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The U.N. Security Council's

1267 Regime

and the Rule of Law in Canada

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I. Introduction

*Someone must have been telling tales about Josef K., for one morning,
without having done anything wrong, he was arrested.¹*

In July 2006, Canadian citizen Abousfian Abdelrazik was informed by a diplomat with Canada's Department of Foreign Affairs and International Trade that he had been added to the United Nations Consolidated List of individuals and entities associated with al Qaeda and the Taliban. Abdelrazik was not told why he had been placed on this list, or by whom. There were no charges pending against him, and there had been no trial or hearing to establish that he was actually associated with al Qaeda or the Taliban. Yet despite this lack of particulars as to the allegations or evidence against him, the lack of any actual inquiry into the merit of the allegations or evidence against him, Abdelrazik found himself the subject of a sanctions regime which entailed severe restrictions on his personal liberty. And despite being cleared by both the Canadian Security Intelligence Service ("CSIS") and the Royal Canadian Mounted Police ("RCMP") of involvement in any criminal or terrorist activities, Abdelrazik remains on the Consolidated List to this day.

The United Nations Consolidated List is the product of an anti-terrorism sanctions regime established by the United Nations Security Council in 1999. First established to target the activities of the Taliban, this sanctions regime – also known as the 1267 Regime² – was expanded to target al Qaeda and Osama bin Laden after the attack on the USS *Cole*. As further detailed below, individuals and entities on the Consolidated List (or the "1267 List") are subjected to restrictions such as international travel bans, asset freezes, and arms embargoes. The due process protections for individuals and entities finding themselves on the 1267 List are minimal – there is, for example, no recourse to judicial review of the United Nations' decision to list, or its refusal to delist. There is,

1 Franz Kafka, *The Trial*, trans. by Mike Mitchell (Oxford: Oxford University Press, 2009) at 5.

2 The 1267 Regime is so called because Security Council Resolution 1267 (1999) sets out the initial sanctions against the Taliban.

for another example, no requirement that the full reasons for listing ever be disclosed to the individuals or entities placed on the list. There is no right to know the identity of the state seeking the listing. The paucity of information provided to those listed stands in stark contrast to the burdens placed on them as a result of their listing.³

As it is currently administered by the United Nations and implemented by Canada, the 1267 Regime fails to comport with basic principles of procedural fairness and due process – principles by which Canada must abide, either as an international legal obligation or as a constitutional obligation. Yet, like all states party to the *Charter of the United Nations* (the “UN Charter”), Canada is in a difficult position. The UN Charter constitutes the supreme international law, and it requires all states to give domestic effect to all resolutions passed by the Security Council. So what happens where, as here, the Security Council mandates adoption of a regime that does not adhere to basic human rights – a regime that would put the implementing state in violation of other international covenants and laws, and in violation of its own constitutional principles?

This paper explores this question through an analysis of the 1267 Regime and its legality under international and Canadian law. First, it discusses the background of the sanctions regime, describes its current manifestation and recounts criticisms of the 1267 Regime by the international community. Second, it discusses whether the regime comports with due process standards as established in international law, and considers how foreign courts have resolved challenges to the 1267 Regime. Third, it considers whether Canada’s implementation of the 1267 Regime is consistent with its due process obligations under the *Charter of Rights and Freedoms* and the *Bill of Rights*, using the experience of Abdelrazik as an example of Canada’s domestic implementation at work. Finally, the paper considers the necessity for the Security Council to take action to ensure that the 1267 Regime respects fundamental human rights and basic due process.

3 The specific measures making up the sanctions regime may themselves impinge on human rights, even where procedural rights related to the creation and maintenance of the sanctions blacklist are respected. For example, travel bans may impermissibly interfere with freedom of movement. An asset freeze impacts an individual’s right to property, and the fact that an individual is listed at all may impinge on his or her privacy and reputation rights. This paper will limit its discussion to the lack of due process protections within the 1267 Regime, as the question of whether the rights to property and free movement, for example, have been impermissibly infringed cannot be properly analyzed without first establishing that the decision to impose sanctions is a fair one.

II. The 1267 Regime

A. Background

The United Nations was established in 1945 with the hope of securing international peace and security in the wake of two devastating world wars. The preamble of the UN Charter makes clear the aspirations of all the Member states: to save succeeding generations from the scourge of war; to reaffirm faith in fundamental human rights; to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.⁴

Established pursuant to Chapter V of the UN Charter, the Security Council has primary responsibility for the “maintenance of international peace and security”⁵ “in accordance with the Purposes and Principles of the United Nations”⁶. To that end, Chapter VII of the UN Charter authorizes the Security Council to take necessary action to address threats to international peace, breaches of the peace and acts of international aggression. Such actions can include the establishment of sanctions regimes. The Security Council is given broad discretion to determine the existence of threats, breaches or acts in violation of international peace.⁷

The Security Council is not designed to be a legislative body. It does, however, have law-making abilities since the UN Charter obliges all member states to “accept and carry out” the decisions of the Security Council⁸. The Security Council is not a representative body. Its membership is only partially elected – of its 15 members, only ten are elected by the General Assembly, and those members serve two-year terms. The other five countries sitting on the Security Council are the permanent members – China, France,

4 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [“UN Charter”] at Preamble.

5 *Id.* at Ch. V, Art. 24(1).

6 *Id.* at Ch. V, Art. 24(2).

7 *Id.* at Ch. VII, Art. 39.

8 *Id.* at Ch. V, Art. 25.

Russian Federation, the United Kingdom and the United States; each of the permanent members has veto power over any decision undertaken by the Security Council.

Decision-making at the Security Council takes the form of resolutions. Sanctions regimes, such as the 1267 Regime, are established through Security Council Resolutions (“SCRs”), pursuant to the Security Council’s authority under Article 41 of the UN Charter, which states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The restrictions making up the sanctions regime are given international effect through domestic implementation by each of the individual Member states of the United Nations.

In the wake of the bombing of the U.S. embassies in Nairobi and Dar es Salaam by Osama bin Laden and his associates, the Security Council passed SCR 1267, which implemented a targeted sanctions regime against the Taliban, which was accused of providing safe haven and training grounds for bin Laden and his followers. The sanctions were directed at a particular government – in this case, the Taliban, which was the ruling regime in Afghanistan at the time. The rationale behind targeting sanctions at specific governments is to encourage them to change their conduct; this has been the traditional approach of the Security Council’s sanctions regimes.

In practical terms, SCR 1267 imposed an asset freeze on the Taliban. Specifically, member states were required to freeze funds and financial resources held by the Taliban, or derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by them.⁹ A sanctions committee, known as the 1267 Committee, was established to ensure that these measures were implemented.

The following year, the Security Council expanded on this sanctions regime with SCR 1333, which undertook to impose a similar asset freeze on Osama bin Laden and

⁹ UN SC Res. 1267, S/RES/1267 (1999) [“SCR 1267”] at para. 4(b).

individuals and entities associated with him or al Qaeda¹⁰. While this was not the first time that the Security Council had directed sanctions against individuals¹¹, it was the first time that it had sought to target those who were not serving as proxies or representatives of states, and represented a significant expansion in the exercise of the broad powers invested in the Security Council. SCR 1333 also called for the establishment of what would become known as the Consolidated List, or the “1267 List”, of individuals and entities subject to the 1267 sanctions regime.

SCRs 1267 and 1333 set out the basic framework for the 1267 Regime, which was refined and updated through a series of subsequent resolutions. For example:

- * In addition to the asset freeze outlined in SCRs 1267 and 1333, SCR 1390¹² imposed an international travel ban and arms embargo on individuals and entities on the 1267 List.
- * SCR 1452¹³ created certain humanitarian exemptions to the asset freeze; up to this time, the asset freeze had been absolute, which meant that individuals on the 1267 List had no legal way of accessing funds for food, shelter or medical care. Pursuant to SCR 1452, funds “necessary for basic expenses”¹⁴ or funds

10 UN SC Res. 1333, S/RES/1333 (2000) [“SCR 1333”] at para. 8(c).

11 Other Security Council sanctions regimes targeting individuals include sanctions established pursuant to SCRs 1132 (targeting members of the former military junta in Sierra Leone and the RUF, as well as adults in the families of those members); 1518 (targeting Saddam Hussein, senior officials of his regime, Hussein’s immediate family, entities controlled by these parties, and former government officials); 1521 (targeting Charles Taylor, his family, and close associates, as well as officials in Liberia’s official regime); 1533 (targeting foreign and Congolese armed groups not party to the global and all-inclusive agreement in the Democratic Republic of Congo); 1572 (targeting individuals in Cote d’Ivoire posing a threat to peace and national reconciliation, who have violated human rights and international law, or are obstructing UN and French forces); 1636 (targeting individuals suspected of involvement in the assassination of former Lebanese Prime Minister Rafiq Hariri); 1718 (targeting individuals supporting nuclear proliferation in North Korea); 1737 (targeting individuals supporting nuclear proliferation in Iran). These resolutions, however, have been directed at individuals associated with a particular regime in a particular country.

12 UN SC Res. 1390, S/RES/1390 (2002) [“SCR 1390”].

13 UN SC Res. 1452, S/RES/1452 (2002) [“SCR 1452”].

14 *Id.* at para. 1(a).

“necessary for extraordinary expenses”¹⁵ would be considered exempt from the asset freeze upon application from the state enforcing the freeze to the 1267 Committee.

- * SCR 1526 called upon states submitting listing requests to include identifying and background information demonstrating the individual or entity’s association with the Taliban, Osama bin Laden or al Qaeda “to the greatest extent possible”, though it fell short of creating an actual requirement to do so.¹⁶ Prior to this, there was no suggestion of requiring any evidentiary standard for listing. Eventually, SCR 1617 created a requirement that when proposing names for the 1267 List, states must also submit a statement of case describing the basis of the proposal, and to make that statement available to member states whose nationals, residents or entities are included on the 1267 List.¹⁷ However, there was still no specification as to how much information a statement of case must provide, beyond basic identifying information. SCR 1904 decided that the statement of the case “shall be releasable upon request, except for the parts a Member State identifies as being confidential to the Committee”.¹⁸
- * It was not until December 2006 that the Security Council, via SCR 1730, adopted a procedure to provide those placed on the 1267 List with a means of seeking their own delisting.¹⁹ Nonetheless, at this time, those on the 1267 List still had no right to know the basis for their listing, and had no access to the statement of case required by SCR 1617.
- * In 2008, the Security Council finally directed the 1267 Committee to make public at least the summary reasons supporting a listing.²⁰ Amidst criticism concerning the currency of the 1267 List, the Security Council also directed the

15 *Id.* at para. 1(b).

16 UN SC Res. 1526, S/RES/1526 (2004) [“SCR 1526”] at para. 17.

17 UN SC Res. 1617, S/RES/1617 (2005) [“SCR 1617”] at paras. 4, 6. SCR 1617 provided – for the first time since the Regime’s inception – a definition of what constituted association with the Taliban, Osama bin Laden or al Qaeda. *Id.* at para. 2.

18 UN SC Res. 1904, S/RES/1904 (2009) [“SCR 1904”] at para. 11.

19 UN SC Res. 1730, S/RES/1730 (2006) [“SCR 1730”] at para. 1.

20 UN SC Res. 1822, S/RES/1822 (2008) [“SCR 1822”] at para. 13.

1267 Committee to conduct a review of all names on the List to ensure that listing remained appropriate, and to thereafter undertake an annual review of names that have not been reviewed in three or more years.²¹

- * The most recent resolution relating to the 1267 Regime is SCR 1904, which was adopted in December 2009.²² SCR 1904 created an Ombudsperson's Office, which would serve as the point of contact for individuals and entities seeking to be delisted. The Ombudsperson is appointed by the Secretary-General of the United Nations (in "close consultation" with the 1267 Committee), and is responsible for reviewing materials relevant to the delisting application and making a non-binding recommendation on the application to the 1267 Committee. Parties seeking delisting are permitted to submit materials in support of their applications, but there is no right to a hearing before the Ombudsperson or the 1267 Committee, nor is there a right to know entirely the evidence available to the Ombudsperson or the Committee. The final decision regarding delisting remains with the 1267 Committee.²³

Thus, the requirements of the 1267 Regime at the time of this writing mandate all Member states to take all the measures previously imposed by the Security Council's preceding resolutions with respect to al Qaeda, Osama bin Laden and the Taliban and "other individuals, groups, undertakings and entities associated with them" as referred to in the 1267 List. These measures require Member states to do the following:

- (a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, by their nationals or by persons within their territory;²⁴

21 *Id.* at paras. 25-26.

22 SCR 1904, *supra* note 18.

23 *Id.* at paras. 20, 21.

24 The definition of "financial assets and economic resources" employed by the Security Council is extraordinarily broad; it includes, for example, "provision of Internet hosting or related services". SCR 1904, *supra* note 18 at para. 4.

- (b) Prevent the entry into or transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfillment of a judicial process or the Committee determines on a case-by-case basis that entry or transit is justified;
- (c) Prevent the direct or indirect supply, sale, or transfer to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical advice, assistance, or training related to military activities.”²⁵

As the 1267 Regime has evolved over the past decade, changes in its procedures and structure have been implemented to address ongoing due process concerns.²⁶ The earliest incarnations of the 1267 Regime provided no mechanism for challenging a listing. Individuals or entities placed on the 1267 List received no notification of their listing, and were not even permitted to submit delisting applications on their own behalf. The modifications described above have been attempts to make the listing and delisting processes more transparent, though these changes are far from adequate and significant flaws in the operation of the Regime remain. For example:

- * Responsibility for the compilation of the 1267 List rests with the 1267 Committee. Likewise, the 1267 Committee remains the final arbiter on delisting petitions, and the Committee’s decision is entirely discretionary, regardless of the evidence presented. The Committee’s decisions are also reached by consensus, which means that if an individual seeking delisting was placed on the list at the behest of a member of the Committee, that country could exert veto power over a delisting petition. There is no recourse to an independent or judicial review to challenge the 1267 Committee’s decisions, effectively meaning that there is no accountability for the 1267 Committee’s decision-making. Listings are indefinite – individuals and entities remain on the 1267 List until the Committee decides otherwise.

25 SCR 1904, *supra* note 18 at para. 1

26 Some of these criticisms will be discussed in greater detail in Section II.B, *infra*.

- * Individuals have no opportunity to make their case before the 1267 Committee prior to being placed on the blacklist, as they are not informed that measures are being contemplated against them.²⁷ They are informed of their placement on the 1267 List by their countries of citizenship or residence, “to the extent possible”.
- * Those listed have no right to know of the evidence against them. While states proposing new designations are required to provide a statement of the case for the listing, there is no requirement that this statement be made available to the individual or entity listed.²⁸ Rather, the statement may be marked as confidential to the 1267 Committee, upon the request of the designating state.²⁹ Thus, unless a Member state is currently sitting on the Security Council, it may never be able to access a statement of case advocating for the listing of one of its own residents or citizens. Meanwhile, there is no specified mechanism for the 1267 Committee to review the accuracy of the evidence presented or the allegations made against an individual or entity proposed for listing.³⁰
- * Nor do listed individuals have any right to know the identity of the countries accusing them of associating with the Taliban or al Qaeda. The identity of a designating state can remain secret, even from other UN member states.³¹ Thus, a Canadian resident or citizen can be placed on the 1267 List at the request of a foreign country, and the Canadian government may never know the identity of the designating country.
- * Individuals cannot petition the 1267 Committee for exemptions from the asset freeze; rather, Member states must agree to do so on a listed individual’s behalf.
- * States are under no strict obligation to inform the 1267 Committee of relevant court decisions or proceedings which may impact the decision to maintain a

27 The rationale for this is to ensure that targeted parties do not have an opportunity to hide or divert their assets before a freeze is put into place.

28 SCR 1904, *supra* note 18 at para. 11.

29 *Id.* at para. 11.

30 See UN SC, *Update Report no. 4: 1267 Committee: Al-Qaida/Taliban Sanctions*, 21 April 2008 [“Security Council Update Report”] at 4.

31 SCR 1904, *supra* note 18 at para. 12.

listing.³² Nor is there any requirement that designating states provide updated or potentially exculpatory information about the individuals and entities placed on the 1267 List at their request.³³ States are merely “encouraged” to provide such information to the 1267 Committee.³⁴

- * Those challenging their listing are given very limited rights of participation in the delisting process. The petitioner is not permitted to communicate directly to the 1267 Committee, and there is no opportunity to present one’s defence or assert one’s rights directly during the delisting process. After the initial submission of the delisting petition, the petitioner has no role to play in process, unless the Ombudsperson requires further information from the petitioner. As for the petitioner, he or she has no right to know what arguments and evidence are being presented either for or against the delisting request. The 1267 Committee deliberates in secret, during a closed session which the petitioner has no right to attend, either personally or through a representative.³⁵ If the 1267 Committee rejects a delisting request, it is not required to provide any reasons for its objection, whether such requests are made by designating states, states of residence³⁶, or by the listed individual or entity³⁷.

32 *Id.* at para. 15.

33 A brief hypothetical can readily illustrate the problems arising from the lack of such requirements. For example, Country X requests that A, an individual, be placed on the 1267 List because of his known connections to Z, a senior member of al Qaeda. It is later shown, through court proceedings and new evidence, that Z is not a member of al Qaeda at all, and in fact, has no connections with al Qaeda, Osama bin Laden, or the Taliban. Accordingly, A’s purported connections to Z cannot be considered a basis for placing A on the 1267 List. However, given that Country X has no obligation to inform the 1267 Committee of this new evidence or of the court proceedings, the 1267 Committee has little reason to reconsider A’s listing. The scenario described here is perhaps not entirely hypothetical, as the discussion about Abousfian Abdelrazik in Section IV.A, *infra*, shows.

34 SCR 1904, *supra* note 18 at para. 28.

35 See Security Council Committee Established Pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, “Guidelines for the Committee for the Conduct of its Work”, available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf [“1267 Committee Guidelines”].

36 SCR 1904, *supra* note 18 at para. 25.

37 *Id.* at Annex II, paras. 12 - 13. These paragraphs provide that the 1267 Committee can, “as appropriate”, provide reasons to the Ombudsperson for rejecting a delisting request, which

These due process concerns are particularly troubling with this specific sanctions regime. What distinguishes the 1267 Regime from many other UN sanctions regimes is that it targets individuals³⁸ – individuals who are not representatives or proxies for rogue governments, but rather, individuals who are simply alleged to have some association with certain terrorist organizations.³⁹ The scope of the 1267 Regime is wider than any other targeted sanctions regime – close to half of the currently listed individuals and entities under Security Council sanctions regimes are on the 1267 List. It is preventative in nature; that is, it places restrictions on liberty based not on what individuals are proven to have done, but what they may do in the future.⁴⁰ While the restrictive measures imposed by the 1267 Regime on listed individuals and entities are not meant to be punitive, the affect they have on individuals is comparable to criminal penalties, particularly considering the severe burdens imposed by the asset freeze and the travel ban. But because sanctions regimes are generally the product of political processes – not legal ones – they may not necessarily be created with procedural and legal protections in mind. As a result, the imposition of sanctions requires far less evidence of wrongdoing than the imposition of criminal penalty, as is evident in the 1267 Regime.

B. Criticisms of the 1267 Regime

The 1267 Regime’s procedural infirmities have attracted criticism from around the world, ranging from the United Nation’s own experts to foreign governments and international courts. At least fifty states have expressed concern over the 1267 Regime’s lack of due process protections.⁴¹

the Ombudsperson is, in turn, to communicate to the petitioner. There is no requirement, however, that any reason be communicated at all be the 1267 Committee.

38 The move towards implementing targeted sanctions as opposed to comprehensive sanctions was born of good intentions. Comprehensive sanctions, such as those targeting entire states, have significant unintended consequences, particularly on vulnerable populations living under the sanctioned regime. Targeted sanctions were thought to reduce the overall human cost of Security Council sanctions. *See, e.g.*, Solomon Major & Anthony McGann, “Caught in the Crossfire: ‘Innocent Bystanders’ as Optimal Targets of Economic Sanctions” (2005) 49 *J. Confl. Resolution* 337 at 339-341; Thomas G. Weiss, “Sanctions as a Foreign Policy Tool” (1999) 36 *J. Peace Research* 499 at 503-504.

39 *See* note 11, *supra*.

40 *See* 1267 Committee Guidelines, *supra* note 35.

41 *See* Ian Johnstone, “The UN Security Council, Counterterrorism and Human Rights” in

United Nations experts

In September 2005, the UN General Assembly passed a resolution on behalf of the Heads of State and Government of the Member States of the United Nations, which “call[ed] upon the Security Council with the support of the Secretary-General to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.”⁴² Further to this resolution, the UN Office of Legal Affairs commissioned Bardo Fassbender, a professor of law at the Institute of International and European Law at Humboldt University Berlin, to undertake a study on the legality of the Security Council’s sanctions regimes.

This study (the “Fassbender Report”) was published on March 20, 2006.⁴³ Fassbender observed that

[t]he human rights and fundamental freedoms which the organs of the United Nations are obliged to respect by virtue of the UN Charter include rights of due process, or “fair and clear procedures”, which must be guaranteed whenever the Organization is taking action that adversely affects, or has the potential of adversely affecting, the rights and freedoms of individuals.⁴⁴

Accordingly, Fassbender concluded that

When imposing sanctions on individuals in accordance with Chapter VII of the UN Charter, the Security Council must strive for discharging its principal duty to maintain or restore international peace and security while, at the same time, respecting the human rights and fundamental freedoms of targeted individuals to the greatest possible extent. There is a duty of the Council duly to balance the general and particular interests which are at stake. Every measure having a negative impact on human rights and freedoms of a particular group or category

Andrea Bianchi & Alexis Keller, ed., *Studies in International Law: Counterterrorism: Democracy’s Challenge* (Oxford: Hart Publishing, 2008) 335 at 344.

42 2005 World Summit Outcome, GA Res. 60/1, UN GAOR, 60th Sess., A/RES/60/1 (2005) at para. 109.

43 Bardo Fassbender, *Targeted Sanctions and Due Process* (Study commissioned by the UN Office of Legal Affairs, March 2006) [“Fassbender Report”]. This study was to be reviewed by the UN Secretariat Policy Committee, which would in turn submit recommendations to the 1267 Committee on how to better structure the 1267 Regime. The 1267 Committee, however, determined that it would only consider proposals from its own members, so the findings of the Fassbender Report were never officially transmitted. See Johnstone, *supra* note 41 at 343.

44 Fassbender Report, *supra* at note 43 at Part C, para. 9.

of persons must be necessary and proportionate to the aim the measure is meant to achieve.⁴⁵

While Fassbender made no explicit criticism of the 1267 Regime specifically, the Regime – as it existed at the time the Fassbender Report was published, and as it exists now – does not contain all of the due process protections cited by Fassbender as necessary for ensuring that the “rights or due process, or ‘fair and clear procedures’” are respected.⁴⁶

Specifically, according to Fassbender, in order for due process rights to be respected, individuals subject to Security Council sanctions regimes must, *inter alia*, be afforded access to an “effective remedy before an impartial institution.”⁴⁷ While Fassbender recognized that an Ombudsperson Office could serve as an impartial institution for providing an effective remedy, he noted that for a remedy to be considered effective, it is necessary to determine whether there is compliance with decisions made by the reviewing body.⁴⁸ But in the 1267 Regime, the Ombudsperson has no ability to make decisions as to whether an individual should remain on the 1267 List. The reviewing body with adjudicative power remains the 1267 Committee, which is not independent.

According to Fassbender, where the sanctions committee – in this case, the 1267 Committee – holds the authority to make the final decision to list or delist, the Ombudsperson must have the power to make a binding recommendation for the review process to be considered sufficiently impartial.⁴⁹ In the case of the 1267 Regime, the Ombudsperson has no such authority to make a binding recommendation on the 1267 Committee.

In 2006, then-UN Secretary-General Kofi Annan sent a letter to the President of the Security Council, outlining his views on the minimum standards for listing and delisting individuals and entities subject to targeted sanctions regimes. While this letter was never published, its contents were read into the record of a June 2006 public meeting of the Security Council by Nicolas Michel, Legal Counsel of the United Nations. The standards outlined by the Secretary-General included, importantly, a right of review of listing

45 *Id.* at Part C, para. 11 (internal citations omitted).

46 *Id.* at Part D, para. 12.

47 *Id.* at Part D, para. 12.

48 *Id.* at Part D, paras. 12.9 - 12.10.

49 *Id.* at Part D, para. 12.12.

decisions by an impartial and independent mechanism. Specifically:

[A person against whom measures have been taken by the Security Council] has a right to review by an effective review mechanism. The effectiveness of that mechanism will depend on its impartiality, degree of independence and *ability to provide an effective remedy, including the lifting of the measure and/or, under specific conditions to be determined, compensation.*⁵⁰

To this day, though, no such independent review mechanism exists for challenging a decision to list or a refusal to delist.

In October 2008, Martin Scheinin, the United Nations Special Rapporteur⁵¹ on the promotion and protection of human rights and fundamental freedoms while countering terrorism, gave a press conference during which he stated that the 1267 Regime's listing procedures did not meet due process requirements of fair trial.⁵² He suggested that it may be necessary to abolish the 1267 Regime entirely and leave listing decisions at the national level with UN member states, where such decisions would be subjected to effective review. Scheinin argued that ensuring the right to a fair trial is of strategic importance in countering terrorism: denying due process rights would only serve to create a sense of injustice and exclusion, which may actually compel individuals to engage in terrorism.⁵³

International bodies and governments

In January 2008, the Parliamentary Assembly for the Council of Europe issued a resolution harshly criticizing the 1267 Regime and its implementation by the Council of the European Union.⁵⁴ In its Resolution 1597, the Parliamentary Assembly found the 1267 Regime to “violate the fundamental principles of human rights and the rule of

50 UN SCOR, 61st Year, 5474th Mtg., UN Doc. S/PV.5474 (2006) at 5 [provisional] (emphasis added).

51 United Nations Special Rapporteurs are human rights experts appointed by the UN Secretary-General, carrying out mandates from the UN Human Rights Council to investigate, monitor, and make recommendations on specific human rights issues.

52 Press Conference by Martin Scheinin, Special Rapporteur on Human Rights and Countering Terrorism (22 Oct. 2008) United Nations Department of Public Information, *available at* http://www.un.org/News/briefings/docs//2008/081022_Scheinin.doc.htm.

53 *Id.*

54 Council of Europe, P.A., *United Nations Security Council and European Union blacklists*, Res. 1597 (2008) [EU Res. 1597].

law.”⁵⁵ Specifically, it found that certain “minimum procedural standards under the rule of law” were unfulfilled, including the right for all individuals:

- [5.1.1] to be notified promptly and fully informed of the charges held against himself or herself, and of the decision taken and the reasons for that decision;
- [5.1.2] to enjoy the fundamental right to be heard and to be able to defend himself or herself;
- [5.1.3] to be able to have the decision affecting his or her rights speedily reviewed by an independent, impartial body with a view to modifying or annulling it; [and]
- [5.1.4] to be compensated for any violation of his or her rights.

Almost all of the criticisms leveled against the 1267 Regime in Resolution 1597 remain valid today. For example, with respect to procedure, the Parliamentary Assembly stated that:

- [6.1] [...] it must be noted and strongly deplored that even the members of the committee deciding on the blacklisting of an individual are not fully informed of the reasons for a request put forward by one member. The person or group concerned is usually neither informed of the request, nor given the possibility to be heard, or even necessarily informed about the decision taken – until he or she first attempts to cross a border or use a bank account. There are no procedures for an independent review of decisions taken or for compensation for infringements of rights. Such a procedure is totally arbitrary and has no credibility whatsoever.
- [6.2] Similarly, substantive criteria for the imposition of targeted sanctions are at the same time wide and vague, and sanctions can be imposed on the basis of mere suspicions. This is a deplorable situation, and breaches human rights and fundamental freedoms.⁵⁶

In December 2008, Thomas Hammarberg, the Commissioner for Human Rights for the Council of Europe, offered his criticisms of the 1267 Regime, remarking that “[b]lacklisting’ is indeed a striking illustration of how human rights principles have

55 *Id.* at para. 6

56 *Id.* at paras. 6.1 - 6.2. *See also* International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009) at 116-117 (observing that it “shares the concerns of the Parliamentary Assembly of the Council of Europe that the [1267 Regime’s] procedures of listing undermine the credibility of the international fight against terrorism, and is ‘unworthy’ of international institutions like the UN and the EU.” (internal citations omitted)).

been ignored in the fight against terrorism.”⁵⁷ According to Hammarberg, if the supreme authority of the Security Council is to be protected as a matter of international law and international practice, then the Security Council must act “in harmony with agreed international human rights standards.” He called for the establishment of an independent review of each decision to list, prior to placing any individual or entity on the 1267 List, to “ensure the right of the individual to know the full case against him or her, the right to be heard within a reasonable time, the right to an independent review mechanism, the right to counsel [...] and the right to an effective remedy.”⁵⁸

And as recently as March 2010, Switzerland issued its own strong disapproval of the 1267 Regime. The Swiss Parliament approved a resolution (the “Swiss Resolution”) that the Swiss Government inform the United Nations Security Council that the Swiss government will not apply the sanctions required under the 1267 Regime against individuals who have not “been brought to justice” (“n’ont toujours pas été déférées à la justice”) after three years of being placed on the 1267 List; who do not have the right of judicial review of their listing; who have not been charged by any judicial authority; and against whom no new evidence has been produced since being included on the List.⁵⁹

The Swiss Resolution reflects the Swiss Parliament’s concern that the 1267 Regime imposes harsh sanctions indefinitely against individuals who may have no charge pending against them, who may have no evidence supporting their listing, who simply cannot access judicial review of the decision to place them on an international blacklist. As described in the supporting report accompanying the Swiss Resolution:

L’inscription sur la liste noire du Conseil de sécurité est proposé par un État (à ma connaissance toujours accepté) et engendre des conséquences très graves pour la liberté de la personne concernée: tous ses biens sont bloqués dans le monde entier et il lui est interdit de passer une frontière. Contre cette mesure il n’existe aucune possibilité de recourir à un organisme indépendant. Les motifs exacts à la base de la décision ne sont que très partiellement portés à la connaissance de l’intéressé et même les membres du Comité des sanctions n’ont qu’un accès restreint aux informations à la base de la requête de l’inscription.⁶⁰

57 Council of Europe, Commissioner for Human Rights, *Arbitrary procedures for terrorist black-listing must now be changed* (2008), available at http://www.coe.int/t/commissioner/viewpoints/081201_en.asp.

58 *Id.*

59 Parliament of Switzerland, *Les fondements de notre ordre juridique court-circuités par l’ONU* (adopted 4 March 2010) at para. 1.

60 *Id.* at para. 1.2.

Accordingly, the Swiss Resolution also called upon the Swiss Federal Government to make clear to the United Nations and the Security Council that it is not possible for a democratic country committed to the rule of law to administer measures such as those required by the 1267 Regime. Specifically:

Le Conseil fédéral, tout en réaffirmant sa volonté inébranlable de collaborer dans la lutte contre le terrorisme, doit clairement faire valoir qu'il n'est pas possible pour un pays démocratique fondé sur la primauté du droit que des sanctions prononcées par le Comité des sanctions, en dehors de toute garantie processuelle, aient pour conséquence qu'on suspende, pendant des années et en dehors de toute légitimité démocratique, les droits fondamentaux les plus élémentaires, ces droits justement proclamés et propagés par l'Organisation des Nations Unies.⁶¹

61 *Id.* at para. 2

III. Due Process Rights: International Perspectives

That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.⁶²

Consistent across the international critiques of the 1267 Regime is an understanding that due process (or procedural fairness) is a fundamental component of the rule of law, and one which has been essentially disregarded by the Security Council. Due process is a principle that is enshrined in international instruments and national constitutions. Section IV.B, *infra*, will look specifically at how due process rights are protected by the Canadian constitution. This section, however, will first consider procedural fairness as a right enshrined in international law, and discuss how international judicial authorities have treated challenges to the 1267 Regime.

Due process is a foundational element of the rule of law. The guarantee of fairness in adjudication, imposition of penalties, and decision-making that impacts the lives of individuals is fundamental to democratic societies. It is also the vehicle through which human rights are protected – for rights to be meaningful, they must be enforceable, which means that individuals must have the ability to access impartial courts and institutions to resolve claims of rights violations. It has thus been observed that “the protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for ‘substantive protection’ against state power. The protection of human rights therefore begins but does not end with fair trial rights.”⁶³

Due process rights encompass a range of rights relating to access to the courts and to fair trials, and can be derived from the two foundational axioms of natural justice or

62 S.A. de Smith, *et al.*, *Judicial Review of Administrative Action*, 4th ed. (London: Stevens, 1980) at 157 (internal citations omitted).

63 Richard Clayton & Hugh Tomlinson, *Fair Trial Rights* (Oxford: Oxford University Press, 2001) at 2.

procedural fairness in the common law. The first of these axioms is the principle of *audi alteram partem*, or, “hear the other side”, which specifies the contents of the hearing. The second is the principle of *nemo iudex in causa sua*, or, “no one ought to be a judge in his or her own cause.”⁶⁴

Due process rights can include the following:

- * The right of access to the court for adjudication of disputes or claims of rights violations
- * The right to an independent and impartial adjudicator
- * The right to be heard before an adverse measure is imposed
- * The right to know and challenge the evidence presented
- * The right to know the reasons for judgment

While the 1267 Regime is not a criminal one, *per se*, it nonetheless possesses a sheen of criminality. Sanctions, while not designed to be punishments, are nonetheless punitive in effect if the result is that individuals are denied access to their own property and limited in their ability to work and travel; in a sense, they impose a penalty without due process of law.⁶⁵ The designation as a listed individual also suggests criminality; because the criteria for listing are based on association with terrorist organizations, the act of listing has criminal connotations.⁶⁶ As one commentator has observed:

[32] [...] [T]he sanctions procedures seem to have both criminal and civil elements. The 1267 Committee lists individuals on the basis of their association with Al-Qaeda, Usama bin Laden, or the Taliban. Association with terrorism, a criminal activity, would seem to have a criminal element and the impact of some of the measures imposed

64 *Id.* at 26.

65 Johnstone, *supra* note 41 at 341.

66 See Thomas J. Biersteker & Sue Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (White paper prepared by the Watson Institute Targeted Sanctions Project) (2006) at 13; see also Dick Marty, *United Nations Security Council and European blacklists*, Report to the Council of Europe Committee on Legal Affairs and Human Rights, Doc. 11454, available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11454.htm>, at para. 26 (“Merely being listed can besmirch one’s reputation by implying that the individual or entity in question is associated with terrorists or even a direct participant in terrorism.”).

arguably rises to the level of criminal sanctions. Yet the Third Report of the 1526 Sanctions Monitoring Team states that '[a]lthough many of those on the List have been convicted of terrorist offences and others indicted or criminally charged, the List is not a criminal list. The sanctions do not impose a criminal punishment of procedure [...] but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales.

[33] However, it does not necessarily follow from the above excerpt that the sanctions are civil in nature [...] ⁶⁷

Accordingly, due process principles relating to the rights of the criminally accused have some bearing here. These rights can include the following:

- * The right to be presumed innocent
- * The right to be promptly informed of the charges
- * The right to mount a defence in person
- * The right to examine or have examined witnesses against him or her

At international law, due process rights were first formally recognized in 1948 with the adoption of the Universal Declaration of Human Rights⁶⁸, which provides, in relevant part:

Art. 8 Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

[...]

Art. 10 Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Art. 11(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

⁶⁷ See Marty, *supra* note 66 at paras. 32-33.

⁶⁸ *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

These principles were subsequently codified in the international human rights treaties.

The International Covenant on Civil and Political Rights (“ICCPR”)⁶⁹, to which Canada is a signatory, states, in relevant part:

Art. 2 (3) Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

[...]

Art. 14(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

[...]

Art. 14(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Art. 14(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

[...]

(d) To be tried in his presence, and to defend himself in person or through legal

⁶⁹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976)[“ICCPR”].

assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Likewise, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), which binds the 47 states making up the Council of Europe, guarantees that “[i]n the determination of his civil rights and obligations⁷⁰ or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁷¹ The rights of the criminally accused are set out in Article 6 of the ECHR and mirror those set forth in the UDHR and ICCPR. The ECHR also provides for a right to an effective remedy: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”⁷²

The regional human rights instruments, such as the American Convention on Human Rights (1969), African [Banjul] Charter on Human and Peoples’ Rights (1981), and Arab Charter of Human Rights, all contain some due process guarantee. While the formulation and the specifics of the due process guarantee differs slightly between the various treaties and declarations, there are several overarching principles that can be concluded as establishing a universal baseline for due process protections. Thus, as the Fassbender Report notes:

[...] it can be concluded that today international law provides for a universal minimum standard of due process which includes, *firstly*, the right of every person

70 The difference between the “fair trial” language in the ICCPR (which speaks of “rights and obligations in a suit at law”) and the ECHR (which discusses “civil rights and obligations”) has led some scholars to argue that these two provisions contemplate different concepts. However, the French versions of the two treaties both contain identical language: “des contestations sur ses droits et obligations de caractère civil”, which suggests that both clauses should be considered to express the same concept, as well. See Biersteker & Eckert, *supra* note 66 at 11.

71 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [“ECHR”] at Art. 6(1).

72 *Id.* at Art. 13.

to be heard before an individual governmental or administrative measure which would affect him or her adversely is taken, and *secondly* the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights are widely guaranteed in universal and regional human rights treaties. *They can be considered as part of the corpus of customary international law [...]*⁷³

As illustrated by the critiques discussed above, none of the incarnations of the 1267 Regime have adequately protected these internationally-recognized rights to due process.

The fact that targeted individuals and entities are not given any notice of their potential listing makes it impossible for them to challenge the initial listing, thereby vitiating their right to be heard *prior* to adverse action being taken against them. This is particularly troubling, given that even the Security Council's own reports acknowledge that "[i]t is far easier for a nation to place an individual or entity on the list than to take them off."⁷⁴ And to the extent that the listing is viewed as quasi-criminal in nature, it would be fair to say the right of individuals to be informed of the charges against them and to be presented with adequate time to prepare a defence would be breached; indeed, targeted individuals may not even be aware of the need to defend themselves. Because the 1267 Committee makes its decisions in secret, targeted individuals would also be denied their right to be "tried" in their own presence.

Even if they were granted a hearing by the 1267 Committee, such a hearing would lack the requisite independence and impartiality demanded by principles of procedural fairness. As Dick Marty, Rapporteur for the Council of Europe's Parliamentary Assembly's Committee on Legal Affairs and Human Rights has noted, the 1267 Committee serves as both prosecutor and judge: "Moreover, with respect to the [Security Council], the five permanent members of the Council tend to dominate all proceedings, giving other states less input and further reducing any possibility of impartiality."⁷⁵

73 Fassbender Report, *supra* note 43 at Part D, para. 1.17 (emphasis added); *see also* Marty, *supra* note 66 at para. 34 (describing "fair trial rights" as guaranteed by customary international law).

74 Security Council Update Report, *supra* note 30 at 3.

75 Marty, *supra* note 66 at para. 34.

Once parties are listed and sanctions are in place, they are still not informed of all the evidence against them, thereby making it difficult – if not impossible – to defend themselves against the allegation that they are associates of al Qaeda, Osama bin Laden, or the Taliban. To attempt a defence in the absence of the evidence presented against them would be effectively forcing the listed individuals to prove a negative and to prove their own innocence, which runs counter to the fundamental notion of presumption of innocence when faced with allegations of wrongdoing.⁷⁶

The right to an effective remedy is also denied. As the United Nations itself has recognized, the right to an effective remedy consists of access to an “independent, impartial and competent judicial or other authority established by law” to provide redress for rights violations.⁷⁷ However, there are no remedies against the 1267 Committee or the Security Council for a wrong listing.⁷⁸ The United Nations is immune from suit in national courts, pursuant to Article 105 of the UN Charter, which states:

The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

Nor is there an impartial or independent adjudicator available within the international system to review appeals from the 1267 Committee’s decisions to list or refusals to delist.

Based on these breaches of internationally-recognized due process rights, foreign courts have sustained challenges to the domestic implementation of the 1267 Regime within their jurisdictions; two of the most prominent cases are discussed here.⁷⁹

76 And despite any arguments that these sanctions are not designed to establish criminality, it is precisely the suspicion that criminality is afoot which justifies an individual’s placement on the blacklist – otherwise, even the most robust supporter of targeted sanctions would have to admit to a certain arbitrariness to the listing procedure.

77 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN GOAR 53d Sess., Annex, Agenda Item 110(b), A/Res 53/144 (1999), at Art. 9.

78 Marty, *supra* note 66 at para. 34.

79 A general discussion of challenges to the 1267 Regime in domestic courts can be found

European Union

In 2008, the European Court of Justice (the “ECJ”) nullified the implementation of the 1267 Regime by the Council of the European Union with respect to the two applicants in *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*⁸⁰.

During the appeals process, these applications were assigned to Advocate-General Miguel Poiares Maduro, who prepared two virtually identical opinions for the ECJ. In his opinions, he observed the following with respect to both Kadi and Al Barakaat:

- [52] The right to effective judicial protection holds a prominent place in the firmament of fundamental rights. While certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the very essence of that right. As the European Court of Human Right held in *Klass and Others*, “the rule of law implies, inter alia, that an interference by the executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.”
- [53] The appellant has been listed for several years in Annex I to the contested regulation and still the Community institutions refuse to grant the appellant an opportunity to dispute the grounds for its continued inclusion on the list. They have, in effect, levelled extremely serious allegations against the appellant and have, on that basis, subjected the appellant to severe sanctions. Yet, they entirely reject the notion of an independent tribunal assessing the fairness of these allegations and the reasonableness of these sanctions. As a result of this denial, there is a real possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected, and might nevertheless remain in place indefinitely. The Court has no way of knowing whether that is the case in reality, but the mere existence of

in the reports of the Analytical Support and Sanctions Monitoring Team to the 1267 Committee. *See, e.g.*, UN Doc. S/2009/502 at 16-17; UN Doc. S/2009/245 at 36-39; UN Doc. S/2004/4 at 36-37; UN Doc. S/2007/677 at 40-42; UN Doc. S/2007/132 at 38-40; UN Doc. S/2006/750 at 47-50; UN Doc. S/2006/154 at 45-47; UN Doc. S/2005/572 at 48-51; UN Doc. S/2005/83 at 52-55.

80 *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, 3 C.M.L.R. 41 (2008) [“Kadi?”].

that possibility is anathema in a society that respects the rule of law.

[54] Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists. As the Commission and the Council themselves have stressed in their pleadings, the decision whether or not to remove a person from the United Nations sanctions list remains within the full discretion of the Sanctions Committee – a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order.⁸¹

The ECJ adopted the Advocate General's opinions in substantial part in its ruling. As a threshold matter, the ECJ found that obligations imposed by an international agreement, such as the UN Charter, cannot have the effect of prejudicing the constitutional principles of the European Community Treaty, "which include the principle that all Community acts must respect fundamental rights."⁸² Accordingly, the Council of the European Union may not pass any measures that would infringe on fundamental rights, even if international agreement would appear to so compel. With respect to whether the measures required by the 1267 Regime respected fundamental rights, the ECJ found that they did not. The ECJ criticized the inability of designated parties to be heard at the time of their listing, the failure of the 1267 Committee to disclose the reasons for listing, and the lack of recourse to judicial review of a listing. The ECJ found that it did not have jurisdiction to adjudicate the lawfulness of listing decisions, but at the same time,

81 Opinion of Advocate-General Miguel Poiares Maduro, Case C-402/05 P, delivered Jan. 16, 2008, at paras. 52-54 (internal citations omitted), *available at* http://blogeuropa.eu/wp-content/2008/02/cnc_c_402_05_kadi_def.pdf. The High Court of England and Wales, in quashing the domestic regulation giving effect to the 1267 Regime in the United Kingdom in *A v. HMT* [2008] EWHC 869, also considered the opinions of Advocate-General Poiares Maduro. This is the lower court decision from which the Supreme Court of the United Kingdom ultimately heard the consolidated appeal in *HMT v. Mohammed Jabar Ahmed and others; Mohammed al-Ghabra; HMT v. Hani El Sayed Sabaei Youssef*, [2010] UKSC 2, discussed *infra*.

82 *Kadi*, *supra* note 80 at para. 285.

the 1267 Regime did not provide for any independent review of the 1267 Committee's decisions. As a result, it found the regulations implementing the 1267 Regime to violate the applicants' rights to defense; to an effective legal remedy; to effective judicial protection; and to property.

Specifically, the ECJ found the following:

[334] [...] [I]t must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.

[...]

[348] [...] Because the Council [of the European Union] neither communicated to the [applicants] the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the [applicants] were not in a position to make their point of view in that respect known to advantage. Therefore, the [applicants'] rights of defence, in particular the right to be heard, were not respected.

[349] In addition, given the failure to inform them of the evidence adduced against them and having regard to the relationship [...] between the rights of defence and the right to an effective remedy, the [applicants] were also unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that their right to an effective legal remedy has also been infringed.

[...]

[352] It must, therefore, be held that the contested regulation, in so far as it concerns the [applicants] was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has the further consequence that the principle of effective judicial protection has been infringed.⁸³

With respect to the right to property, the ECJ held that in principle, asset freezes were justifiable, in appropriate circumstances. In this case, however, because Kadi was unable to "put his case to the competent authorities", the restriction on his property rights

83 *Id.* at paras. 334, 348-349, 352 (internal citations omitted).

resulting from his being placed on the 1267 List was unjustified.⁸⁴

The ECJ's decision in *Kadi* marked the first time a court had found the 1267 Regime to violate fundamental rights. *Kadi* also marked the first time the ECJ annulled a measure giving effect to a SCR for violating fundamental principles of Community law, and opened the door for further applications seeking annulment of the European Union's 1267 regulations.⁸⁵

Indeed, following the ECJ's reasoning in *Kadi*, the Court of First Instance at the Court of Justice of the European Union (the "CFI") likewise annulled the EU regulations implementing the 1267 Regime as to Mohammed Othman in *Othman v. Council of the European Union and Commission of the European Communities*⁸⁶. The Court remarked that individuals on the 1267 List are subjected to the regime's restrictive measures for an indefinite period of time, thereby permitting "the permanent exclusion of the applicant from almost all aspects of social life."⁸⁷ The CFI went on to observe that

the applicant is deprived of any judicial challenge to the restrictive measures imposed on him. The decision to include him [on the 1267 List] is an entirely political decision of the Security Council, taken in a wholly non-judicial manner without any regard to the rules of evidence or of fairness. There is no remedy, even of a quasi-judicial kind, that might be invoked against the Security Council's decision.⁸⁸

Accordingly, the CFI found that imposition of the measures required under the 1267 Regime constituted an impermissible infringement on the applicant's fundamental rights to due process.⁸⁹

84 *Id.* at paras. 369-371.

85 Christopher Michaelsen, "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 J. Int'l L. 329.

86 *Othman v. Council of the European Union and Commission of the European Communities*, T-318/01 (June 11, 2009), available at https://www.unodc.org/tldb/pdf/Case_T-318_01_Omar_Mohammed_Othman.pdf

87 *Id.* at para. 66.

88 *Id.* at para. 67.

89 *Id.* at paras. 88-90.

United Kingdom

On January 27, 2010, the new Supreme Court of the United Kingdom struck down the domestic legislation implementing the 1267 Regime in that country. In the consolidated cases *HMT v. Mohammed Jabar Ahmed and others; Mohammed al-Ghabra and HMT v. Hani El Sayed Sabaei Youssef*⁹⁰, (“*HMT v. A, K, M and G*”), a majority of the Court found that the 1267 Regime could not comport with principles of natural justice or procedural fairness so long as it denied designated individuals access to judicial review of their listing.⁹¹

In his reasons, Lord Hope characterized the consequences of the 1267 Regime to be “drastic” and “oppressive”, and noted: “Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.”⁹²

In the United Kingdom, the 1267 Regime is given effect via the *Al-Qaida and Taliban (United Nations Measures) Order* (the “UK 1267 Order”), which was issued by Order of Council pursuant to section 1 of the *United Nations Act 1946*. As in Canada, an Order of Council is promulgated by the Executive, with no legislative review or oversight. Such orders never go before Parliament, and require no Parliamentary assent before becoming law. The UK 1267 Order was quite simple – it set out the restrictions required by the 1267 Regime and applied them to those on the 1267 List. The UK was not responsible for compiling the list, nor could it be, if it was to carry out the requirements of SCR 1267 and its progeny; it was required to adopt the 1267 List wholesale and as determined by the 1267 Committee.

A majority of the Court found that the UK 1267 Order deprived those subject to it of their right to access an effective remedy, in violation of the *Human Rights Act*, which gives domestic effect to the ECHR. The Court recognized that an effective remedy in this circumstance means being able to subject the 1267 Committee’s decision to list to judicial review, “something that, under the system that the 1267 Committee currently

90 *HMT v. Mohammed Jabar Ahmed and others; Mohammed al-Ghabra and HMT v. Hani El Sayed Sabaei Youssef*, [2010] UKSC 2 [“*HMT v. A, K, M and G*”].

91 The individuals in this case were variously listed on the 1267 List and the United Kingdom’s own terrorist blacklist; the discussion here will focus only on the portions of the decision relating to the 1267 Regime.

92 *HMT v. A, K, M and G*, *supra* note 90 at para. 6.

operates, is denied to [listed parties].”⁹³ The Court had little difficulty accepting that “access to a court to protect one’s rights is a foundation of the rule of law.”⁹⁴

Importantly, the Court took into consideration the December 2009 revisions to the 1267 Regime, and specifically, the creation of the Office of the Ombudsperson to review delisting request. It found that review by a United Nations-appointed Ombudsperson is still no substitute for judicial review.⁹⁵ The Court also recognized that individuals may have access to the parts of a statement of case that have been designated as non-confidential and that there is a process in place for challenging a listing. Nonetheless, Lord Phillips concluded:

[T]hese provisions fall far short of the provision of access to a court for the purpose of challenging the inclusion of a name on the Consolidated List, and far short of ensuring that a listed individual receives sufficient information of the reasons why he has been placed on the list to enable him to make an effective challenge to the listing.”⁹⁶

Thus, it held that the provision of the UK 1267 Order which adopted the 1267 List as setting out the subjects of the Order was *ultra vires* the *United Nations Act*. According to Lord Hope, while it is within Parliament’s power to infringe on the basic rights of citizens, the Executive cannot do so via an Order in Council. If a law is to deprive individuals of fundamental freedoms, it must do so with the clear authority of Parliament:

The absence of any indication that Parliament had the imposition of restrictions on the freedom of individuals in mind when the provisions of the [*United Nations Act*] were being debated makes it impossible to say that it squarely confronted those effects and was willing to accept the political cost when that measure was enacted.⁹⁷

93 *Id.* at para. 81.

94 *Id.* at para. 146.

95 *Id.* at para. 181.

96 *Id.* at para. 149; see also Lord Mance’s reasons at para. 239.

97 *Id.* at para. 61, 81.

Moreover, as Lord Phillips observed, Parliament could not have reasonably anticipated when it first passed that *United Nations Act*

the possibility that the Security Council would, under article 41 [of the UN Charter], decide on measures that seriously interfered with the rights of individuals in the United Kingdom on the ground of the behaviour of those individuals without providing them with a means of effective challenge before a court. I conclude that Parliament would not have foreseen this possibility, having particular regard to the reference to human rights in the preamble and article 1.3 of the Charter and to the fact that the 1946 Act was passed at a time when the importance of human rights was generally recognised, as exemplified two years later by the adoption by the General Assembly of the Universal Declaration of Human Rights.⁹⁸

This decision is compelling in its forceful condemnation of the 1267 Regime, but also instructive in considering the legality of Canada's implementation of the 1267 Regime. As further detailed in Section IV.A, *infra*, Canada gave domestic effect to the 1267 Regime much the same way as the United Kingdom did – via Order in Council. As discussed in Section IV.B.1, the due process rights at issue are not only well-established principles at international law, but find strong protection in the *Charter of Rights and Freedoms*. Accordingly, the reasoning articulated by the UK Supreme Court could (and should) be adopted by Canadian courts considering this issue.

98 *Id.* at para. 154.

IV. Canada's Implementation of the 1267 Regime and Constitutional Implications

A. The 1267 Regime in Canada

Decisions of the UN Security Council are binding on all Member states. Pursuant to Article 25 of the UN Charter, Member states “agree to accept and carry out the decisions of the Security Council.” Moreover, Article 48 stipulates that the Security Council may direct Member states to undertake specific actions to carry out its decisions.⁹⁹

There is a general presumption that Canada complies with its international law obligations, and with respect to its practice, Canada has accepted the binding nature of Security Council decisions.¹⁰⁰ There are differing ways in which international law becomes a part of Canada's domestic law. Customary international law, for example, is presumed to be part of the common law, though it can also be codified into statute. Treaty law, on the other hand, is made part of the domestic law through implementation of a domestic statute giving effect to the international obligation. As one commentator has observed, this requirement “flows from the separation of powers in the Canadian constitutional system: the executive branch of government enjoys the exclusive power to conclude international treaties, but only the legislative branch may enact domestic law.”¹⁰¹ Obligations created out of the UN Charter are treaty obligations, and as such, need to be made into a domestic law before they can have any effect in Canada.

⁹⁹ Specifically, Article 48 provides:

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

¹⁰⁰ E. Alexandra Dosman, “Designating ‘Listed Entities’ for the Purposes of Terrorist Financing Offences at Canadian Law”, (2004) 62 U.T. Fac. L. Rev. 1 at 5.

¹⁰¹ *Id.* at 6.

The *United Nations Act*¹⁰² gives effect to Canada's UN Charter obligations to follow Security Council decisions. Specifically, it allows the Governor in Council to make orders and regulations implementing SCRs, without seeking Parliamentary approval. Section 2 of the *United Nations Act* states:

When, in pursuance of Article 41 of the Charter of the United Nations, set out in the schedule, the Security Council of the United Nations decides on a measure to be employed to give effect to any of its decisions and calls on Canada to apply the measure, the Governor in Council may make such orders and regulations as appear to him to be necessary or expedient for enabling the measure to be effectively applied.¹⁰³

While Parliament is given an opportunity to annul such orders and regulations within 40 days of them being tabled, Parliament is not required to approve them in any way before they come into effect or for them to remain law in Canada.¹⁰⁴

Thus, it was through application of the *United Nations Act* that Canada gave effect to the 1267 Regime domestically. Via Order in Council, a series of regulations was issued to implement the various SCRs making up the 1267 Regime; these regulations are known collectively as the *United Nations Al-Qaida and Taliban Regulations*¹⁰⁵ (the “1267 Regulations”), which provide, in relevant part:

Prohibitions

3. No person in Canada and no Canadian outside Canada shall knowingly provide or collect by any means, directly or indirectly, funds with the intention that the funds be used, or in the knowledge that the funds are to be used, by the Taliban, a person associated with the Taliban, Usama bin Laden or his associates.
4. No person in Canada and no Canadian outside Canada shall knowingly
 - (a) deal directly or indirectly in any property of the Taliban or a person associated with the Taliban including funds derived or generated from property owned or controlled, directly or indirectly, by the Taliban or a person associated with the

102 *United Nations Act*, R.S.C. 1985, c. U-2.

103 *Id.* at s. 2.

104 *Id.* at s. 4.

105 *United Nations Al-Qaida and Taliban Regulations*, SOR/99-444 [“1267 Regulations”].

Taliban or by persons acting on behalf of the Taliban or a person associated with the Taliban or at their direction;

- (b) enter into or facilitate, directly or indirectly, any financial transaction related to a dealing in property referred to in paragraph (a);
- (c) provide any financial services or any other services in respect of any property referred to in paragraph (a); or
- (d) make any property or any financial or other related service available, directly or indirectly, for the benefit of the Taliban or a person associated with the Taliban.

4.1 No person in Canada and no Canadian outside Canada shall knowingly

- (a) deal directly or indirectly in any property of Usama bin Laden or his associates including funds derived or generated from property owned or controlled, directly or indirectly, by Usama bin Laden or his associates or by persons acting on their behalf or at their direction;
- (b) enter into or facilitate, directly or indirectly, any financial transaction related to a dealing in property referred to in paragraph (a);
- (c) provide any financial services or any other services in respect of any property referred to in paragraph (a); or
- (d) make any property or any financial or other related service available, directly or indirectly, for the benefit of Usama bin Laden or his associates.

4.2 No person in Canada and no Canadian outside Canada shall knowingly, directly or indirectly, export, sell, supply or ship arms and related material, wherever situated, to the Taliban or a person associated with the Taliban or Usama bin Laden or his associates.

4.3 No owner or master of a Canadian ship and no operator of an aircraft registered in Canada shall knowingly, directly or indirectly, carry, cause to be carried or permit to be carried arms and related material, wherever situated, destined for the Taliban or a person associated with the Taliban or Usama bin Laden or his associates.

4.4 No person in Canada and no Canadian outside Canada shall knowingly provide, directly or indirectly, to the Taliban or a person associated with the Taliban or Usama bin Laden or his associates technical assistance related to military activities.

5. No person in Canada and no Canadian outside Canada shall knowingly do anything that causes, assists or promotes, or is intended to cause, assist or promote, any act or thing prohibited by any of sections 4 to 4.4.

[...]

Exceptions

- 5.7(1) A person whose property has been affected by section 4 or 4.1 may apply to the Minister [for Foreign Affairs] for a certificate to exempt property from the application of either of those sections if the property is necessary for basic or extraordinary expenses.
- 5.7(2) The Minister shall issue a certificate if the necessity of that property is established in conformity with Security Council Resolution 1452 (2002) of December 20, 2002,
- (a) in the case of property necessary for basic expenses, within 15 days after receiving the application, if the Committee of the Security Council did not refuse the release of the property; and
 - (b) in the case of property necessary for extraordinary expenses, within 30 days after receiving the application, if the release of the property was approved by the Committee of the Security Council.

Breaches of the prohibitions in the *1267 Regulations* may result in criminal liability, fines and imprisonment of up to 10 years.¹⁰⁶

The *1267 Regulations* permit “[a]ny Canadian or person in Canada claiming not to be Usama bin Laden or his associates or a person associated with the Taliban” to petition the Minister of Foreign Affairs to be delisted “in accordance with the Guidelines of the Committee of the Security Council.”¹⁰⁷ With the adoption of SCR 1904, this provision is somewhat moot, as the new delisting procedure directs parties to submit delisting petitions directly to the Ombudsperson, thereby making it unnecessary for states to make petitions on their behalf. It is important to recognize that this provision does not mean – and has never meant – that Canada has the authority to remove someone from the 1267 List, or to suspend application of the *1267 Regulations*.

The *1267 Regulations* also further permit applications by persons “claiming not to be a person designated either as Usama bin Laden or one of his associates or as a person associated with the Taliban by the Committee of the Security Council [...] for a certificate stating that it is not the person whose name appears on the list of the

¹⁰⁶ *United Nations Act*, *supra* note 102 at s. 3.

¹⁰⁷ *1267 Regulations*, *supra* note 105 at s. 5.3.

Committee of the Security Council.”¹⁰⁸ This provision addresses issues of mistaken identity – for example, if an individual happens to share a name with someone on the 1267 List – but provides no remedy for individuals who are correctly identified as the designated party, but may be on the 1267 List for wrong reasons.

To the extent that the *1267 Regulations* provide for judicial review, it is limited only to review of decisions by the Minister of Foreign Affairs to not support or transmit a delisting request.

The operation of Canada’s implementation of the 1267 Regime can perhaps be best illustrated through the example of Abousfian Abdelrazik, a Canadian citizen who has been on the 1267 List since 2006.

Abousfian Abdelrazik

*One cannot prove that fairies and goblins do not exist any more than Mr. Abdelrazik or any other person can prove that they are not an Al-Qaida associate.*¹⁰⁹

As of this writing, Abousfian Abdelrazik remains the only Canadian national or resident on the 1267 List. Abdelrazik is a dual citizen of Canada and Sudan. He arrived in Canada in 1990 as a political refugee from his native Sudan and became a citizen in 1995. He has three children living in Canada. Abdelrazik was added to the 1267 List in July 2006; at the time, he was in Sudan.¹¹⁰

In October 2007, Abdelrazik sought Canada’s assistance in seeking his delisting; at the time of his request, the 1267 Regime had no mechanism for individual applications for delisting; all delisting requests had to be transmitted by a UN Member state. After obtaining reports from CSIS and the RCMP stating that Abdelrazik had no involvement in terrorist or criminal activities, Canada agreed to transmit his request to the 1267

¹⁰⁸ *Id.* at s. 5.6.

¹⁰⁹ *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 at para. 53.

¹¹⁰ The narrative of how Abdelrazik came to return to Sudan, his detention by the Sudanese secret police (purportedly at the behest of Canadian authorities), his alleged torture by the Sudanese authorities, and his struggle to return to Canada in the face of government obstruction is not directly relevant to the discussion here. It is, however, outlined in some detail in Zinn J.’s decision in *Abdelrazik*, *supra* note 109, where the Court found that Canada had violated Abdelrazik’s right to return to Canada, as protected by section 6 of the *Canadian Charter of Rights and Freedoms*.

Committee in December 2007. The delisting request was denied, and no reasons were given. His Canadian passport had expired by that time. Nonetheless, in early 2008, the Department of Foreign Affairs and Trade (“DFAIT”) informed Abdelrazik that he was entitled to emergency travel documents for his return to Canada and that they would be issued once Abdelrazik could confirm an itinerary. In early 2008, however, the 1267 Regime had provided no exemptions to its international travel ban, so it was impossible for Abdelrazik to confirm an international itinerary.

In June 2008 – over six years after the 1267 Regime’s travel ban was first imposed – the Security Council adopted SCR 1822, which provided for certain exemptions to the travel ban. One of these exemptions permitted travel for repatriating a citizen to his or her home country. Thus, in August 2008, Abdelrazik booked a flight to Canada on Etihad Airways and requested that DFAIT provide him with an emergency travel document. Despite its previous position that an emergency passport would be issued upon presentation of a confirmed itinerary, DFAIT refused his request.

In December 2008, DFAIT informed Abdelrazik that Passport Canada would only issue an emergency passport if he was able to present a fully-paid-for ticket to Canada, knowing that Abdelrazik was impecunious and had no ability to purchase a ticket, that he was subject to the 1267 Regime’s asset freeze, and that the *1267 Regulations* prohibited the contribution of funds to individuals on the 1267 List. Nonetheless, in response to DFAIT’s new condition, almost 200 Canadians contributed to the purchase of a ticket from Khartoum to Montreal for Abdelrazik, scheduled to depart on April 3, 2009. On the morning of April 3, however, DFAIT again reneged on its representations and informed Abdelrazik’s lawyers that no emergency passport would be issued.

In the meantime, Abdelrazik’s lawyers had brought suit in the Federal Court, seeking an order compelling DFAIT to repatriate him. Abdelrazik argued that Canada had engaged in conduct designed to thwart his return to Canada, which breached his right as a citizen of Canada to return, as protected by section 6 of the *Charter of Rights and Freedoms*. Canada, in turn, argued that Abdelrazik could not return to Canada because he was subject to the restrictions of the 1267 Regime, and that Canada had no part in placing him on that list.¹¹¹

¹¹¹ *Abdelrazik*, *supra* note 109 at paras. 2-3.

Canada also asserted that because Abdelrazik was on the 1267 List, it could not assist his return home. This argument was advanced on two grounds. First, according to Canada, the 1267 Regime’s prohibition against providing listed individuals and entities with funds or economic resources meant that the government could not provide Abdelrazik with the means of returning home – that is, a flight back to Canada. Second, because Abdelrazik would have to travel over foreign airspace in order to return to Canada from Sudan, he could not rely on the repatriation exemption to the 1267 Regime’s travel ban, and Canada would accordingly be in breach of its international obligations if it were to facilitate his return home.

The Federal Court rejected Canada’s arguments. Justice Zinn correctly pointed out that the repatriation exemption to the 1267 Regime’s travel ban contemplates and permits travel through foreign territories.¹¹² The Court also found that Canada had engaged in a course of conduct constituting a breach of Abdelrazik’s right to enter Canada; such misconduct included Canada’s attempt to assert that the 1267 Regime prohibited Abdelrazik’s repatriation.¹¹³ Accordingly, the government was found to have breached Abdelrazik’s *Charter* rights, and was ordered to arrange for his return to Canada.

Since his return to Canada, Abdelrazik has been living off a modest stipend from the government of Quebec for food and shelter, permitted to him pursuant to the humanitarian exemption provision in s. 5.7 of the *1267 Regulations*. His only assets – a pension entitlement from his deceased wife – have been frozen.¹¹⁴ Obtaining employment has been difficult, given the prohibition against making “any property” available to those on the 1267 List. Any potential employer would have to seek an exemption from the 1267 Committee to be able to pay Abdelrazik’s wages.¹¹⁵

112 *Id.* at para. 127-129.

113 *Id.* at para. 156.

114 Paul Koring “Abdelrazik’s bank account frozen” *The Globe and Mail* (15 April 2010), available at <http://www.theglobeandmail.com/news/national/abdelraziks-bank-account-frozen/article1536149/>.

115 There are those who have attempted to provide financial assistance to Abdelrazik, in defiance of the *1267 Regulations*. For example, in May 2010, the Canadian Labour Congress, the Canadian Union of Postal Workers, the Canadian section of the International Machinists, and the Windsor Labour Council all committed to hiring Abdelrazik to show support for him, and for the right to work. See Tobi Cohen “Labour leaders defy UN sanctions and put Abdelrazik to work” *The Montreal Gazette* (18 May 2010), available at <http://www.montrealgazette.com/news/Abdelrazik+finds+work+despite+sanctions/3042822/story.html>.

The restrictions on Abdelrazik's liberties are severe. He has no means of supporting himself or his three children. So long as he remains on the 1267 List, he is known as an associate of the Taliban or al Qaeda, though he has not been charged with any crime – terrorism-related or otherwise – either in Canada or abroad. He cannot travel outside Canada, and in practical terms, it is difficult for him to travel within Canada, given that his assets are frozen and Canadians are generally prohibited from giving him funds or property of any sort.

Pursuant to SCR 1822, which directed the 1267 Committee to conduct a review of all names on the 1267 List to ensure that the list “is as updated and accurate and possible and to confirm that listing remains appropriate”¹¹⁶, a review of Abdelrazik's listing was concluded on May 6, 2010.¹¹⁷ No reasons were given for why Abdelrazik remained on the list after this review. The narrative summary of reasons for his listing – which remains the only information available to Abdelrazik as to why he is on the 1267 List – states that Abdelrazik has been listed because of, *inter alia*, his association with Abu Zubaydah, “Usama bin Laden's former lieutenant responsible for recruiting and running Al-Qaida's network of training camps in Afghanistan.”¹¹⁸ This narrative summary was

116 SCR 1822, *supra* note 20 at para. 25.

117 *The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them*, at entry QI.A.220.06, available at <http://www.un.org/sc/committees/1267/consolidatedlist.htm>.

118 The entirety of the narrative summary is as follows:

Abu Sufian al-Salamabi Muhammed Ahmed Abd al-Razziq was listed on 31 July 2006 pursuant to paragraphs 1 and 2 of resolution 1617 (2005) as being associated with Al-Qaida, Usama bin Laden or the Taliban for “participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf, or in support of” and “recruiting for” Al-Qaida (QE.A.4.01) and Ansar al-Islam (QE.A.98.03).

Additional information:

Abu Sufian al-Salamabi Muhammed Ahmed Abd al-Razziq has been closely tied to senior Al-Qaida (QE.A.4.01) leadership. He has provided administrative and logistical support to Al-Qaida.

Abd al-Razziq was closely associated with Abu Zubaydah, listed as Zayn al-Abidin Muhammad Hussein (QI.H.10.01), Usama bin Laden's (QI.B.8.01) former lieutenant

made available by the 1267 Committee on June 22, 2009.

But it is difficult to see how the summary reasons provided in June 2009 were able to justify Abdelrazik's current listing. For example, the central allegation in the summary reasons is that Abdelrazik allegedly associated with senior members of al Qaeda – specifically, with Abu Zubaydah. In October 2009, however, the United States government affirmatively stated that Zubaydah was not a member of al Qaeda, let alone a former lieutenant to Osama bin Laden. In a brief filed in the United States District Court for the District of Columbia relating to Zubaydah's petition for *habeas corpus*, the U.S. Department of Justice stated that the United States

has not contended [...] that the Petitioner [Zubaydah] was a member of al-Qaida or otherwise formally identified with al-Qaida. [...] Respondent does not contend that Petitioner was a "member" of al-Qaida in the sense of having sworn *bayat* (allegiance) or having otherwise satisfied any formal criteria that either Petitioner or al-Qaida may have considered necessary for inclusion in al-Qaida. Nor is the Government detaining Petitioner based on any allegation that Petitioner views himself as part of al-Qaida as a matter of subjective personal conscience, ideology, or worldview.¹¹⁹

responsible for recruiting and running Al-Qaida's network of training camps in Afghanistan.

Abd al-Razziq recruited and accompanied Tunisian Raouf Hannachi for paramilitary training at Khalden camp in Afghanistan where Al-Qaida and other listed entities were known to train. Abd al-Razziq advised another individual concerning Al-Qaida training camps prior to this individual's departure for these camps. Abd al-Razziq also told this individual that he had been personally acquainted with Usama bin Laden while attending one of these camps himself. Abd al-Razziq has also been associated with the Ansar al-Islam (Q.E.A.98.03) network. Abd al-Razziq was a member of a cell in Montreal, Canada, whose members met in Al-Qaida's Khalden training camp in Afghanistan. Members of this cell with whom Abd Al-Razziq was closely associated included Ahmed Ressay and Abderraouf Jdey. After training in the Khalden camp, Ressay attempted to attack Los Angeles International Airport in conjunction with the Millennium celebrations in January 2000. Jdey has been closely linked with Al-Qaida operatives and involved in plans for conducting hijacking/terrorist operations.

In 1996, Abd al-Razziq attempted to travel to Chechnya to participate in the fighting but never made it there. In 1999 he journeyed to Chechnya in the company of others wanting to participate in fighting but was never able to travel further than a small area of Chechnya under the Russian control.

Narrative Summaries of Reasons for Listing, available at <http://www.un.org/sc/committees/1267/NSQI22006E.shtml>.

119 *Husayn v. Gates*, U.S. Dist. Ct., D.C., No. 08-cv-1360 (RWR), *Respondent's Memorandum of Points*

Keeping in mind that it is the United States government that has repeatedly stressed Zubaydah's purported dangerousness and importance within the al Qaeda hierarchy, this declamation carries significant weight.¹²⁰ Given that the 1267 Committee did not conclude its review of Abdelrazik's listing until May 2010, this information should have been available to the Committee and taken into consideration.

Whether this was the case is unknown. The 1267 Committee deliberates in secret and provides no reasons for its decisions. There is no requirement on the part of any Member state – including the country making the initial listing request or subsequently opposing a delisting request – to provide updated information on listed parties, whether that information would support a continued listing or compel a delisting. But based on the narrative summary available on the 1267 Committee's website at the time of this writing, it would appear that the Committee did not take into account the fact that the United States – the only country asserting that Zubaydah is a senior al Qaeda official – believed that Zubaydah was in fact not even a member of al Qaeda. Rather, it continued to rely on outdated assertions to keep Abdelrazik on the 1267 List.

B. Constitutional Implications

Given the restrictions on liberties imposed by the 1267 Regime, coupled with its relative lack of procedural safeguards, is Canada's domestic implementation of the 1267 measures constitutional?

The operation of the 1267 Regime in Canada potentially implicates a number of

and Authorities in Opposition to Petitioner's Motion for Discovery and Petitioner's Motion for Sanctions (17 October 2009) ["U.S. DOJ Brief"] at 35 - 36.

120 After Zubaydah's capture in March 2002, Secretary of Defense Donald Rumsfeld stated in a Department of Defense news briefing on April 1, 2001 that: "I don't think there's any doubt but a man named Abu Zubaydah is a close associate of [Osama bin Laden's], and if not the number two, very close to the number two person in the organization. I think that's well established." (U.S. Department of Defense News Briefing (1 April 2002), available at <http://www.globalsecurity.org/military/library/news/2002/04/mil-020401-dod02.htm>). White House spokesperson Ari Fleischer has described Mr. Zubaydah as a "key terrorist recruiter and operational planner and member of Usama bin Laden's inner circle." (See BBC News Profile on Abu Zubaydah (2 April 2002), available at http://news.bbc.co.uk/2/hi/south_asia/1907462.stm). Likewise, President George W. Bush described Mr. Zubaydah as al Qaeda's "chief of operations." (Remarks by the President in Address to the Nation (6 June 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020606-8.html>).

constitutional concerns.¹²¹ Given that the most pressing criticism of the 1267 Regime is its lack of due process protections, however, the discussion here will focus on procedural fairness as a principle of fundamental justice, protected by Canadian constitutional law.

1. Due process rights in Canadian law

Due process rights are deeply engrained in the common law, and in Canada are given explicit protection under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) and the *Canadian Bill of Rights*¹²² (the “*Bill of Rights*”).

Section 7 of the *Charter* serves as the principal source of procedural protections under Canadian law¹²³, and provides as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In order for claimants to demonstrate a violation of s. 7, they must first demonstrate that there has been a deprivation of life, liberty or security of person.¹²⁴ The meanings afforded to liberty and security of persons under the jurisprudence have been quite broad. The Supreme Court of Canada has recognized, for example, that s. 7’s protection of liberty is not “restricted to mere freedom from physical restraint”. Rather, “‘liberty’ is engaged where state compulsions or prohibitions affect important and fundamental life choices.”¹²⁵ Security of person has also been given a meaning broader than mere physical

121 For example, the measures required by the 1267 Regime would impact the right to enjoyment of property and not to be deprived thereof except in accordance with due process of law, in violation of sections 1(a) and 2(e) of the *Canadian Bill of Rights*. They also likely affect freedom of association as protected by section 2(d) of the *Charter of Rights and Freedoms*. Infringement of freedom of movement may give rise to a breach of the liberty interest protected by s. 7 of the *Charter*. See *Wilson v. British Columbia (Medical Services Commission)*, [1988] 53 DLR (4th) 171 (BCCA), leave to appeal to S.C.C. refused, [1988] 92 NR 400n.

122 *Canadian Bill of Rights*, S.C. 1960, c. 44 [“*Bill of Rights*”].

123 For discussion on why other provisions of the *Charter* (for example, section 11, which guarantees that a person charged with an offence “a fair and public hearing by an independent and impartial tribunal”) have not developed into sources of general procedural protections in non-criminal contexts, see David J. Mullan, *Administrative Law* (Toronto: Emond Montgomery Publications, 2003) at 213-214.

124 *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at para. 12.

125 *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307 at paras. 49, 54.

security, and has been found to encompass psychological integrity.¹²⁶

Next, claimants must show that the deprivation of life, liberty or security of person is not in accordance with “the principles of fundamental justice.”¹²⁷ Under s. 7, “fundamental justice” means more than procedural justice – it encompasses substantive justice, as well.¹²⁸ “Fundamental justice”, as expressed in due process rights, will be discussed in greater detail below, though at this point, it is important to note that the Supreme Court of Canada has recognized that, *inter alia*, s. 7 guarantees a right to be informed of the case to be met¹²⁹, a right to an independent decision-maker¹³⁰, and a right to reasons for a decision¹³¹.

What this means in terms of protection of due process rights is therefore this: where a decision-maker has a power of decision over life, liberty or security of person, the decision-maker is required to follow certain rules of procedural fairness.

To the extent that the quasi-criminal nature of the 1267 Regime would trigger procedural protections attached to criminal proceedings, those procedural rights are articulated in s. 11 of the *Charter*. For example, subsections (a) and (d) provide as follows:

11. Any person charged with an offence has the right
 - (a) to be informed without unreasonable delay of the specific offence;
 - [...]
 - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

Canadian courts, however, have been reluctant to extend s. 11 rights beyond strictly criminal contexts, and are accordingly unlikely to find this section applicable here,

126 *Id.* (Bastarache J., writing for a majority of five, held that state-induced psychological stress would be a breach of security of the person.)

127 *Charakaoui*, *supra* note 124 at para. 12.

128 *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

129 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

130 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

131 *Id.*

regardless of the quasi-criminal aspects of the 1267 Regime.¹³² Nonetheless, Canadian courts have developed the following general approach with respect to procedural rights in non-criminal contexts: “[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*”.¹³³ It therefore follows that “factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts”.¹³⁴

The principal procedural protections in the *Bill of Rights* are found at sections 1(a) and 2(e), which provide as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely
 - (a) the right of the individual to life, liberty, security of person and enjoyment of property, and the right not to be deprived thereof except by due process of law

[...]
2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed and applied so as to
 - (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

Section 2(e)’s guarantee of a “fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations” has been

132 See Mullan, *supra* note 123 at 213-214.

133 Suresh, *supra* note 129 at para. 118.

134 *Debhani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at 1077 (*per* Iacobucci J.).

construed to guarantee procedural rights. As per Peter Hogg, in the context of s. 2(e), “the term fundamental justice was equivalent to natural justice, a term that does have an established meaning in Anglo-Canadian law. The rules of natural justice are rules of procedure only: they require a hearing, unbiased adjudication and (a recent development) a fair procedure.”¹³⁵

The specific content of “procedural fairness” and “due process” in Canada accordingly has been determined through interpretations of the common law, the *Charter* and the *Bill of Rights*. The discussion that follows will focus on the specific procedural rights that are implicated by the 1267 Regime and have been recognized in the Canadian jurisprudence.

Right to be informed of and to respond to the case to be met

The rights to be informed of the case to be met and to provide a meaningful response to that case have been recognized by the Supreme Court of Canada as procedural rights protected by both s. 2(e) of the *Bill of Rights*¹³⁶ and s. 7 of the *Charter*.¹³⁷

In *Suresh v. Canada (Minister of Citizenship and Immigration)*¹³⁸, Suresh was a Convention refugee seeking landed immigrant status in Canada. Pursuant to section 53(1)(b) of the former *Immigration Act*, the Minister of Citizenship and Immigration issued a “security certificate”. Under the *Act*, security certificates could be issued against non-citizens, designating them as threats to national security and authorizing their arrest and detention. Security certificates could then be converted into removal orders. In this case, the Minister sought to return Suresh to Sri Lanka, where he faced risk of torture as a member of the LTTE.

135 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 47-20.

136 See *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. In this case, the Supreme Court of Canada split in a 3-3 decision on whether the procedures for determining Convention refugee status violated s. 7 of the *Charter* or s. 2(e) of the *Bill of Rights*, but the entirety of the Court was in agreement that the procedures did not fulfill the requirements of fundamental justice, where the procedure did not afford individuals seeking Convention refugee status an opportunity to state his case and to know the case to be met.

137 Nonetheless, it is important to note that the right to know the case to be met is not absolute. See *Charkaoui*, *supra* note 124 at para. 57 (noting that Canadian statutes sometimes provide for *ex parte* or *in camera* hearings, and that the Supreme Court has “declined” to recognize notice and participation as “invariable constitutional norms, emphasizing a context-sensitive approach to procedural fairness.”)

138 *Suresh*, *supra* note 129.

While Suresh was provided with the opportunity to make written submissions challenging the Minister's decision, he had not been provided with a copy of the immigration officer's report, which served as the basis for the certificate. The immigration officer's report, in turn, was based on information from CSIS.

The Supreme Court of Canada recognized that under s. 7 of the *Charter*, Suresh had a right to know the case to be met and to respond to the allegations against him.

Specifically:

[122] Subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents¹³⁹, this means that the material on which the Minister is basing her decision must be provided to the individual, including memoranda such as Mr. Gautier's recommendation to the Minister. Furthermore, fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister. While the Minister accepted written submissions from the appellant in this case, in the absence of access to the material she was receiving from her staff and on which she based much of her decision, Suresh and his counsel had no knowledge of which factors they specifically needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order *after* the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister's staff.

[123] Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise. Thus the refugee should be permitted to present evidence pursuant to s. 19 of the Act showing that his or her continued presence in Canada will not be detrimental to Canada, notwithstanding evidence of association with a terrorist organization.¹⁴⁰

As has been noted, it is therefore

139 The government's claim of confidentiality over virtually all of the information at issue in subsequent security certificate cases eventually led to a wholesale restructuring of the security certificate regime, after a finding by the Supreme Court that the procedure for determining whether a certificate is reasonable and for reviewing detentions authorized by the security certificates violated s. 7 of the *Charter*. See *Charkaoui*, *supra* note 124, and discussion *infra*.

140 *Suresh*, *supra* note 129 at paras. 122-123 (emphasis in original).

trite law that both at common law and under s. 7 of the Charter the rules of fundamental justice require that an individual is entitled to know the case against him in a decision-making process which leads to a diminution of his liberty. [...] The requirement that an individual is entitled to know and be given an opportunity to respond to the case against him is essential not only to prevent abuses by people making false accusations but also to give the person who has been accused the assurance that he or she is not being dealt with arbitrarily or capriciously.¹⁴¹

Right to an oral hearing

In Canada, there is limited right to an oral hearing in non-criminal contexts, even where fundamental rights are involved. For example, in *Suresh*, even though the Supreme Court found that Suresh's fundamental rights were at stake, he was not entitled to an oral hearing; the opportunity to make written submissions was sufficient procedural protection.¹⁴² Likewise, in *Kindler v. Canada (Minister of Justice)*¹⁴³, the Supreme Court also held that the Minister of Justice's obligation to adhere to the "principles of fundamental justice" with respect to extradition decisions did not require that oral or in-person hearings be provided prior to the issuance of an extradition order surrendering an individual to a foreign jurisdiction. There, the Supreme Court found that written submissions as to whether or on what terms an extradition order should be made provided sufficient procedural protections.¹⁴⁴ Nonetheless, as David Mullan notes, "the conventional view has always been that the claim to an oral hearing is at its highest when credibility is an issue in the proceedings."¹⁴⁵

Right to an independent decision-maker

The Supreme Court of Canada has recognized that procedural fairness "requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-

141 *Gough v. Canada (National Parole Board)* (1990), 45 Admin. L.R. 304 (FC TD), excerpted in Mullan, *supra* note 123.

142 *Suresh*, *supra* note 129 at para. 121; see also *Komo Construction Inc. v. Commission des Relations de Travail du Quebec* [1968] SCR 172 (Que.) (holding that the application of the rule of *audi alteram partem* does not require that there must always be an oral hearing).

143 *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

144 For an expanded discussion on oral hearings as a procedural right in Canada, see generally Mullan, *supra* note 123 at 366-379.

145 *Id.* at 367.

maker.”¹⁴⁶ Impartiality and independence of decision-makers are contemplated and protected by both the *Charter* and the *Bill of the Rights*.¹⁴⁷ Importantly, the Supreme Court has held that the requirement of impartiality and independence is not only limited to individual decision-makers, but to institutions:

Since [*R v. Lippé*, [1991] 2 SCR 114] there is no longer any doubt that impartiality, like independence, has an institutional aspect. [...] [T]he constitutional guarantee of an “independent and impartial tribunal” has to be broad enough to encompass [the concept of institutional impartiality]. [...] The objective *status* of the tribunal can be as relevant for the ‘impartiality’ requirement as it is for “independence.” Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.¹⁴⁸

In an earlier case, decided under s. 2(e) of the *Bill of Rights*, the Federal Court of Appeal found that section 2(e)’s guarantee of “a fair hearing in accordance with the principles of fundamental justice” were violated where the Canadian Human Rights Commission, which had substantiated a complaint against an individual (thereby suggesting that his guilt had already been proven), acted as prosecutor before a Tribunal that it had itself appointed.¹⁴⁹ The Court of Appeal found that there was a reasonable apprehension of institutional bias, and that individuals before the Tribunal were “not afforded a fair hearing in accordance with the principles of fundamental justice. While actual bias was neither alleged nor established in this case, the appearance of injustice also constitutes bias in law.”¹⁵⁰

Right to reasons for decisions

Canadian law recognizes a general right to reasons for decisions, though this right is not absolute.

146 *Baker*, *supra* note 130 at para. 45.

147 *See generally* Mullan, *supra* note 123 at 571-674.

148 2747-3174 *Québec Inc. v. Québec (Régie des permis d’alcool)*, [1996] 3 SCR 919 at para. 42 (internal citations omitted).

149 *MacBain v. Canada (Canadian Human Rights Commission)*, (1985), 22 DLR (4th) 119 (FCA), 1985 CarswellNat 161.

150 *Id.* at para. 28.

In *Baker v. Canada (Minister of Citizenship and Immigration)*¹⁵¹, the Supreme Court of Canada recognized that “in certain circumstances, the duty of procedural fairness will require the provision of written explanation for a decision.” Such circumstances can include, as was the case in *Baker*, decisions which have “profound importance [...] to those affected”.¹⁵²

Writing for the majority in *Baker*, L’Heureux-Dubé, J. noted the following:

Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given.¹⁵³

Subsequently, in *Suresh*, the Supreme Court held s. 7 of the *Charter* required the Minister of Immigration and Citizenship to provide written reasons for her decision to issue a security certificate against Suresh and to support her conclusion that there are no substantial grounds to believe that Suresh would be subjected to torture upon return to Sri Lanka.¹⁵⁴

Due process and national security

Due process rights are not vitiated by concerns about national security and the need for maintaining confidentiality over sensitive information.

The Supreme Court’s decision in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*¹⁵⁵ is most instructive in this regard. This case revisited the security certificate regime at issue in *Suresh* and considered the process for issuing and reviewing a certificate under the *Immigration and Refugee Protection Act* (“IRPA”), the successor legislation to the *Immigration Act*, at issue in *Suresh*.

151 *Baker*, *supra* note 130.

152 *Id.* at para. 43.

153 *Id.* at para. 39 (internal citations omitted).

154 *Suresh*, *supra* note 129 at para. 126. For a more general discussion on the right to reasons and the limits of that right, see generally Mullan, *supra* note 123 at 469-484.

155 *Charkaoui*, *supra* note 124.

Under IRPA, after the Minister of Citizenship issued a security certificate, the certificate would be reviewed for reasonableness by the Federal Court and converted into a removal order if found to be reasonable. At no time during this process did the individual named on the certificate know the nature of the case against him. The scheme explicitly permitted deportation on the basis of confidential information that was not to be disclosed to the individual named in the certificate or anyone acting on the person's behalf.

The scheme created by IRPA did not provide for a hearing when the certificate was issued. While the designated individual had a right to be heard during the Federal Court review of the certificate, the hearing could be held *in camera* and *ex parte* at the request of the government. The judge reviewing the certificate was required to “ensure the confidentiality of the information on which the certificate is based [...] if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person.”¹⁵⁶ Accordingly, where national security concerns were claimed by the government of Canada, the designated individual had no access to the evidence supporting the security certificate and forming the case against him, and thus, no ability to adequately mount a defense. As the Court observed:

Without knowledge of the information put against him or her, the named person may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence. The named person is, to be sure, permitted to make legal representations. But without disclosure and full participation throughout the process, he or she may not be in a position to put forward a full legal argument.¹⁵⁷

The Supreme Court of Canada found the security certificate procedure to violate s. 7 guarantees. As an initial matter, it found that both liberty and security interests were implicated, which triggered application of s. 7. Among other things, the Court noted that issuance of a security certificate could affect an individual's security interest, as a certificate “may bring with it the accusation that one is a terrorist, which could cause irreparable harm to the individual.”¹⁵⁸

156 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 78 [“IRPA”].

157 *Charkaoui*, *supra* note 124 at para. 52.

158 *Id.* at para. 14.

The Court then went on to find that the infringements on liberty and security of person were not in accordance with principles of fundamental justice. In so finding, the Court emphasized that “security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s. 7 stage of the analysis”¹⁵⁹, and that the “principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*”¹⁶⁰.

For the Supreme Court, fundamental justice required that the individual named on the security certificate know the case to meet, and that the security certificate scheme denied individuals this procedural right. The Court observed that

without this information, the named person may not be in a position to contradict errors, identify omissions, challenge the credibility of informants or refute false allegations. This problem is serious in itself. It also underlies [concerns] about the independence and impartiality of the designated judge, and the ability of the judge to make a decision based on the facts and law.¹⁶¹

While recognizing that “national security considerations can limit the extent of disclosure of information to the affected individual”, the Court nonetheless found the security certificate review process to “gut” the principle that a person whose liberty is in jeopardy must know the case to be met, thereby breaching s. 7 of the *Charter*. Writing for the Court, McLachlin, C.J. pointedly remarked: “How can one meet a case one does not know?”¹⁶²

The Court went on to find that there was no justification for the s. 7 violation under s. 1 of the *Charter*. While the protection of information relating to national security interests was a sufficiently important objective for s. 1 purposes and the withholding of such information was rationally connected to the objective, the law did not employ the least drastic means for achieving this objective.¹⁶³ The security certificate review procedure was accordingly struck down as unconstitutional.

159 *Id.* at para. 23.

160 *Id.* at para. 27.

161 *Id.* at para. 54.

162 *Id.* at para. 64.

163 *Id.* at para. 87.

The parallels between the security certificate scheme at issue in *Charakaoui* and the 1267 Regime are evident. But even as the Federal Court has noted, the listing and delisting processes of the 1267 Regime have even *fewer* procedural protections than the security certificate regime struck down in *Charakaoui*:

Unlike the first Canadian security certificate scheme that was rejected by the Supreme Court in *Charakaoui v. Canada (Minister of Citizenship and Immigration)*, the 1267 Committee listing and de-listing processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the national requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge.¹⁶⁴

2. Constitutionality of Canada's implementation of the 1267 Regime

Given the procedural infirmities inherent in the 1267 Regime and Canada's wholesale adoption of the 1267 List and the restrictive measures required by the Security Council, there are serious constitutional difficulties with Canada's domestic implementation of the 1267 Regime.

The domestic courts of UN Member states have no jurisdiction to review decisions undertaken by the Security Council, so to that end, Canada's courts do not have authority to determine the legality of the SCRs setting out the procedures for creating and maintaining the 1267 List, *per se*. Canadian courts, however, are jurisdictionally capable of reviewing Canadian laws giving effect to the 1267 Regime, so at issue would be whether the *1267 Regulations* pass constitutional muster, though to a certain extent, any review of the *1267 Regulations* would necessarily entail passing opinion on whether the SCRs provide adequate procedural safeguards.

Among the effects of the *1267 Regulations* is to impose an asset freeze on individuals and entities on the 1267 List by prohibiting Canadian residents and citizens from providing money to or engaging in financial transactions with the listed parties. To the extent this limits an individual's right to access his or her own property, this would constitute an interference with the right to property and trigger the protections of s. 2(e) of the *Bill of Rights*, which guarantees procedural fairness when "rights and obligations" are being

¹⁶⁴ *Abdelrazik*, *supra* note 109 at para. 51 (internal citations omitted).

determined. And to the extent that the interference with property rights is so severe as to impact an individual's ability to make fundamental life choices, or to cause extreme psychological distress, there may be a deprivation of liberty and security of person within the meaning of s. 7 of the *Charter*. Indeed, it is not difficult to imagine how restrictive an asset freeze would be, even accounting for the basic needs exemptions. As the example of Abdelrazik shows, individuals subject to the asset freeze cannot work; cannot accept gifts from friends or family out of fear of placing them in breach of the financing prohibitions in the *1267 Regulations*; cannot exercise their freedom of mobility; cannot freely associate with others, out of concern that their associates may in turn be branded as associates of al Qaeda or bin Laden. The restrictions on liberty are significant and severe.

Having established the applicability of s. 2(e) and s. 7 of the *Bill and Rights* and the *Charter*, respectively, the question to be considered is whether (1) there has been “a fair hearing in accordance with the principles of fundamental justice”, in the case of the s. 2(e) analysis; or (2) the deprivations of liberty and security of person were “in accordance with the principles of fundamental justice”, in the case of s. 7.

In both cases, the answer would have to be “no”. The *1267 Regulations* do not provide for any of the due process protections required by the principles of fundamental justice described in Section IV.B.1, *supra*.

The *1267 Regulations* make no provision for informing targeted individuals of the case to be met or of the reasons why they are subject to the sanctions regime, beyond simply informing them that they are on the 1267 List. Individuals targeted by the *Regulations* also have no right to a hearing – either an oral hearing or a “hearing” via written submissions – to challenge the restrictive measures taken against them; the measures are simply imposed on all parties found on the 1267 List. There is no independent decision undertaken by the Canadian government to impose sanctions on individuals, and hence no opportunity to offer reasons for the imposition of sanctions, nor the ability to appeal it. Thus, the *1267 Regulations* create significant infringements on rights and liberties without creating any procedure for challenging the imposition of these infringements.

Nor, as previously discussed, do the SCRs creating the 1267 Regime and animating the *1267 Regulations* provide for the necessary procedural protections, required at both Canadian and international law. Individuals targeted by the *Regulations* are offered no

due process protections by the 1267 Committee in the listing and delisting process. The procedure for challenging a listing is much like the security certificate review procedure struck down by the Supreme Court in *Charakaoui*, minus the added protection of judicial review available in the security certificate scheme. There is little in the procedures set out by the SCRs and the 1267 Committee Guidelines which could be construed as creating a system of decision-making in accordance with the principles of fundamental justice.

Accordingly, the *1267 Regulations* likely violate s. 7 of the *Charter* and s. 2(e) of the *Bill of Rights*.

It is, however, trite law that the *Charter* does not offer an absolute protection of rights, and the state is permitted to limit rights if it can establish that the limits are demonstrably justifiable in a free and democratic society, per section 1 of the *Charter*. But as the Supreme Court recognized in *Charakaoui*, “[t]he rights protected by s. 7 – life, liberty, and security of the person – are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests. It follows that violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1.”¹⁶⁵ Indeed, the Supreme Court has found that it is “rare” for a violation of s. 7 to be justified under s. 1.¹⁶⁶

The *Oakes* test sets out the factors for determining whether a breach of *Charter* rights can be justified under s. 1:¹⁶⁷

1. Does the impugned government action pursue a pressing and substantial objective important enough to justify limiting a *Charter* right?
2. Is the government action rationally connected to the objective?
3. Does the government action impair the *Charter* right no more than is necessary to achieve the objective?
4. Are the effects of the infringement proportional to the importance of the objective?

There are two potential objectives that can be offered to justify the s. 7 violation.

¹⁶⁵ *Charakaoui*, *supra* note 124 at para. 66.

¹⁶⁶ *United States v. Burns*, [2001] 1 S.C.R. 283 at para. 133; *see also* Hogg, *supra* note 135 at 38-46.

¹⁶⁷ *R. v. Oakes*, [1986] 1 S.C.R. 103.

First, the government may suggest that the *1267 Regulations* seek to protect national security and combat terrorism by implementing the 1267 Regime into Canadian law. It is arguable that the *1267 Regulations* are rationally connected to this proffered objective. But do the *1267 Regulations* minimally impair s. 7 rights? Arguably not. The *1267 Regulations* are not the only laws in Canada designed to combat terrorism, nor are they the only laws that utilize a blacklist for targeting individuals and entities for sanctions. For example, the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*¹⁶⁸ (the “*Terrorism Regulations*”) empowers the Governor in Council, at the recommendation of the Minister of Foreign Affairs, to compile a list of individuals and entities believed to be involved in terrorist activities. The *Terrorism Regulations* provide for judicial review of the decision to list and sets out a review procedure which, at the very least, provides the listed individual with a “reasonable opportunity to be heard.”¹⁶⁹ If the objective of the *1267 Regulations* is to protect national security and combat terrorism, the existence of the *Terrorism Regulations* suggests that there are alternate means of pursuing this objective which would provide for some greater procedural protections. Given that the *1267 Regulations* do not minimally impair the named person’s rights, it is difficult to see how the fourth factor – proportionality – can be resolved in favour of justifying the *Regulations*. Regardless of the importance of the objective, if there are less impairing alternatives to achieve that objective, the effects of the infringement will always be more harmful than they have to be.

Alternatively, the government may suggest that the pressing and substantial objective justifying the s. 7 breach is the fulfillment of Canada’s international treaty obligations, as UN Member states are required by the UN Charter to give domestic effect to Security Council decisions. In that case, the *Regulations* certainly have a rational connection to the stated objective – they substantively embody the sanction measures required by the SCRs establishing the 1267 Regime. With respect to minimal impairment, it is arguable that there is no alternative way to satisfy Canada’s treaty obligations under the UN Charter other than through literal adoption of the regime set out by the SCRs, without putting it in breach of its international obligations.

168 *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360.

169 This is not to say that the mechanisms for judicial review as set out in the *Terrorism Regulations* satisfy all of the due process requirements guaranteed under the *Charter*; an analysis of the procedural protections offered by the *Terrorism Regulations*, however, is beyond the scope of this paper.

But the justification would likely fail on the final proportionality factor. The detrimental effects of the infringement – deprivation of an individual’s fundamental due process rights, limitations on liberty and security of person, denial of basic fairness – cannot be outweighed by the importance of fulfilling Canada’s obligation under the UN Charter. It is, after all, a basic principle of Canadian law that treaty obligations cannot trump constitutional protections. But more importantly, the international obligation that Canada is seeking to fulfill is one that has been deemed effectively unlawful under international law. Indeed, if it were any entity other than the Security Council which had sought to impose such measures, the 1267 Regime itself would have been found unlawful under international human rights law. It cannot reasonably be argued that Canada has a compelling interest in adhering to an international obligation that would not only force it to commit a significant breach of the *Charter*, but would support a sanctions regime that has been internationally criticized by governments, courts and the United Nations itself.

It is unlikely that the *1267 Regulations* would pass constitutional muster. That alone would invalidate them. There is also the additional argument that the *Regulations* are also *ultra vires* the *United Nations Act*: the Governor in Council cannot enact regulations in violation of the *Charter*.¹⁷⁰ Therefore, in order for the *1267 Regulations* to take effect, Parliament must take up the task of enacting them, while invoking s. 33 of the *Charter* (the “notwithstanding clause”).¹⁷¹ Section 33 provides as follows, in relevant part:

- 33 (1) Parliament of the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 or 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

170 It is worth noting that there is also an argument that the *1267 Regulations* are *ultra vires* the jurisdictional power of its enabling legislation, which would parallel the reasoning of the UK Supreme Court in striking down the Treasury regulation implementing the 1267 Regime in the United Kingdom. The contours of that challenge, however, is beyond the scope of this paper.

171 The *Bill of Rights* has its own “notwithstanding clause” in s. 2, which states that the *Bill* applies “unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights.”

Under s. 33, Parliament may override the s. 7 protections of the *Charter*, and the *1267 Regulations*, as they exist now, may operate notwithstanding the fact that they are unjustifiably in violation of s. 7. Invocation of s. 33, however, would undoubtedly signal that the government is enacting legislation that is inconsistent with the *Charter*, creating a public debate “normally unwelcome to the government”.¹⁷² As a political matter, it may be very difficult to obtain support in Parliament for legislation that deliberately and consciously undermines *Charter* rights.

¹⁷² Hogg, *supra* note 135 at 39-9.

V. Concluding Observations

While the validity of the 1267 Regime itself was not at issue in *Abdelrazik*, Zinn J. nonetheless made the following declaration:

I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness.

Repeated in the critiques, commentary and jurisprudence concerning the 1267 Regime is a common refrain: this regime is fundamentally unfair.

Thus, as discussed above, the highest courts of the United Kingdom and the European Union have struck down the implementing legislation for the 1267 Regime in their jurisdictions, thereby putting their countries in breach of their treaty obligations under the UN Charter. The recent resolution passed by the Swiss Parliament shows that at least one UN Member state has declared its intention to deviate from the Security Council's direction in an attempt to place some procedural safeguards in the operation of the sanctions regime.¹⁷³ This was not the first time Switzerland has attempted to introduce some measure of due process into its domestic implementation of the 1267 Regime: when it implemented SCR 1483, Switzerland made provisions for notifying individuals prior to freezing assets. Targeted individuals then had 30 days to either challenge the asset freeze in Switzerland's federal court, or to apply for an exemption to the freeze.¹⁷⁴ As Dick Marty observed, this conduct "might contravene" the Security Council's resolutions, but for the Swiss, it was a matter of fulfilling its national and international human rights obligations.¹⁷⁵

In the past, Canada too has (briefly) defied the 1267 Regime, putting itself in breach of

¹⁷³ See note 59, *supra*, and accompanying text.

¹⁷⁴ Marty, *supra* note 66 at para. 84.

¹⁷⁵ *Id.*

its Security Council obligations in order to protect the rights of a Canadian citizen. In the case of Liban Hussein, a Canadian citizen who found himself on both Canada's own terrorist blacklist, pursuant to the *Terrorism Regulations*, and subsequently on the 1267 List, the Canadian government removed him from the domestic blacklist and exempted him from the *1267 Regulations* after determining that there was "no evidence he was connected to any terrorist activities."¹⁷⁶ At the time that Canada exempted Hussein from the *1267 Regulations*, however, he was still on the 1267 List; accordingly, Canada's conduct put it in non-compliance with the Security Council's directives.

Concerns over the Security Council's authority to enact resolutions incompatible with human rights norms have led to suggestions that UN Member states should not be bound by "unlawful" SCRs. A report to the Council of Europe's Parliamentary Assembly's Committee on Legal Affairs and Human Rights suggests that under the jurisprudence of the European Court of Human Rights, states are not required to execute United Nations sanctions if doing so would place them in breach of their obligations under the ECHR.¹⁷⁷

While these moves may be affirmations of commitment to due process and the rule of law, they nonetheless also serve to erode the authority of the Security Council and the United Nations.¹⁷⁸ The authority of the Security Council must be maintained to some degree – it is the primary body through which collective security is effected and enforced, and the Security Council's primary function, it may be recalled, is to maintain international peace and security. Nor is it reasonable to say that targeted sanctions should be eliminated entirely. But as has been observed: "[...] the trade-off between due process and [Security] Council effectiveness is not zero-sum: inattention to procedural

176 Dosman, *supra* note 100 at 18. This article also provides a fuller account of the circumstances surrounding the listing and delisting of Liban Hussein at pages 15 through 19.

177 Marty, *supra* note 66 at paras. 80-83. See also Judgments of the Court of First Instance of September 21, 2005 in *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the EU and Commission of the EC*, Case T-306/01 ["Yusuf"], and *Yassin Abdullah Kadi v Council of the EU and the Commission of the EC*, Case T-315/01 (stating that UN Security Council resolutions which do not observe *jus cogens* fail to bind UN Member states).

178 See Thomas J. Biersteker & Sue Eckert, *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"* (White paper prepared by the Watson Institute Targeted Sanctions Project) (2009) ["*Watson Report Update*"].

fairness can hurt the efficacy of targeted sanctions, through a combination of foot-dragging by member states and court challenges by individuals and NGOs.¹⁷⁹

There is no reason why the Security Council should not be acting in accordance with fundamental principles of human rights. According to the Fassbender Report:

The UN Security Council being a principal organ of the United Nations, a legal obligation of the Council to comply with standards of due process, or ‘fair and clear procedures’, for the benefit of individuals and ‘entities’ presupposes that the United Nations, as a subject of international law, is bound by respective rules of international law. In accordance with the established system of sources of international law, the United Nations could be obliged to observe such standards by virtue of international treaties (including the UN Charter as the constitution of the United Nations), customary international law, or general principles of law recognized by the members of the international community.

[...]

The development of international human rights law, to which the work of the United Nations has decisively contributed, has given grounds for legitimate expectations that the UN itself, when its action has a direct impact on the rights and freedoms of an individual, observes standards of due process, or ‘fair and clear procedures’, on which the person concerned can rely.¹⁸⁰

The Security Council itself has acknowledged that anti-terrorism measures must respect human rights. In 2003, the Security Council adopted SCR 2003, a declaration on the

179 Johnstone, *supra* note 41 at 349.

180 Fassbender Report, *supra* note 43 at Part C, paras. 2, 6. *See also Yusuf*, *supra* note 177 at paras. 279 *et seq.*:

[T]he Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to ‘reaffirm faith in fundamental human rights, in the dignity and worth of the human person.’ In addition, it is apparent from Chapter I of the Charter, headed ‘Purposes and Principles’, that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms. Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act ‘in accordance with the Purposes and Principles of the United Nations’. The Security Council’s powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

issue of combating terrorism which included the following term:

6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.¹⁸¹

There has been no shortage of suggestions from commentators as to how the 1267 Regime can be improved.¹⁸² For example, it has been suggested that the United Nations could create an independent arbitral panel or a judicial institution to consider delisting proposals, to which sanctions committees would delegate decision-making authority on delisting petitions. Decisions of the panel would be binding on the sanctions committee and be made public.¹⁸³ The panel would have access to all of the information supporting the decision to list, and individuals requesting delisting would be granted a hearing.

It has also been suggested that the Security Council should take further steps to increase transparency of the listing process. For example, the Security Council could adopt more detailed criteria for how listing and delisting decisions are made, and establish explicit evidentiary standards and guidelines for what information should be kept confidential, and what should be made publicly available.¹⁸⁴ Time limits could be imposed on listings. The 1267 Committee could also be required to provide written reasons for their decisions.

In order to maintain its own authority, the Security Council needs to take steps to bring the 1267 Regime into conformity with fundamental principles of justice and fairness. This is something only the Security Council can do. By its own terms, the UN Charter supersedes all other international treaties, including the human rights treaties. The UN Charter also puts decisions made by the Security Council beyond judicial review of

181 UN SC Res. 1456, S/RES/1456 (2003), Annex at para. 6.

182 *See, e.g.* Biersteker & Eckert, *Watson Report Update supra* note 178 at 23 - 32; *see also* David Cortright, et al., *Human Rights and Targeted Sanctions: An Action Agenda for Strengthening Due Process Procedures* (White paper prepared by the Sanctions and Security Research Program, Policy Brief SSRP 0911-01) (2009).

183 While there may be concerns about infringement upon the Security Council's authority, it should be noted that the Security Council already delegates binding decision-making authority to other tribunals, such as the International Criminal Tribunal for the former Yugoslavia.

184 Johnstone, *supra* note 41 at 350.

national courts. Even the International Court of Justice, the principal judicial body of the United Nations, has historically been cautious with respect to Security Council decisions, going so far as to state that it has no power to review.¹⁸⁵ In order to fend off the risk of selective application of SCRs, the Security Council itself needs to ensure that its decisions are consistent with the human rights instruments that bind the rest of the world, so that UN Member states like Canada will not be forced into non-compliance with the UN Charter simply so they can maintain fidelity to their national and international commitments to human rights and fundamental justice.

In the meantime, however, Canada and other UN Member states must follow the lead of countries like Switzerland and implement Security Council directives only in a manner consistent with their national and international human rights obligations, even if that means breaching the letter of their obligations under the UN Charter. It is nothing less than a matter of sovereignty, and of maintaining fidelity to the core principles underlying the UN Charter and the entire regime of international human rights law.

185 Antonios Tzanakopoulos, “United Nations Sanctions in Domestic Courts”, *J. Int’l Crim. Justice*, 8 (2010) at 258-259.

The 1267 Regime

In 1999, the United Nations Security Council established an anti-terrorism sanctions system known as the 1267 Regime to target the activities of al Qaeda, the Taliban and Osama bin Laden. The 1267 Regime consists of a blacklist, which subjects individuals on the list to an international travel ban and an asset freeze. Individuals are placed on the blacklist without notice, and until recently, could not even be told why there are on the list. A Canadian citizen can be placed on the 1267 List by a foreign nation without any independent review by Canada, and it is possible that Canada may not even have full access to the allegations against listed nationals.

The 1267 Regime has been characterized as violating fundamental principles of due process by Canada's Federal Court, the United Nations' own experts, and the European Court of Justice. Nonetheless, Canada continues to participate in legitimizing the regime through domestic legislature and policy directives.



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