiring states to comply with those norms is to require states to engage in asymmetrical war.[6]

Second, in a world that relies on the state system for the basic control of individual or nonstate actors, terrorist groups have become truly international (often beyond the jurisdiction of a particular state) requiring global and coordinated response. An effective response to terrorism seems therefore to require two important measures: The response should be international and coordinated, and it should be able to

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3. Many argue with good reason that terrorism is not a new phenomenon requiring new institutional setups to deal with it. Many countries, some in Europe, have been dealing with it within existing penal structures and criminal justice systems without much problem. *See* Adeno Addis, *"Informal" Suspension of Normal Processes: The "War on Terror" as Autoimmunity Crisis*, 87 B.U. L. REV. 323 (2007).

4. Although there is no internationally agreed on definition of terrorism (and some would employ the term to apply to both state and nonstate actors), the general trend now seems to be that the term applies to certain actions of nonstate and individual actors and not to the action of states. Internationally, the Security Council came close to defining terrorism in Resolution 1566. *See* S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

5. *See* MARK OSIEL, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR 42 (2009).

6. *See id.*

reach individuals and nonstate actors as subjects of prevention or sanction.

In recent years, the Council, the primary international organ on matters of international peace and security, has taken a number of measures that appear to take us in that direction. One such measure is a sanction system that directly targets individuals and nonstate actors that are accused of supporting or associating with terrorist groups. These sanctions involve the inclusion of individuals and groups in a consolidated list for the purpose of freezing their assets and restricting their travels.

What I shall do in this Essay is examine the process by which individuals or other nonstate actors happen to get on the list and what rights are afforded to them to contest the listing and delisting process. In doing so, I shall make and defend three propositions. First, the current system of individualized sanction against suspected terrorists or their associates is transforming the Council in an unplanned and very troubling way. The Council is expanding its powers beyond what was perhaps anticipated by the founders, while not expanding corresponding checks on that power.[7] So, what is worrying is not that the Council attempts to adapt its powers to new circumstances, but the fact that its expansion is not accompanied by the needed correlative checks on those powers. The problem with "mission creep"[8] is that it does not come as a package reform. The Council is able to reach down to the individual without simultaneously providing the individual a procedure that would allow or entitle him or her to have a standing before the Council. Individuals become subjects of international law for purposes of direct sanctioning while having no corresponding legal personality for the purposes of challenging before the Council the validity of those sanctions. This is what I shall refer to as the problem of asymmetry. The carefully crafted checks and balances in the international system are

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7. An official within the United Nations Secretariat (the bureaucracy) is quoted to have said that "the issue of individual human rights was not thought through at the outset" when individualized sanctions were adopted as a counterterrorism strategy. THOMAS BIERSTEKER & SUE ECKERT, ADDRESSING CHALLENGES TO TARGETED SANCTIONS: AN UPDATE OF THE "WATSON REPORT" 6 (Oct. 2009) (internal quotation marks omitted); *see also* Thomas J. Biersteker, *Targeted Sanctions and Individual Human Rights*, 65 INT'L J. 99, 101 (2010). In connection with a visit to Stockholm by the then-U.N. Secretary General, Kofi Annan, the Swedish prime minister expressed the same worries. He noted: "This is a conflict between principles that we have not previously seen. I have stated worries for this. . . . We are learning to handle a new situation and I hope to reach greater understanding along the way." Per Cramér, *Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 85, 92 (Erika de Wet & André Nollkaemper eds., 2003).

8. *See infra* note 31 and accompanying text.

changing in an ad hoc and unreflective manner. This is no way to "enhance[] the U.N.'s overall performance, credibility, and legitimacy."[9] Asymmetry (lack of reciprocity) is the new legal black hole. It is interesting that while there is a great deal of controversy about procedural deficiencies in relation to the detentions of "enemy combatants," such as those in Guantanamo Bay, there is very little discussion about the procedural shortcomings involving the freezing of property of individuals and other entities, a system of financial blockade that increasingly resembles confiscation. And it is not just the loss of use of property that the targets of sanctions are faced with, they also face serious consequences of isolation from and shunning by the communities in which they live and work.

Second, the legitimacy of the listing system, and generally individualized sanction systems, will depend on the extent to which the asymmetry is corrected. I shall argue that the only way to ensure legitimacy is to establish an independent adjudicative body, a body that is independent from the Council, to make the determination whether an individual or entity ought to be listed and whether a listed individual or entity should be delisted.

Third, I shall argue that the United States has a special responsibility to push for the reform of the current process of listing and delisting of alleged associates of terrorists, for not only are many on the list designated by the United States, but the whole listing system is in fact modeled after "long established framework for blacklisting terror suspects and freezing their assets."[10]

II. THE EVOLUTION OF TARGETED SANCTIONS: A BRIEF HISTORY

Economic sanctions imposed by the United Nations Security Council have become a regular feature of international life. Until the beginning of the 1990s, the Council "had imposed sanctions only twice."[11] Since then the Council has been rather active, imposing

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9. *See* NATIONAL SECURITY STRATEGY, *supra* note 1, at 46.

10. Peter Fromuth, *The European Court of Justice* Kadi *Decision and the Future of UN Counterterrorism Sanctions*, AM. SOC'Y INT'L L. INSIGHT, Oct. 30, 2009, http://www.asil.org/insights091030.cfm; *see also* Yvonne Terlingen, *The United States and the UN's Targeted Sanctions of Suspected Terrorists: What Role for Human Rights?*, ETHICS & INT'L AFFS., Summer 2010, http://www.cceia.org/resources/journal/24_2/essays/002.html ("The United States has played a key role in shaping the Security Council's approach to counterterrorism, including its human rights component.").

11. Addis, *supra* note 2, at 574. It is not accidental that sanctions started proliferating in the 1990s, for that follows the collapse of the Soviet Union and the end of cold war politics that had paralyzed the workings of the Council.

comprehensive sanctions[12] on a number of countries with the intent of persuading the regimes of the target countries to alter or modify the challenged behavior or policy.[13] As two authors put it, sanctions became "the tool of choice for the council."[14]

As comprehensive or broad-based sanctions proliferated, however, their use came under intense challenge from various sources. Some critics maintained that comprehensive sanctions do not achieve the purposes for which they are adopted. Often, they fail to bring the desired behavioral change, critics argued, because the leaders of the target countries and their supporters often insulated themselves from the effects of those sanctions. Even if such measures led to the desired behavioral modification, the costs of those sanctions are often unacceptably high. Ordinary citizens endure massive deprivation in life, liberty, and property, as the sanctions against Iraq after the first Gulf War amply demonstrated.[15] It seemed morally unacceptable to employ sanctions (these seemingly "peaceful" and yet "deadly" instruments[16]) targeting innocent civilians for suffering as a means of achieving a foreign policy objective. The Kantian categorical imperative that we "treat humanity, whether in [our] person or in the person of any other, never simply as a means, but always at the same time as an end,"[17] seemed particularly applicable in this circumstance.

Partly as a response to the mounting evidence that comprehensive sanctions led to massive disruption and even destruction of life of innocent citizens of the target country, the Council developed a system of targeted sanctions—freezing of assets and travel restrictions of leaders of

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12. By "comprehensive sanctions" I mean to refer to multilateral (Security Council mandated) sanctions that are imposed on a country on all sectors of economic and social life. Because the sanctions are Security Council mandated, all Member States are required to comply with them and to enforce them against the target state. *Id.* at 575.

13. Behavior modification has both a preventive and corrective dimension to it. The Council could impose sanctions to prevent a regime from acting in a way that will undermine international peace and security (preventive) or to reverse offending acts and actions (corrective).

14. Jane Boulden & Andrea Charron, *Evaluating UN Sanctions: New Ground, New Dilemmas, and Unintended Consequences*, 65 INT'L J. 1, 7 (2010).

15. *See* Addis, *supra* note 2, at 607-12.

16. Joy Gordon, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions*, 13 ETHICS & INT'L AFFS. 123, 123-24 (1999) ("[E]conomic sanctions were described [by the drafter of the League of Nations Covenant] in odd, paradoxical terms. The history of sanctions since that time reflects this ambivalence: they are 'peaceful' yet 'deadly,' they are 'potent' yet involve no force. They are depicted as civilized and humane, in contrast to military actions, yet devastating and intolerable to leaders engaged in wrongdoing if they are strict enough.").

17. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 96 (H.J. Paton trans., Harper & Row 1964) (1948).

the target country[18]—designed to minimize the unintended adverse effects of sanctions on the innocent and most vulnerable segments of the target country.[19] Such restrictions were over time extended to the leaders of groups calling themselves freedom fighters engaging in either low- or high-intensity armed conflicts with the government in power. Targeted or individualized sanctions were, therefore, imposed on leaders of governments or government-like entities (governments-in-waiting) who were believed to be responsible for the disapproved act or policy.[20] Targeted sanctions, or "smart" sanctions as they are sometimes called,[21] are supposed to be like "smart" bombs. They target directly the objectionable behavior or actor and avoid or at least minimize what are euphemistically called "collateral damages."[22]

Increasingly, however, the Council has started to impose sanctions on individuals and nongovernment entities for activities or policies that are said to pose a threat to international peace and security, even when those actions are not related to (and often are contrary to) government

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18. *See, e.g.*, S.C. Res. 1718, ¶ 8, U.N. Doc. S/RES/1718 (Oct. 14, 2006) (North Korea); S.C. Res. 1591, ¶ 3, U.N. Doc. S/RES/1591 (Mar. 29, 2005) (designating certain individuals in Sudan for sanction); S.C. Res. 1636, ¶ 10, U.N. Doc., S/RES/1636 (Oct. 31, 2005) (Lebanon/Syria); S.C. Res. 1572, ¶¶ 9-11, U.N. Doc. S/RES/1572 (Nov. 15, 2004) (targeting certain individuals in Côte d'Ivoire); S.C. Res. 1518, ¶ 1, U.N. Doc. S/RES/1518 (Nov. 24, 2003) (targeting certain individuals in Iraq); S.C. Res. 1132, ¶ 5, U.N. Doc. S/RES/1132 (Oct. 8, 1997) (against military junta in Sierra Leone); S.C. Res. 917, ¶ 4, U.N. Doc. S/RES/917 (May 6, 1994) (against the military junta in Haiti).

19. *See* U.N. Security Council, Letter dated Apr. 13, 1995 from the Permanent Representatives of China, France, the Russian federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1995/300 (Apr. 13, 1995).

20. An example of sanction on a government-like entity is one that was imposed on the leaders of UNITA, the former guerilla movement fighting against the government of Angola. S.C. Res. 1127, U.N. Doc. S/RES/1127 (Aug. 28, 1997). Of course sanctions could also be targeted at sectors of the economy rather than individuals or corporations. Examples of such sanctions are arms embargoes and bans on certain trade items such as diamond, oil, timber, etc. *See, e.g.*, S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006) (Iran); S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 22, 2003) (Liberia).

21. *See* Addis, *supra* note 2, at 617; *see also* Cramér, *supra* note 7, at 97 ("From a general perspective, the method to target sanctions on specifically designated individuals or private organizations is a type of 'smart' sanction that has been developed since the early 1990s and gained a general acceptance.").

22. Often, the phrase "collateral damages" is used to refer to the damages that are suffered by innocent individuals or entities. Most thought that targeted sanctions were much better than comprehensive sanctions in minimizing the negative impacts of sanctions on the innocent sector of the target country. The United Nations High Commissioner for Human Rights was one of them. The Commissioner recognized that "the system of targeted sanctions represents an important improvement over the former system of comprehensive sanctions." U.N. High Comm'r for Human Rights, *Rep. of the U.N. High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, HUMAN RIGHTS COUNCIL, ¶ 25, U.N. Doc. A/HRC/4/88 (Mar. 9, 2007).

policies or policies of government-like entities. This is done mostly as a counterterrorism strategy.

III. TARGETED SANCTIONS AS A COUNTERTERRORISM STRATEGY

Under Resolution 1267, the Security Council ordered, among other things, the freezing of funds linked to the then Taliban regime of Afghanistan.[23] The resolution was adopted as a response to the attacks on the U.S. embassies in Kenya and Tanzania, attacks which were blamed on Osama bin Laden who at the time of the adoption of the resolution was residing in Afghanistan under the protection of the Taliban regime.[24]

The resolution also established a sanctions committee[25] (the 1267 Committee) whose task was to oversee the execution of the sanctions mentioned in the resolution.[26] In a general sense, those targeted for sanction under Resolution 1267 were not very different from targets of individualized sanctions that the Council had imposed under earlier resolutions.[27] It was a sanction system that targeted leaders of a country that had sheltered a terrorist group (al-Qaeda) and had refused continued demands by the Council to surrender its leader (Osama bin Laden).[28] But in subsequent resolutions, the Council extended the mandate of the 1267

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23. The Council decided that States shall:

> Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban . . . and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.

S.C. Res. 1267, ¶ 4(b), U.N. DOC. S/RES/1267 (Oct. 15, 1999).

24. *Id.*

25. Presumably, this committee like other ad hoc Security Council committees is established pursuant to article 29 of the U.N. Charter which provides that the Council may appoint committees, commissions or rapporteur for specific purposes. U.N. Charter art. 29.

26. The Council "[d]ecides to establish . . . a Committee of the Security Council consisting of all the [fifteen] members of the Council." S.C. Res. 1267, *supra* note 23, ¶ 6. The Committee is also known as the al-Qaeda and Taliban Sanction Committee.

27. Thus, for example, this resolution banned aircrafts that are "owned, leased or operated by or on behalf of the Taliban" from landing in the territories of Member States. *Id.* ¶ 4(a).

28. The Council

> [d]emands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted [the United States], or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.

Id. ¶ 2.

Committee to execute sanctions, such as freezing of assets against al-Qaeda and Osama bin Laden,[29] and ultimately all persons suspected to be involved in or associated with terrorism.[30] This expansion of the listing system and that of the jurisdiction of the 1267 Committee is what one commentator aptly refers to as "mission creep," akin to the expansion of the U.N. peacekeeping mission.[31] Indeed, the Council's general counterterrorism policy could be characterized as such.

This development is qualitatively different from individualized sanctions targeting leaders of countries or guerrilla movements. First, unlike the circumstances surrounding the sanctions against leaders of countries or parties, where information is public and often debated openly within the Council itself and other international organs—here individuals are listed as candidates for financial sanctions or travel restrictions mostly, and often purely, on the allegation of a country, the basis of which is not fully disclosed.

Second, targets of sanctions in relation to leaders of governments or government-like entities have at their disposal institutional ways of challenging the bases on which those sanctions are imposed. Clearly leaders of a country have access to the United Nations generally and the Council specifically. Even opposition parties fighting to take over the government have access to the Council to the extent that they have governments that support their cause and are willing to speak on their behalf at international fora. Private individuals, businesses, and other nongovernmental entities, on the other hand, do not have such access or standing. Indeed, often it is their own governments that advocate their listing, and even if that was not the case, it is often the "country of the targeted party's residence or citizenship" that can request delisting, which clearly creates "problems of procedural fairness for listed parties in states that oppose or refuse to forward delisting requests."[32] The state here

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29. S.C. Res. 1333, ¶ 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000). The Council "[d]ecides that all States shall . . . freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee . . . and *requests* the Committee to maintain an updated list, based on information provided by States and regional organizations." *Id.*

30. *Id.* (Consolidated List); S.C. Res. 1373, ¶¶ 1(c), 6, U.N. Doc. S/RES/1373 (Sept. 28, 2001); *see also* S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

31. Clara Portela, *National Implementation of United Nations Sanctions: Towards Fragmentation*, 65 INT'L J. 13, 16-17 (2010) ("To some extent, the evolution of [targeted] sanctions parallels that of peacekeeping operations. As the number of missions increased, their mandates were gradually expanded to encompass a host of responsibilities, resulting in 'mission creep' and leading to questions about impartiality of the mission.").

32. THOMAS J. BIERSTEKER & SUE E. ECKERT, WATSON INST. FOR INT'L STUDIES, STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 3 (2006). The study was commissioned by the governments of Switzerland, Germany, and Sweden. *Id.* at 5.

becomes not a defender of individuals but a collaborator or an enabler of the Council. These individual and entities do not have access to the international fora to challenge the sanctions. The problem of asymmetry manifests itself here starkly. The Council reaches directly to individuals and private entities for purposes of sanctioning them, but without giving those individuals and entities a corresponding right of access to it for purposes of challenging the accuracy of the basis on which the designation is made. Also, the fact that terrorist listing is not country-specific and actors are regarded as international actors means that they are often not viewed as within the protection and jurisdiction of specific states.

Third, and more importantly, given the fact that the decision of the Council appears to be unreviewable by coordinate international institutions or challengeable by regional or national bodies,[33] the asymmetry and the lack of due process inherent in the listing and delisting systems becomes even more worrisome.[34] Given the fact that the Council has a very expansive view of who or what is considered to be "associated with Al-Qaida, Usama bin Laden or the Taliban,"[35] the probability of unfair designation becomes rather high.

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33. *See* Addis, *supra* note 2, at 600 ("[A]ssertion of extensive authority by the Council takes place within a context where no other United Nations organ can review the Council's interpretive judgments.").

34. The concern was noted as far back as 2004 by a Report of the High-Level Panel. *See* U.N. Secretary-General, *Follow-Up to the Outcome of the Millennium Summit*, ¶ 152, U.N. Doc. A/59/565 (Dec. 2, 2004). ("The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions."). Subsequently, others added their voices and notes of concern. *See, e.g.*, U.N. Chairman of the S.C. 1267 Committee, Letter dated 8 March 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council, ¶ 40, U.N. Doc. S/2006/154 (Mar. 10, 2006); U.N. Chairman of the S.C. 1267 Committee, Letter dated 2 September 2005 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council, ¶¶ 52-57, U.N. Doc. S/2005/572 (Sept. 9, 2005). Some members of the U.N. Human Rights Committee made this observation: "It is more than a little disturbing that the executive branches of 15 Member States appear to claim a power, with none of the consultation or checks and balances that would be applicable at the national level." Fromuth, *supra* note 10 (internal quotation marks omitted).

35. They include: those "participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; . . . supplying, selling, or transferring arms and related materiel to; . . . recruiting for; or . . . otherwise supporting acts or activities of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof." S.C. Res. 1904, ¶ 2, U.N. Doc. S/RES/1904 (Dec. 17, 2009) [hereinafter Resolution 1904].

As a response to the concerns outlined above and perhaps more precisely because of what appeared to be rebellion from regional courts such as the European Court of Justice[36] against the unjust nature of the asymmetry, the Council unanimously adopted Resolution 1904 and through it established the office of the Ombudsperson.[37] The resolution was apparently drafted by the United States, though it was because of the persistent advocacy of a number of European countries and human rights nongovernmental organizations that the listing process became an issue of concern for the Council.[38] The U.S. Permanent Representative to the United Nations, Ambassador Susan Rice, called the resolution "very important," because it "improves the fairness and transparency of the [sanction] regime."[39]

Resolution 1904 establishes the office of the Ombudsperson "for an initial period of 18 months" to assist the sanctions committee in its consideration of delisting requests.[40] The Ombudsperson is to be appointed by the Secretary-General of the United Nations and is to be "an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions."[41] The job of the Ombudsperson is to "receive requests from individuals and entities seeking to be removed from the Consolidated List."[42] The Ombuds-

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36. *See* Joined Cases C-402/05P & 415/05P, Kadi v. Council, 2008 E.C.R. I-6351.

37. *See* Resolution 1904, *supra* note 35, ¶ 20. The office has now been filled. The Secretary-General has appointed Judge Kimberly Prost of Canada as the first Ombudsperson. Press Release, Security Council, Al-Qaida and Taliban Sanctions Committee Welcomes Appointment of Judge Kimberly Prost To Serve as Ombudsperson, U.N. Press Release SC/9947 (June 7, 2010).

38. Public Statement, Amnesty Int'l, Security Council's Creation of Ombudsperson To Look at Al Qaida and Taliban Sanctions Regime Welcome but Insufficient, AI Index IOR 41/032/2009 (Dec. 17, 2009) ("The resolution unanimously adopted today, drafted by the USA, builds upon the persistent work of a small group of dedicated countries outside and inside the Security Council, as well as NGOs, insisting that due process guarantees must be incorporated in the Security Council's listing and delisting procedures.").

39. Press Release, Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, on Security Council Resolution 1904, Sudan, and the Middle East, at the Security Council Stakeout (Dec. 17, 2009), http://usun.state.gov/briefing/statements/2009/133836.htm.

40. Resolution 1904, *supra* note 35, ¶ 20.

41. *Id.*

42. *Id.* ¶ 21; *see also* Portela, *supra* note 31, at 16 ("The first reference to a 'consolidated list' came in March 2001 in a press release that listed the names of 156 individuals and 17 entities. It came to be known in the media as the 'black list.'"). As of October 23, 2009, there were 504 individuals and entities on the Consolidated List. Out of that number, 142 were individuals associated with the Taliban, mostly former officials in the Taliban government. The largest number, 255, consists of individuals who are allegedly associated al-Qaeda, while the rest, 107, are entities and other groups and undertakings said to be associated with al-Qaeda.

person is to acknowledge receipt of the delisting request, inform the petitioner of the general procedure for delisting, answer specific questions from the petitioner about the delisting process, and if it is a repeated request with no additional information, then the Ombudsperson is to return it to the petitioner "for his or her consideration."[43] If the delisting request is not returned to the petitioner, then the next step is for the Ombudsperson to send the information to the various entities that have a stake in the listing (delisting) of the individual or entity—such as members of the 1267 Committee, the designating state(s), and the state(s) of residence or nationality of the petitioner—for their comment about the request.[44] After gathering and analyzing all the relevant information, the Ombudsperson is to "lay out for the Committee the principal arguments concerning the delisting request."[45] The Ombudsperson does not have the authority to recommend delisting, let alone the power to delist. That is a job left to the Committee. The Committee communicates its decision through the Ombudsperson. Although the Ombudsperson is required to communicate to the petitioner the decision of the Committee, it is also required to "respect the confidentiality of Committee deliberations and confidential communications between [itself] and Member States."[46]

That the office of the Ombudsperson is a positive step toward addressing the serious institutional problems that are inherent in the individual sanctions systems is not in doubt,[47] but as many have noted, the step is not commensurate with the serious lack of due process and transparency inherent in the listing and delisting process.

BIERSTEKER & ECKERT, *supra* note 7, at 7. A recent *New York Times* article indicated that the Committee is "speeding up efforts that could lead to the removal of the Taliban leaders . . . the top United Nations official [in Kabul, Afghanistan,] said." Rod Nordland, *United Nations Could Hasten Removal of Taliban Leaders from Terror Blacklist*, N.Y. TIMES, June 13, 2010, at A16. As the *Times* reports, "[t]he presence of Taliban leaders on the list has been a sticking point in efforts to start peace negotiations with them, but attempts to remove any have foundered because of opposition from Security Council members." *Id.* A U.N. official is quoted as believing that "there was a real possibility of removing at least a large portion of the Taliban names." *Id.*

43. *See* Resolution 1904, *supra* note 35, Annex II ¶ 1.

44. *Id.* Annex II ¶ 2.

45. *Id.* Annex II ¶ 7(c).

46. *Id.* Annex II ¶ 14.

47. The Costa Rican representative on the Council called it a "step in the right direction." Press Release, Security Council, Security Council Amends United Nations Al-Qaida/Taliban Sanctions Regime, Authorizes Appointment of Ombudsperson To Handle Delisting Issues, U.N. Press Release SC/9825 (Dec. 17, 2009); *see also* Biersteker, *supra* note 7, at 116 ("While the ombudsperson makes no formal recommendation, this is the first time the UN Security Council has created an independent review mechanism at the UN level to address due process and human rights concerns of designees.").

First, the party to which individuals have some access (the Ombudsperson) has neither the power to delist nor even to recommend to the Committee a course of action. The Council, which has not heard from the accused, retains the power to decide and exercises that power sitting as a committee. The notion that an accused has a right to present his or her case before the decision maker and that he or she is entitled to receive publicly articulable reasons from the decision maker for the conclusions that it has reached is utterly foreign to the setup here.

Those who resist the idea of a much more robust due process right for targets of individualized sanctions do so on the ground that unlike detentions or other forms of confinements, the freezing of assets or travel bans are not punitive but rather "preventive in nature." This difference, they argue, requires different approaches to what rights are available and how they can and should be vindicated. However, the distinction between what is preventive and what is punitive is hard to sustain in this particular circumstance. Imagine the following: an individual included in the Consolidated List is accused of being associated with terrorist groups. The consequence of being listed is that everyone is forbidden from conducting financial transactions with him. He cannot be employed. His bank account and other assets are frozen. He cannot pay his mortgage, and he is about to lose his condo and perhaps become homeless.[48] The individual's life is being destroyed. If this is not punishment, then the word punishment has lost its meaning.

Second, once listed, an individual or entity is not protected by time limit. In any case, delisting is going to be tough given that the Committee does not have to deal with any pressure that a positive recommendation by the Ombudsperson might have placed on it; the Committee operates by consensus; and even if consensus is not the mode of operation, an affirmative decision by the Committee would still require the concurrence of all five permanent members of the Council (the concurrence of all veto holders).[49]

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48. This is the actual case of Abdirisak Aden, "a Somali-born former school principal and partner in a money-transfer office" who lived in Sweden. Christopher Cooper, *Shunned in Sweden: How Drive To Block Funds for Terrorism Entangled Mr. Aden*, WALL ST. J., May 6, 2002, at A1. It appears that Mr. Aden was added to the list on the urging of the United States for allegedly funding terrorism. The *Wall Street Journal* reported that the "U.S. Treasury Department added Mr. Aden's name to a list of groups and individuals it said had a role in funding terrorism. It faxed the list to the U.N. Security Council, which appended it without fanfare to its own economic sanctions list." *Id.* Mr. Aden denies strongly the accusation and apparently the Swedish government also objected to the inclusion of his name without proof. *Id.*

49. The United States, which has submitted the largest number of names on the Consolidated List, is likely to veto (and in fact has vetoed) the removal of names it had forwarded for inclusion. *Id.*

Third, the initial listing process is still nontransparent and without a mechanism of reviewing the accuracy of the suggested listing. States are encouraged to submit names to be included in the Consolidated List, and although they are required to "provide a detailed statement of case" and although that statement is releasable, States could actually request that parts of the report be confidential to the Committee.[50]

IV. DEALING WITH THE ASYMMETRY: WHAT CAN BE DONE?

As I noted earlier, the establishment of the office of the Ombudsperson is a step in the right direction as far as transparency and due process are concerned. Perhaps the Committee is no longer "one of the UN's least transparent and least representative fora."[51] But as many have observed, the change is not sufficient to address the serious problem of asymmetry. In an excellent paper, Dr. Larissa van den Herik recently argued that the office of the Ombudsperson, while a valuable first step, still falls far short of being an independent and impartial authority capable of granting appropriate relief.[52] I concur with this observation and have in the last section canvassed some of the arguments that support this conclusion.

What then would deal with the problem of asymmetry more directly and more effectively? There are at least three conditions that must exist for there to be a fair process and transparency. First, those subject to sanctions should have a chance to present their case to those who are authorized to impose the sanctions, not their agents or their subordinates. Second, targeted individuals or entities need to have access to information sufficient to give them a credible chance to rebut the basis on which they were designated. Third, the decision maker must be and must be seen to be independent of those who have levied the accusation or the charge.

None of these conditions seems to be met by the current arrangement, even with the establishment of the Ombudsperson's office. Those designated to be listed have no opportunity to appear before the

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50. Resolution 1904, *supra* note 35, ¶ 11.

51. The statement was made by a counterterrorism expert cited in Terlingen, *supra* note 10.

52. *See* Larissa van den Herik, The Security Council, Targeted Sanctions & the Ombudsperson: Revisiting the Need for Review in Light of the Individualization of Security Council Resolutions 14 (unpublished manuscript presented at an international legal theory workshop at Wash. Univ. Law Sch. Feb. 2010) (on file with author) ("Given the limited powers, it is hard to argue that the Ombudsperson would qualify as an effective remedy."). I was the assigned discussant of that paper, and some of the ideas in this Essay have their origins from the comments I made on the paper at the workshop.

Committee to challenge their designation or to petition for delisting after designation. Even if they were to appear before the Committee, the condition might still not be satisfied to the extent that current practice "does not allow for any deliberation at committee meetings."[53] Committee members apparently do not deliberate as a body before they make their decision. They simply vote their instructions from their respective capitals.[54] The lack of deliberation, as well as the fact that members vote based on instructions from their governments, make the decision less of a decision of the Committee. Deliberation is an important ingredient of a collective decision procedure, for not only would that enhance the possibility of reducing error by requiring that each member subject its views to the scrutiny of other members, but it also enhances the legitimacy of the decision process to the extent that the process demonstrates sufficient regard for the interest of the accused or the targeted.[55] In addition, as I noted earlier, even if there were a deliberative majority decision to delist, that decision could be vetoed by one of the five veto holders.

As to the second factor—the availability of information for credible presentation and representation—the information that is made available to the blacklisted parties under the current system will likely continue to be insufficient to allow them to credibly petition for delisting. As to the third and final factor, no one will reasonably contend that the Committee (even when helped by the Ombudsperson) is an independent decision maker.

For the listing and delisting process to be credible, it must be reviewed by an independent entity that is not directly accountable to the Security Council, which is charged to maintain international peace and security and is therefore likely to err on the side of security when it examines events and circumstances. Just like the executive branch in the United States, the Security Council will view its primary job as ensuring security and will thus likely strike the balance between security and

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53. Biersteker, *supra* note 7, at 113.

54. *Id.* ("Representatives either vote as instructed by their capital, or remain silent and make use of the no-objection provision.").

55. For the importance of a public deliberative process as a demonstration of "an appropriate solicitude for the legitimate interests" of individuals or entities whose rights are under threat, see Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 324 (2010). *See also* Adeno Addis & Jonathan Remy Nash, *Identitatrian Anxieties and the Nature of Inter-Tribunal Deliberations*, 9 CHI. J. INT'L L. 613, 618 (2009) ("[I]nter-tribunal dialogue . . . enhances the possibility of arriving at the correct or most defensible reason.").

human rights in favor of security.[56] Indeed, to the extent that the United States has played a key role in the development of the Council's counterterrorism policy (and it has), it is in fact the executive branch of the United States that has shaped that policy. It is no coincidence, therefore, that there is more than a passing resemblance between the executive branch's counterterrorism policy and that of the policy of the Council. That being the case, it seems reasonable to insist that in the same way that the courts in the United States have attempted to require the executive branch to justify its security measures, there needs to be an independent agency in the U.N. system that will play a similar role in relation to the Council.

The resistance to an independent review is likely to be based on a fear that an independent decision maker would fragment and undermine the Security Council's authority over international peace and security.[57] There are a number of responses to that fear or worry. First, sanctions against individuals and nonstate entities that are not linked to the action of states or state-like groups are a considerable expansion of the Council's Chapter VII authority. The Council is acting here not as a political body constrained by countervailing political actors as the Charter provides. Rather, it is acting as an adjudicative body without complying with proper adjudicative procedures. Therefore, there is no power to fragment! The notion of "encroachment" on the power of the Council should not have the same saliency here that it would have if and when the Council is acting in the context of an international security system that takes the states and their governments as the proper subjects of sanction and regulation.

Second, the establishment of independent adjudicative tribunals in the realm of international peace and security is not new. The Council has established a number of independent ad hoc tribunals to deal with individuals who are viewed as threats to international peace and security.[58] Now, it is true that these tribunals are dealing with cases where

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56. It is instructive that human rights has not figured much at all in the many resolutions that the Council has adopted announcing counterterrorism policies and strategies.

57. In fact, this was apparently a major reason why the Council did not accept the suggestion that the Ombudsperson should have the ability to recommend to the Council. *See* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 104 AM. J. INT'L L. 271, 284 (2010) ("The ombudsperson is not authorized, however, to make recommendations regarding specific cases. Several Council members, including China, France, and Russia, reportedly believed that allowing such recommendations would set an unwelcome precedent for second-guessing Security Council decisions.").

58. Examples are the ad hoc tribunals for the former Yugoslavia and Rwanda. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (Yugoslavia); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (Rwanda).

individuals are accused of serious crimes and their liberties are under threat while the blacklisted are only facing the freezing of their assets and restrictions on their movements. The first is punitive and the second preventive, we are told. But as I argued earlier, the distinction between what is punitive and what is preventive is rather hard to sustain credibly, at least in the specific circumstance. It is punitive to list an individual or an entity and to impose on it a highly intrusive long-term measure[59] that is severe and stigmatizing, which freezing of assets (that resembles confiscation) and travel bans are.[60]

Listing individuals and freezing their assets should not be viewed as a political and discretionary decision of the Council that merits presumption of legality in the same way that decisions to incarcerate an individual for committing certain international crimes (war crimes, crimes against humanity, genocide, etc.) are not, and should not be, regarded as political and discretionary. To paraphrase a famous decision of the United States Supreme Court, the Security Council is constrained by the conscience of its members and whatever limits the political organs (individual states, coordinate international organs such as the General Assembly, regional political organs, etc.) are able or willing to put on its actions, but on matters of individual rights, there is no discretionary power to wield.[61]

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59. The former High Commissioner for Human Rights, Louise Arbour, is right when she observed, "The longer an individual is on a list, the more punitive the effect will be." U.N. High Comm'r for Human Rights, Rep. of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, HUMAN RIGHTS COUNCIL, ¶¶ 47, 50, U.N. Doc. A/HRC/8/13 (June 2, 2008).

60. The European Court of Human Rights' reading of article 6 of the European Convention on Human Rights might be instructive here. The Court has held that whether a particular action should be denominated as a "criminal charge" is a function of many factors such as the nature and severity of the sanction or threatened sanction. *See, e.g.*, Lauko v. Slovakia, 1998-VI Eur. Ct. H.R. 2495, 2504; Lutz v. Germany, 123 Eur. Ct. H.R. (ser. A) at 7, 23 (1987). The severity of indefinite freezing of assets and the fact that the sanctioned individual will have difficulty securing any employment with such designation makes these targeted sanctions not qualitatively different from a punitive action.

61. Here I am of course referring to Chief Justice Marshall's famous statement in *Marbury v. Madison*. After noting that the question of "whether the legality of an act of the head of a department [e.g. the President of the United States] be examinable in a court of justice or not must always depend on the nature of that act," he concluded that the President is "invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803). Why? Because "[t]he subjects are political . . . not individual rights." When the issue involves individual rights then there is no political discretion to exercise. The President is accountable to an independent body such as the courts. *Id.* at 166.

V. WHAT ROLE FOR THE UNITED STATES IN REFORMING THE LISTING AND DELISTING PROCEDURES?

As I noted in the Introduction, the United States has a special responsibility to try to reform the system. This is so for a number of reasons. First, the listing process owes much of its current form to the push of the former U.S. Administration of George W. Bush. Indeed, many of those on the list were designated by the United States, and after September 11, 2001, there was so much goodwill that whatever the U.S. government suggested was added to the list.[62]

Second, the process is entirely at odds with the values that are meant to define the United States as a political community. As a candidate for president, Barack Obama campaigned on the eminently sensible policy that our security does not have to be purchased at the expense of our values.[63] Here is a circumstance that could vindicate that thinking, and the adoption of Resolution 1904 shows that the United States can play an important role in reforming the system in that direction.

Third, to the extent that the United States views itself as leading the global fight against terrorism, its capacity to build and retain the necessary coalition around the world is going to depend on both whether the procedures employed are fair and are perceived to be so. Legitimacy has both normative and sociological aspects to it. An action or a process is legitimate from the normative point of view to the extent that it complies with certain moral, ethical, or legal requirements. It is, for example, consistent with some notion of justice or due process. This is

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62. *See* Biersteker, *supra* note 7, at 102. "At the time (late fall 2001 and early 2002), the global outpouring of global sympathy for the US was such that there was very little scrutiny given to the proposed additions" to the U.N. list by the Treasury Department of the United States. *Id.* "Whatever names the US proposed were added to the list." *Id.* Indeed, the circumstances were such that "virtually every US-sponsored statement of [the] case placed before the 1267 committee was accepted by the other 14 security council members, with relatively little scrutiny or questioning. If the US wanted a designation made, so the logic went, it must have good reasons. Even if the designation was based on classified intelligence not made available to the other members of the council, as was the case with most of the US designations during this period, there was little or no opposition." *Id.*; *see* Cramér, *supra* note 7, at 88 ("Thus, it seems that the decisions taken by the Taliban Sanctions Committee have largely been based on information provided by the United States Government."); *see also* Terlingen, *supra* note 10 ("In the weeks following September 11, 2001, the United States swiftly added some 200 names to the Consolidated List.").

63. This was a statement that the presidential candidate often made, whether the issue was Guantanamo, torture, or secret prisons. The coordinator of the U.S. State Department's counterterrorism policy in the Obama Administration is also quoted as having said the following recently at an international meeting: "Our approach recognizes . . . that our counterterrorism efforts can best succeed when they make central respect for human rights and the rule of law. . . . As President Obama has said from the outset, there should be no trade-off between our security and our values." Terlingen, *supra* note 10.

the objective element of legitimacy which we might label as *normative legitimacy*. I have argued that the individualized sanctions system lacks normative legitimacy.

By *sociological legitimacy* I mean to suggest that an action or a process is perceived to be legitimate by those at whom it is directed or whom it is meant to bind. The lack of sociological legitimacy will certainly make it difficult for the act or the process to be effectively implemented, at least in relation to nonauthoritarian regimes. This is the subjective element of legitimacy. The Security Council (and the United States) would need the full cooperation of Member States for successful implementation. And that is more likely to occur when the process is viewed as legitimate.

It is precisely the concern that the process lacks minimal requirements of fairness that has led to challenges of the individualized sanction system before national and regional adjudicative bodies. The most famous and perhaps the most serious challenge is the decision of the European Court of Justice in *Kadi* and *al Barakaat*.[64] If the Council wishes to retain a coordinated and effective individualized sanctions system in relation to international terrorism, then it must realize that the sanctions system must be fair and must be seen as such by those expected to implement it and more importantly by the citizenry of those countries. Otherwise, the very fragmentation that the Council feared and intended to remedy when it established the listing system may become a reality.[65]

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64. Joined Cases C-402/05P & C-415/05P, Kadi v. Council, 2008 E.C.R. I-6351. Yassin Abdullah Kadi, a Saudi national, and Al Barakaat International Foundation, registered in Sweden, were designated by the 1267 Committee and as a result of that designation were subsequently added to the European Community blacklist. Both designees challenged the Council and the Commission of the European Communities before the European Court of Justice. The Court decided that the procedure followed by the EU Council violated many of the defendants' rights—such as the right to know the reason for the listing, the right to property, and access to effective judicial review—and therefore the regulation should have been annulled. *id.* In another case, the Human Rights Committee, the body that was established to monitor the implementation of the rights in the International Covenant on Civil and Political Rights, held that Belgium was in violation of its obligation under the Covenant when it froze the assets of a couple and designated their names for inclusion in the Council's Consolidated List. Ironically, however, although Belgium itself was finally convinced that the couple was erroneously designated and requested the Council to delist them not once but twice, it did not succeed! U.N. Human Rights Comm., Sayadi v. Belgium, Commc'n No. 1472/2006, ¶ 10.8, U.N. Doc. CCPR/C/94/D/1472/2006 (Dec. 29, 2008). It is not just from adjudicative bodies where challenges are coming. Several parliaments have started debating the issue. *See* Biersteker, *supra* note 7, at 104-05.

65. *See* Andrea Gattini, *Joined Cases C-402/05 P & 415/05 P,* Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, 46 COMMON MARKET L. REV. 213, 234 (2009). National and regional adjudicative bodies may assert jurisdiction to review

VI. CONCLUSION

There is no dispute that every nation has the right to protect its citizens from terrorist threats and attacks. And it is proper that the international community assist nations to better coordinate and deal with the worldwide threat posed by terrorism. But the individualized sanctioning process as a counterterrorism strategy raises serious problems. The Council is reaching to individuals as subjects of security concern, but the current security arrangement does not provide adequate safeguards for the security and liberty of accused individuals. Listed individuals' chances of challenging the action of the Council in national and regional courts are said to be unavailable by virtue of articles 25 and 103 of the Charter, which are understood to suggest that the decisions of the Council are not reviewable.[66] Perhaps so, but the Charter also provides that one of the major purposes of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms"[67] and the Council is required to "act in accordance with the Purposes and Principles of the United Nations."[68] The U.N. General Assembly understood that much.[69]

Thus, as a matter of law and fairness and as a matter of ensuring that its decisions are viewed as legitimate,[70] the Council should establish

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decisions of the Security Council "only to the extent, and so long as the UN did not organize a judicial or quasi-judicial system of review of the decisions of the Sanctions Committee." *Id.*

66. U.N. Charter arts. 25, 103. Under article 25, Member States agree "to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 103 provides that in the event of conflict between a Member State's obligation under the Charter and its obligation under any other international agreement its "obligations under the present Charter shall prevail."

67. U.N. Charter art. 1. As I noted earlier, what is remarkable about the resolutions establishing the individualized sanction systems is how very little reference there is about human rights. It is as if human rights cannot be constraints on the action of the Council. *See* BIERSTEKER & ECKERT, *supra* note 7, at 6 ("As one member of the UN secretariat observed . . . 'the issue of individual human rights was not thought through at the outset' [of the individualized sanction system].").

68. U.N. Charter art. 24. The General Assembly of the United Nations has also called on the Council to "ensure, as a matter of priority, that fair and transparent procedures exist for placing individuals and entities on its list, for removing them and for granting humanitarian exceptions," and thus recognizes that the promotion of human rights is a fundamental basis for the fight against terrorism. G.A. Res. 60/288, Annex II, ¶ 15, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

69. *See id.* Annex IV ("[R]eaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the [Counter-terrorism] Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.").

70. Each of the five permanent members of the Council faces (or it believes it faces) terrorist threats both as an individual country and as a member of the group. China has challenges from various ethnic groups that it calls terrorists. Russia has been fighting

an independent tribunal that has the authority to *decide* who is and who is not properly listed as a terrorist threat. The accuser should not also be the judge.[71] There are of course a variety of forms the tribunal could take as long as it complies with the three principles I listed earlier as being necessary for a legitimate process—the decision maker should allow the blacklisted to appear before it and argue their case, the information available to the accused should give them a credible chance to contest the accusation, and the decision maker should be independent of the initial accuser.

Otherwise, the process would continue to suffer not only from lack of normative legitimacy but from sociological legitimacy as well, making it less likely for Member States to cooperate fully in the implementation of its strategy and policy against international terrorism, a phenomenon the Council has correctly and repeatedly characterized as a threat to international peace and security.[72]

If the Obama Administration is serious about ensuring "new U.N. frameworks and capacities [for] counterterrorism" that are "credible" and "legitimate,"[73] then establishing an independent tribunal with the capacity to review and decide whether blacklisted individuals and entities should be delisted might not be a bad place from where to start.

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secessionist groups from Chechnya. The United Kingdom believes that it has terrorist threats from some of its citizens whose ancestors come from South Asia as well as remnants of the Northern Ireland Conflict. The United States is, of course, engaged with al-Qaeda and its worldwide network. Were the assessment of who is associated with or a supporter of terrorists to be left to the Council sitting as a committee, as currently is the case, then it is reasonable to assume that members of the committee (the executive branches of the various countries) will always err on the side of security. We have seen it in the domestic context. It is the courts that have forced members of the executive branches to pay some attention to the rule of law and to human rights concerns.

71. This has been precisely the issue in relation to the military tribunals established in the United States to try detainees who are accused of being "enemy combatants."

72. *See, e.g.*, S.C. Res. 1735, pmbl., U.N. Doc. S/RES/1735 (Dec. 22, 2006) ("[T]errorism in all of its forms and manifestations constitutes one of the most serious threats to peace and security.").

73. *See* NATIONAL SECURITY STRATEGY, *supra* note 1, at 46.