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WHEN DUE PROCESS CONCERNS BECOME DANGEROUS: THE SECURITY COUNCIL'S 1267 REGIME AND THE NEED FOR REFORM

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Abstract: The United Nations Security Council adopted Resolution 1267 in 1999 in response to rising apprehension of a surge of terrorist activity within Afghan territory. Notably, the Sanctions Committee charged with enforcing the Resolution provisions did not impose asset freezes, arms prohibitions, or travel bans on entire nations suspected of supporting the Taliban. The 1267 regime instead subjected individuals and entities to these sanctions. Based on information provided by U.N. member states, such targets found themselves on the Security Council's terrorist "blacklist," known as the Consolidated List. The targets were neither warned of this listing nor afforded a method by which they could effectively appeal their inclusion. This Article discusses the due process concerns inherent to the 1267 regime, which have been increasingly emphasized at both the regional and national court levels, leading to invalidation of some regulations implementing the regime. It then evaluates alternative solutions to the procedural status quo against a proposed set of criteria, ultimately advocating for an independent tribunal capable of hearing complaints from targets and issuing binding delisting decisions.

Introduction

In 1999, the United Nations Security Council (U.N.S.C. or Security Council) adopted Resolution 1267[1] under its Chapter VII authority,[2] in

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[1] S.C. Res. 1267, pmbl., U.N. Doc. S/RES/1267 (Oct. 15, 1999).

[2] When read together, Article 25 of the UN charter (requiring all member states "to accept and carry out decisions of the Security Council") and Article 103 of the Charter (demanding all states defer to their Charter responsibilities over other international obli-

response to concerns over the use of Afghan territory "for the sheltering and training of terrorists and planning of terrorist acts." This Resolution, which would be strengthened and reaffirmed by subsequent Resolutions 1333, 1363, 1373, 1390, 1452, 1455, 1526, 1566, 1617, 1624, 1699, 1730, 1735, 1822, and 1904[3] imposed sweeping sanctions against the Taliban in the form of travel and arms bans and asset freezes.[4] Unlike previous U.N.S.C. sanctions that had blanketed entire nations, however, these sanctions targeted only those resources "owned or controlled directly or indirectly by the Taliban . . . as designated by the [Sanctions] Committee [set up by the resolution] . . . ."[5] Based on information provided by U.N. member states, this Sanctions Committee would be responsible for keeping an updated list (Consolidated List) of targeted individuals and entities. In 2001, the Committee added the name of Yassin Abdullah Kadi, a Saudi Arabian businessman, who soon after found his assets summarily frozen.[6]

Kadi was not alone in finding himself the individual target of the Security Council's terrorist "blacklist."[7] To date, the list has contained the names of over five hundred individuals and entities (targets).[8] The Committee has rarely informed the targets placed on the Consolidated List of the facts underlying their placement on the list, or even the very

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gations) ensure that resolutions made pursuant to the U.N.S.C.'s powers under Chapter VII are binding on all member states of the U.N. *See infra* Part I.

[3] *See generally* S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006); S.C. Res. 1699, U.N. Doc. S/RES/1699 (Aug. 8, 2006); S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1452, U.N. Doc. S/RES/1452 (Dec. 20, 2002); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000). These resolutions pertain both to the targeted sanction 1267 regime and to the subsequently enacted 1373 regime, which extended asset freezes and travel bans to members of *any* terrorist group.

[4] *See* S.C. Res. 1526, *supra* note 3, ¶ 1. The 1267 sanctions were later broadened to include "funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization . . . ." S.C. Res. 1333, *supra* note 3, ¶ 8.

[5] S.C. Res. 1267, *supra* note 1, ¶ 4.

[6] *See* Case T-315/01, Kadi v. Council (*Kadi I*), ¶¶ 22–23, 2005 E.C.R. II-3649, 2005 ECJ EUR-Lex LEXIS 673 (Sept. 21, 2005).

[7] *See* United Nations, Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, http://www.un.org/sc/committees/1267/information.shtml (last visited Mar. 23, 2010) (noting that the list holds more than 500 names).

[8] *See id.*

fact of their inclusion.[9] Moreover, the Security Council has provided no mechanism for targets to challenge their inclusion either before or after the listing.[10] Those targets dissatisfied with the freeze on their assets or the restriction of their movement can only hope that their state of residence or citizenship will negotiate with whatever country had recommended their listing (designating state) to reach a mutual agreement to recommend the delisting of the individual. Nevertheless, should any member of the Sanctions Committee (consisting of representatives of all countries on the Security Council) choose to block the delisting, the target will remain indefinitely listed.[11]

Unlike many targets, however, Kadi sought judicial redress for what he saw as an unfair listing. By 2008, his case had risen to the European Court of Justice (ECJ), which overruled the prior decision by the Court of First Instance to uphold the European Union's regulation giving effect to Resolution 1267.[12] Instead, citing due process violations contrary to the "constitutional guarantee stemming from the [European Community] Treaty as an autonomous legal system," the ECJ annulled the EU regulation as it concerned Kadi.[13] The judgment tore a hole in member states' implementation of the U.N.S.C.'s 1267 anti-terrorist regime and sparked a firestorm of debate as to the appropriate circumstances under which regional courts may interfere with the implementation of a binding Security Council resolution on human rights grounds.[14]

Ironically, it was the international community's concerns about the human rights implications of general sanctions that led the Security Council to implement targeted sanctions.[15] The general sanctions placed on Iraq in the early 1990s had a devastating humanitarian effect on the people of Iraq.[16] As a result, the Security Council increasingly turned to targeted sanctions as a means of applying pressure on those

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[9] *Cf.* Thomas J. Biersteker & Sue E. Eckert, Watson Inst. Targeted Sanctions Project, Brown Univ., Strengthening Targeted Sanctions Through Fair and Clear Procedures 28 (2006), *available at* http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf [hereinafter Biersteker & Eckert, Targeted Sanctions] (discussing the lack of transparency that exists concerning sources of information about an individual's listing).

[10] *Id.* at 3–7.

[11] *Id.* at 37.

[12] Joined Cases C-402 & C-415/05, Kadi v. Council (*Kadi II*), ¶¶ 1–2, 2008 E.C.R. I-6351, 2008 ECJ EUR-Lex LEXIS 1954 (Sept. 3, 2008).

[13] *Id.* ¶ 316.

[14] Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 19–20.

[15] *See* Save the Children, Iraq Sanctions: Humanitarian Implications and Options for the Future, ch. 10 (2002) [hereinafter Save the Children].

[16] *See id.* ch. 2 (detailing the humanitarian toll exacted on Iraqis by the general sanctions).

responsible for threatening international peace and security while minimizing collateral impact.[17] The Security Council's failure to provide any due process protections for targets of these new sanctions, however, has raised a different set of criticisms about its approach.

Whereas the ramifications of sanctions aimed at a particular state fell almost entirely on the residents of that state, the 1267 regime requires *all* member states of the United Nations (U.N.) to implement regulations potentially depriving their own citizens of property rights, restricting their movement, and barring judicial review.[18] For those states with strong domestic traditions and laws protecting these rights, such a mandate is extremely troubling. Thus, several international, regional, and domestic tribunals, such as the European Court of Justice, the European Court of Human Rights, the Human Rights Committee of the International Covenant on Civil and Political Rights, the Swiss Federal Court, the British House of Lords, the United Kingdom Supreme Court, and the Federal Court of Canada, have challenged the national regulations giving effect to certain Security Council resolutions.[19] Although many of these tribunals have grudgingly accepted the primacy of the resolutions under the U.N Charter, judicial discontent has been mounting. The ECJ's recent decision in *Kadi v. Council* (*Kadi II*) marks the first time a regional court has chosen to annul a domestic regulation implementing a binding Security Council resolution.[20] Emboldened by *Kadi II*, national courts have likewise begun to invalidate the domestic regulations that implemented Resolution 1267 obligations in member states.[21]

In the face of this mounting criticism, the Security Council has taken some incremental steps to ameliorate member states' due process

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[17] *Id.*

[18] *See* S.C. Res. 1267, *supra* note 1, ¶¶ 2, 4.

[19] *See generally* Abdelrazik v. Minister of Foreign Affairs, [2009] F.C. 580 (Can.); A v. HM Treasury, [2010] UKSC 2, [2010] 2 W.L.R. 378 (U.K.); R (Al-Jedda) v. Sec'y of State for Def., [2007] UKHL 58, [2008] 1 A.C. 332 (appeal taken from Eng.) (U.K.); *Kadi I*, 2005 E.C.R. II-3659, 2005 ECJ EUR-Lex LEXIS 673; *Kadi II*, 2008 E.C.R. I-6351, 2008 ECJ EUR-Lex LEXIS 1954; Case C-117/06, Möllendorf, 2007 E.C.R. I-8361, 1 C.M.L.R. 11 (2008); Case C-355/04, Segi v. Council, 2007 E.C.R. I-1657, 2007 ECJ EUR-Lex LEXIS 2015 (Feb. 27, 2007); U.N. Human Rights Comm., Sayadi v. Belgium, Commc'n No. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (2008); Johannes Reich, *Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999)*, 33 YALE J. INT'L L. 505, 507 n.25 (2008) (discussing Nada v. State Secretariat for Econ. Affairs, Bundesgericht [BGer] [Federal Court] Nov. 14, 2007, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 450 (Switz.)).

[20] *See Kadi II*, ¶ 372, 2008 E.C.R. I-6351, 2008 ECJ EUR-Lex LEXIS 1954.

[21] *See Abdelrazik*, F.C. 580 ¶¶ 162–65; *HM Treasury*, 2 W.L.R. at 408–10.

concerns. The first substantive concession came with the Security Council's adoption of Resolution 1730.[22] This Resolution established a central office called the focal point, which is entrusted with the tasks of handling delisting requests from targets by passing along such requests to the concerned states (the designating state and the state of the petitioner's residence and citizenship) and informing the petitioner of the ultimate decision made by the Sanctions Committee.[23] Once the focal point issues a request, the target's participation in its own delisting is over. Should any government recommend a target's delisting, the request is put on the Sanction Committee's agenda. The Sanctions Committee is also informed if any government opposes delisting. Unfortunately, if after one month no member of the Sanctions Committee recommends delisting, the request is considered rejected. Although Resolution 1730 frees targets from reliance on a state's initial espousal of a claim,[24] it does not give targets an opportunity to hear the evidence against them or to present their own case to the Sanctions Committee.[25] Additionally, Resolution 1730 does not require a state to explain why it chose to block an individual's delisting request.[26]

Other resolutions have requested that the Sanctions Committee make "information it considers relevant . . . publicly available"[27] or that it allow individual member states to administer humanitarian exemptions to the asset freeze.[28] Resolutions have also asked member states to include better indentifying information when proposing a name for the list and to inform individuals of their listing and of the Committee's guidelines and humanitarian exemptions.[29] In 2008, the Security Council adopted Resolution 1822, which urged member states to review delisting petitions in a timely manner and to update the Committee on any new developments.[30] The Resolution directed the Sanctions Committee to conduct periodic reviews of targets to ensure the listing remained appropriate and "[encouraged] the Committee to continue

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[22] *See generally* S.C. Res. 1730, *supra* note 3 (establishing a central office for handling delisting requests).

[23] *Id.*

[24] *See* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 34–37 (noting that the biggest problem with delisting may have been the number of requests that never made it to the Sanctions Committee due to a state's refusal to espouse a target's claim).

[25] S.C. Res. 1730, *supra* note 3, app. ¶¶ 5–8.

[26] *Id.* app. ¶¶ 5–6.

[27] S.C. Res. 1390, *supra* note 3, ¶ 5.

[28] *See* S.C. Res. 1452, *supra* note 3, ¶ 1.

[29] *See* S.C. Res. 1617, *supra* note 3, ¶¶ 4–5; S.C. Res. 1526, *supra* note 3, ¶¶ 17–18.

[30] S.C. Res. 1822, *supra* note 3, ¶ 20.

to ensure that fair and clear procedures exist for placing individuals . . . on the Consolidated List and for removing them . . . ."[31]

Most recently, on December 17, 2009, the Security Council adopted Resolution 1904 which created "an Office of the Ombudsperson, to be established for an initial period of 18 months . . . ."[32] This ombudsperson, performing in "an independent and impartial manner,"[33] assists targeted individuals by conveying their delisting requests to the Sanctions Committee, keeping them informed of general procedure and decisions made relevant to their case, and ensuring that the Committee's consideration period is not unduly prolonged.[34] In addition, the ombudsperson aids the Sanctions Committee by soliciting additional information from and facilitating a dialogue with the petitioner; coordinating inquiries between the interested States, the Committee, and the information-gathering Monitoring Team; and drafting a Comprehensive Report pursuant to the delisting request, and presenting it in person to the Committee.[35] In effect, Resolution 1904 creates in the ombudsperson a watchdog over the interests of delisting petitioners, albeit one without the ability to ensure that Sanctions Committee takes its observations seriously or ultimately delists the petitioner.[36]

Despite these positive developments, the fundamental criticism of the 1267 regime has remained unchanged—that targets have no effective remedy to challenge their inclusion on the Consolidated List.[37] Although judges sitting in domestic and regional courts have been sympathetic to these complaints, they have not suggested that protection is solely the province of domestic or regional courts. Rather, these courts have implied that, should the Security Council provide a reasonable means for administrative review of a listing, they would consider the due process issue remedied.[38]

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[31] *Id.* ¶ 28.

[32] S.C. Res. 1904, *supra* note 3, ¶ 20.

[33] *Id.*

[34] *See id.* annex II.

[35] *Id.*

[36] *See id.*

[37] Bardo Fassbender, United Nations, Office of Legal Affairs, Targeted Sanctions and Due Process 5 (2006), *available at* http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf. Although this Article is primarily concerned with the due process violations stemming from the 1267 regime, similar criticisms have been made of Security Council resolutions authorizing the detention of alleged terrorists. *See, e.g.*, R (Al-Jedda) v. Sec'y of State for Def., [2007] UKHL 58, [2008] 1 A.C. 332, 332–33 (appeal taken from Eng.) (U.K.).

[38] *See Kadi II*, ¶ 319, 2008 E.C.R. I-6351, 2008 ECJ EUR-Lex LEXIS 1954 ("[S]o long as under that system of sanctions the individuals or entities concerned have an acceptable

Now that judicial discontent has reached the level of invalidating national and regional implementation of a binding Security Council resolution, the failure to address these due process concerns has created a security crisis. As a result, the present represents a critical moment to reform the 1267 regime. There is no shortage of reform suggestions. Legal commentators over the past decade have argued for various centralized and decentralized schemes that could solve the due process problem. This Article evaluates the various factors (due process, a strong counter-terrorist regime, and U.N.S.C. authority) that must be taken into account in selecting an appropriate review mechanism. It then proposes that the Security Council create an independent tribunal with the power to hear a target's case and issue binding delisting decisions.

Part I of this Article explains the legally binding and preeminent nature of the 1267 regime as a Chapter VII resolution of the Security Council and describes the rising tide of discontent that has been emanating from regional and national courts. Part II discusses the consequences of these cases, both in terms of security concerns and threats to the primacy of the Security Council. This section then explains the due process problems inherent to the current procedure before analyzing a range of suggestions from various legal commentators. Part III identifies criteria for assessing the viability of alternative solutions. These proposed criteria include such issues as independence of a decision-maker, accessibility to the target, ability to provide an effective remedy, speed, concern over sharing sensitive information, infringement on Security Council authority, and the overall political efficacy of the proposed solution. The aim, of course, is not simply to resolve the due process problem, but to do so in a manner that does not negatively affect security concerns, either by weakening the 1267 regime or by threatening the supremacy of the U.N.S.C. The Article concludes with the argument that an independent tribunal with the ability to hear individual complaints and issue binding decisions is the mechanism that best balances these concerns.

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opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.").

I. Background

A. *The Binding and Preeminent Nature of Certain Chapter VII Resolutions*

As the touchstone for understanding the role of U.N. institutions,[39] the U.N. Charter serves as the starting point for an analysis of the impact of Chapter VII resolutions of the Security Council. Article 24 states that members of the U.N. "confer on the Security Council primary responsibility for the maintenance of international peace and security . . . ."[40] To that end, Article 25 further explains that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[41] This provision has been interpreted to mean that "decisions" taken under Chapter VII, which are not recommendations, are considered legally binding on all member states.[42]

The U.N. Charter also provides clear textual guidance that when the Security Council acts in relation to matters of international peace and security, its decisions supersede all other international obligations of member states. Specifically, Article 103 provides: "In the event of a conflict between the obligations of the Members of the United Nations under the . . . Charter and their obligations under any other international agreement, their obligations under the . . . Charter shall prevail."[43] In this way, Article 103 functions as a de facto international supremacy clause mandating that a state's U.N. obligations override its other international commitments. Furthermore, Article 103 is understood to mean that in determining a State's conflicting international obligations, it is not only the Charter but also *any obligation* under the Charter that prevails.[44] Article 103 is likewise memorialized in the Vienna Convention on the Law of Treaties, which under Article 30 states: "Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject matter shall be determined in accordance with the follow-

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[39] *See* Comm'n to Study the Org. of Peace, The United Nations: The Next Twenty-Five Years 2 (1970).

[40] U.N. Charter art. 24, para. 1.

[41] *Id.* art. 25.

[42] The Charter of the United Nations: A Commentary 457 (Bruno Simma ed., 2d ed. 2002). There are also decisions of the Security Council taken under other chapters of the U.N. Charter which are binding, but the focus of this Article is exclusively on Chapter VII sanctions-related resolutions.

[43] U.N. Charter art. 103.

[44] The Charter of the United Nations, *supra* note 42, at 1292.

ing. . . ."[45] Thus, Article 30 reinforces the proposition that each state's obligations under the U.N. Charter supersede its commitments under other international treaties, protocols, and mechanisms.

Chapter VII of the Charter authorizes the Security Council to make recommendations or decisions to address that which the Council determines to be a threat to the peace, a breach of the peace, or an act of aggression.[46] Not all Chapter VII resolutions are *per se* legally binding, however.[47] There is a three-pronged test to determine whether a Chapter VII Resolution is binding: (1) if there is a determination under Article 29 of the existence of a threat to the peace, breach of the peace, or act of aggression; (2) if there is explicit evidence of action under Chapter VII; and (3) if there is evidence that the Council has made a decision within the meaning of Article 25, which provides that "the Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[48]

Resolution 1267 satisfies these three criteria. First, there has been a "determination" that the failure of the Taliban to stop providing "sanctuary and training for international terrorists and their organizations," as required by paragraph 13 of Resolution 1214, constitutes a "threat to international peace and security."[49] Second, the Resolution explicitly states the Security Council is "acting under Chapter VII of the Charter of the United Nations."[50] Third, in the operative section of the Resolution, the Security Council unequivocally decided that "all States shall . . . (a) [d]eny permission for any aircraft to take off from or land in their territory . . . [if from the] Taliban . . . [and] (b) [f]reeze funds and other financial resources [from] . . . the Taliban, as designated by the [Sanctions] Committee . . . ."[51] Therefore, it is indisputable that the Chapter VII resolution is binding on all member states of the U.N.

So why is the binding nature of Resolution 1267 a problem? In short, consistent with the requirements of Articles 25 and 103, all states must implement the Resolution 1267 sanction regime even if the mini-

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[45] Vienna Convention on the Law of Treaties art. 30, para. 1, May 23, 1969, 1155 U.N.T.S. 331.

[46] U.N. Charter, arts. 39–51.

[47] *See* Sir Michael Wood, Senior Fellow, Lauterpacht Ctr. for Int'l Law, Univ. of Cambridge, First Lecture at the Lauterpacht Centre for International Law: The Legal Framework of the Security Council, ¶ 31 (Nov. 7, 2006) *available at* http://www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_1.pdf.

[48] *Id.* ¶¶ 38–39.

[49] *See* S.C. Res. 1267, *supra* note 1, ¶ 4.

[50] *Id.*

[51] *Id.*

mal due process protections for targets are in flagrant violation of a state's other binding international or regional legal obligations, such as those enshrined in the International Covenant on Civil and Political Rights, African Charter on Human and People's Rights, American Convention on Human Rights, or European Convention on Human Rights.[52]

B. *Increasing Judicial Discontent*

Regional and domestic courts have become increasingly more sympathetic to claims arising from a target's placement on the Consolidated List over the past several years. European courts have tended to serve as the fora for such cases given Europe's strong domestic and regional laws protecting human rights.[53] Since 2005, courts have increasingly challenged the idea that Security Council resolutions are unbounded by any law, while simultaneously upholding resolutions' primacy over international law and the domestically-implemented regulation in question.[54] By the end of 2008, however, the ECJ was bold enough to challenge the enforcement of a binding Security Council resolution by annulling the contested European regulation. Subsequent 2009 and 2010 decisions in courts on both sides of the Atlantic upheld the primacy of targeted individuals' rights over the domestic regulations and actions intended to

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[52] *See generally* U.N. Charter arts. 25, 103; International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; African Charter on Human and People's Rights, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights, Nov. 21, 1969, S. Treaty Doc. No. 95-21 (1969), 1144 U.N.T.S. 143; European Convention on Human Rights, Sept. 3, 1953, 213 U.N.T.S. 221.

[53] *See* Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 Harv. Int'l L.J. 1, 3 (2010) (noting that the EU sees itself as a "virtuous international actor" with an ambition "to carve out a distinctive international role for itself as a 'normative power' committed to effective multilateralism under international law").

[54] *See generally* R (Al-Jedda) v. Sec'y of State for Def., [2007] UKHL 58, [2008] 1 A.C. 332 (appeal taken from Eng.) (U.K.); Kadi v. Council (*Kadi II*), 2008 E.C.R. I-6351, 2008 ECJ EUR-Lex LEXIS 1954; Case C-117/06, Möllendorf, 2007 E.C.R. I-8361, 1 C.M.L.R. 11 (2008); Case C-355/04, Segi v. Council, 2007 E.C.R. I-1657, 2007 ECJ EUR-Lex LEXIS 2015 (Feb. 27, 2007); Reich, *supra* note 19 (discussing *Nada*, 133 BGE II 450). Article 103 of the U.N. Charter requires that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. Charter art. 103. Article 25 reads: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." U.N. Charter art. 25. Taken together, these articles mandate that member state obligations to carry out U.N.S.C. resolutions trump other international law obligations.

carry out member states' binding obligations under Security Council resolutions.[55]

As a starting point for this analysis, it is important to understand the legal limits of Security Council action. The Security Council, like any organ of the U.N., is bound by law—and specifically the framework of powers and functions articulated for it in the U.N. Charter.[56] Even though acts of the Security Council are not justiciable, it must nevertheless abide by these rules.[57] Additionally, the Security Council cannot contravene preemptory norms of international law (*jus cogens*).[58] These fundamental principles circumscribing the power of the Security Council have also been recognized by the tribunals that have examined the validity of the 1267 regime.

1. Security Council Bound by *Jus Cogens*

The 2005 case, *Kadi I*, was the first to significantly challenge the 1267 regime.[59] At first glance, the ruling of the Court of First Instance

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[55] Abdelrazik v. Minister of Foreign Affairs, [2009] F.C. 580 ¶¶ 162–65 (Can.); A v. HM Treasury, [2010] UKSC 2, [2010] 2 W.L.R. 378, 408–10 (U.K.). It is also worth noting that there have been more than thirty court cases challenging the 1267 regime since its inception, and these cases are not limited to Europe and North America, but also include challenges in Turkey and Pakistan. See Thomas J. Biersteker & Sue E. Eckert, Watson Inst. Targeted Sanctions Project, Brown Univ., Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report" 47–48 (2009), *available at* http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf [hereinafter Biersteker & Eckert, Watson Report Update].

[56] *See, e.g.*, Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 64 (May 28). The opinion states:

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of the constitution.

Id.

[57] *See* U.N. Charter art. 24, para. 2; *see, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, 53 (Feb. 3) (observing that "[w]hether or not States have accepted the jurisdiction of the Court, they are required to fulfill their obligations under the Charter of the United Nations and other rules of international law").

[58] *See* Kamrul Hossain, *The Concept of* Jus Cogens *and the Obligation Under the U.N. Charter*, 3 Santa Clara J. Int'l. L. 72, 96–97 (2005); Wood, *supra* note 47, ¶ 6.

[59] *See generally Kadi I*, 2005 E.C.R. II-3659, 2005 ECJ EUR-Lex LEXIS 673. *Jus cogens* is a principle of international law so fundamental that no nation or institution may ignore or attempt to contractually circumvent it through treaties. *See* The Fundamental Rules of the International Legal Order: *Jus Cogens* and Obligations *Ergo Omnes* 29 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006). Classic examples of *jus cogens* norms include the prohibition of genocide and participation in the slave trade. *See id.* at 99.

(CFI) of the ECJ appears deferential to the authority of the Security Council.[60] The court held that U.N. member states' obligation to respect Security Council resolutions under customary law and under Article 103 of the U.N. Charter, "clearly prevail[s] over every other obligation of domestic law or of international treaty law . . . ."[61] Thus, the court did not even have "the jurisdiction to review indirectly the lawfulness" of a U.N.S.C. decision.[62]

After concluding that it had no jurisdiction to review a Security Council resolution, however, the court further declared:

> None the less [sic], the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.[63]

Yet, despite reaffirming this well-understood limit on Security Council action, the court ultimately found that, in the instant case, the Security Council Resolutions had not actually breached *jus cogens*.[64]

This holding, although remaining deferential to the Resolutions at hand, broke with earlier European cases that dealt with a Security Council resolution's effect on an individual. For example, in *Bosphorus Hava Yollari Turizm v. Minister for Transport, Energy and Communications*, Irish authorities impounded a Yugoslavian aircraft.[65] The aircraft had been leased to a Turkish company pursuant to an EC regulation that formed part of the U.N. sanctions regime against the Former Republic of Yugoslavia.[66] In this case, the ECJ held that, when viewed in light of the aims intended by the U.N. resolution, the impounding of the air-

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[60] *See Kadi I*, ¶ 181, 2005 E.C.R. II-3659, 2005 ECJ EUR-Lex LEXIS 673.

[61] *Id.*

[62] *Id.* ¶ 221.

[63] *Id.* ¶ 226.

[64] *Id.* ¶ 275. The court found that, with regard to the freezing of Kadi's funds, *jus cogens* only prohibits the arbitrary deprivation of property, and Kadi had not been arbitrarily nor permanently deprived of his assets. *See id.* ¶¶ 243–51. The alleged breach of the right to be heard did not violate *jus cogens* as the Sanctions Committee offered a mechanism for the re-examination of individual cases, albeit only through national espousal. *Id.* ¶ 261–62. Finally, as regarding the breach of the right to effective judicial review, the court found that the right of access to courts is not absolute and thus not a right guaranteed by *jus cogens*. *Id.* ¶¶ 287, 291.

[65] *See* Case C-84/95, Bosphorus Hava Yollari Turizm v. Minister for Transp., Energy & Commc'ns, ¶ 2, 1996 E.C.R. I-3953 (Judgment).

[66] *Id.* ¶ 1 (Opinion of Advocate General).

craft could not "be regarded as inappropriate or disproportionate."[67] Nowhere did the ECJ imply that it could invalidate regulations implementing a Security Council resolution. Furthermore, in the cases of *Behrami v. France* and *Saramati v. France*,[68] which revolved around a wrongful death and detainment attributable to U.N. peacekeeping forces in Kosovo, the European Court of Human Rights found that "the [European] Convention[on Human Rights] cannot be interpreted in a manner which would subject the acts and omissions of contracting parties, which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court."[69]

The reasoning of the CFI in *Kadi* proved influential. In 2007, the Swiss Federal Court issued a similar decision on a blacklisting case. Youseff Mustafa Nada was an Egyptian-born Italian national who had been put on the Consolidated List due to his involvement with Al Taqwa Management SA, a widespread financial network suspected of supporting terrorist activities.[70] At the time of his listing, Nada was living in Campione d'Italia, "a small Italian enclave roughly half a square mile in size fully surrounded by Swiss territory."[71] As a result of his placement on the Consolidated List, Nada was restricted from leaving Campione d'Italia and his assets were frozen.[72] After a three-year investigation into his alleged terrorist connections terminated, Nada filed a petition with the Swiss domestic agency responsible for the enforcement of sanctions.[73] The agency dismissed the petition, and the case eventually ended up in the Swiss Federal Supreme Court.[74]

Ultimately, the Swiss Federal Supreme Court also dismissed Nada's petition, pointing to its member state obligation to enforce the resolutions of the Security Council.[75] Just like the CFI in *Kadi*, however, the court held that it could annul implementing regulations when and if

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[67] *Id.* ¶ 26 (Judgment).

[68] Behrami v. France, Saramati v. France, App. Nos. 71412/01, 78166/01, 45 Eur. H.R. Rep. SE10 (2007). *Behrami* concerned the death and injury of two children in Kosovo who unknowingly played with undetonated cluster bomb units under the control of Kosovo Force (KFOR) units. *See id.* ¶¶ 5–7. *Saramati* dealt with the prolonged detention of an Albanian man under suspicion for attempted murder and illegal possession of a weapon in Kosovo by the KFOR. *See id.* ¶¶ 8–17.

[69] *Id.* ¶ 149 .

[70] *See* Reich, *supra* note 19, at 507–08.

[71] *Id.* at 507.

[72] *Id.* at 508.

[73] *Id.*

[74] *Id.*

[75] *Id.*

the Security Council resolution clashed with *jus cogens* norms.[76] Unfortunately for Nada, the court did not find that his frozen assets and containment to a half-square mile qualified as a violation of *jus cogens*.[77]

The CFI's decision in *Kadi* and a Swiss Federal Supreme Court decision marked the first instances in which domestic and regional courts affirmed the heretofore theoretical limitations on the Security Council's powers in the context of the 1267 regime.[78] Moreover, not only did these courts hold that *jus cogens* bound the U.N.S.C., but they also reaffirmed that a regional or domestic courts had the jurisdictional competence to determine whether this boundary had been breached. Although these courts ultimately found that the Resolutions in question did not breach *jus cogens* and upheld the implementing regulations, their decisions put the Security Council on notice that the 1267 regime was under scrutiny.

2. Reaffirming the Importance of Fundamental Rights

After the CFI and the Swiss Federal Supreme Court decisions, a number of cases followed which, although not purporting to restrict the U.N.S.C.'s resolution-making authority, still very much emphasized the importance of honoring due process rights. The ECJ heard another listing case, albeit one stemming not from the 1267 Resolution regime, but rather from the obligations imposed on states by Resolution 1373.[79] Resolution 1373 was another anti-terrorism measure which called upon states to freeze the funds of any terrorist or terrorist sympathizer.[80] Unlike Resolution 1267 and its progeny, Resolution 1373 allowed individual member states to list and delist their own nationals without a U.N. entity maintaining a Consolidated List.

In response to this Resolution, the European Union adopted a Common Position which listed Segi, a Spanish group purportedly associated with Basque terrorists, as an entity whose assets were to be fro-

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[76] *See* Reich, *supra* note 19, at 508.

[77] *See id.*

[78] *See* Búrca, *supra* note 53, at 23, Reich, *supra* note 19, at 508 (discussing *Nada*, 133 BGE II 450).

[79] *See* Segi v. Council, 2007 E.C.R. I-1657, 2007 ECJ EUR-Lex LEXIS 2015 (Feb. 27, 2007).

[80] *See* S.C. Res. 1373, *supra* note 3, ¶ 1. Resolution 1373 targeted all "persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts," whereas the 1267 regime targeted only the Taliban and terrorists connected to Al-Qaida. *See id.*; S.C. Res. 1267, *supra* note 1, ¶ 4(b).

zen.[81] When Segi brought its complaint over the listing to the ECJ, the court, in *Segi v. Council*, noted that member states of the European Union must enable "natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered."[82] Nevertheless, after stating that judicial protection must be available to those affected by acts of the European Union (here, the adoption of a Common Position implementing Resolution 1373), the court proceeded to hold that it did not have the jurisdiction to hear the complaint at hand because it could not "create a legal remedy not provided for by the applicable texts."[83] Thus, while reaffirming that the right to court access is a fundamental right, the court simultaneously dodged the question of whether a regulation that did not grant a remedy for a potential breach of rights is invalid.[84]

Later that same year, the ECJ also heard the *Möllendorf* case, in which a 1267 listing imposed some unforeseen consequences on a third party.[85] This case concerned a contract of sale for land conducted between two parties in which the money had already been paid to the sellers when the buyer was blacklisted.[86] Under German law, ownership had not yet transferred because the transaction had not been registered in the Land Registry.[87] Since the asset freeze on the buyer prohibited registration, the issue arose as to whether the sales transaction had to be reversed, as was usual procedure under German law.[88] The sellers, however, argued that being forced to repay the sales price would disproportionately limit their right to property.[89]

The ECJ ultimately concluded that it was for the German authorities to determine whether a "disproportionate infringement of the right to property" had occurred, as the sellers contended, and, if it had, "to apply the national legislation in question, so far as it is possible, in such a way that the requirements flowing from Community law are not

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[81] *See Segi*, ¶¶ 1–3, 2007 E.C.R. I-1657, 2007 ECJ EUR-Lex LEXIS 2015. The Spanish High Court had also declared Segi's activities illegal and ordered incarceration for several of Segi's leaders. *See id.* ¶ 9.

[82] *Id.* ¶ 56.

[83] *Id.* ¶¶ 60, 61.

[84] *See id.* ¶ 60.

[85] *See generally* Case C-117/06, Möllendorf, 2007 E.C.R. I-8361, 1 C.M.L.R. 11 (2008).

[86] *See id.* ¶¶ 22–29.

[87] *See id.* ¶ 52.

[88] *See id.* ¶ 59, 62.

[89] *See id.* ¶¶ 22–40.

infringed."[90] Much like its analysis in *Segi*, the court did not put the legality of the 1267 sanction regime at stake but rather concentrated on the scope of the implementing measures. Once again, the court sidestepped examining the Resolution itself while still managing to highlight the importance of protecting an individual's rights.

Not all courts were as protective of fundamental rights in the face of a binding Security Council resolution, given the U.N. Charter's Article 103 supremacy clause. In *R (Al-Jedda) v. Secretary of State for Defence*, for example, the British House of Lords found that Resolution 1546, permitting the Multi-National Force operating in Iraq to detain individuals for reasons of security, prevailed over the United Kingdom's obligations to honor due process rights guaranteed under the European Convention on Human Rights.[91] The House of Lords qualified the supremacy of Resolution 1546, however, holding that Security Council-provided authority must be exercised in such a way that a detainee's rights are not infringed to a greater degree than necessary in such a detention.[92] Baroness Hale of Richmond concluded that, although a Security Council resolution might overrule a British commitment to the due process rights guaranteed in the European Convention, "[t]he right was qualified, but not displaced."[93]

Taken together, these cases reaffirm that binding Security Council resolutions do not permanently overrule member states' commitments to human rights. On the contrary, they must be interpreted only to qualify the right to the smallest extent possible.

3. Holding States Responsible

Beyond the outlying *jus cogens* limitation on Security Council action and reaffirmation of state obligations to due process rights, courts have recently begun to hold states liable for their actions taken in conformity with Security Council resolutions. In 2008, the Human Rights Committee (HRC), established by the International Covenant on Civil and Political Rights (ICCPR),[94] heard a blacklisting complaint for violations of the treaty from two Belgian citizens, Nabil Sayadi and Patricia

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[90] *Id.* ¶ 79.

[91] *See* R (Al-Jedda) v. Sec'y of State for Def., [2007] UKHL 58, [2008] 1 A.C. 332, 354–355 (appeal taken from Eng.) (U.K.).

[92] *See id.* at 355.

[93] *See id.* at 376.

[94] ICCPR, *supra* note 52, 999 U.N.T.S. at 179.

Vinck.[95] The two had been placed on the Consolidated List based on their leadership positions in the *Fondation Secours International*, purportedly the European branch of an American association which had been on the sanctions list for several years.[96] When Belgium proposed their names to the Sanctions Committee, Sayadi and Vinck had not been convicted of any terrorist activity. Moreover, during the period of criminal investigation against Sayadi and Vinck, Belgium refused their petition to take their delisting request to the Sanctions Committee until a domestic court finally ordered it do so.[97]

The HRC determined that although it could not consider the alleged violation of other instruments of the U.N. Charter, it was

> competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council. It [was] the duty of the Committee, as guarantor of rights protected by the Covenant, to consider to what extent the obligations imposed on the State party by the Security Council resolutions may justify the infringement . . . .[98]

Thus, granting itself the power to review if a state's action was in conformity with the ICCPR even when acting under binding Security Council resolutions, the Committee held that Belgium was liable for the initial inappropriate listing of Sayadi and Vinck.[99]

In spite of Belgium's argument that it was required to respect Resolution 1267 and report the names of its suspected terrorist supporters under Article 103, the Committee found that the listing was

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[95] *See* U.N. Human Rights Comm., Sayadi v. Belgium, Commc'n No. 1472/2006, ¶¶ 2.3–3.1., U.N. Doc. CCPR/C/94/D/1472/2006 (2008). Nabil Sayadi and Patricia Vinck claimed violations of Articles 2, 4, 12, 14, 15, 17, 18, 22, 26, and 27 of the Covenant. *Id.* ¶ 3.1.

[96] *See id.* ¶ 2.2.

[97] *See id.* ¶ 2.5. A domestic court also dismissed the case against Sayadi and Vinck after three years of a criminal investigation. *See id.* ¶ 2.6.

[98] *Id.* ¶ 10.6.

[99] *See id.* ¶ 3.4. The Committee stated:

> Respect for the presumption of innocence, the right to an effective remedy, and the right to a procedure with all due structural and functional guarantees have been violated. The presumption of innocence had been flouted by the Belgian State's proposal to place the authors' names on the Sanctions Committee list without "relevant information" in breach of article 14, paragraph 2 of the Covenant.

Id.

premature and therefore illegal.[100] Consequently, Belgium was responsible to do everything in its power to remove the petitioners from the Consolidated List and to give them some form of compensation.[101] Furthermore, Belgium was "also obliged to ensure that similar violations do not occur in the future."[102]

In effect, this decision amounted to a finding that a national regulation's foundation in a Chapter VII U.N.S.C. resolution does not entirely shield the state from its other international legal obligations. Indeed, Belgium was held to account for having too eagerly complied with the 1267 regime. Nevertheless, the Committee claimed their findings were not an unabashed attack on the Security Council's authority, although the several Committee dissenters disagreed.[103] The HRC explicitly stated that, despite the chilling effect that imposing liability for a premature listing might have on states' compliance with Resolution 1267's demand for member states to be active in listing suspected Al-Qaida supporters, "there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations."[104]

As rebellious as holding a member state liable for an action taken in conformity with a U.N.S.C. resolution might seem, this decision was probably overshadowed by that of the ECJ, when it revisited the *Kadi* case in 2008 in *Kadi v. Council* (*Kadi II*). The court's first break from the CFI's decision came with the holding that "obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights . . . ."[105] While still noting the primacy of a Security Council resolution pursuant to

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[100] *See id.* ¶ 8.1 (noting Belgium's argument that "under Article 103 of the Charter, Charter obligations prevail over any others, a State Member of the United Nations carrying out its obligations under the Charter cannot incur liability under the Covenant").

[101] *See* U.N. Human Rights Comm., Sayadi v. Belgium, Commc'n No. 1472/2006, ¶ 12, U.N. Doc. CCPR/C/94/D/1472/2006 (2008).

[102] *Id.* ¶ 13.

[103] *See id.* ¶ 10.2. Sir Nigel Rodley, Mr. Ivan Shearer, and Ms. Iulia Antoanella Motoc wrote: "[U]nless the Committee believes that the State party's mere compliance with the Security Council listing procedure (in absence of bad faith by the State party or overstepping of the Security Council's powers) is capable of itself violating the Covenant, it is not clear how the authors can still be considered victims . . . ." *Id.* app. A. (Rodley, dissenting in part). Ms. Ruth Wedgwood commented, "[t]he authors are complaining about the actions and decisions of the United Nations Security Council, not the acts of Belgium." *Id.* app. A (Wedgwood, dissenting).

[104] *Id.* ¶ 10.3.

[105] *Kadi II*, ¶ 285, 2008 E.C.R. I-6351, 2008 ECJ EUR-Lex LEXIS 1954.

member states' Article 103 obligations, the court denied that a decision "that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order [would entail] any challenge to the primacy of that resolution in international law," despite the fact that such a decision could place the individual member states comprising the European Community (EC) in violation of international law.[106] Just a few paragraphs later, the court also stated that there was no basis in the EC Treaty for granting immunity from jurisdiction for a Community regulation solely based on the primacy of member states' obligations at the level of the international law.[107]

Ultimately, the ECJ's reasoning led it to strongly conclude:

> the review by the Court of the validity of any Community measure in light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.[108]

Interestingly enough, however, the ECJ declared that "so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the U.N. legal system, the court must not intervene in any way whatsoever."[109] Nevertheless, as such a mechanism was not in place, the court annulled the contested regulation as it concerned Kadi and potentially placed the twenty-seven member states of European Community in breach of international law.[110]

Two further cases elevating the importance of individual rights above a member state's obligations to implement Security Council resolutions followed closely on the heels of *Kadi II*. In June 2009, the Canadian Federal Court heard *Abdelrazik v. Minister of Foreign Affairs*, a case that revolved around a Canadian citizen's inability to return to Canada based on the travel restrictions imposed on him by virtue of his inclusion on the Consolidated List.[111] Abdelrazik, a Sudanese-born naturalized Canadian citizen, had been repeatedly detained without charge by

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[106] *Id.* ¶ 288.
[107] *Id.* ¶ 300.
[108] *Id.* ¶ 316.
[109] *Id.* ¶ 319.
[110] *See id.* ¶ 368–69.
[111] Abdelrazik v. Minister of Foreign Affairs, [2009] F.C. 580, ¶¶ 1–4, 23 (Can.).

Sudanese authorities while on a trip to Sudan.[112] After each detention, Abdelrazik attempted to return to Canada, but each of his attempts failed, in part due to resistance by Canadian authorities hesitant to allow his return.[113] The matter was further complicated by the asset and travel ban placed on Abdelrazik following his 2006 inclusion on the Consolidated List.[114]

Abdelrazik brought his case to court, contending that the Canadian government violated section 6(1) the Canadian Charter of Rights and Freedoms, which guarantees Canadian citizens the right to enter Canada.[115] In response, the Canadian government argued that "it is not as a consequence of any of Canada's actions that Mr. Abdelrazik has been prevented from entering Canada; rather it is as a consequence of his listing by the 1267 Committee as an associate of Al-Qaida."[116] Accordingly, the government suggested it could not help Abdelrazik return without violating its obligations under Security Council resolutions, in particular, under the theretofore most recent resolution in the 1267 regime, Resolution 1822.[117]

The Canadian Federal Court did not find this argument persuasive; rather, the court interpreted Resolution 1822 such that it would allow Abdelrazik to return without placing Canada in breach.[118] First, noting that the travel ban of Resolution 1822 permits states to allow entry to listed individuals who are citizens of that state,[119] Justice Russel Zinn defined the term "territory" as used in the Resolution to exclude airspace over the other countries that a returning Abdelrazik would have to fly through,[120] thus interpreting "the UN travel ban [to present] no impediment to Mr. Abdelrazik returning home to Canada."[121] Furthermore, the Justice concluded that the exception to the travel and asset ban provided in Resolution 1822 for the "fulfilment of a 'judicial process'" was broad enough to include a measure of execution ordered by the court.[122] Under this expanded definition, a court order requiring the Canadian government to allow Abdelrazik to return would not

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[112] *Id.* ¶¶ 9–22.
[113] *Id.* ¶¶ 17–22.
[114] *Id.* ¶ 23.
[115] *Id.* ¶ 42.
[116] *Id.* ¶ 44.
[117] *Abdelrazik*, F.C. 580, ¶ 44–49.
[118] *Id.* ¶ 51.
[119] *Id.* ¶ 57.
[120] *Id.* ¶¶ 121–24.
[121] *Id.* ¶ 129.
[122] *Id.* ¶¶ 162–65.

place the government in breach of the Resolution.[123] By defining away any potential obstructions under the 1267 regime to Abdelrazik's return, Justice Zinn was therefore able to find that "[t]here is no impediment from the UN Resolution to Mr. Abdelrazik being repatriated to Canada" and to demand that the government provide Abdelrazik with a passport, ticket, and an escort back.[124]

Justice Zinn's interpretation of Resolution 1822 allowed him to safeguard the individual's rights without explicitly placing his country in breach of its international obligations.[125] Again, this case exemplifies a court's attempt to emphasize human rights in the face of seemingly-contradictory international obligations without directly defying the Security Council regulation.[126] Presumably, however, a direct challenge to this decision would materialize if the Security Council were to interpret the exemptions to Resolution 1822 contrary to the Canadian Federal Court. In short, Justice Zinn's confidence in his own interpretation of the Resolution's terms returned the question of reform back to the Security Council's court; if left unaddressed, the 1267 regime's implementation could splinter across lines of national interpretation.

A v. HM Treasury, a case adjudicated by the new Supreme Court of the United Kingdom (U.K. Supreme Court), is the most recent case to address U.K. laws implementing the 1267 regime.[127] In determining whether the national regulations placing asset and travel bans on the targeted individuals were unlawful, the court explicitly considered both the *Kadi II* and the *Abdelrazik* holdings[128] before concluding that *R (Al-Jedda) v. Secretary of State for Defence*[129] had established precedent "that article 103 leaves no room for any exception, and that the [European] Convention rights fall into the category of obligations under an international agreement over which obligations under the [U.N.] Charter must prevail."[130] The court refused to let the inquiry end there, however, and suggested that *Al-Jedda* "leaves open for consideration how the position may be regarded under domestic law."[131] Ultimately, the court held that the targeted individual "is entitled to succeed on the point

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[123] *Abdelrazik*, F.C. 580, ¶¶ 156, 160, 165.

[124] *Id.*

[125] *Id.* ¶¶ 162–65.

[126] *Id.*

[127] A v. HM Treasury, [2010] UKSC 2, [2010] 2 W.L.R. 378, 378–80 (U.K.).

[128] *Id.* at 408–10.

[129] R (Al-Jedda) v. Sec'y of State for Def., [2007] UKHL 58, [2008] 1 A.C. 332 (appeal taken from Eng.) (U.K.).

[130] *HM Treasury*, 2 W.L.R. at 411–12.

[131] *Id.* at 412.

that the regime to which he has been subjected has deprived him of access to an effective remedy."[132] The implementing regulations were quashed on the grounds they violated the 1946 United Nations Act.[133] This statute provides the executive in the United Kingdom discretion to adopt regulations outside of parliamentary scrutiny when it acts to implement certain mandates of the U.N.S.C.,[134] but such regulations "must be either 'necessary' or 'expedient' to enable those measures to be 'applied' effectively."[135]

Interestingly, in finding that the targeted individuals were impermissibly denied judicial access, the majority explicitly considered whether the recently enacted Resolution 1904, establishing the ombudsperson's office, remedied prior due process concerns.[136] After discussing the continuing problems with transparency, listing, and delisting, the court concluded that "[w]hile these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy."[137] Unfortunately for those concerned with maintaining the primacy of Security Council resolutions, it seems that Resolution 1904's attempt to allay national court concerns over due process has not turned back the rising tide of judicial discontent. Indeed, it is worth noting that the U.K. Supreme Court did not even discuss in depth the fact that quashing the domestic regulations could place the state in breach of its Security Council obligations.[138] Instead, the court seemed more concerned with protection of individual rights than its potential violation of international law.[139]

Furthermore, the due process deficiencies of the 1267 regime have begun to attract the attention of legislators as well as judges. On March 1, 2010, the Swiss Parliament's Foreign Affairs Committee adopted a proposal over the objection of the Swiss Foreign Minister urging the Swiss government to inform the Security Council it intended to refuse to apply financial sanctions to any targeted individual who has not been given judicial access after three years, was unable to appeal his or her listing in front of a judicial body, and has not had any further accusa-

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[132] *Id.* at 414.
[133] *Id.* at 400.
[134] *Id.* at 386, 400, 414.
[135] United Nations Act, 1946, 9 & 10 Geo. 6, c. 45, § 1 (U.K.).
[136] *HM Treasury*, 2 W.L.R. at 413–14.
[137] *Id.*
[138] *See generally id.*
[139] *See id.* at 407–15.

tions made against him or her.[140] Clearly, courts and legislators emboldened by *Kadi II* will require more than the newly-established ombudsperson's office to satisfy their due process concerns.

II. Discussion

A. *Consequences of the Recent Decisions*

This stream of recent decisions has left both the validity and the efficacy of the 1267 regime on rockier ground than at any point since its adoption in 1999. For several years, the scope of customary law with respect to due process has been broadening to include actions by international organizations that affect individuals.[141] This trend, as well as the fact that the U.N. itself has substantially contributed to the development of international human rights law, has led to the expectation that the U.N. will observe basic standards of due process.[142] The recent blacklisting decisions will only contribute to this expectation and will perhaps encourage other domestic or regional courts to issue their own challenges to the U.N.S.C. The real danger, of course, lies not in the fact that other courts might choose to annul resolution-implementing regulations based on that state's higher standards of human rights protection, but rather that courts will use the *Kadi II* precedent "to assert their local understandings of human rights and their particular constitutional priorities over international norms . . . ."[143] A court could disregard a UN resolution not because it falls short of domestic human rights guarantees but simply because it contradicts other domestic legal principles.

Practically speaking, after these recent decisions, nations may be unwilling to implement national or regional regulations that effectuate U.N.S.C. resolutions concerning sanctions. This unwillingness alone could result in a major gap in the coverage of the 1267 regime, particularly in light of the asset-freezing and travel-banning requirements of the

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[140] *See* Rapport de la Commission de Politique Extérieure du Parlement Suisse (Report of the Foreign Affairs Commission of the Swiss Parliament), Les Fondements de Notre Ordre Juridique Court-circuités par l'ONU (The Foundations of Our Judicial Order Short-circuited by the United Nations) (2010), http://www.parlament.ch/afs/data/f/bericht/2009/f_bericht_n_k4_0_20093719_0_20100301.htm.

[141] Fassbender, *supra* note 37, at 6–7 ("[A] trend can be perceived widening the scope of customary law in regard to due process to include direct 'governmental' action of international organizations vis-à-vis individuals."). Fassbender notes that a contributing factor to this trend has been the law of the European Community. *Id.*

[142] *See id.* ¶ 6.

[143] *See* Búrca, *supra* note 53, at 42.

Resolutions. Those concerned that their names could appear on the blacklist could move their assets (or perhaps even their persons) to non-complying nations. When that group of nations is the European Community, known for its usual respect for and deference to international law, such a hole in member-state implementation could threaten to unseat the whole regime.[144] As noted by scholars, targeted sanctions are only as strong as the weakest link of member state implementation.[145]

Clearly, the European Community's refusal to participate fully in the regime based on the inviolability of the guarantees stemming from the EC Treaty would be inconsistent with the U.N. Charter's supposed primacy over other international treaties.[146] Furthermore, "[j]udicial review of Security Council resolutions by national courts would open a Pandora's box and result in the fragmentation of U.N. resolutions along the borders of national and supranational jurisdictions."[147] Ultimately, judicial review could undermine the credibility of the Security Council. Court decisions to prioritize the protection of due process over security concerns arguably weaken not only the resolutions at hand, but also the U.N.S.C.'s overall ability to create an effective and unified regime.[148]

Thus, in addition to extensive legal and philosophical arguments that the U.N.S.C. should be responsive to due process concerns,[149] security concerns provoked by judicial resistance compel the Security Council to reform.[150] Considering that over fifty member states have expressed concern over the efficacy of the 1267 regime, this pressure is

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[144] *See* Búrca, *supra* note 53, at 3 (noting the *Kadi* decision "sits uncomfortably . . . with the broader political ambition of the EU to carve out a distinctive international role for itself as a 'normative power' committed to effective multilateralism under international law").

[145] The Stockholm Process, Making Targeted Sanctions Effective: Guidelines for the Implementation of the UN Policy Options 10 (Peter Wallensteen et al. eds., 2003).

[146] Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 7 (noting that an annulment of the national measures implementing a U.N.S.C. resolution "could also challenge Article 103 of the UN Charter, which states that obligations under the Charter shall prevail over obligations Member States may have under any other international agreement").

[147] Reich, *supra* note 19, at 510.

[148] *See* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 7 ("In the final analysis, should a regional or national court judgment challenge the application of national measures giving effect to a listing by a Security Council sanctions committee, the decision could undermine the effective implementation of UN sanctions.").

[149] *See* Fassbender, *supra* note 37, at 7.

[150] *See* Reich, *supra* note 19, at 509 ("The looming possibility of a clash between national courts and the international regime should encourage the member states to press for an overhaul of the current sanctions regime.").

not inconsiderable, and the worry that other states could follow Canada and Europe's suit is well-founded.[151] Even the Special Rapporteur on Legal Affairs and Human Rights for the Parliamentary Assembly of the Council of Europe expressed his hope that "national courts could actually compel the UN authorities to improve their procedures and so help to increase the legitimacy of these lists . . . ."[152] Given both human rights *and* security concerns, a critical moment to press for reform has arrived.

B. *Suggestions for Reform*

Over the past decade, many suggestions for reform of the 1267 regime have been proposed and discussed. Resolutions subsequent to Resolution 1267 have incorporated some of these suggestions into the regime by later resolutions.[153] The current procedure, however, still leaves much to be desired in terms of accountability, individual access, impartiality, and effective remedy.[154] In particular, commentators have noted that there is still no protection against arbitrary decision-making by the Sanctions Committee, and no way to review allegations once a listing is imposed.[155] Other criticisms focus on the lack of transparency in the decisions to list or delist.[156] Yet another problem is the uncertain

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[151] *See* U.N. Sec. Council, Comm. Established Pursuant to Resolution 1267 Concerning Al-Qaida & the Taliban & Associated Individuals & Entities, Analytical Support & Sanctions Monitoring Team, *Fourth Report Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, ¶¶ 40–46, U.N. Doc. S/2006/154 (Mar. 10, 2006), *available at* http://www.un.org/Docs/sc/committees/1267/1267mg.htm.

[152] Eur. Parl. Comm. on Legal Affairs & Human Rights, *UN Security Council and European Union Blacklists*, ¶ 5, Doc. No. 11454, add. (2007).

[153] *See supra* notes 22–23, 25–36 and accompanying text.

[154] *See* Fassbender, *supra* note 37, at 4 ("Whether the respective committee, or the Security Council itself, grants a de-listing request is entirely within the committee's or the Council's discretion; no legal rules exist that would oblige the committee or the Council to grant a request if specific conditions are met."); *see also* Biersteker & Eckert, Watson Report Update, *supra* note 55, at 5 ("It is important to recognize the important changes already made and to give credit to the serious and painstaking efforts to address the problems. Nonetheless, legal challenges in national and regional courts, concerns in parliamentary assemblies, and criticism from the human rights committee continue.").

[155] Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 Am. J. Int'l L. 275, 297 (2008) ("A report issued by the Council of Europe in 2006 stated that the 1267 process violates the European Convention on Human Rights because it provides no protection against arbitrary decisions and no mechanism for reviewing the accuracy of allegations made.").

[156] *See id.* at 298 ("The third line of criticism relates to the lack of reasons given for decisions at each step."); *see also* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 3 ("Finally, the lack of transparency of committee procedures and difficulties in obtaining information contribute to general perceptions of unfairness."). To the Security Council's credit, Resolutions 1735 and 1822 did attempt to respond to many of the transparency

and potentially unlimited timeline for delisting decisions,[157] as "in practice, such requests can carry on indefinitely [and] [s]tates may either object without specifying a reason or demand a technical hold that places the request on indefinite hold."[158] Ultimately, despite the steps that have been made towards opening up the Sanctions Committee to individual petitions, the underlying issue is that delisting decisions remain a political process.[159] Targets still do not have the opportunity to present their cases in front of the Sanctions Committee, and, should they lack support from their states of residence or citizenship, it is unlikely that their requests will be taken seriously.[160] In addition, "[g]iven that the same body is responsible for initial placement on the list and the subsequent review of those decisions, it seems that the opportunity for review is neither full nor impartial."[161] From a target's standpoint, political decision-making is an insufficient guarantee of fair consideration and effective remedy.[162]

To improve these lapses in due process, commentators have argued over the past decade for various remedial mechanisms.[163] The

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criticisms by asking member states to provide more information when listing and by requiring the Sanctions Committee to make more information available on its website. Currently, however, states or members of the Sanctions Committee blocking a request for delisting are not required to explain why. *See* U.N. Sec. Council, Comm. Established Pursuant to Resolution 1267 Concerning Al-Qaida & the Taliban & Associated Individuals & Entities, *Guidelines of the Committee for the Conduct of Its Work*, ¶¶ 4–6 (Dec. 9, 2008), *available at* http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

[157] Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 37.

[158] *Id.* The recently enacted Resolution 1904 does require the Ombudsperson to ensure stricter timelines for consideration and responses to delisting requests. *See* S.C. Res. 1904, *supra* note 3, annex 2. Given the purely nonbinding nature of the Ombudsperson's recommendations, however, it remains to be seen if this new framework will result in timely decisions.

[159] This is not to say that permitting individuals to bypass state espousal and take requests directly to the Focal Point and now the ombudsperson was not a huge procedural improvement. Indeed, before Resolutions 1735 and 1904 it was possible that the largest hidden problem was that individual requests never made it to the Sanctions Committee due to a state's unwillingness to espouse the claim. *Id.* at 34–36.

[160] *See id.*

[161] Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. Ann. Surv. Am. L. 491, 514 (2004).

[162] *See* Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 Nordic J. Int'l L. 159, 183 (2003) ("As regards the question of political safeguards, these are obviously insufficient from the individual perspective.").

[163] *See* U.N. SCOR, 61st Sess., 5599th mtg. at 2–3, U.N. Doc. S/PV.5599 (Dec. 19, 2006); Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 47; Fassbender, *supra* note 37, at 30–31; Cameron, *supra* note 162, at 208–11; Gutherie, *supra* note 161, at 524–41; Reich, *supra* note 19, at 510; Press Release, Press Conference by Special Rapporteur on Human Rights and Countering Terrorism (Oct. 22, 2008), *available at* http://www.un.org/News/briefings/docs/2008/081022_Scheinin.doc.htm. A wide range of meas-

most aggressive suggestion has been to entirely dismantle the 1267 regime and leave blacklisting decisions fully in the hands of member states.[164] Under this proposal, "[s]tates would be responsible for both determining who should be sanctioned and for providing the procedural protections that accompany sanctioning."[165] Consequently, "[t]he coordination role of the Security Council would be replaced by the bilateral and multilateral agreements concerning sanctioning."[166] States would cooperate with each other, either through formal treaties or informal case-by-case agreements to ensure that sanctioned individuals had their assets and movements restricted world-wide.[167]

A similar and more radical proposal that has surfaced but has not been favored by the U.N.'s own Special Rapporteur on Human Rights and Countering Terrorism has been the abolition of the 1267 Sanctions Committee coupled with the movement of listing to the Counter-Terrorism Committee's jurisdiction on the basis of Resolution 1373.[168] This alternative would eliminate the entire question of due process by having the U.N. provide expertise for judicial decisions made on a national level, but without a U.N.-sponsored list.[169] Another upside to this alternative could be the increase in state participation in reporting. States have reported much more frequently to the Counter-Terrorism Committee, despite the fact that they are under no obligation to do so, than to the Sanctions Committee, where U.N.S.C.-dictated obligation does exist.[170]

Apart from decentralizing alternatives, another suggestion has been to allow listing at the U.N. level but to promote state judicial review of such decisions.[171] This is essentially the default that has emerged from

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ures has also been suggested for improving listing procedures as an aspect of due process. Nevertheless, as the recent court cases have focused on the right of effective remedy as the crucial aspect of due process, this Article duly focuses only on suggestions for delisting.

[164] *See* Gutherie, *supra* note 161, at 525–26.

[165] *Id.* at 525.

[166] *Id.*

[167] *See id.* at 526.

[168] Press Release, *supra* note 163.

[169] In *Segi*, for example, the ECJ found the fact that the listing decisions were made on the national level meant that the petitioner could avail himself of the national due process protection. *See* Segi v. Council, ¶¶ 59–62, 2007 E.C.R. I-1657, 2007 ECJ EUR-Lex LEXIS 2015 (Feb. 27, 2007); *see* discussion *supra* Part I.

[170] *See* Eric Rosand, *Current Developments: The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 Am. J. Int'l L. 745, 758–59 (2004) (discussing the strange discrepancy between state reporting to the CTC Committee and the 1267 Sanctions Committee).

[171] *See* Gutherie, *supra* note 161, at 535 ("Another possibility is for the Security Council to legitimate the role of state mechanisms for review of 1267 Committee decisions.").

the ECJ's *Kadi II* decision.[172] If institutionalized, "the Security Council would explicitly recognize the capacity of state and regional bodies to play a critical role in reviewing sanctioning determinations."[173] On the one hand, this model would allow the U.N.S.C. to retain oversight, while ensuring that individual nations would be able to uphold their standards of due process protection.[174] On the other hand, this approach could also create massive gaps in the sanctions regime, as different states could adopt different approaches to reviews. Even if the U.N.S.C. were to set standards for review, it would be "impossible to set them in a manner that is acceptable to all member states."[175]

Some commentators, including members of the Security Council[176] and the Special Rapporteur on Human Rights and Countering Terrorism,[177] have pressed for more centralized alternatives, such as the establishment of an independent tribunal within the U.N. with the power to review individual petitions and issue binding delisting decisions on the Sanctions Committee.[178] Each of the commentators who have suggested this mechanism has a slightly different take on the structure of such a tribunal. Some recommend an arbitral panel;[179] some recommend an appeals court for the Sanction Committee's decisions;[180] and still others call for the Secretary General to compose a

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[172] *See Kadi II*, ¶ 225, 2008 E.C.R. I-6351, 2008 ECJ EUR-Lex LEXIS 1954.

[173] Gutherie, *supra* note 161, at 535.

[174] *See id.*

[175] *Id.* at 536.

[176] U.N. SCOR, *supra* note 163, at 2–3 (including a statement by Denmark advocating for the establishment of "an independent review mechanism").

[177] *See* Press Release, *supra* note 163.

[178] *See, e.g.*, Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 47 (espousing the creation of an independent arbitral panel to consider delisting proposals); Fassbender, *supra* note 37, at 30–31 ("Among the options available to the Council are the establishment of—an independent international court or tribunal . . . ."); Cameron, *supra* note 162, at 208–11 (analyzing the benefits and disadvantages of an international arbitral body with the competence to hear delisting requests); Gutherie, *supra* note 161, at 532 ("Thus, if internal procedures are to be relied upon to satisfy the rights of targeted individuals, the Security Council will need to establish an independent review body."); Reich, *supra* note 19, at 510 ("Hence, the U.N. itself must provide for an independent administrative mechanism to review both the listing and de-listing decisions made by the Committee.").

[179] *See* Cameron, *supra* note 162, at 209–10 (discussing how such a panel would be composed).

[180] *See* Gutherie, *supra* note 161, at 532 ("Here the tribunal would be created to hear appeals of decisions taken by the 1267 Committee, and potentially other administrative bodies that have been created under auspices of Chapter VII action by the Security Council.").

panel of experts.[181] Nevertheless, there are a few common factors on which most commentators agree. An individual must be able to bring his request directly to the tribunal, which would have full access to non-redacted information, including the sensitive security information about the individual's case. Although the arbitrators/judges might be picked by the U.N.S.C., they would, in effect, form an independent judicial mechanism similar to judges presiding over the international criminal tribunals. Finally, nearly all proponents of this kind of mechanism agree that the tribunal would have the power to issue binding decisions on an individual's delisting.

Another popular suggestion is the creation of an independent ombudsperson office within the U.N., which would have the power to consider individual delisting requests and issue non-binding recommendations.[182] This proposal also varies slightly depending on the commentator, but most agree that the ombudsperson should be endowed with broad powers to investigate a delisting request—although the office may not possess full access to sensitive intelligence information. The ombudsperson would also be accessible to individual delisting requests, despite the fact that he or she would not give an individual the opportunity to present his or her case at a formal hearing. The ombudsperson's ultimate decision on an individual's case would carry substantial weight but would not bind the Sanctions Committee.[183] This proposal, essentially, is the one that has gained the most currency with the U.N.S.C. and was recently established by Resolution 1904.[184] Notably, Resolution 1904 did not establish a permanent ombudsperson's office but rather a temporary one with an eighteen-month mandate.[185]

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[181] *See* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 46–47 ("[A] list of arbitrators and experts with appropriate experience (criminal or administrative law, security, human rights) would be composed by the Secretary-General and called upon to form *ad hoc* three-member panels to hear individual delisting appeals.").

[182] *See id.* at 45 ("The ombudsperson would be independently appointed and make independent recommendations about delisting requests."); Fassbender, *supra* note 37, at 30–31 (noting that "an ombudsperson office, as it exists in a number of States and in the European Union as an alternative remedial mechanism" could be established); Johnstone, *supra* note 155, at 307 ("[T]he focal point in the Secretariat or a separate panel could be given independent review functions—as a sort of ombudsperson.").

[183] Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 45 ("[T]he ombudsperson's decision would not be binding on the sanctions committee. Procedurally, the ombudsperson would be accessible by listed individuals, but there would not be a formal hearing, nor would the ombudsperson have access to nonredacted statements of case.").

[184] *See* S.C. Res. 1904, *supra* note 3, annex 2.

[185] *Id.*

The least aggressive suggestion is to simply maintain the status quo but to encourage the Security Council to word its future resolutions broadly enough that states would be afforded the discretion to implement them in accordance with domestic human rights standards.[186] As an illustration, in adopting a Chapter VII resolution to reform the Consolidated Listing, the Security Council could require that member states must implement resolutions in a manner consistent with ICCPR obligations, regardless of whether the state in question is a party to that treaty. Such maintenance of the status quo may "retain the questions of the Security Council's legitimacy in mandating sanctions without sufficient procedural protections and domestic courts' authority in reviewing implementation of those sanctions."[187] Granted, one might counter that maintaining the status quo until the present has not led to "nuanced political compromise" but rather to the beginnings of what might become a major breach in the 1267 security regime. Even more broadly-worded U.N.S.C. resolutions would also probably water-down their effectiveness and uniform implementation.

III. Analysis: A Framework for Consideration

There is no lack of suggested due process-improving mechanisms from which to choose.[188] Therefore, in determining which of the many suggestions would provide the most effective reform, it is crucial to isolate criteria by which to judge whether a particular method has addressed the key concerns critics have raised.[189] Many legal commentators who have considered this issue have viewed the due process

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[186] *See* Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, 9 German L.J. 1987, 2001 (2008) (discussing how the ECJ was able to avoid review of Security Council measures because the resolution at hand was "formulated in broad terms, as a result of which those responsible for their implementation had discretion as to how to achieve the desired result"); Gutherie, *supra* note 161, at 521–22 (noting that leaving the development of the system to the Security Council, the relevant Security Council committees, and state and regional political and judicial branches will encourage political compromise that takes into account concerns of security and due process).

[187] Gutherie, *supra* note 161, at 521–22 (quoting Jared Wessel, Safety in Ambiguity, Danger in Positivism: A Case for Leaving the Executive-Legislative Relationship Undefined in an Emergency Powers Regime 3–4 (June 4, 2003) (unpublished manuscript, on file with Peter Gutherie)). Gutherie continues, "Perhaps this uncertainty is to be desired, because as long as all parties are uncertain as to their respective positions there will be an incentive to 'reach nuanced political compromises which balance the needs of security with the needs of civil-liberty.'" *Id.*

[188] *See* Fassbender, *supra* note 37, 30–31.

[189] *See id.* at 4.

inadequacy strictly as a human rights problem.[190] Although there are due process concerns, there is also a critical security risk at stake, as a state's or group of states' refusal to enforce targeted sanctions could undermine the entire regime.[191] The goal is for improvements in due process to bolster the counter-terrorism regime and maximize compliance with U.N.S.C. resolutions.[192] In sum, there are three critical issues which must be considered: (1) improving due process for delisting requests; (2) ensuring the effectiveness of the 1267 counter-terrorism regime; and (3) maintaining the authority of the U.N.S.C. In seeking a mechanism that supports these three prongs, it is important to analyze the key factors bolstering each area.

A. *Improving Due Process*

Effective due process relies on three principal concerns: the independence of the decision-maker, the accessibility of the decision-maker to the individual, and the power of the decision-maker to grant an effective remedy.[193] With regard to the first factor, long-standing national and international norms have dictated that impartiality is a crucial component of fair adjudication.[194] Accordingly, proposed mechanisms that lack an independent decision-maker will not pass due process muster. For example, any panel of experts or judicial body that is entirely

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[190] *See* E.J. Flynn, *The Security Council's Counter-Terrorism Committee and Human Rights*, 7 Hum. Rts. L. Rev. 371, 374–76 (2007) (discussing Former Secretary-General Kofi Annan, the High Commissioner for Human Rights, Louise Arbour, and the Executive Director of the U.N. Counter-Terrorism Committee agreeing that violating Human Rights in counter-terrorism efforts is counterproductive).

[191] *See* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 7 ("[S]hould a regional or national court judgment challenge the application of national measures giving effect to a listing by a Security council sanctions committee, the decisions could undermine the effective implementation of UN sanctions.").

[192] *See* Johnstone, *supra* note 155, at 277 ("Rules that are perceived as both procedurally and substantively just exert a compliance pull on states, even in the absence of enforcement.").

[193] *See* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 3 ("Elements that render an effective remedy are: (i) an independent and impartial authority, (ii) decision-making authority, and (iii) accessibility.").

[194] *See* ICCPR, *supra* note 52, 999 U.N.T.S. at 176 ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); Fassbender, *supra* note 37, at 6 ("[Due process] rights can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of Article 38, paragraph 1, lit. c, of the ICJ statute.").

chosen by, dependent on, or easily replaced by the Security Council probably would not pass the bar of providing effective due process.[195]

Given the nature of targeted sanctions, accessibility to the target remains the most glaring due process feature absent from the 1267 regime. After all, the Security Council was not designed for specific complaints or input, although it has slipped into making these kinds of decisions that affect targets.[196] Commentators have argued that to restrain the growing unaccountability of international organizations over individuals and groups, it is important to shift accountability relationships beyond those solely accessible to states.[197] Targets must be allowed to directly challenge the decisions that affect their rights.[198] Hence, commentators have consistently called for this kind of accessibility, as it is the key to due process reform.[199]

Some reform suggestions do not lend themselves well to target access. For instance, simply relying on the Security Council to word its decisions more broadly in the future does not open the process at all to

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[195] Of course, even if decision-makers were chosen by the Security Council, dependence could be lessened if the adjudicators are guaranteed their positions once appointed for fixed and lengthy terms, as is the case with judges of the special tribunals created by the U.N.S.C.

[196] *See* Fassbender, *supra* note 37, at 22 ("[T]he founders of the United Nations did not expect the Organization to exercise power or authority in a way that the rights and freedoms of individual persons would be directly affected."); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 Eur. J. Int'l L. 881, 887 (2006) ("No one could have reasonably anticipated at the time of the drafting of the UN Charter that the subsequent practice of the organ would evolve to encompass a general law-making—and previously quasi-judicial—activity to face threats to the international legal order . . . .").

[197] *See* de Wet, *supra* note 186, at 1987. The author notes:

> The growing power of international institutions in areas that were formerly regulated domestically, along with the growing impact of their conduct on (the rights of) States and non-State actors alike, has thus far not been matched by a shift in accountability relationships beyond those applicable within the confines of the territorial State.

Id.

[198] *See* Andrew Byrnes, *An Effective Complaints Procedure in the Context of International Human Rights Law*, *in* The UN Human Rights Treaty System in the 21st Century 139, 144 (Anne F. Bayefsky ed., 2000) ("One measure of the effectiveness of an international complaints procedure that might be adopted is whether the procedure is really accessible to the citizens of the countries which have accepted it . . . .").

[199] U.N. SCOR, 61st Sess., 5474th mtg. at 7–8, U.N. Doc. S/PV.5474 (June 22, 2006); *see also* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 44 (noting that "procedural guarantees such as accessibility for individuals or entities affected" constitute a traditional element of the right to an effective remedy); Fassbender, *supra* note 37, at 6 ("Generally recognized due process rights include the right of every person to be heard before an individual measure which would affect him or her adversely is taken . . . .").

targets. Less obvious perhaps is that an ombudsperson's office, although open to target delisting requests, does not allow for participation in the process because targets are not allowed to present their own case; rather, they must simply wait for termination of the investigation and issuance of a recommendation. If due process is to be taken seriously, targets must be afforded as full an opportunity as possible to defend their rights.

The third factor underlying due process is the decision-maker's ability to guarantee an effective remedy, which entails several other specific considerations. The decision must be made in a timely manner to ensure that the petitioner is not left in legal limbo.[200] The decision must be well-reasoned and persuasive.[201] Most importantly in the context of delisting, the reviewing body must have the power to issue binding decisions, as a mere recommendation to the Sanctions Committee cannot guarantee the petitioner's rights will be safeguarded.[202] The importance of binding decisions casts a negative light on several of the reform suggestions. Neither the proposed panel of investigatory experts nor the ombudsperson's office is granted anything more than recommendatory powers by their putative creators. From the vantage-point of maximizing due process, some of the more centralized recommendations—such as an ombudsperson's office, a panel of investigatory experts, or persuading the U.N.S.C. to use broader language—are less desirable.

B. *Ensuring the Effectiveness of the 1267 Counter-terrorism Regime*

Due process concerns instigated the current security crisis by provoking courts to annul regulations that implement the Security Coun-

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[200] *See* Fassbender, *supra* note 37, at 31. (listing "speed and efficiency of consideration by the reviewing body" as a criterion for effectiveness of a remedy); Byrnes, *supra* note 198, at 146 ("From the individual complainant's point of view, a speedy determination of a complaint is obviously desirable.").

[201] *See* Fassbender, *supra* note 37, at 31 (noting that the quality of the decision-making is an important factor); Byrnes, *supra* note 198, at 149 (indicating that the ability to explain and justify an adjudicatory decision "is important for the acceptance and implementation of the decision by the party affected in an individual case, as well as for establishing the legitimacy of the body more generally").

[202] Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 3 (noting that decision-making authority is an important element of an effective remedy); Fassbender, *supra* note 37, at 31 (listing compliance and follow-up as important considerations of an individual complaint mechanism); Byrnes, *supra* note 198, at 151 ("The speedy and effective implementation of a decision of an adjudicatory body is a critical indicator of the effectiveness of a complaint procedure."); Cameron, *supra* note 162, at 210 ("To fully satisfy the human rights objections, the decision of the arbitral body would have to be binding on the sanctions committee.").

cil's counter-terrorism resolutions. Accordingly, any mechanism that would remedy due process concerns must not lose sight of the important goal of securing effective implementation of the 1267 regime. An effective counter-terrorism regime requires several key elements. For instance, states and the international community must be able to move with speed when reacting to a potential terrorist threat. Therefore, most of the proposed reforms focus on post-hoc mechanisms. Although due process normally requires that an opportunity be given to an individual to challenge his or her listing before it occurs, the necessity of speed in preventing a putative terrorist-supporter from funneling finances into terrorist hands explains only permitting challenges after listings have occurred.[203]

Perhaps the thorniest issue in improving counter-terrorist efforts is that of restricting access to sensitive information. As states are keen on keeping intelligence private, they are often reluctant to share their sources and methods with other states, or even the U.N., to preserve the secrecy of their intelligence-gathering capabilities.[204] This lack of cooperation in the intelligence realm renders less appealing any reform suggestion by which national courts review the listing, unless the designating state also happens to be the reviewing state (and the government feels comfortable giving sensitive information to the national judiciary). It is unlikely states trust each other enough to give a foreign judiciary the necessary security information to make an informed decision on an individual's case.[205] Consequently, reviewing courts may end up making uninformed delisting decisions, and such decisions are likely to be skewed in favor of unfreezing dangerous individuals' assets because the information justifying the freeze will not be readily accessible. This consideration also implicates advisory mechanisms at the level of the U.N., such as an ombudsperson's office or group of experts, given that designating states may not feel comfortable sharing information with an international judicial body.[206] The more independent, and thus free from

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[203] *See* Gutherie, *supra* note 161, at 530–31 (noting that the problem of needing "to act quickly to prevent asset transfers to terrorists . . . is one that can be solved through post-hoc review").

[204] *See id.* at 537 ("[T]he state(s) recommending listing to the 1267 Committee may not be willing to share detailed information with the government of other states that are implementing the sanctions.").

[205] *See id.*

[206] *See* Cameron, *supra* note 162, at 209 ("There are special problems involved in giving international judicial bodies access to very sensitive intelligence material. There is a real risk of leakage of intelligence to hostile states, which may well be members of the Security Council."); Johnstone, *supra* note 155, at 307 ("If an ombudsperson were established, con-

the control of a potentially hostile state, such a mechanism is, and the more highly-trained in handling intelligence material the experts chosen to adjudicate are, the less pressing the information leakage issue becomes.

The final counter-terrorism concern is the need for broad and uniform coverage of the 1267 regime. Allowing individual states using different standards to review listing decisions could lead to wide-spread unevenness in the implementation of the regime. The most problematic scenario would be that in which the courts of a state less sympathetic to counter-terrorism concerns would allow lax implementation and freely delist those individuals who represent a legitimate threat to international security. For this reason, the suggestions to allow state judicial review of a Sanctions Committee listing, or to totally abolish the Sanctions Committee in favor of moving the question of listing to the jurisdiction of the Counter-Terrorism Committee (again, allowing state judicial review), do not adequately address real security concerns.

In general, the counter-terrorism requirements of speed of implementation, security of sensitive intelligence, and broad and uniform coverage point away from decentralized measures that would allow for state listing decisions or state judicial review of Sanction Committee listing decisions.

C. *Reaffirming the Authority of the U.N.S.C.*

Ultimately, the resolution of such due process and security concerns should reaffirm the U.N.S.C.'s importance in a world in which threats to peace and security persist.[207] The U.N.S.C. was not originally designed to impact targets directly,[208] and its mechanisms are not directly well-suited to discharging a judicial function.[209] In assuming such governmental functions, the U.N.S.C. has opened itself up to criticism by the judicial keepers of constitutional guarantees. On behalf of these guarantees and the individuals protected by them, the recent decisions issued by regional and domestic courts have challenged the primacy of the U.N.S.C. over international law. Above and beyond all, in order to be palatable to members of the Security Council, any reform mecha-

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fidentiality issues would surely arise, as states would be reluctant to provide such an office with sensitive information.").

[207] *See* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 7.

[208] *See* U.N. Charter art. 24, para. 1.

[209] *See* Cameron, *supra* note 162, at 168 (noting that the Security Council is assuming a judicial and legislative role in targeting individuals); Johnstone, *supra* note 155, at 300 (arguing that the Security Council is ill-suited to assuming a quasi-judicial role).

nism must support the U.N.S.C.'s place as the absolute keeper of international peace and security.

Any measure which infringes too greatly on the U.N.S.C.'s authority will not reaffirm the relevance of the U.N.S.C. in the maintenance of international peace and security. It is far more likely that U.N.S.C. member states would be willing to entertain suggestions that recentralize reviewing authority within the U.N.S.C. than one handing over such review to member states. Certainly, the U.N.S.C. would not consent to dismantling its own regime to increase state sanctioning control nor to authorize states to review delisting requests that implicitly review the Chapter VII resolutions that created them.[210] Any decentralization of the counter-terrorist regime would serve only to weaken perceptions of the Security Council's legitimacy and effectiveness.[211]

To allow review without undermining the U.N.S.C.'s primacy, any measure selected must focus solely on review of the application of the targeted resolution to an individual's case and not on the validity of the resolution itself. The right to an effective remedy extends only so far as the target's rights are infringed, or, "[i]n other words, an individual person cannot contend that a resolution adopted by the Council as such is unlawful under the UN Charter."[212] In addition, the review mechanism should not be accessible to member states attempting to claim the same unlawfulness or to a person affected by general sanctions.[213] Any mechanism established must be strictly limited to targets seeking no more than their personal delisting.

Finally, reform measures must be politically and practically viable vis-à-vis members of the U.N.S.C. As noted above, any mechanism which is perceived to infringe on U.N.S.C. authority is unlikely to garner the needed support.[214] By contrast, implementing the most deferential suggestion (that the U.N.S.C. merely be encouraged to more broadly word their resolutions to allow for state discretion) also strips the U.N.S.C. of its ability to ensure specific and effective enforcement of its regime.[215] Moreover, we must consider issues of expense and

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[210] *See* Gutherie, *supra* note 161, at 493.

[211] *See id.* (arguing that dismantling the Security Council regime is unfeasible "because decentralization of sanctions would entail a loss of legitimacy and effectiveness and would also fail to fully address human rights concerns").

[212] *See* Fassbender, *supra* note 37, at 29.

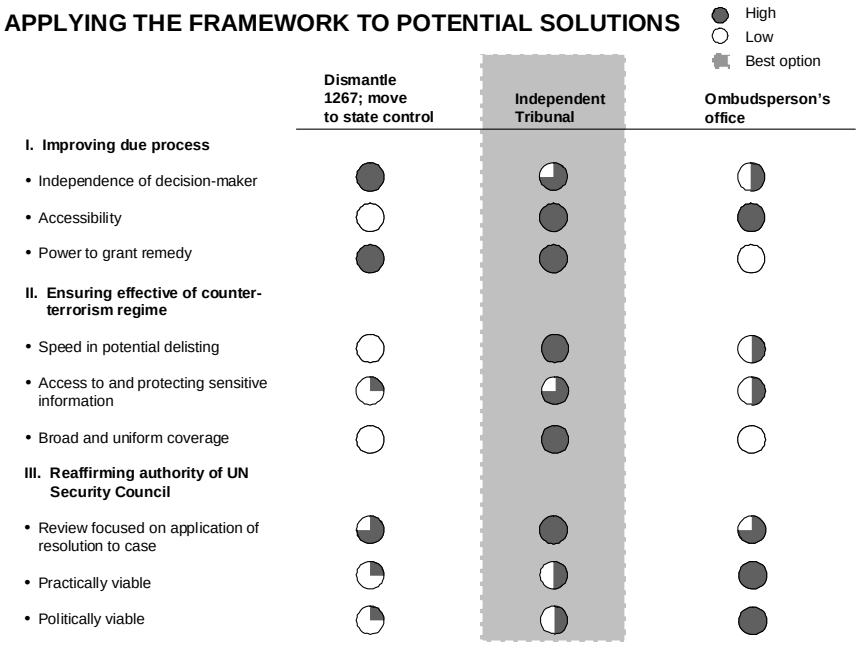
[213] *See* Cameron, *supra* note 162, at 184 ("But even if some form of external review body is created, this does certainly not mean that there should be a legal remedy for all people affected, directly or indirectly, by general economic sanctions.").

[214] *See* Gutherie, *supra* note 161, at 493.

[215] *See id.*

complexity; although composed of some of the world's most powerful and wealthy nations, the U.N.S.C. might also be loath to pursue any reform perceived as too costly or too bureaucratic, such as instituting an entirely separate reviewing body within the U.N.[216] In short, in seeking to reaffirm the authority of the U.N.S.C., it is crucial to pursue a centralized measure open only to individual and group petitioners. Such a measure must not be too costly or complex to create.

D. *Selecting the Right Reform Measure*



These multiple due process, counter-terrorism, and U.N.S.C. primacy tugs on the reins of reform demonstrate that there is no one clear direction. Rather, the best measure will be the one that most effectively balances these competing concerns. An independent tribunal composed of security-savvy judges and selected by the U.N.S.C., which has the power to hear target complaints and issue binding delisting decisions on the Sanctions Committee, constitutes the mechanism best-suited to the task.

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[216] *See* BIERSTEKER & ECKERT, TARGETED SANCTIONS, *supra* note 9, at 45 (noting an advantage of one suggestion to be that "it does not create a new costly or bureaucratic body, but rather integrates the function into an existing structure").

Such a judicial mechanism is not unprecedented. The U.N.S.C.'s establishment of the Independent Criminal Tribunal for the former Yugoslavia (ICTY) and subsequent tribunals such as the Independent Criminal Tribunal for Rwanda (ICTR),[217] has proven its ability to create an independent body with the competence to hear and adjudicate individuals' cases. A 1267 tribunal could serve in a similar capacity. The U.N.S.C. would initially select a number of judges with the relevant judicial and security expertise. This permanent body would be authorized to hear target complaints resulting not only from delisting requests based on the current Consolidated List but also from complaints resulting from due process violations for any other U.N.S.C. resolutions that target individuals and groups. Given the outcry over the humanitarian toll exactly by general sanctions, it is likely that the U.N.S.C. will continue to expand its use of targeted sanctions.[218] Targets would be granted a hearing, and this body would have access to all relevant information about the listing.

Such a tribunal would effectively satisfy the current due process complaints. To be sure, the judges would be initially selected by the U.N.S.C. and thus arguably predisposed to certain biases. Much like the ICTY and the ICTR, however, the intent is that the extended terms of a judge's position after appointment would help ensure judicial independence, as much as that ideal is attainable. The U.N.S.C. could further bolster the independence of tribunal judges by requiring the election of judges through procedures similar to those of the International Court of Justice and other special tribunals for seating judges.[219] Crucially, such a tribunal would also be fully open for individuals and groups to both make delisting requests and present their cases. The tribunal would also have the power to issue delisting decisions binding

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[217] For example, these include the Independent Criminal Tribunal for Rwanda established by Security Council Resolution 955 and the Special Court for Sierra Leone, authorized by Security Council Resolution 1315. William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierre Leone 29, 36 (2006).

[218] *See* Save the Children, *supra* note 15, ch. 10 (2002); Cameron, *supra* note 162, at 185 ("So targeted sanctions, both unilateral and multilateral are 'here to stay' and the tendency will probably be for more people to be covered by targeted sanctions.").

[219] The United Nations Charter, which established the International Court of Justice, serves as an illustration of the kind of procedures that could be developed. U.N. Charter art. 92. Articles 2 through 33 regarding the organization of the Court provide substantial detail in relation to the election of judges, with descriptions of nomination procedures, required qualifications, how judges must receive majority votes in the General Assembly and Security Council, and how judges are chosen if none receive the requisite majorities. Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 933.

on the Sanctions Committee, thereby ensuring the worthy petitioner an effective remedy.[220]

Ideally, the tribunal would repair the patchy implementation of the 1267 regime. After all, the ECJ in *Kadi II* explicitly stated that were a review mechanism provided through the U.N.S.C., it would not have intervened.[221] Not only would the tribunal help bring the European Community states back into compliance, but it would also do so without compromising any of the other goals of the 1267 regime. The fact that the tribunal would be open only for post-hoc review of listing ensures that the Sanctions Committee and member states could still act with speed in listing a putative-terrorist supporter. To assuage concern over disclosure of sensitive information, the U.N.S.C. could choose judges who are both experienced in handling intelligence and trusted by a large group of nations—indeed, one imagines such skills would be mandatory for a judge to win the support of enough U.N.S.C. members to be appointed.

Giving the judges access to all case materials does not necessarily mean petitioners would also be granted full access to view the same security information, although the rules of this new tribunal should encourage maximum disclosure and allow particular lawyers to be provided security clearances to view certain information, even if that access is denied to the listed parties themselves. This may put petitioners at a disadvantage in their inability to present their cases. Such a compromise is necessary, however, given the importance of security concerns to member states who propose listings. It is important to remember that despite the importance of due process and the possible harshness of the asset freeze and travel ban, these resolutions do not expose those listed to criminal sanctions, but rather to administrative sanctions.[222]

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[220] The existence of such a tribunal would not deprive the Sanctions Committee of its own independent ability to delist; rather, the tribunal would simply require the Sanctions Committee to abide by the tribunal's delisting decisions.

[221] *Kadi II*, ¶ 319, 2008 E.C.R. I-6351, 2008 ECJ EUR-Lex LEXIS 1954 ("[So] long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.").

[222] *See* U.N. Human Rights Comm., Sayadi v. Belgium, Commc'n No. 1472/2006, ¶ 10.11, U.N. Doc. CCPR/C/94/D/1472/2006 (2008) ("Although the sanctions regime has serious consequences for the individuals concerned, which could indicate that it is punitive in nature, the Committee considers that this regime does not concern a 'criminal charge.'"); S.C. Res. 1735, *supra* note 3, pmbl. (reiterating that the asset freeze, travel ban, and arms ban "are preventative in nature and are not reliant upon criminal standards set out under national law"); Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 13 ("[I]t may be concluded that targeted sanctions are most likely not criminal sanctions.");

The judges could mitigate some of the unfairness by revealing the intelligence they deem safe to expose and by discarding or assigning less weight to those parts of the case that the petitioner does not have an opportunity to rebut.[223]

Finally, concentrating review power under the auspices of the Security Council reaffirms the authority and relevance of the Council in matters of international peace and security.[224] The tribunal would only have jurisdiction to hear individual and group delisting requests. This limitation would stymie any potential challenge to the underlying resolution from discontented state petitioners.[225] Moreover, the placement of the tribunal within the U.N. also eliminates any incidental review of U.N.S.C. resolutions stemming from regional court consideration of an targets's complaints (as when the CFI held that U.N.S.C. resolutions could be bounded by *jus cogens*). Concededly, such a tribunal will likely be expensive and, at the outset, difficult to implement. But if the tribunal is made permanent, it is likely to become more cost-efficient in the long run, particularly as the U.N.S.C.'s use of targeted sanctions is only bound to increase.[226] Thus, while all potential solutions are imperfect, the establishment of an independent tribunal is the best option to balance competing concerns.

Conclusion

For the past several years, critics of Resolution 1267's lack of due process have been asking the U.N.S.C. to reform the regime to allow targets to challenge their listing. What makes the present a particularly

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Fassbender, *supra* note 37, at 29–30 ("This understanding of a listing of an individual as a measure of an administrative character corresponds to the assumption that sanctions imposed on an individual person by the Security Council are not penalties imposed on account of a criminal offence committed by that person."); Gutherie, *supra* note 161, at 506 ("Given the ambiguous nature of these sanctions and the clear state practice of allowing non-criminal asset seizures, it would be difficult to effectively hold that asset freezes always constitute criminal sanctions.").

[223] For example, in the United States, the Classified Information Procedures Act describes how classified materials may be used in U.S. federal courts, how defendants may seek to discover classified materials being used against them, how hearings may be held on the use of such materials, and how judges may employ remedies to mitigate against situations where defendants are unable to access materials used against them. *See* 18 U.S.C. app. 3 (2006).

[224] *See* Biersteker & Eckert, Targeted Sanctions, *supra* note 9, at 7.

[225] For example, a state that felt it had sanctions unjustly imposed upon it would not be able to challenge the Security Council's decision by bringing a complaint to this tribunal.

[226] *See* Cameron, *supra* note 162, at 184–85 (arguing that sanctions are an inexpensive means of demonstrating political will and that targeting private individuals rather than national leaders is politically safer).

germane time to urge reform is that recent domestic and regional court decisions have begun turning the due process issue into a security concern. As had become clear from the adoption of Resolution 1904 and the establishment of a temporary ombudsperson's office, U.N.S.C. members finally have a real incentive to consider the human-rights problem that confronts them. In addition, the temporary nature of the ombudsperson's office, combined with the fact that its establishment has not persuaded courts that the due process problems have been fixed, has effectively given the U.N.S.C. an eighteen-month time-limit to decide how to permanently solve this problem.[227] The choice is clear for the U.N.S.C.: ignore mounting judicial concerns over due process violations and potentially face an increasing number of states refusing to implement resolutions; *or*, incorporate due process protection into the 1267 regime and regain its footing as the leading international entity responsible for maintaining international peace and security.

Although it may be obvious that the time for reform is at hand, the form of the measures that should be instituted is much less clear. There is no single ideal solution but rather a set of criteria which, when considered together, help identify the need for an independent, speedy, inexpensive, post-hoc, intelligence-guarding judicial tribunal that is only accessible to the targets and capable of promising an effective remedy. As a result, both human rights and security critics should encourage the Security Council to satisfy due process, counter-terrorism, and U.N.S.C. authority-concerns by initiating a process to bring this promising new tribunal to fruition.

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[227] *See* A v. HM Treasury, [2010] UKSC 2, [2010] 2 W.L.R. 378, 413–414 (U.K.).