



## Targeted Sanctions and Due Process

The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter

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## A. Definition of the study's scope

In the World Summit Outcome Document (General Assembly Resolution 60/1, paragraph 109) of 16 September 2005, the Heads of State and Government of the Member States of

the United Nations have affirmed their commitment to the rule of law and to the fair and clear procedures in sanctions regimes of the Security Council, and to the principle of due process.

The author wishes to express his gratitude to the participants of the expert seminar on fair and clear procedures in sanctions regimes of the Security Council, convened by the Legal Counsel of the UN, Mr. Nicholas Michel, which took place at UN Headquarters on 27 February 2006 to discuss a draft of the present study. He is grateful for valuable comments and criticism.

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<sup>1</sup> Emphasis added.

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**B. The problem: The lack of legal procedures available to individuals and “entities” targeted with sanctions under Chapter VII of the UN Charter through which they could challenge the measures taken against them**

There are currently ten sanctions regimes in place which have been imposed by the Security Council acting under Chapter VII of the UN Charter, the oldest, concerning Somalia, established in 1992, and the most recent established pursuant to Resolution 1591 concerning Sudan in March 2005.

Eight of the ten sanctions regimes have been established with the purpose, *inter alia*, of

preventing the flow of funds and other financial resources into the hands of the Government of Somalia and the Government of Sudan, and preventing the Government of Somalia and the Government of Sudan from obtaining funds and other financial resources from the international financial institutions, the international monetary fund, the international bank for reconstruction and development, the world bank, and the international center for the promotion of private investment development.

accordance with Article 103 of the UN Charter, to comply with resolutions made by the Security Council under Chapter VII of the UN Charter.<sup>6</sup> If, exceptionally, a domestic legal order allows an individual directly to take legal action against a Security Council resolution, the United Nations enjoys absolute immunity from every form of legal proceedings before national courts and authorities, as provided for in Article 105, paragraph 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations (General Assembly Resolution 1/22A of 13 February 1946) and other agreements.<sup>7</sup>

It has been argued by leading scholars of international law that the present situation

is not in line with the principle of due process. The United Nations should be held responsible for the actions of its member states. The United Nations should be held responsible for the actions of its member states. The United Nations should be held responsible for the actions of its member states.<sup>8</sup>

<sup>6</sup> Thus, the EU Council and EC Commission in the *Y, S, f* and *di* cases correctly described the law. The United Nations should be held responsible for the actions of its member states. The United Nations should be held responsible for the actions of its member states. The United Nations should be held responsible for the actions of its member states.<sup>8</sup>

### C. Summary of findings

1. On the basis of constitutional and statutory rules and practices common to a great number of States of all regions of the world, and as guaranteed by universal and regional







**D. Comments and explanations**

- 1. On the basis of constitutional and statutory rules and practices common to a great number of States of all regions of the world, and as guaranteed by universal**







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vate citizens against oppressive action by government agents and agencies and the afford-

2. **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.**

3. **Since the United Nations is not a party to any universal or regional treaty for the protection of human rights, it is not directly bound by the respective treaty provisions guaranteeing rights of due process. The United Nations being an autonomous subject of international law, it does not follow from the fact alone that its Member States have ratified certain human rights instruments that an according obligation of the Organization has come into existence.**

3.1 The United Nations, as an international organization and a subject of international law,<sup>38</sup> is not a party to any of the universal or regional treaties and conventions for the protection of human rights and fundamental freedoms. Accordingly, the UN is not directly bound by the respective provisions guaranteeing standards of due process. The treaties and conventions were drafted only with a view to the performance of States, not of other subjects of international law. For instance, in Article 2, paragraph 1 of the International

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<sup>37</sup> See Shelton, *supra* note 27, at p. 358.

<sup>38</sup> See ICJ, Advisory Opinion in the *Reservations to the Convention on the Prevention and Punishment of Crimes Against Humanity*, ICJ Reports 1951, p. 179.





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**international organizations, including the United Nations, will be increasingly influenced by that development as they, too, begin to engage in “supranational” lawmaking with a direct effect on individuals.**

4.1 As explained above, the legal spheres of individual member stat

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5.6 As explained in part 1 above, certain standards of due process are concurrently recognized in the domestic (constitutional) law of a great number of States of all regions of the world. To that extent, they have become rules of international law in the form of general principles of law in the meaning of Article 38, para. 1, lit. c, of the ICJ Statute. Although

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to international organizations (see *supra*, part 5), the principal source of human rights obligations of the United Nations is the UN Charter. All UN organs are bound to comply with the rules of the Charter as the constitution of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent.

8.1 The United Nations is an organization based on the concept of the rule of law. The organs of the UN are bound to comply with the rules of the UN Charter, which is the constitution of the United Nations.<sup>74</sup>

8.2 In the preamble of the UN Charter, the peoples of the United Nations have declared their solemn determination to live together in peace and harmony in a world of freedom, justice, equality and mutual respect. They are determined to accept the principles of the Charter and to live in accordance with them. They are determined to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. They are determined to strengthen international law and to create conditions of stability and well-being for all. They are determined to cooperate in solving international problems, in maintaining international peace and security, and in promoting and encouraging universal respect for and observance of human rights and fundamental freedoms for all. They are determined to practice tolerance and to live together in peace and harmony with one another. They are determined to accept the obligations which have been assumed by them in the Charter and to live in accordance with them. They are determined to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all.<sup>75</sup>

<sup>74</sup> See, e.g., *United Nations v. United States of America*, 1971 O.J. (L.A.C.) 1, 10 (1971).

the Commission on Human Rights. The Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of Genocide of 1948, the Convention on the Elimination of Racial Discrimination of 1965 and the two Human Rights Covenants of 1966 have become part of the constitutional foundation of the international community. In the preamble of the International Covenant on Civil and Political Rights, the States Parties to the Covenant declared, *inter alia*,<sup>78</sup>

An American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States at Bogotá in 1948, and the American Declaration of the Principles and Declaration of the Rights and Duties of Man, adopted by the Organization of American States at Bogotá in 1948, are hereby reaffirmed as a basis for the development of the rights and duties set forth in the present Covenant;<sup>79</sup>

and the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States at Bogotá in 1948, and the American Declaration of the Principles and Declaration of the Rights and Duties of Man, adopted by the Organization of American States at Bogotá in 1948, are hereby reaffirmed as a basis for the development of the rights and duties set forth in the present Covenant;<sup>78</sup> and the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States at Bogotá in 1948, and the American Declaration of the Principles and Declaration of the Rights and Duties of Man, adopted by the Organization of American States at Bogotá in 1948, are hereby reaffirmed as a basis for the development of the rights and duties set forth in the present Covenant;<sup>79</sup>



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**greatest possible extent.<sup>85</sup> 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 of persons must be necessary and proportionate to the aim the measure is meant to achieve.<sup>86</sup>**

**12. While the circumstances and modalities of particular sanctions regimes may require certain adjustments or exceptions, the rights of due process, or “fair and clear procedures”, to be guaranteed by the Security Council in the case of sanctions imposed on individuals and “entities” under Chapter VII of the UN Charter should include the following elements:**

**( ) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;**

**( ) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;**

**(c) the right of such a person or entity of being advised and represented in his or her dealings with the Council;**

**(d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously establishe**

12.3 As is known, the consideration of individual communications by the Human



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the form of compensation, rehabilitation, satisfaction, and/or guarantees of non-repetition<sup>98</sup>

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<sup>100</sup> ... *inter* ...

<sup>101</sup> ...

<sup>102</sup> ...

<sup>103</sup> ...



**E. Select bibliography**

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**F. Legal texts**

- I. The Universal Declaration of Human Rights (1948)  
 [with Vienna Declaration and Programme of Action (1993) and Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1999)]
- II. International Covenant on Civil and Political Rights (1966)
- III. Regional Human Rights Treaties
  - 1. [European] Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
  - 2. Protocol No. 7 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (1984)
  - 3. American Convention on Human Rights (1969)
  - 4. African [Banjul] Convention on Human and Peoples Rights (1981)

**I. The Universal Declaration of Human Rights (1948)**

**Article 6**

Everyone has the right to a fair and public hearing by an independent and impartial tribunal in the case of any dispute about his rights and obligations and of any criminal charge against him.

**Article 7**

Everyone has the right to be free from torture or other cruel, inhuman or degrading treatment or punishment.

**Article 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.

**Article 28**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

*See also. Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on 25 June 1993<sup>104</sup>

*World Conference on Human Rights,*

Considering that the promotion and protection of human rights is a matter of priority for the international community,

Reaffirming the commitment of the international community to the promotion and protection of human rights and to the principle of the universality of human rights,

Reaffirming the commitment of the international community to the promotion and protection of human rights and to the principle of the universality of human rights, and to the principle of the universality of human rights, and to the principle of the universality of human rights,

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Emphasizing the need for the international community to promote and protect human rights and to the principle of the universality of human rights, and to the principle of the universality of human rights,

<sup>104</sup> UN Doc. A/CONF.157/23 of 12 July 1993.



nancial assistance should be provided by the international community. It is incum-





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(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

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

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### **Article 16**

Everyone shall have the right to recognition everywhere as a person before the law.

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### III. Regional Human Rights Treaties<sup>106</sup>

#### 1. [European] Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

##### Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

1. the lawful detention of a person after conviction by a competent court;
2. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
3. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
4. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
5. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
6. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken to deport him.

necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved

tice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

**Article 8. Right to a Fair Trial**

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so

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- b. to develop the possibilities of judicial remedy; and
  - c. to ensure that the competent authorities shall enforce such remedies when granted.

*See also:* **American Declaration of the Rights and Duties of Man (1948)**<sup>107</sup>

**Article I. Right to life, liberty and personal security**

Every human being has the right to life, liberty and the ra12.5228(ra )12.5228(oi)6.9129(i)-4.60947(t)-4.609

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#### 4. African [Banjul] Charter on Human and Peoples' Rights (1981)

##### Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

##### Article 7

1. Every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

*See so:* **Resolution of the African Commission on Human and Peoples' Rights on the Right of a Fair Trial (1992)**<sup>108</sup>

**The African Commission on Human and Peoples' Rights**

meeting in its Eleventh Ordinary Session, in Tunis, Tunisia, from 2 to 9 March 1992,

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4) Have the free assistance of an interpreter if they cannot speak the language used in court.

Persons convicted of an offence shall have the right of appeal to a higher court.

## **5. Arab Charter on Human Rights (1994)<sup>109</sup>**

### **Article 7**

The accused shall be presumed innocent until proved guilty at a lawful trial in which he

XXXVII - there shall be no exceptional tribunal or court:

XXXIX - the institution of the jury is recognized, according to the organization which the law shall establish, and the following are ensured:

- a) full defense;
- b) secrecy of voting;
- c) sovereignty of verdicts;
- d) power to judge willful crimes against life;

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### **3. European Union: Charter of Fundamental Rights of the European Union (2000)<sup>111</sup>**

#### **Article 41 – Right to good administration**

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
  - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
  - (c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language.

#### **Article 42 – Right of access to documents**

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

#### **Article 43 – European Ombudsman**

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of mal-

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

#### **Article 48 – Presumption of innocence and right of defence**

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

#### **4. India: Constitution of India (1949, as amended)**

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## **5. New Zealand: The New Zealand Bill of Rights Act (1990)**

### **Section 8 [Life]**

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

### **Section 22 [Personal Liberty]**

Everyone has the right not to be arbitrarily arrested or detained.

### **Section 23 [Arrest]**

(1) Everyone who is arrested or who is detained under any enactment

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

- (b) The right to be tried without undue delay:
- (c) The right to be presumed innocent until proved guilty according to law:
- (d) The right not to be compelled to be a witness or to confess guilt:
- (e) The right to be present at the trial and to present a defence:
- (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
- (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
- (h) The right, if convicted of the offence, to appeal according to the law to a higher court against the conviction or against the sentence or against both:
- (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

**Section 27 [Right to justice and remedies]**

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's right, obligations, or interests protected or recognised by law.
- (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

**6. South Africa: Constitution of the Republic of South Africa (1996)**

**Section 12 – Freedom and security of the person**

(1) Everyone has the right to freedom and security of the person, which includes the right—

- (a) not to be arrested without being informed at the time of arrest of the name and duty station of the arresting officer and of the authority and grounds for the arrest;
- (b) not to be detained without being informed, as soon as practicable, of the reasons for such detention;
- (c) not to be held incommunicado, except in terms of section 35(2)(b);
- (d) not to be tortured or inhumanly or degradingly treated;
- (e) not to be kept in detention unless there has been a reasonable suspicion that the person has committed an offence and that there are not sufficient grounds to release the person;
- (f) not to be kept in detention longer than necessary in a particular case.

**Section 33 – Just administrative action**

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and—

**Section 34 – Access to courts**



Everyone has the right to have any dispute that can be resolve

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8. to be presumed innocent, to remain silent, and not to testify during the proceedings;
  9. to adduce and challenge evidence;
  10. not to be compelled to give self-incriminating evidence;
  11. to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  12. not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  13. not to be tried for an offence in respect of an act or omission for which that person

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