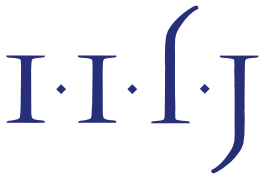

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DUE PROCESS OF LAW IN THE FACT-FINDING WORK OF THE SECURITY COUNCIL'S PANELS OF EXPERTS: AN ANALYSIS IN TERMS OF GLOBAL ADMINISTRATIVE LAW

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Luciana T. Ricart[*]

Abstract

This article describes, through two case studies, the fact-finding activity of UN Panels of Experts, and argues that the nature of the activities undertaken by them – a type of global administration with elements of a quasi-judicial character – calls for the adoption of certain procedural protections that should accompany their work. This is particularly important given the fact that the activities of these panels have important repercussions on the legal condition of the listed individuals and companies, who – among other things – can be subject to travel bans and freezing of their personal assets, and barred from accessing banking facilities or establishing commercial relations with international financial institutions. This article draws the principles to which the activity of the fact-finding work of the Security Council's Panels of Experts should be subject from international human rights law and from the practices of inquiry commissions.

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DUE PROCESS OF LAW IN THE FACT-FINDING WORK OF THE SECURITY COUNCIL'S PANELS OF EXPERTS. AN ANALYSIS IN TERMS OF GLOBAL ADMINISTRATIVE LAW.

I. INTRODUCTION

The Security Council, the organ of the United Nations entrusted by the Charter with the primary responsibility for the maintenance of international peace and security, [1] has, through its practice, enlarged the kind of "measures not involving the use of force" that can be imposed on member states in order to fulfill that function. The Council's ingenuity, and its efforts to adjust its powers to the circumstances of specific cases,[2] has led it to impose travel bans and embargoes on the sale of arms, diamonds and petroleum products, among other measures. In addition, the sanctions have not only targeted states but also individuals, or groups of individuals, by listing them as having links with terrorist organizations, or subjecting them to restrictive entry and transit controls and freezing their assets. The Council has been strongly criticized, both in terms of the efficacy of its actions, and the consequences of its decisions for third states and for the population of the targeted state.[3]

Another aspect of the imposition of sanctions that has to be taken into account is the issue of implementation and monitoring. In that respect, the practice of the Security Council after the Cold War has been to set up Sanctions Committees, which are composed of representatives of all its members. These bodies make their decisions by consensus, which are then reported to the Council by the chairperson. The Sanctions Committees – formed by diplomats, who do not always possess the required expertise – have often been aided by independent experts who report and provide recommendations to them on the implementation and monitoring of sanctions. The Panels of Experts are also set up as fact-finding bodies to investigate certain situations and give recommendations on what action the Council could take to address those that pose a threat to peace. A UN International Commission of Inquiry (UNICOI) was first established by the Security Council by Resolution 1013 in September 1995, to investigate and report to the Rwanda Sanctions Committee on violations of the arms embargo.[4] Later, these types of panels have been established by the Security Council in relation to Afghanistan, Angola, the Democratic Republic of Congo, Liberia, Sierra Leone and Somalia.[5]

As the findings of these panels can impact upon the rights of individuals, they have been subjected to strong criticism on the grounds that their reports were not

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[1] UN Charter, article 24.1

[2] Linos-Alexandre Sicilianos, *Bilan de Recherches de la Section de Langue Francaise du Centre D'Étude et de Recherche de l'Academie, in* CENTRE D'ÉTUDE ET DE RECHERCHE DE DROIT INTERNATIONAL ET DE RELATIONS INTERNATIONALES, LES SANCTIONS ÉCONOMIQUES EN DROIT INTERNATIONAL 19, 87 (2000).

[3] *Id*.

[4] S.C. Res. 1013, UN Doc., S/RES/1013 (1995).

[5] *See* United Nations, 'Letter dated 23 October 2003 from the Secretary-General addressed to the President of the security Council', 'Letter dated 15 October 2003 from the Chairman of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo addressed to the Secretary-General', UN Document S/2003/1027, ¶ 75.

sufficiently supported by annexed documentation, and that their conclusions have been reached by applying a low threshold of evidence. Furthermore, even if their recommendations have not always been adopted by the Security Council, there have been threats of litigation made against the panels,[6] and their findings have been regarded in most instances as carrying the authority of Security Council decisions.

In this paper, I will examine the activities of some of these groups of independent experts/fact-finding bodies, analyzing their composition and procedures. I will argue that the nature of the activities undertaken by them – a type of global administration with elements of a quasi-judicial character – calls for the adoption of certain procedural standards for their fact-finding activities, procedural protections that should accompany their work.

It must be highlighted that the following analysis is both descriptive, drawing upon the current practice of the work of the panels of experts (*de lege lata*), and prescriptive, proposing a set of principles of procedural due process that should be adopted in the fact-finding activity of these bodies (*de lege ferenda*).

Part II of this paper will describe through two case studies some of the panels and the purpose for which they were created. Part III will then extract the main procedural features these bodies followed, how they are composed and what are administrative law-type elements characterize their processes. Finally, I will lay down the procedural rules to which they should be subject, and make some proposals with a view to enhancing the fact-finding procedures of these panels.

II. CASE STUDIES: PANEL OF EXPERTS IN ANGOLA AND IN THE DEMOCRATIC REPUBLIC OF CONGO.

A. Angola: Sanctions against UNITA

In 1993[7] and subsequently in 1997[8] and 1998,[9] the Security Council imposed sanctions against the *União Nacional para a Independência Total de Angola* **(**UNITA), prohibiting the sale or delivery of arms, military equipment and petroleum products to UNITA, and the purchase of diamonds mined in areas that they controlled. The sanctions required the seizing of bank accounts and other financial assets of UNITA, mandated the closing of their representation offices abroad, and imposed restrictions on the travel of senior UNITA officials and adult members of their immediate families. The purpose of those measures was not to punish UNITA, but to require it to comply with the obligations it had undertaken in the 1991 "Acordos do Paz" and the 1994 Lusaka Protocol, and to limit its ability to pursue its objectives by military means.

Along with the imposition of sanctions, a Sanctions Committee was established to monitor their implementation by member States.[10]

1. The Establishment of a Panel of Experts

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[6] Human Security Research and Outreach Program, *UN Sanctions Expert Panels and Monitoring Mechanisms: Next Steps*, May 2006, *available at* http://www.humansecurity.gc.ca/pdf/sanctions_expert-en.pdf

[7] S.C. Res. 864, ¶ 17-25, UN Doc., S/RES/864 (1993).

[8] S.C. Res. 1127, ¶ 4, UN Doc. S/RES/1237 (1997).

[9] S.C. Res. 1173, ¶ 11-12, UN Doc., S/RES/1173 (1998).

[10] S.C. Res. 864, *supra* note 7, ¶ 22.

i. Why the Panel was set up

In Resolution 1237 (1999), the Security Council established a Panel of Experts with a six month mandate, "to collect information and investigate reports, including through visits to the countries concerned, relating to the violations of the measures imposed against the União Nacional para a Independência Total de Angola (UNITA) with respect to arms and related materiel, petroleum and petroleum products, diamonds and the movement of UNITA funds as specified in the relevant resolutions and information on military assistance, including mercenaries; to identify parties aiding and abetting the violations of the above-mentioned measures; and to recommend measures to end such violations and to improve the implementation of the above-mentioned measures."[11]

ii. Composition of the Panel

Originally, two Panels of Experts of five members each were set up, one on the sources of revenue, funding and petroleum supplies of UNITA, and the other on the sources of military support to UNITA. They were later combined into one ten-member Panel.[12]

iii. Methods used by the Panel in its investigation and Results reached

The investigations of this Panel resulted in a report in March 2000[13] that 'named and shamed' a number of governments – including the serving Presidents of Burkina Faso and Togo – and specific individuals with private sector interests, creating significant distress in some UN circles, and greatly increasing the pressure on UNITA's external sources of funds and other support.[14] The report motivated fiery discussions in the Security Council, where a number of African and European nations challenged its methodology.[15]

This report was commonly known as the "Fowler Report", after the Canadian diplomat – Ambassador Robert Fowler – who was chairing the Angola Sanctions Committee at the time, and who was particularly influential in improving the work of that monitoring body. The publication of the report also attracted a great amount of press attention, and some criticism from NGOs with regards to the methods and findings of the Panel.[16]

The Panel, in its report, devoted only four paragraphs to describing how it carried out its work, and the evidentiary standards that it applied. It highlighted that its members had traveled to as many as thirty countries in Europe and Africa (as well as the United States and Israel) to gather information on alleged violations, to check or verify information that was received, and to investigate leads and linkages. They had conducted interviews with government officials, NGOs, police and intelligence sources, industry

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[11] S.C. Res. 1237, ¶ 7, UN Doc, S/RES/1237 (1999).
[12] United Nations, 'Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA', UN Doc S/2000/203 (10 March 2000) [hereinafter, 2000 Angola Report].
[13] *Id.*
[14] CHESTERMAN, S., FRANCK, T & MALONE, D., LAW AND PRACTICE OF THE UNITED NATIONS. DOCUMENTS AND COMMENTARY, chapter 10 (2007).
[15] Alex Vines, *Monitoring UN Sanctions in Africa: the Role of Panels of Experts*, 2003 VERIFICATION YEARBOOK 247, at 251, *available at* www.vertic.org.
[16] *See Infra* notes 18 and 19 and accompanying text.

associations and commercial companies, journalists and others. Moreover, during the visit to Angola in January 2000 by Ambassador Fowler, together with the Vice Chairman and the Rapporteur of the Panel, videotaped interviews were conducted with a number of key recent defectors from UNITA.

As for the evidentiary standards applied in the course of the investigations, the Panel stated in its report that, in all of its work, it had been especially careful to use only information that had been confirmed or corroborated by more than one source in which the Panel had confidence. This standard had been applied to all information collected by the Panel, including that gathered from UNITA defectors.

Conscious of the implications of the report, the Panel stated that it required direct evidence in the case of those political leaders mentioned. Such direct evidence was confirmed and corroborated by at least two other sources deemed by the Panel to be credible. For other non-UNITA persons mentioned in the report, the Panel had required a comparable level of proof of their involvement; moreover, it tried to focus primarily on the main actors in each category, rather than seeking to present an exhaustive list of every person thought to be connected with UNITA sanctions-busting.

By using these, rather than looser, standards, the Panel highlighted that a number of actors involved, including important ones, had inevitably escaped being explicitly mentioned in the report. However, it further stated that if, as it recommended, the Council decided to establish some form of monitoring or follow-up mechanism, information in the Panel's possession would be made available to those concerned so that further investigations could be conducted in order to confirm or corroborate the allegations in question.[17]

iv. Assessment of the Methods used by the Panel in its investigation

Despite the allegedly high standards of evidence applied in its findings, there were a number of weaknesses and flaws in how the report was assembled that must be highlighted. Alex Vines, a former member of the UN Panel of Experts on Liberia, draws attention to the fact that, unlike the UNICOI reports, the Angola Panel relied heavily on videotaped testimonies of senior defectors. According to him, there was also some political editing in that reference to Zambia was excluded, as the authors of the report feared that this could provide a pretext for Angola to invade it. This gave the report an anti-francophone flavor – an issue that was used in attempts to undermine both the report and the Panel of Experts. In addition, the Panel had been seen as partisan in that it didn't report on corrupt Angolan officials who had helped UNITA to violate sanctions.[18]

Another flaw, emphasized by Human Rights Watch, was the failure to arrange for a full transcription of the more than fifteen hours of footage on the cross-examination of UNITA defectors in Angola, although this information became a key source of the information included in the report. Furthermore, the interviewing techniques of the members of the Panels were said to be lacking in some regards. The report, according to this organization, contained few details on the finances of UNITA and the brokers who flew supplies to it. The Panel did not use the expertise and assistance of Interpol, despite

[17] 2000 Angola Report, *supra* note 12, ¶ 8-12.
[18] A. Vines, supra *note* 15, at 251.

the fact that Ambassador Fowler had recommended it and that Interpol itself had offered to provide the Panel with the assistance of an analyst.[19]

2. The Security Council's endorsement of the Panel Report and the Establishment of a Monitoring Mechanism

After the controversy generated by the publication of the "Fowler Report", the Security Council adopted Resolution 1295, welcoming the report of the Panel of Experts and taking note of the conclusions and recommendations contained therein.[20] The Council did not engage in any kind of assessment of the information enclosed in the report, limiting itself to welcoming the decision of several of the States referred to in the report to establish interdepartmental commissions and other mechanisms to investigate the allegations. It also took note of the information provided to the Council by States in response to the conclusions and recommendations of the Panel of Experts and requested the Sanctions Committee to consider fully all such information, including, where appropriate, through discussion with representatives of the States concerned, inviting the submission of additional information where appropriate.[21] Regarding the list of UNITA officials and members of their families that were subject to travel restrictions, the Council in this resolution requested the Sanctions Committee to consult relevant States, including the Government of Angola, regarding the possible expansion of that list, drawing on the information set out in paragraphs 140 to 154 of the report of the Panel of Experts.

There is no other procedural guidance in the Security Council resolution as to how to deal with the information obtained by the Panel of Experts. Instead, the Council chose to establish a new body in this resolution.

i. Why the Monitoring Mechanism was set up

In an attempt to distinguish it from the Panel of Experts, this time the name "Monitoring Mechanism" was given to the expert body set up by the Security Council. This body's mandate was to collect information and investigate further leads relating to allegations of sanctions violations with respect to arms and related material, petroleum and petroleum products, diamonds, funds and financial assets, travel and travel representation, as contained in Resolutions 864 (1993), 1127 (1997) and 1173 (1998). In addition, it would take into consideration any relevant leads contained in the report of the Panel of Experts.[22]

ii. Composition of the Monitoring Mechanism

The Monitoring Mechanism was established for an initial period of six months and was composed of five experts. Despite this composition, this body did not include any of the members of the previous Panel of Experts, and the content and style of the reports it drafted were significantly different from the controversial "Fowler Report".[23]

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[19] Human Rights Watch, *Briefing Paper: The UN Sanctions Committee on Angola: lessons learned?*, April 17, 2000, *available at* http://hrw.org/english/docs/2000/04/17/angola3069.htm..
[20] S.C. Res. 1295 ¶ 2, UN Doc S/RES/1295 (April 18, 2000).
[21] *Id.* at ¶ 7.
[22] United Nations, Department of Political Affairs, Under-Secretary General, "Monitoring Mechanism on UNITA Sanctions. Fact Sheet", *available at* http://www.un.org/Depts/dpa/docs/monitoringmechanism.htm
[23] A. Vines, *supra* note 15, at 251

iii. Methods used by the Monitoring Mechanism in its investigation and Results reached

This mechanism ran for almost two years and filed several reports.[24] In carrying out their mandate, the Monitoring Mechanism's experts would conduct visits to appropriate countries, report periodically to the Sanctions Committee on Angola, and submit a written report to the Security Council containing, *inter alia*, recommendations aimed at improving the implementation of the measures imposed against UNITA.[25]

In the first report filed by the Monitoring Mechanism, it stated that its methodology would be to take the reports of the Panel of Experts as a point of departure, to follow up on the leads provided but not investigated by it and to draw from the current situation on the ground in Angola. As to the threshold of evidence used, it highlighted that it would use strict evidentiary standards in its investigations, and put allegations to those concerned in order to allow them to exercise their right to reply.

In addition, the Monitoring Mechanism thought it important to sensitize international public opinion about its role in particular, and the role of the Security Council's sanctions against UNITA in general. In that regard, it created a web site containing information on its work, as well as an e-mail address where the Monitoring Mechanism could be contacted; and it committed itself to holding regular consultations with the other Panels of Experts working on similar issues.[26]

iv. Assessment of the Methods used by the Monitoring Mechanism in its investigation

The findings of the Monitoring Mechanism with regards to arms and military equipment seem to be supported by more documentary evidence than the reports of the previous Panel of Experts. Furthermore, the Monitoring Mechanism seems to have been more cautious when reaching conclusions. The part of the report dealing with the role of transport in the violation of sanctions against UNITA contains a detailed description of the individuals, companies and organizations involved in the resupply of UNITA through air transport. The report seems to lack, however, any response from those accused of

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[24] United Nations, 'Interim report of the Monitoring Mechanism on Angola Sanctions established by the Security Council in Resolution 1295 (2000) of 18 April 2000', UN document S/2000/1026 (25 October 2000); 'Final report of the Monitoring Mechanism on Angola Sanctions', UN document S/2000/1225 (21 December 2000); 'Addendum to the final report of the Monitoring Mechanism on Sanctions against UNITA, 11 April 2001', UN document S/2001/363 (18 April 2001); 'Supplementary report of the UN Monitoring Mechanism on Angola Sanctions established by Security Council Resolution 1295 (2000), in accordance with paragraph 6 of Security Council Resolution 1348 (2001)', UN document S/2001/966 (12 October 2001); 'Additional report of the Monitoring Mechanism on Sanctions against UNITA', UN document S/2002/486 (26 April 2002); 'Additional report of the UN Monitoring Mechanism on Sanctions against UNITA', UN document S/2002/1119 (16 October 2002); and 'Final report of the Monitoring Mechanism on Sanctions against UNITA submitted in accordance with paragraph 4 of Resolution 1439 (2002)', UN document S/2002/1339 (10 December 2002).

[25] It is also reported that the Monitoring mechanism tried to enhance its investigative capacity in 2001 by commissioning the political risk consultancy Kroll Associates to assist it. The results were disappointing, which demonstrated to the UN Secretariat that the subcontracting to the private sector might not be appropriate for this type of work; *See* Alex Vines, *supra* note 15, at 252.

[26] 'Final Report of the Monitoring Mechanism on Angola Sanctions', UN Doc S/2000/1225, (21 December 2000) ¶ 5-7.

being involved in these activities, thus contradicting the evidence gathering process the Mechanism said it would follow.

The part of the report dealing with sanctions on diamond trading and financial assets also contains a very thorough description of the individuals, governments and companies involved in the trading of diamonds,[27] and a description of the methodology used by the Monitoring Mechanism in conducting its investigation and evaluating the different sources of information.

Finally, in its conclusions, the report – among other things – highlights the regional component of conflicts of the type existing in Angola. In this sense, it stressed that there were many common elements in terms of arms, diamond dealers and air transport carriers involved in these conflicts, and that it would not be surprising to see the same names, companies and activities related to organized crime emerging in other countries in the region, such as the DRC and Sierra Leone.[28]

The *addendum* to this report, filed by the Monitoring Mechanism on April 11, 2001 (after the renewal of its mandate in 2001 by Security Council Resolution 1336), contained detailed information on the companies involved in the arms and financial transactions, and the composition of their boards of directors.[29] In terms of UNITA's representation, and travel and residence of senior UNITA officials and their adult family members, the additional report, drawing on new information – and in an effort to keep the list as accurate as possible – suggested that certain names be deleted, others added, and a number of other changes made.[30]

The report contains accounts of the methodology used for investigating the UNITA diamond trade, highlighting that evidence-gathering in the world of diamond dealing is made particularly difficult by the relative absence of documentation of the kind one would encounter in more normal trading channels, and because of the complicity of diamond trading networks. For these reasons, the Monitoring Mechanism took a cautious approach to naming companies, to avoid the risk of being misled by rumor. The experts had also launched an initial study into the feasibility of a detailed investigation with Interpol and other relevant experts into this issue, and concluded that this could yield results; although it also stated that it was premature to publish the details, as the investigation was underway. They did, however, highlight the need for the successor to the Mechanism (or some other body, such as Interpol) to continue with this line of investigation.[31]

In their concluding remarks, they emphasized that "in terms of the work of the mechanism that has been mandated, there is still lots to be done in connection with the ongoing investigations, analysis of the information that is being gathered and continuing consultations with the governments and organizations concerned…"[32]

After a further renewal of the mandate of the Monitoring Mechanism, a supplementary report was filed by the experts, drawing upon the previous leads and having collected more information on the relevant areas of investigation. The

[27] *Id.* at ¶ 145-202.
[28] *Id*. at ¶ 252-253.
[29] United Nations, '*Addendum* to the final report of the Monitoring Mechanism on Sanctions against UNITA', UN Doc S/2001/363 (April 11, 2001), ¶ 14-33.
[30] *Id*. at ¶ 49-50.
[31] *Id.* at ¶ 79-86.
[32] *Id*. at ¶ 117.

supplementary report highlights the work of the Monitoring Mechanism in consultation with the Interpol Secretariat, which has conducted criminal background checks on the arms dealers and the brokering companies named in previous reports.

In its conclusions and recommendations for future action, the Monitoring Mechanism highlighted the need for endowing the Security Council with the permanent capacity to ensure ongoing monitoring of targeted sanctions regimes and illicit trafficking in high-value commodities in armed conflicts. This would prevent duplication of tasks and overlapping of investigations, and ensure the preservation of a comprehensive database.

B. Democratic Republic of Congo: The Illegal Exploitation of Natural Resources

1. Why the Panel was set up

The Panel of Experts on the "Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo" was initially set up for a period of six months by the Secretary General, following a request made by the President of the Security Council on June 2, 2000.[33] Its mandate was (a) to collect information on all activities of illegal exploitation of natural resources and other forms of wealth of the DRC, including those undertaken in violation of the sovereignty of that country; (b) to research and analyze the links between the exploitation of the natural resources and other forms of wealth in the DRC and the continuation of the conflict; and (c) to revert to the Council with recommendations.[34]

Later, the Security Council, in a statement by its President dated December 19, 2001, requested the Secretary General to renew the mandate of the Panel of Experts for a further period of six months, and asked the Panel to submit both an interim and a final report.[35] The Panel was asked to include in its reports, among other things, an update of the relevant data, an analysis of further information from all relevant countries, and "an evaluation of the possible actions that could be taken by the Council in order to help bring to an end the plundering of the natural resources of the DRC, taking into account the impact of such actions on the financing of the conflict and their potential impact on the humanitarian and economic situation of the DRC."[36]

2. Composition of the Panel

The Panel was composed of five experts and assisted by a technical advisor, an associate political officer, an administrator and a secretary.[37] When the Panel's mandate was renewed, two of the experts were reappointed.

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[33] Security Council, 'Statement by the President of the Security Council', UN Doc. S/PRST/2000/20 (June 2, 2000).

[34] *Id*.

[35] Security Council, 'Statement by the President of the Security Council', UN Doc. S/PRST/2001/39 (December 19, 2001).

[36] United Nations, 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo', UN Doc. S/2002/1146 (16 October 2002), ¶ 1 [hereinafter, 2002 Final DRC Report].

[37] United Nations, 'Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo', UN Doc. S/2001/357 (12 April 2001), ¶ 2-3.

3. Methods used by the Panel in its investigation and Results reached

The initial report filed by the Panel highlighted the link existing between the illegal exploitation of natural resources and the continuation of the armed conflict.[38] The Panel reviewed the processes by which natural resources were physically exploited by the occupying forces, primarily those of Rwanda and Uganda, in conjunction with their respective rebel counterparts in the DRC. Selected individuals linked to these forces and rebel groups were profiled, to illustrate the extent to which this was an organized and "embedded" venture.[39] The Panel further stated that this situation would not have been possible were it not for the fact that bilateral and multilateral donors, and certain States (both neighboring and more distant), had passively facilitated the exploitation of the resources of the DRC. Moreover, it found that the role of private companies and individuals had been vital. The Panel was not hesitant to state that it had "indications of the direct and indirect involvement of some staff of embassies and cooperation agencies of developed countries", proceeding later to name specific persons involved as well as some regional leaders. However, the experts were cautious in certain of their statements regarding accusations against Presidents or specific individuals, indicating only that further investigation was required. [40]

Amongst the recommendations of the Panel were included the imposition of sanctions against the countries and individuals involved in the illegal activities, and the establishment of certain preventive measures to avoid a recurrence of the current situation. Moreover, some form of reparation to the victims of the illegal exploitation of natural resources was suggested by the experts.

The Panel further recommended that the Security Council consider establishing an international mechanism to investigate and prosecute the individuals, companies and government officials named in the report as being involved in economic criminal activities which directly or indirectly harmed powerless people and weak economies.[41]

The Panel also proposed that the Security Council establish a permanent mechanism charged with investigating the illicit trafficking of natural resources in armed conflicts, also monitoring the cases which were already subject to the investigation of other panels, such as those of Angola, the Democratic Republic of the Congo and Sierra Leone.[42]

The findings of the Panel in the first report filed after the renewal of its mandate were widely publicized in the press.[43] These resulted in major controversy, as the Panel specified those individuals and organizations involved in the illegal exploitation of natural resources, and recommended that certain restrictive measures (such as travel bans, freezing of personal assets, and bans on accessing banking facilities or establishing

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[38] *Id*. at ¶ 109.
[39] *Id.* at ¶ 17-18.
[40] *Id* at ¶ 181-183.
[41] *Id.* at ¶ 239.
[42] *Id*. at ¶ 240.
[43] BBC News, *UN Condemns Congo Exploitation*, November 20, 2001, *available at* http://news.bbc.co.uk/1/hi/world/africa/3218149.stm; BBC News, *UN Should Act on Congo Plunder*, October 28, 2003, *available at* http://news.bbc.co.uk/1/hi/world/africa/3218149.stm

commercial relations with international financial institutions) be taken.[44] The Panelists also drafted another list of business enterprises which, in their view, had acted in violation of the OECD Guidelines for Multinational Enterprises.[45]

The Panel stated that they had obtained information from a wide variety of sources, including documents and/or eye-witness observations.[46] As to the standard of proof applied, the Panel claimed to have "operated under a reasonable standard of proof, without recourse to judicial authority to subpoena testimony or documents", and to have "made every effort to fairly and objectively evaluate the information it has gathered".[47]

4. An attempt by the Security Council to respect the right of individuals and companies to be heard before the Panel of Experts.

Following the criticisms and threats of litigation made against the Panel,[48] the Security Council, at the time it extended the Panel's mandate, sought to introduce some form of procedure by which individuals, companies and States named in the report would have an opportunity to be heard. In the words of the Council, it invited, "in the interests of transparency, individuals, companies and States which have been named in the Panel's last report to send their reactions (…) to the Secretariat", and requested "the Secretary-General to arrange for the publication of these reactions, upon request by individuals, companies and States named in the report".[49] The Security Council also stressed "the importance of dialogue between the Panel, individuals, companies and States", and requested "that the Panel provide to the individuals, companies and States named, upon request, all information and documentation connecting them to the illegal exploitation of the Democratic Republic of Congo's natural resources."[50] Finally, recognizing that the Panel was not a judicial body and did not have the resources to carry out an investigation whereby its findings could be considered as established facts, the Security Council urged "all States, especially those in the region, to conduct their own investigations, including as appropriate through judicial means, in order to clarify credibly the findings of the Panel."[51] The Council further "noted with satisfaction" the decisions of both the DRC and some other States to establish such judicial inquiries.

The Panel arranged meetings in Nairobi in March 2003 with those named in its report, in order to enable them to effectively comment on its findings and to discuss the

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[44] 2002 Final DRC Report, *supra* note 36, ¶174-176 (s*ee also* Annex I: "Companies on which the Panel recommends the placing of financial restrictions"; Annex II: "Persons for whom the Panel recommends a travel ban and financial restrictions").
[45] *Id*. at ¶ 177 and Annex III.
[46] United Nations, 'Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo', UN Doc. S/2003/1027 (23 October 2003), ¶ 9, 11 [hereinafter, 2003 Final DRC Report].
[47] 2002 Final DRC Report, *supra* note 36, ¶ 8.
[48] *See supra* note 6 and accompanying text.
[49] S.C. Res. 1457, ¶ 11, UN Doc. S/RES/1457 (24 January 2003) (noting with concern the links between conflict and natural resources in the DRC, it renewed the mandate of the Panel of Experts on the illegal exploitation of natural resources in that State).
[50] *Id*. at ¶ 12.
[51] *Id*. at ¶ 15.

procedures for an exchange of information.[52] 58 individuals, companies and States reacted, a number much lower than the approximately 160 named in the report. These written reactions were published as an annex to the report of the Panel on June 20, 2003. In the letter from the Chairman of the Panel of Experts to the Secretary-General, he stressed – in what looked like an attempt to protect or justify the nature of the findings of the Panel – that its "objective was not to blame or condemn individuals, companies or other named parties", but rather "to highlight the links between the illicit exploitation of natural resources and the fuelling of conflicts".[53]

After the submission of these reactions, the Security Council passed Resolution 1499 (2003),[54] in which it welcomed "the publication of the reactions of those individuals, companies and States", took note of "the efforts of the Panel to remove from the annexes attached to its report the names of those parties with which it has or will have reached a resolution by the end of its mandate", and requested the Secretary-General "to extend the mandate of the Panel until 31 October 2003 to enable it to complete the remaining elements of its mandate, at the end of which the Panel will submit a final report to the Council".[55]

As a result of the dialogue and work with the parties listed in the initial reports, the Panel – with the objective of achieving a resolution to the issues that led to the parties being listed, in order that they could be removed from the annexes – placed the parties listed into five categories: i) **category I** addressed the cases that had been resolved. These parties were removed from the annexes, but the report cautioned that this resolution should not be seen as invalidating the Panel's earlier findings with regard to the activities of those actors. The actors in this category face no pending issues, since the original concerns that led to their being listed were worked out to the satisfaction of both the Panel and individuals and companies involved. Among the different types of resolutions achieved, there was agreement to improve transparency in the way companies operate in the DRC or to take actions to remedy inappropriate conduct;[56] ii) **category II** concerned

[52] United Nations, Press Release, Security Council Requests mandate Extension until 31 October for Panel investigating plunder of resources in Democratic Republic of Congo, UN Doc SC/7841; 2003 Final DRC Report, *supra* note 46, ¶ 13.

[53] United Nations, 'Letter dated 17 June 2003 from the Chairman of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo addressed to the Secretary-General', UN Doc. S/2002/1146/Add. 1, Annex.

[54] In between, however, Resolution 1453 (2003) imposed an arms embargo on armed groups in the Kivus and Ituri regions, and on those not party to the Global and All-Inclusive Agreement. The Council also expressed its determination to closely monitor compliance with these measures and to consider necessary steps to ensure the effective monitoring and implication thereof, including the possible establishment of a monitoring mechanism. The sanctions imposed by this resolution would be the object of monitoring by the Sanctions Committee and Group of Experts created by Resolution 1533 (2004), which is still performing its work after successive renewals of its mandate. However, this Panel of Experts has not been the object of the present study.

In this resolution, in addition, the Council categorically condemned the illegal exploitation of the natural resources and other sources of wealth of the DRC, and expressed its intention to consider means that could be used to bring it to an end, and anticipated with interest the report to be submitted by the group of experts on such illegal exploitation and on the link that existed between it and the continuation of hostilities and demanded that all parties and interested states offer full cooperation to the group of experts. S. C. Res. 1493, U.N. Doc. S/RES/1493 (2003).

[55] S. C. Res. 1499, UN Doc. S/RES/1499 (2003).

[56] 2003 Final DRC Report, *supra* note 46, ¶ 23-28.

those cases in which a provisional resolution had been reached, which was dependent on the companies fulfilling commitments on corporate governance that would only occur after the end of the Panel's mandate;[57] iii) **category III** comprised companies, together with their owners or proprietors that were referred for updating or further investigation to the National Contact Points of the CIME (Committee on International Investment and Multinational Enterprises), which is responsible for monitoring compliance with the OECD Guidelines for Multinational Enterprises;[58] iv) **category IV** concerned companies and individuals that were referred to governments for further investigation or about which governments had asked the Panel for information so that they could conduct their own enquiries;[59] v) and **category V** included all of the parties that did not react to the Panel's report. The Panel does not comment on these, but still lists them.[60]

The lessons drawn by the Panel, although very brief, in terms of carrying out the task with which it was charged, address issues that will be highlighted in Part IV of this paper. In the first place, the experts underline the need – for future panels – to establish a witness protection program, given the difficulties it encountered when dealing with the security of its sources. Next, they emphasized the need to analyze, institutionalize and make available, as appropriate, the experiences and lessons learned from the investigations and findings of successive panels established by the Council on Afghanistan, Angola, the DRC, Liberia, Sierra Leone and Somalia. Finally, they stressed the importance of institutionalizing monitoring activities concerning arms and revenue flows in conflict situations, covering longer periods that would require – in the Panel's view at least – high levels of expertise, flexibility in conducting fieldwork, and adequate support by the relevant UN bodies and Secretariat.[61]

5. Assessment of the Methods used by the Panel in its investigation

Even though the Panel claimed to have "obtained information from a wide variety of sources, which provided documents and/or eye-witness observations",[62] most of the time their findings were not supported by annexed documentation and were thus subject to severe criticism by some member States and entities named in the report.[63]

In addition, we see from Resolution 1457 that the Security Council did not engage in any assessment whatsoever of the role and performance of the Panel, merely stressing instead "the importance of following up the independent findings of the Panel",[64] and expressing "its full support."[65]

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[57] *Id*. at ¶ 29.
[58] *Id*. at ¶ 30.
[59] *Id*. at ¶ 31.
[60] *Id.* at ¶ 32.
[61] *Id*. at ¶ 74-76.
[62] 2002 Final DRC Report, *supra* note 36, ¶7.
[63] A.Vines, *supra* note 15, at 259. The statement by the Permanent Representative of Uganda to the United Nations is illustrative of this: "Contrary to the Panel's assertion that it relied purely on documentary and corroborated evidence/information, the United Nations Panel continues to rely on hearsay/uncorroborated information. Indeed, the final report of the Panel contains a number of serious factual errors…", United Nations, 'Statement by the government of Uganda on the final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo', UN Doc. S/2002/1202 (28 October 2002) ¶ 2.c); 2003 Final DRC Report, *supra* note 46, ¶ 9, 11.
[64] S. C. Res. 1457, *supra* note 49, ¶ 8.
[65] *Id*. at ¶ 20.

Regarding the special mechanism set up by the Security Council by which individuals and companies were heard, one might have expected the final report to take more seriously the reactions of individuals, companies and States. Instead, it is rather more a justification of the findings[66] and working methods of the Panel, which defines itself not as "a judicial body", instead operating "under a reasonable standard of proof and obtained information, including documentation, entirely on a voluntary basis from a variety of sources".[67]

The standard of proof used by the Panel in assessing the behavior of individuals or companies was, it claimed, a standard based on "reasonableness" or "sufficient cause"; moreover, it the Panel stated that its own nature and the various mandates that it was given precluded it from determining the guilt or innocence of parties that had business dealings linked to the DRC. Accordingly, it stated that it has restricted itself to the narrower issue of identifying parties where it had information indicating a *prima facie* case to answer."[68] However, as the effects of being listed in a Panel report can be likened to that of a criminal accusation, it is submitted here that the standard of proof used was not sufficiently respectful of due process guarantees. This will be analyzed in greater detail in Part IV of this paper.

i. The ICJ's endorsement of the findings of the Panel of Experts in the *Armed Activities on the Territory of the Congo* case (DRC v. Uganda)

A few words are in order regarding the upholding of the findings of the Panel of Experts by the International Court of Justice in the *Armed Activities on the Territory of the Congo Case*.[69] This case, which dealt with Uganda's international responsibility for committing violations of international humanitarian law and the Government's endorsement of the illegal exploitation of natural resources by private parties, relied heavily on the findings of the Panel of Experts and other UN bodies, as well as on the Report of the Inquiry Commission of the Republic of Uganda, chaired by Justice David Porter.[70] However, the Court did not engage in any serious assessment of the findings of these fact-finding bodies, or of the standard of proof applied by them; rather, it merely limited itself to stating that it "consider[ed] that both the Porter Commission Report, as well as the United Nations Panel reports …furnish sufficient and convincing evidence for it to determine whether or not Uganda engaged in acts of looting, plundering and illegal exploitation of the DRC's natural resources."[71]

The decision of the ICJ shows that the procedural shortcomings of the methods used by the Panel of Experts and its findings have real implications at other levels, with the consequent prejudice to the rights of individuals and companies investigated therein.[72]

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[66] A. Vines, *supra* note 15, at 259.
[67] 2002 Final DRC Report, *supra* note 46, ¶ 5
[68] *Id.* at ¶ 15-16.
[69] International Court of Justice, *Armed Activities on the Territory of the Congo* (DRC v. Uganda), 2005 I.C.J. (December 19th, 2005) [hereinafter, *Armed Activities Case*]
[70] Republic of Uganda, Judicial Commission of Inquiry headed by Justice David Porter (Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo), 2001.
[71] *Armed Activities Case*, *supra* note 69, para. 237.
[72] For a critic of the ICJ's use of fact-finding methods and findings of UN bodies as its own, *see* José Álvarez, *Burden of Proof*, ASIL NEWSLETTER: NOTES FROM THE PRESIDENT, *available at* http://www.asil.org/newsletter/president/pres070625.html

III. NATURE AND SCOPE OF THE EFFECT OF THE PANELS' ADMINISTRATIVE ACTION ON INDIVIDUALS AND COMPANIES.

A. Common features of the Panels

By looking at the cases referred to above, and by reference to some other Panels of Experts that have fallen outwith the scope of this paper, it is possible to extract some common features regarding their composition and their working methods:

- The Panels of Experts are composed of approximately five members, generally distributed geographically – to reflect the philosophy and membership of the UN – and these members are almost automatically reappointed when the mandate of the body is extended.[73]

- The Panels are given an initial mandate of six months, which is generally renewed as this time frame does not allow them to reach any substantial conclusions.

- Their mandate is often concerned with collecting information and investigating reports of violations of sanctions imposed by the Security Council; identifying parties aiding and abetting in the violations of those measures; and recommending measures to end the violations to the Security Council.

- The methodology of investigation used by them consists mainly in interviews (with government officials, police and intelligence sources, NGOs, industry associations, commercial companies, journalists, members of rebel groups, among others), field visits and examination of documentation obtained in the course of those visits.

- The standard of verification of the information collected by the experts is claimed to be "high", a "reasonable standard of proof". In this sense, the expert bodies say they only rely on information that has been confirmed or corroborated by more than one source.

- In general, these bodies do not make provision for those concerned to allow them to exercise a right to reply. This safeguard has been inserted at later stages of the reporting mechanism in the Congo Panel, yet even in that instance it remained of a limited character.

- The Panels claim that their activity is not of a judicial character; their stated objective is not to blame or condemn individuals, companies or other named parties.

B. Administrative law-type elements of the Panels' processes

After examining the common features of the Panels of Experts, it is imperative to study – from a strict *de lege lata* perspective – what the real nature of the activities carried out by these Panels of Experts is. Is their activity strictly limited to fact-finding? Or is it quasi-judicial or even judicial? The answer we give to these questions will have profound implications for the level of procedural protection that should guide their work (which will be set out in Part IV of this paper), both in terms of the principles of procedural due process to be applied to the establishing of facts, and of the threshold of protection that should be afforded to individuals and companies under investigation.

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[73] A.Vines, *supra* note 15, at 258; *See* M. Cherif Bassiouni, *Appraising U.N. Justice-related Fact-finding Missions*, 5 WASH. U. J. L. & POL'Y 35, at 40 (2001) (noting that within the human rights arena there is an almost incestuous tendency to reappoint the same experts to the missions and the same UN staffers to support them).

Panels of Experts examine data, hear testimonies, and consider contextual circumstances, which in themselves seem to be purely fact-finding activities. However, they also evaluate whether normative standards – set by the sanctions imposed by the Security Council, or by other norms such as the 'illegal exploitation' of natural resources – have been violated,[74] and reach conclusions allocating guilt to individuals and companies, thus engaging in a sort of quasi-judicial determination. Furthermore, the "product" of their work – the reports – is generally publicized and has been the source of much public debate and criticism.[75]

Thus, the activities undertaken by these panels – whose authority derives from the Security Council – form part of the "global administrative space", and are regulatory in character.[76] In the typology that Kingsbury *et al.* draw of global administration, these bodies fit into the category of "administration by formal international organizations".[77]

In terms of *lex lata*, the question that arises is to what extent the activity of these global bodies is subject to certain basic administrative law principles and requirements, both of a substantive and procedural character. As illustrated above, the work of the panels of experts is not subject to any strong substantive or procedural safeguards.[78] However, given that the tasks entrusted to these bodies have important repercussions on the legal conditions of the listed individuals and companies (who can be subject to travel bans and freezing of their personal assets, and barred from accessing banking facilities or establishing commercial relations with international financial institutions), mechanisms to safeguard the rights of those affected by the action of these Panels should be put in place.

A preliminary issue that has to be determined before analyzing which due process guarantees should attach to the work of the Panels of Experts is whether we are dealing with a criminal or civil/administrative procedure. The nature of the procedure should have repercussions as to what type of guarantees the individuals and companies will benefit from, what evidentiary threshold should be met, what kind of review mechanism should be made available to them. In this sense, the naming of the companies and individuals as being implicated in diamond smuggling, arms trafficking, *etc.*, can be seen as having a punitive character. It is undeniable that the "naming and shaming" of those individuals and companies by the panels of experts is a legal act with legal consequences; and an argument could therefore be made that this amounts to a 'criminal charge' in light of its punitive nature, severity of consequence, as well as the stigmatization resulting in

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[74] *See supra* notes 33-61 and accompanying text.

[75] *Cf.* Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-finding by International Agencies*, 74 AM. J. INT'L L. 308 (1980) (describing that the activity of fact-finding commissions generally goes beyond just establishing the facts); David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 –AUT LAW & CONTEMP. PROBS. 127, 146 (2005) (describing the nature of the activities of the 1267 Security Council Committee). *See supra* notes 6, 18-19 and accompanying text.

[76] Benedict Kingsbury, Nico Krisch, Richard B. Stewart & Jonathan B. Wiener, *Foreword: Global Governance as Administration –National and Transnational Approaches to Global Administrative Law*, 68-AUT LAW & CONTEMP. PROBS. 1, 2 (2005); CHESTERMAN, FRANCK, & MALONE, *supra* note 14, at chapter 10.

[77] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68-AUT LAW & CONTEMP. PROBS. 15, 21 (2005).

[78] *See supra* Parts II.A.1.iv, II.A.2.iv and II.B.5 on assessment of the methods used by the Panels in their investigation.

which it results.[79] It also amounts to a declaration of criminality, which may give rise to future action, either at the international or domestic sphere.

IV. PROCEDURAL RULES TO WHICH THE ACTIVITY OF THE PANELS SHOULD BE SUBJECT: SOME PROPOSALS IN TERMS OF GLOBAL ADMINSITRATIVE LAW.

Even if the international legal order can be said to be institutionally immature in the sense that perfect analogies to domestic legal orders are not possible,[80] the cases under analysis go beyond that international context, forming instead part of a global sphere, in which the rights of private parties are affected by the action of an international organization's officials and organs. In this global sphere, the work of the Panel of Experts and their endorsement by the Security Council directly affects the rights of individuals and companies named in the reports. As a consequence, there is the need to ensure some safeguards for those individuals and companies to protect their rights.

The fact that there have been threats of litigation against the members of the Panels of Experts based on the low evidentiary threshold and the consequent defamation caused to the individuals and companies concerned illustrates both that there has been a failure of the Panels and the Security Council more generally to provide due process guarantees, and that there does not exist in the global sphere any institution that can provide a remedy for those affected by the acts of international public officials.

From the nature of the activities carried out by these fact-finding bodies, there are certain procedural standards that would most effectively safeguard the rights of individuals and companies, whilst at the same time maintaining the utility of this monitoring mechanism for the sanctions regime of the Security Council. The question that arises is what the sources of these standards might be. Firstly, I propose to draw them from human rights instruments, the interpretations of those instruments by human rights bodies, and the basic rights recognized in the constitutional orders of many States. I will then look at some of the practices of certain inquiry commissions in jurisdictions that were given these fact-finding competencies, in order to extract some good practices in terms of their work.

A. Human Rights and Due Process

As Professor Sabino Cassese highlights, "participatory rights at the global level have a somewhat rudimentary structure. While in domestic legal systems both notice and comment procedures (i.e., participation in rule-making processes) and hearing procedures (i.e. participation in adjudicatory proceedings) are subject to detailed analytical rules, in the global legal system they are only summarily regulated."[81] However, he also points out that one of the forces that drive the generalization of participatory rights in the global arena are human rights norms. In that sense, the right of participation in the global legal

[79] E. de Wet & A. Nollkaemper, *Review of Security Council Decisions by National Courts*, supra note 85, at 177 (referring to the jurisprudence of the European Court of Human Rights in interpreting the notion of 'criminal charge').

[80] *Cf.* David Dyzenhaus, *Emerging from self-Incurred Immaturity* (2004), draft paper presented at NYU, available at http://www.law.nyu.edu/kingsburyb/spring04/globalization/dyzenhaus_020904.pdf.

[81] Sabino Cassese, *A Global Due Process of Law?*, at 54, *available at* http://www.law.nyu.edu/kingsburyb/fall06/globalization/papers/Cassese.doc (paper presented at the Hauser Colloquium on Globalization and its Discontents, NYU School of Law, Fall 2006).

system serves the function of furthering the right of defense. Thus, "the right to a hearing prior to a decision provides national governments or private actors with an opportunity to present their views and protect their interests".[82]

But how can that right be construed so as to apply to the activity of these panels of experts, which have an administrative and quasi-judicial character? Can we talk of a 'human right to administrative justice'?[83] And even if so, what would be the content of that right?

I will argue that the notion of "administrative justice" can be extracted from the norms of international human rights law and the basic rights recognized in the constitutional orders of many States. The enlargement by international courts of the provisions of human rights treaties that provide for a 'fair and public hearing within a reasonable time by an independent and impartial tribunal' in any case involving a determination of a person's civil rights and obligations, applying it to some national administrative procedures, is illustrative of this process.[84]

1. Preliminary issues that must be addressed

However, two preliminary issues must be addressed. First, whether the Security Council and its subsidiary organs (in this case the panels of experts) are bound by human rights norms; and second, whether the procedural norms can also be applicable to entities other than individuals.

i. Is the Security Council bound by human rights norms?

This is an issue that has been dealt with extensively in the literature;[85] it far exceeds the scope of this paper. Nevertheless, there seems to be an understanding among the Security Council members that the sanctioning measures – and, by implication, the monitoring of these sanctions – should be undertaken in a manner consistent with human rights norms.[86] There is also support in the literature regarding fact-finding by international agencies, in the sense that the implementation of fair procedures must begin precisely with the organs entrusted with the protection of rights.[87] This idea is also present in the approach that relies, in seeking to apply human rights law to the UN, on the

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[82] *Id.* at 59, 62.

[83] B.S. Chimni, *Global Administrative Law: Winners and Losers*, at 15, *available at* http://www.iilj.org/global_adlaw/documents/ChimniPaper.pdf;

[84] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 15 1950, Europ. T.S. No. 5; International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, U.N.G.A. Res. 2200 (XXI); American Convention on Human Rights, art.8, Nov. 22, 1969, O.A.S. Treaty Ser. No. 36, O.A.S. Off Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1979).

[85] *See inter alia* Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN YEARBOOK OF INTERNATIONAL LAW 166, 171-176 (2002); José Álvarez, *The Security Council's War on Terrorism: Problems and Policy Options*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 123-35 (ERICA DE WET & ANDRÉ NOLLKAEMPER, EDS. 2003).

[86] *See* Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, at 499 (2004) and the statements of States therein referred. *See also*, Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, *supra* note 85, at 171-175; Bardo Fassbender, *Targeted Sanctions and Due Process*, 20 March 2006, *available at* http://www.un.org/law/counsel/Fassbender_study.pdf , page 6.

[87] *Cf.* Thomas M. Franck & H. Scott Fairley, *supra* note 75, at 345.

fact that one of the purposes of the Organization itself is to promote and encourage respect for human rights and fundamental freedoms.[88]

Therefore, in terms of the activity of the panels of experts, I argue that among the human rights that the UN must respect, are the rights of due process, or 'fair and clear procedures', given that these panels are taking action that has the potential to adversely affect the rights of individuals.

ii. Can companies and other entities also claim protection?

The second important preliminary issue that has to be ascertained is whether these procedural norms are only applicable to individuals. It is clear that commercial companies and enterprises are not the addressees of international human rights norms. However, since the activity of these panels of experts also affects these types of entities, and considering also the fact that sometimes the individual members of these entities are not named separately in the reports of the panels, it would be appropriate that the due process rights described above be extended to those entities also.[89] Indeed, this seems to have been the approach taken by the General Assembly in the World Summit Outcome Document, in which, when dealing with the general issue of targeted sanctions, it "call[ed] upon the Security Council with the support of the Secretary General to ensure fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exceptions."[90] Therefore, these fair and clear procedures should be applicable both to the individuals and the other entities that are named in the reports of the panels of experts.

2. Procedural safeguards to which the activity of the Panels of Experts should be subject.

I will now turn to the procedural safeguards that should attach to the activity of these panels of experts when investigating and naming individuals and companies in their reports as having violated a sanctions regime or other normative framework.

Under international instruments protecting human rights, and due process guarantees contained in domestic constitutions, the right to due process is construed differently whether one deals with a criminal or civil/administrative procedure. In addition, this qualification has implications both for the evidentiary threshold that would have to be met, and on the kind of review mechanism that would normally be open to the actor affected.[91]

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[88] ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 191-204 (2004); Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations changing Human Rights Responsibilities*, 25 HUM.RTS. Q. 314, 317 (2003); August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 857 (2001).

[89] B. Fassbender, *supra* note 86, at 32.

[90] United Nations General Assembly, 2005 World Summit Outcome, ¶ 109, U.N. Doc. A/RES/60/1 (24 October 2005).

[91] Thomas J. Biersteker & Sue E. Eckert, *White Paper prepared by the Watson Institute Targeted Sanctions Project Brown University, "Strengthening Targeted Sanctions Through Fair and Clear Procedures"*, (Providence: Watson Institute for International Studies, 2006), *available at* http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf, page 14.

We have already discussed that the nature of the activities undertaken by these fact-finding bodies can be likened to a criminal accusation.[92] However, even if one arrives at the conclusion that these are not 'criminal charges', at the very least what can be concluded is that the activity of these panels of experts can trigger the rights protected by Article 14 of the International Covenant on Civil and Political Rights and the respective regional human rights conventions. The right to a fair and impartial proceeding, as it has been construed by the major human rights monitoring bodies, extends to non-criminal matters also.[93] Now, what is the content of that right?

Human rights treaties and national constitutions contain several differences in the definition of due process rights to be applied to individuals in the context of domestic law.[94] These differences notwithstanding, however, there seems to be "under international law a universal minimum standard of due process, which includes, *firstly*, the right of every person 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." [95] Also, the attributes of procedural justice have been said to revolve around impartiality, and the provision of a hearing and a reasoned decision.[96]

As we have seen from the analysis of the methods used by the panels of experts, these domestic law standards derived from human rights and constitutional law have not been translated in full to the "global" sphere. I argue that the activity of the panels of experts should follow such fair and clear procedures as defined both in human rights treaties and national constitutions, as the interests of individuals and companies are affected by the reports generated as a result of that activity. The right to a fair hearing and its complements (i.e., the right of being informed of the investigative measures taken against a person; the right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body; and the right to be advised and represented by counsel)[97] could well be implemented in the work of the panels of experts, as was, in some senses at least, demonstrated by the procedure set up by the Congo Panel[98] (albeit

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[92] *See supra* note 79 and accompanying text.

[93] *Morael v. France*, Human Rights Committee, Communication No. 207/1986, U.N. Doc. A/44/40 at 210 (1989); Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994); Juliane Kolott, *Fair Trial –the Inter-American System for the Protection of Human Rights, in* THE RIGHT TO A FAIR TRIAL 133, 151 (D. WEISSBRODT & R. WOLFRUM EDS., 1998); DAVID WEISSBRODT, THE RIGHT TO A FAIR TRIAL. ARTICLES 8, 10 AND 11 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 125 (2001).

[94] *Cf.* D. WEISSBRODT & R. WOLFRUM, THE RIGHT TO A FAIR TRIAL (1998); B. Fassbender, *supra* note 86; *Cf.* M. Cherif Bassiouni, *Human Rights in the context of criminal justice: identifying procedural protections and equivalent protections in national constitutions*, 3 DUKE J. COMP. & INT'L. L. 235 (1993) (identifying common principles, standards, and norms enunciated in certain international instruments concerning the criminal process and their concordance in national constitutions).

[95] B. Fassbender, *supra* note 86, at 15.

[96] Carol Harlow, *Global Administrative Law: the Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 204-207 (2006) (also recalling that Article 41 of the European Union's Charter of Fundamental Freedoms extends due process rights in the ambit of Community Law, guaranteeing a "right to good administration", defined as the "right of every person to be heard, before any individual measure which could affect him or her adversely is taken")

[97] B. Fassbender, *supra* note 86, at 15.

[98] *See supra* Part II.B.4

not in a particularly "timely manner", given that it was done after the initial findings were published).

What should also be highlighted is that the principle of "equality of arms" between the parties is one of the most important elements of a fair hearing.[99] The inspection of records and the opportunity to rebut the evidence is a corollary of this,[100] and, even if it were deemed that the activity of the panels of experts does not amount to a criminal investigation, procedures enabling this should nonetheless be put in place to ensure that the individuals and companies rights are safeguarded.

As to the possibility of a review of the findings of the panels of experts (which is another substantial component of the right to a fair hearing[101]), when faced with an accusation of this kind, in general the individuals concerned do not have the opportunity to challenge the findings of the panel at the global level. However, as we have seen, in response to the criticism of the findings of the panels of experts and the threats of litigation made against them, some procedures to deal with these issues were put in place in certain contexts. In the reports of the later panels of experts that were created, one can see that there is much more documentation supporting the investigation and a concern to meet higher evidentiary standards.

On the other hand, if the individual or companies seek to challenge these procedures in national or regional courts, some recent cases in similar situations – dealing with the sanctions imposed by the Security Council's 1267 Committee – have demonstrated that such courts do not normally see themselves as capable of protecting the individual procedural rights, out of deference to the UN's powers in the field of the maintenance of international peace and security.[102]

There are several proposals that can be found in the literature for strengthening internal mechanisms within the Security Council when it comes to the imposition of sanctions and their review.[103] As for the findings of the panels of experts, a similar approach could be taken in the sense of creating a centralized review mechanism that would provide the Security Council with the permanent institutional capacity to provide individuals and companies investigated in the reports with the guarantees that I have described above, and some sort of impartial review in accordance with human rights

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[99] Erika de Wet, *The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES (E. DE WET & A. NOLLKAEMPER EDS., 2003).

[100] E. de Wet & A. Nollkaemper, *Review of Security Council Decisions by National Courts*, *supra* note 85, 168.

[101] B. Fassbender, *supra* note 86, at 15.

[102] Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council*, Case T-253/02 *Chafiq Ayadi* v *Council of the European Union*, and Case T-49/04 *Faraj Hassan* v *Council of the European Union and Commission of the European Communities*, all available at http://europa.eu.int; *Cf.* SABINO CASSESE, GLOBAL ADMINISTRATIVE LAW CASES AND MATERIALS 58 (2006); P. Gutherie, *supra* note 86, at 521.

[103] *See* P. Gutherie, *supra* note 86, at 533 (proposing setting up an independent review body under the auspices of the Security Council to hear appeals of decisions taken by the SC Committees and other administrative bodies created by the SC under chapter VII); Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC J. INT'L L. 159 (2003) (proposing an arbitral model); E. de Wet & A. Nollkaemper, *Review of Security Council Decisions by National Courts*, *supra* note 85 (proposing a centralized review mechanism that guarantees a fair – albeit in camera – hearing in accordance with international human rights standards at the international level).

standards. The adoption of this type of mechanism has been proposed by some of the Panels in their reports,[104] but has so far not been taken up. As for the review mechanism set up by the Congo Panel of Experts, even if the individuals and companies were given the opportunity to submit their views on the findings of the Panel, these were considered by the same members who had initially suspected them or their undertakings of involvement in the illegal activities. This demonstrates a lack of impartiality that a centralized review mechanism could remedy.[105]

B. Principles Derived From Inquiry Commissions

Once we have established that the individuals and entities subject to the investigative activities of the panels of experts must be afforded the opportunity of a hearing in which they can rebut the allegations made against them and an effective review of that decision, it is now necessary to look at the standard of evidence used by the panels, and to assess what would constitute procedural probity in the type of activity carried out by these fact-finding bodies.

As the Stockholm Process reports, "the investigations carried out by the panels of experts have been criticized for lacking procedural standards in the design of their working methods, investigative procedures, standards of evidence and reporting formats. Some panels have even been accused by the media of employing standards of evidence and verification to substantiate allegations of sanctions that are less rigorous than those employed by professional journalism".[106]

Since the findings of the panels of experts have the power to prejudice rights, interests or legitimate expectations of the individuals or organizations involved, the decision-making process should be subjected to principles of procedural fairness similar to those that are used in investigations of this kind in national legal systems,[107] and in fact-finding commissions on human rights issues.[108] These minimum standards of due process would serve the dual purpose of controlling the way facts are established, and what is done with those facts subsequently.[109]

Some good practices in terms of fact-finding and guidelines as to indications of procedural probity can be derived from the aforementioned Commissions; these can be applied, *mutatis mutandi* (and with the requisite flexibility according to the circumstances of each case), to the work of the panels of experts.

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[104] *See supra* Part II.B. 3

[105] *Cf.* E. de Wet & A. Nollkaemper, *supra* note 85, at 169.

[106] *Making Targeted Sanctions Effective. Results from the Stockholm Process on the Implementation of Targeted Sanctions* (WALLENSTEEN, STAIBANO & ERIKSSON EDS, 2003) § 73, *available at* http://www.peace.uu.se.

[107] *Cf.* Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Program, volume I, *available at* http://www.oilforfoodinquiry.gov.au

[108] T. Franck & H. S. Fairley, *supra* note 75; Robert Miller, *United Nations Fact-Finding Missions in the Field of Human Rights*, 1970-1973 AUST. YBIL 40; M. Cherif Bassiouni, *Appraising U.N. Justice-related Fact-finding Missions*, *supra* note 73; David Weissbrodt & James McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. IN'L L. 1 (1981-1982); Stephen B. Kaufman, *The Necessity for Rules of Procedure in Ad Hoc United Nations Investigations*, 18 AM. U. L. REV. 739 (1968-1969).

[109] *Cf.* T. Franck & H.S. Fairley, supra note 75, at 309.

1. Choice of Members

One of the elements that make a fact-finding mission credible is its composition: members must be selected in a manner that assures their impartiality.[110] In terms of the panels of experts, we have seen that their composition does not seem to be a major issue in terms of fairness and impartiality, apart from the fact that there is a tendency to reappoint the same experts when the mandate of the panels is renewed. In terms of composition of the panels, a good approach is to have a roster of experts from which to draw the members in any given case. This has already been set up by the Sanctions Branch of the Security Council, but the selection and appointment of experts will require further improvement in order to, for example, provide for mechanisms of disqualification or recusation to protect against the appearance of bias.

2. Terms of reference/mandate

The terms of reference set out in the Security Council Resolution creating the expert body in question should be clear as to precisely the mandate of the experts is in any given case: that of strictly conducting fact-finding, or also establishing whether normative standards have been violated, and drafting remedial recommendations. Another caveat that must be taken into account in the authorization by the Security Council is whether there are preconceived notions of guilt contained already in the very resolution that creates the subsidiary body, in effect stating a conclusion about the very same issues the experts are ostensibly charged with examining.

Further, with regard to the mandate, newly established panels should build upon the experience of previous bodies, and there should be coordination as to their mandates and parameters of investigation, in order that there be no unnecessary duplication of tasks.

3. Rules of procedure

The need to demonstrate the credibility of the facts if these are found to be persuasive of the existence of a violation is the principal reason why fair procedures are essential to fact-finding processes.[111] In this sense, as one expert has highlighted, "panels should observe robust methodological and evidentiary standards".[112] This means that, at a minimum, the findings should be corroborated by two independent, verifiable sources. This is so because, in the work of the panels generally, at present evidence is insufficiently tested against contrary evidence, and specific facts are only rebutted after the investigators have published their initial report. Evidence, therefore, should be examined in such a way as to facilitate informed cross-examination and rebuttal. As the Report of the Australian high-level commission investigating corruption in the United Nations Oil-for-food program stated, the main requirement of procedural fairness "in relation to an Inquiry is that it cannot lawfully make any finding adverse to the interests of a person without first giving that person the opportunity to make submissions against the making of such a finding."[113]

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[110] *Id.* at 313.
[111] *Id.* at 317
[112] A.Vines, *supra* note 15, at 259.
[113] Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Program, *supra* note 107, at § 7.79.

As to the confidential information on which panels of experts generally rely because of the lack of subpoena powers, this should be managed with extreme care, and not constitute the sole basis of public assertions of alleged violations.

4. Utilization of the Report

A key factor in the publication of the report is for it to have all the documentation used in the investigation attached to it. This has occurred in some instances, and it is increasingly happening with the new reports filed, but it should be systematized.

Moreover, the findings of a Panel should only be made available to the media after they have been considered by the Security Council, in order to avoid further difficulties concerning the legal liability of the expert groups. In terms of the drafting of the report, steps should be taken to develop a "model" format to be used by all the panels of experts, in order to create a standardized reporting system that will make it easier to distinguish those parts of the report that are strictly fact-finding from those that are recommendations to the Security Council.

Finally, when the mandate expires, the documentation used by the experts should be kept available for the following monitoring mechanisms, in order to avoid forcing subsequent panels to start from scratch when dealing with similar cases of violations of sanctions regimes or other normative standards.

V. CONCLUSION

As Prof. Bassiouni has highlighted, despite the experience of various agencies of the United Nations in the area of fact-finding, it has not yet developed a system of fact-finding by which the experiences of the past can be used to benefit the future.[114] Most of the fact-finding bodies, including the panels of experts within the ambit of the Security Council, have had to develop their work and methodological tools mainly on an *ad hoc* basis. This has resulted in a body of fact-finding practice using procedures of dramatically contrasting probity.[115]

The activities of the panels of experts have severe implications for the rights of individuals and organizations "named and shamed" in their reports: the mere act listing of listing their names, without a thorough investigation that affords procedural due process guarantees, results many times in restrictive entry and transit controls, and/or the freezing of the assets of the actor in question..

This impact on the rights of individuals and companies necessitates the adoption of certain principles of procedural due process in the fact-finding activity, and due process guarantees in the quasi-judicial activity, that the Panels of Experts engage in when they deduce whether normative standards – Security Council-imposed sanctions or other normative standards – have been violated. I have attempted to draw these principles both from international human rights law and from the practices of inquiry commissions. Had some of these minimum standards been applied in the cases under analysis, they would have resulted in more fair and credible findings, and prevented the experts from being subject to severe criticism and threats of litigation.

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[114] M. C. Bassiouni, *supra* note 73, at 48.
[115] *Cf.* T. Franck & H. S. Fairley, *supra* note 75, at 311.