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## ARTICLE

# DUALIST, BUT NOT DIVERGENT: EVALUATING UNITED STATES IMPLEMENTATION OF THE 1267 SANCTIONS REGIME

*William Diaz*<sup>†</sup>

### I. INTRODUCTION

In pursuing a unified policy to combat the threat of global terrorism, the United Nations Security Council (UNSC) took sweeping and innovative measures by adopting Resolution 1267 (1999) and a number of subsequent Resolutions for targeted sanctions against the Taliban,<sup>1</sup> Al-Qaeda,<sup>2</sup> and their associates. Subsequent to the attacks of September 11, 2001, the Security Council adopted Resolution 1373 (2001), requiring UN Member States to combat terrorism through law enforcement, domestic legal reform, multilateral cooperation, ratification of relevant treaties, increased border control, and targeted sanctions. These measures are central to the counter-terror efforts of the United Nations and its Member States.

While Resolution 1373 imposes a number of requirements upon Member States, it reserves considerable discretion in implementation to national legal orders. In contrast, the sanctions regime launched by Resolution 1267 rigidly targets individuals and entities who are part of, or associated with, the Taliban and Al-Qaeda, while affording limited due process to targeted parties. With Resolution 1267 sanctions still lacking transparency and providing limited access to redress, this targeted sanctions regime has remained cause for controversy despite continued reform via a number of subsequent UNSC Resolutions.<sup>3</sup> As a matter of clarification and reference for further discussion, both Resolutions 1373 and 1267 provide for

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

2. S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

3. Especially in light of the relatively recent *Kadi* decision rendered by the European Court of Justice. See Case T-306/01, Yusuf and Al Barakaat Int'l Found. v. Council and Comm'n, 2005 E.C.R. II-3533; Case T-315/01, Kadi v. Council and Comm'n, 2005 E.C.R. II-3649; Joined Cases C-402 & 415/05P, Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 2008 E.C.R. I-6351 (annulling regulations implementing Resolution 1267).

sanctions for terror-related individuals and entities, but they diverge considerably in scope and the level of discretion left to states in implementation.

In practice, the United States has been a vocal advocate for targeted sanctions, and an active, and perhaps, under-scrutinized proponent for listing a range of parties for asset freezing, particularly in the aftermath of the attacks on September 11, 2001.<sup>4</sup> However, current adherence to Resolution 1267 and its amending Resolutions by the United States remains a nuanced scenario combining vetting for compatibility with national law, the influence exerted by the United States within the sanctions regime, the quality and scope of available intelligence, and the functions of an established constitutional order. These factors culminate in a national implementation that remains dualist yet adherent to obligations under Article 25 of the United Nations Charter (UNC Article 25).

## II. SCOPE

This article will evaluate United Nations and United States implementation and continued compliance under Resolution 1267, while discussing Resolution 1373 in a more limited fashion. Part 1 will discuss United Nations practice under these Resolutions. Part 2 will evaluate United States practice and autonomous review under its dualist implementation of Resolution 1267. Part 3 will evaluate the international implications of United States implementation. Part 4 will discuss the restraints Resolution 1267 has placed on United States unilateralism.

### A. Security Council Practice in Countering Terrorism

#### 1. UN Security Council Practice—Resolution 1373

In response to the terror attacks of September 11, 2001, the United Nations Security Council unanimously adopted Resolution 1373 under

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4. THOMAS BIERSTEKER & SUE ECKERT, ADDRESSING CHALLENGES TO TARGETED SANCTIONS: AN UPDATE OF THE “WATSON REPORT” 7 (2009); Christopher Cooper, *Shunned in Sweden: How Drive to Block Funds for Terrorism Entangled Mr. Aden*, WALL ST. J., May 6, 2002, at A1 (“In the immediate aftermath of 9/11, there was enormous goodwill and a willingness to take on trust any name that the U.S. submitted,” says a European diplomat assigned to the Security Council. He says it was only later that members realized some of those named had no firm connection to a violent organization.”).

Chapter VII of the United Nations Charter.<sup>5</sup> Resolution 1373 serves as a landmark UNSC Resolution insofar as it represents a clear shift in international law. With Resolution 1373, the Security Council uniquely wielded its Chapter VII powers to order Member States to specifically act or refrain from acting in a context beyond that of disciplining a specific state.<sup>6</sup> Comprised of fifteen members from the UNSC, the Counter-Terrorism Committee (CTC) was established to monitor implementation of Resolution 1373.<sup>7</sup> Specifically, Resolution 1373 imposes a number of binding obligations on States, including prohibiting support for terrorists, requiring punishment of terrorists and terror supporters, and tightening

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5. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (“*Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts . . .*”). Since its passage, Resolution 1373 has received two amendments, Resolution 1456 adding human rights considerations, and Resolution 1566 defining terrorism. S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (“States must ensure that any measure taken to combat terrorism comply with all their obligations under international law . . . in particular international human rights, refugee, and humanitarian law.”); S.C. Res. 1566, ¶ 6, U.N. Doc. S/RES/1566 (Oct. 8, 2004). This resolution defines terrorism as:

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences [sic] within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature . . . .

*Id.* ¶ 3.

6. See generally Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT. L. 901 (2002) (discussing the legislative nature of Resolution 1373).

7. S.C. Res. 1373, *supra* note 5, ¶ 6. For an overview of the CTC, see generally Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT. L. 333 (2003). See also Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT. L. 901, 902 n.16 (2002) (“This aspect of Resolution 1373 is based on the Council’s practice in connection with the establishment of binding economic or other sanctions. In recent years, it has always established a monitoring committee to which states are to report their activities in complying with the resolution and which may also be charged with taking certain decisions relating to the implementation of the sanctions regime.”) The Resolution 1267 Committee serves as an example.

border controls. All these actions would typically be reserved for normal treaty making processes.

Resolution 1373 requires States to prevent and suppress terrorist financing, while criminalizing willful collection of terror funds.<sup>8</sup> The Resolution further provides that States should prohibit their nationals “or persons or entities in their territories from making funds, financial assets, economic resources, financial or other related services available to persons who commit or attempt to commit, facilitate or participate in the commission of terrorist acts.”<sup>9</sup> Resolution 1373 additionally requires States to refrain from supporting entities or persons involved in terrorist acts by denying safe haven for those who finance, plan, support, or perform terrorist acts.<sup>10</sup> Finally, States must ensure that terrorists and their supporters are brought to justice,<sup>11</sup> and must also implement the relevant international conventions and protocols to combat terrorism.<sup>12</sup>

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8. See generally S.C. Res. 1373, *supra* note 5. Press Release, Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls for Suppressing Financing, Improving International Cooperation, U.N. Doc. SC/7158 (Sept. 28, 2001), available at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.

9. S.C. Res. 1373, *supra* note 5, ¶ 1(d); Press Release, Security Council, *supra* note 8.

10. S.C. Res. 1373, *supra* note 5, ¶ 1(c); Press Release, Security Council, *supra* note 8; Emilio J. Cárdenas, *The United Nations Security Council's Quest for Effectiveness*, 25 MICH. J. INT'L L. 1341 (2004) (describing Resolution 1373 as “[breaking] new ground” by using, for the first time ever, the Council’s Chapter VII powers to direct all Member States to take steps to do or refrain from doing what it mandates, in a general context not directly related to disciplining any individual country or particular non-state actor”); Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23, 42 (2006) (describing Resolution 1373 as “the first use of Chapter VII powers to order states to take or refrain from specific actions other than when disciplining a specific country.”).

11. S.C. Res. 1373, *supra* note 5, ¶ 2(e); Press Release, Security Council, *supra* note 8.

12. S.C. Res. 1373, *supra* note 5, ¶ 3(d). The anti-terror treaty regime includes thirteen international conventions, as well as several regional conventions (in chronological order): Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sep. 14, 1963, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sep. 23, 1971, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 246; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Feb. 24, 1988, 1652 U.N.T.S. 499; Convention for the Suppression of Unlawful Acts against

Despite the broad and comprehensive nature of Resolution 1373, it leaves implementation to the discretion of individual States via domestic and/or regional legal orders.<sup>13</sup> Specifically, States are left to decide under Resolution 1373 implementation who is to be targeted for sanctions, what is to be considered terrorism, and what amounts to a terrorist attack.<sup>14</sup> As such, the scope of Resolution 1373 extends beyond merely Al-Qaeda, the Taliban, and associated parties. Overall, Resolution 1373's reliance on national or regional discretion in implementation is distinct from the more rigid requirements of Resolution 1267.

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the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270. Regional instruments include: International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, UN Doc. A/RES/59/290. Regional conventions include (in chronological order): OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Feb. 2, 1971; European Convention on the Suppression of Terrorism, Jan. 27, 1977; SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987; Arab Convention on the Suppression of Terrorism, Apr. 22, 1998; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, Jun. 4, 1999; Convention of the Organization of the Islamic Conference on Combating International Terrorism, Jul. 1, 1999; OAU Convention on the Prevention and Combating of Terrorism, Jul. 14, 1999,

13. The Court of First Instance of the European Union addressed the discretion reserved within Resolution 1373, in T-228/02, *Org. eds Modjahedines du peuple d'Iran v. Council of the European Union*, 2006 E.C.R. II-4665 (annulling Council Regulation (EC) No. 2580/2001, implemented under U.N. Security Council Resolution 1373 (2001)). Resolution 1373 vests individual states with the discretion to manage lists and apply domestic procedure in applying sanctions.

14. States implementing measures under Resolution 1373 may define terrorism as they see fit, resulting in a potentially broader scope than that of Resolution 1267. *See, e.g.*, Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 25, 2001), § 3(d). Note that while Executive Order 13224 represents the domestic implementation of Resolution 1267, it applies in a broader manner beyond Al-Qaeda and the Taliban, favoring a statutory definition of terrorism that falls within Resolution 1373 implementation. Executive Order 13224 defines terrorism as

an activity that—(i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears to be intended—(A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

## 2. UN Security Council Practice—Resolution 1267

Adopted in 1999, Resolution 1267 targeted the Taliban and, in part, served as a response to the 1998 bombings of United States embassies in Kenya and Tanzania, bombings attributed to Usama bin Laden.<sup>15</sup> Unlike Resolution 1373, Resolution 1267 creates a sanctions regime and committee concerned solely with listing a limited class of individuals and entities for targeted sanctions, including asset freezing. While the Resolution 1267 Regime<sup>16</sup> initially targeted Taliban-related parties and assets for freezing, Resolution 1390 incorporated the Al-Qaeda terror network for targeted sanctions.<sup>17</sup>

A critical tool in United Nations anti-terror measures, the Resolution 1267 Regime requires Member States to freeze assets, exclude listed entities from their territories, and prevent the supply of arms and military equipment to listed parties associated with Al-Qaeda or the Taliban.<sup>18</sup>

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15. Resolution 1267 targeted the Taliban; Resolution 1390 added Al-Qaeda to the Resolution 1267 Regime. *See* S.C. Res. 1390, *supra* note 2 (imposing sanctions on Usama bin Laden, Al-Qaeda, the Taliban, and associated parties); S.C. Res. 1267, *supra* note 1, at 2 (“Noting the indictment of Usama bin Laden and his associates by the United States of America for, *inter alia*, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States, and noting also the request of the United States of America to the Taliban to surrender them for trial . . . .”); James C. McKinley Jr., *Two U.S. Embassies in East Africa Bombed*, N.Y. TIMES, Aug. 8, 1998 (reporting the attacks on United States embassies in Kenya and Tanzania).

16. This term will be employed to describe the totality of practice under Resolution 1267 and its subsequent amending Resolutions.

17. S.C. Res. 1390, *supra* note 2, at 1 (recalling Resolutions 1267 (1999), 1333 (2000), 1363 (2001), and reaffirming Resolutions 1368 (2001), 1373 (2001), 1378 (2001), and 1383 (2001)). Resolution 1390 is novel in that it targets non-state entities absent a territorial connection.

18. S.C. Res. 1904 U.N. Doc. S/RES/1904 (Dec. 17, 2009), at 2 (“*Emphasizing* that sanctions are an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security, and stressing in this regard the need for robust implementation of the measures in paragraph 1 of this resolution as a significant tool in combating terrorist activity . . . .”). *See* The Consolidated List Established and Maintained by the 1267 Committee with Respect to al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them (Mar. 24, 2011), *available at* <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>.

The Consolidated List consists of the four sections:

- A. Individuals associated with the Taliban
- B. Entities and other groups and undertakings associated with the Taliban
- C. Individuals associated with Al-Qaida
- D. Entities and other groups and undertakings associated with Al-Qaida

Listing and delisting of individuals and entities is at the discretion of the 1267 Committee, a subcommittee of the Security Council. Controversially, and despite various amending resolutions, the 1267 Regime continues to lack pre-designation notice, a right to hearing, and independent judicial review.<sup>19</sup> As a result, States have successfully listed individuals and entities while sharing minimal evidence with other members of the 1267 Committee. Limited process and notice has given rise to a perception of unfairness and engendered opposition, including hesitancy on the part of some Member States to name individuals and entities for targeted sanctions.<sup>20</sup>

a. Listing—Security Council Practice

The 1267 Regime is saddled with a broadly based perception that it lacks procedural fairness and an effective post-designation remedy.<sup>21</sup> Listing begins with submissions by Member States for consideration by the 1267 Committee.<sup>22</sup> Submissions should, “to the extent possible,” include the basis for designation.<sup>23</sup> States are “strongly encouraged,” but not required, to seek additional information on an individual from the target’s state(s) of

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19. See, e.g., S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001); S.C. Res. 1373, *supra* note 5; S.C. Res. 1390, *supra* note 2; S.C. Res. 1452, U.N. Doc. S/RES/1452 (Dec. 20, 2002); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005); S.C. Res. 1699, U.N. Doc. S/RES/1699 (Aug. 8, 2006); S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008); S.C. Res. 1904, *supra* note 18.

20. Case T-306/01, Yusuf and Al Barakaat Int’l Found. v. Council and Comm’n, 2005 E.C.R. II-3533; Case T-315/01, Kadi v. Council and Comm’n, 2005 E.C.R. II-3649; Joined Cases C-402 & 415/05P, Kadi & Al Barakaat Int’l Found. v. Council & Comm’n, 2008 E.C.R. I-6351; Sayadi v. Belgium, Views, Human Rights Comm., 94th Sess., No. 1472/2006, P 10.13, U.N. Doc. CCPR/C/94/D/1472/2006 (2008); Abdelrazik v. Minister of Foreign Affairs, [2009] F.C. 580 (Can.); BIERSTEKER & ECKERT, *supra* note 4, at 8 (“[M]ore than 50 Member States have expressed concern about the lack of due process and absence of transparency associated with listing and delisting.”); WATSON INSTITUTE TARGETED SANCTIONS PROJECT, STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 6 (2006), available at [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf) (citing the Third and Fourth Reports of the 1267 Monitoring Team, available at <http://www.un.org/Docs/sc/committees/1267/1267mg.htm>).

21. WATSON INSTITUTE, *supra* note 20.

22. 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*, ¶ 6(a) (Jan. 26, 2011) [hereinafter *Committee Guidelines*], available at [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf).

23. *Committee Guidelines*, *supra* note 22, ¶ 6(c).

residence and/or nationality.<sup>24</sup> Criminal charges or convictions are not a prerequisite for listing, given its intended preventive nature.<sup>25</sup> Member States must use specific forms and information must be provided for proposing names for inclusion.<sup>26</sup> In addition, Member States may co-sponsor new designations when listing requests are under consideration.<sup>27</sup> Because evidence serving as the basis for a listing may be sensitive in nature, States may be hesitant to share relevant intelligence, even with other 1267 Committee members.<sup>28</sup>

The overall criteria, providing listing for those “obstructing the peace process” and the ability to list based on “association”<sup>29</sup> with Al-Qaeda or the Taliban remain controversial, especially since evidence justifying listing may be scant.<sup>30</sup> In practice, statements of case presented to the 1267 Committee have varied widely in length and quality.<sup>31</sup> In 2006, it was reported that there was typically little consultation with affected Member States, as only states currently on the Security Council were receiving and reviewing evidence for listing.<sup>32</sup> This lack of transparency was further compounded by the lack of shared intelligence between 1267 Committee members. Ongoing reforms to the 1267 Regime—though episodic and

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24. *Id.*

25. *Id.* ¶ 6(c) (“A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature.”).

26. *Id.* ¶ 6(d) (“When proposing names for inclusion on the Consolidated List, Member States should use the standard forms for listing available on the Committee’s website and shall include as much relevant and specific information as possible on a proposed name . . .”).

27. *Id.* ¶ 6(g).

28. Despite being a relatively early criticism of the Resolution 1267 Regime, this problem persists. See Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 528 (2004).

29. S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005), ¶ 4. Resolution 1617 has operated to limit the scope of “association.”

30. WATSON INSTITUTE, *supra* note 20.

31. *Id.* at 26. (“At one end of the continuum, a joint submission from two Member States recommending the listing of three individuals allegedly included a general background on the organization with which they were affiliated, followed by six detailed paragraphs on each individual, with specific information relating to actions they have allegedly taken. Another statement of case proposing the listing of six individuals included 70 pages of faxed material, including copies of arrest warrants. At the other end of the spectrum was a statement of case that purportedly included 74 names, with only a single, general paragraph of justification. Due to the general nature of the statement of case, a hold was placed on the latter request and the committee did not list the names.”).

32. *Id.* at 1.

reactive—at least suggest a trend toward greater transparency, availability of information, and ease of communication.<sup>33</sup>

The first reform in February 2001 approved humanitarian aid exemptions by the Resolution 1267 Committee. Security Council Resolution 1452 (2002) introduced exemption provisions, as well as timely post-designation notification to listed individuals or entities.<sup>34</sup> Resolution 1455 (2003) emphasized the importance of identifying information while also revising listing guidelines and list-updating procedures.<sup>35</sup> Resolution 1526 (2004) continued the trend toward greater protection of targeted parties, requiring more robust identifying and background information, and calling for the appointment of a sanctions monitor team.<sup>36</sup> Resolution 1617 (2005) emphasized the need for case details by providing clarification of what should be contained in statements of case.<sup>37</sup> Quite significantly, Resolution 1730 (2006) created a focal point, broadening the ability to challenge listing by permitting parties to petition in the absence of state sponsorship.<sup>38</sup>

Resolution 1735 (2006), incorporating recommendations from the 2006 *Watson Report*, further elaborated upon the content that should be included in statements of case and the procedures to improve upon deficiencies in notification.<sup>39</sup> Resolution 1822 (2008) continued to improve notification processes, while continuing to re-assess the 1267 Regime and make recommendations for greater transparency.<sup>40</sup> Included in Resolution 1822 is a mandatory requirement for statements of case and narrative summaries for all listees.<sup>41</sup> Resolution 1822 included significant procedural reforms for the Resolution 1267 Regime: a review of all listees within two years, an ongoing review process thereafter, and narrative summaries published on the Internet.<sup>42</sup> Resolution 1904 (2009) provides for the appointment of an ombudsman, as discussed at length in section 1.2.3.<sup>43</sup>

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33. BIERSTEKER & ECKERT, *supra* note 4, at 12.

34. S.C. Res. 1452, *supra* note 19; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 56.

35. S.C. Res. 1455, *supra* note 19; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 56.

36. S.C. Res. 1526, U.N. Doc. S/RES/1526 (2004); *see also* BIERSTEKER & ECKERT, *supra* note 4, at 57.

37. S.C. Res. 1617, *supra* note 29; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 57.

38. S.C. Res. 1730, *supra* note 19; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 57.

39. S.C. Res. 1735, *supra* note 19; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 57.

40. S.C. Res. 1822, *supra* note 19; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 57.

41. S.C. Res. 1822, *supra* note 19; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 57.

42. S.C. Res. 1822, *supra* note 19; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 57.

43. S.C. Res. 1904, *supra* note 18; *see also* BIERSTEKER & ECKERT, *supra* note 4, at 57.

Under current procedures, the 1267 Committee considers listing requests within a period of ten full working days, a time frame that may be expedited in cases of emergency and necessity.<sup>44</sup> Listing decisions are generally taken by consensus.<sup>45</sup> Committee Members and the Monitoring Team are called upon, but not obligated, to share information with the 1267 Committee.<sup>46</sup> Information to be shared in a non-compulsory manner includes any information available regarding a listing request, to inform listing decisions and provide a narrative summary for listing.<sup>47</sup>

Upon addition to the Consolidated List, the Committee, in cooperation with other parties, publicizes a narrative summary of reasons for the listing on its website<sup>48</sup> and publishes relevant releasable information.<sup>49</sup> In its notification, the Secretariat invites States to provide, in accordance with national law, details on measures taken to freeze assets of the individuals or entities listed.<sup>50</sup>

Despite consultative processes amongst Committee members, the Monitoring Team, and Member States, the listing process is perceived as extralegal and opaque. While the necessity to omit pre-designation notice is widely accepted,<sup>51</sup> the lack of subsequent hearings, judicial processes, or compulsory disclosure of evidence, all contribute to this unfavorable perception.<sup>52</sup>

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44. *Committee Guidelines*, *supra* note 22, ¶ 6(h).

45. WATSON INSTITUTE, *supra* note 20, at 29-30.

46. *Committee Guidelines*, *supra* note 22, ¶ 6(i).

47. *Id.*

48. S.C. Res. 1822, *supra* note 19, ¶ 13 (“Directs the [1267] Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating States, after a name is added to the Consolidated List, to make accessible on the Committee’s website a narrative summary of reasons for listing for the corresponding entry or entries on the Consolidated List, and *further directs* the Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating States, to make accessible on the Committee’s website narrative summaries of reasons for listing for entries that were added to the Consolidated List before the date of adoption of this resolution . . .”).

49. *Committee Guidelines*, *supra* note 22, ¶ 6(k).

50. *Id.* ¶ 6(n).

51. *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3649; *Joined Cases C-402 & 415/05P, Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R. I-6351, ¶¶ 134–135 (stating the requiring pre-designation notice would render sanctions useless.); *Global Relief Foundation, Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), and describing pre-designation notice as a “suicide pact”).

52. See generally Jared Genser & Kate Barth, *When Due Process Concerns Become Dangerous: The Security Council’s 1267 Regimes and the Need for Reform*, 33 B.C. INT’L &

b. Delisting—Security Council Practice

Despite the many amending Security Council Resolutions, the 1267 Regime remains subject to frequent criticism due to its amorphous threshold for listing, and the limited due process afforded to listed parties seeking removal from the Consolidated List.<sup>53</sup>

Section 7 of the 1267 Committee's guidelines provides the procedure for requesting delisting.<sup>54</sup> Currently, the Office of the Ombudsperson receives these requests, by or on behalf of the petitioner.<sup>55</sup> States may submit requests for delisting after "having bilaterally consulted with the designating State(s), the State(s) of nationality, residence or incorporation, where applicable."<sup>56</sup>

Upon request of a Member State to the 1267 Committee, the delisting request shall be placed on the Committee's agenda for more detailed consideration. The Committee then gives consideration to the opinions of designating State(s), State(s) of residence, nationality or incorporation. Members of the 1267 Committee are "called upon," but not required "to make every effort to provide reasons for objecting to delisting requests."<sup>57</sup> The Secretariat shall inform the Members of the Committee whether an objection has been received and the Consolidated List will be updated when appropriate.<sup>58</sup>

Should a delisting request of a Member State be rejected, the 1267 Committee's decision is provided to "the State submitting the request, the State(s) where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national (to the

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COMP. L. REV. 1 (2010) (extensively discussing the tension between confidentiality of sensitive intelligence and the functions of due process.); WATSON INSTITUTE, *supra* note 20 (discussing the lack of transparency and deficiency of process in the Resolution 1267 Regime.); BIERSTEKER & ECKERT, *supra* note 4, at 36-37 (discussing the challenges posed by intelligence-sharing in the context of the European Court of Justice and the *Kadi* case).

53. BIERSTEKER & ECKERT, *supra* note 4, at 8 ("[M]ore than 50 Member States have expressed concern about the lack of due process and absence of transparency associated with listing and delisting.").

54. Sec. Council Comm. Fact Sheet on delisting, *available at* [http://www.un.org/sc/committees/1267/fact\\_sheet\\_delisting.shtml](http://www.un.org/sc/committees/1267/fact_sheet_delisting.shtml) (last visited July 2, 2011).

55. *Committee Guidelines*, *supra* note 22, ¶ 7(c).

56. Request For delisting from the Consolidated List Maintained by the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, *available at* <http://www.un.org/sc/committees/1267/pdf/De-listing%20form%20-%20English.pdf>

57. *Committee Guidelines*, *supra* note 22, ¶ 7(h).

58. *Id.* ¶ 7(g).

extent this information is known).”<sup>59</sup> This notification includes the 1267 Committee’s decision, an updated summary of reasons for listing, and available “publicly releasable information” about the decision.<sup>60</sup>

While Resolution 1730 provides that the United Nations Secretariat receive challenges from listed individuals, individual petitioners still lack any right to actively participate in a hearing or any live testimony during review, and outcomes are still not governed by legal principles or procedure.<sup>61</sup> While the United Nations has established an Ombudsperson as an intermediary for Resolution 1267 matters, the Ombudsperson lacks substantive decision-making power or even access to substantive evidence kept as state secrets. As such, the Ombudsperson ultimately fails to offer significantly enhanced due process within the sanctions regime.

### c. Resolution 1904—Establishing the Ombudsperson

Drafted by the United States, and unanimously adopted by the Security Council, Resolution 1904 serves to increase due process guarantees within the Resolution 1267 Regime.<sup>62</sup> Established pursuant to paragraph 20 of Security Council Resolution 1904, the Office of the Ombudsperson assumes various tasks in the delisting process. Appointed by the Secretary General,<sup>63</sup> the Ombudsperson serves as an information gathering agent and intermediary between a petitioner and the 1267 Committee. This Ombudsperson lacks any substantive review powers as discretion for delisting remains solely within the auspices of the 1267 Committee.

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59. *Id.* ¶ 6(n).

60. *Id.* ¶ 6(k).

61. S.C. Res. 1730, *supra* note 19.

62. Amnesty Int’l, *Security Council’s Creation of Ombudsperson To Look at Al Qaida and Taliban Sanctions Regime Welcome but Insufficient*, AI Index IOR 41/032/2009 (Dec. 17, 2009). “The resolution [Resolution 1904] unanimously adopted today, drafted by the USA, builds upon the persistent work of a small group of dedicated countries outside and inside the Security Council, as well as NGOs, insisting that due process guarantees must be incorporated in the Security Council’s listing and delisting procedures.”

63. S.C. Res. 1904, *supra* note 18 (authorizing the appointment of Ombudsperson to handle delisting issues). Press Release, Security Council, Al-Qaida and Taliban Sanctions Committee Welcomes Appointment of Judge Kimberly Prost to Serve as Ombudsperson SC/9947 (2010) This position is currently held by Kimberly Prost, appointed by the Secretary General on June 3, 2010; Press Release, Security Council, Dep’t of Pub. Info, Security Council Amends United Nations Al-Qaida/Taliban Sanctions Regime, Authorizes Appointment of Ombudsperson to Handle Delisting Issues, U.N. Doc, SC/9825 (Dec. 17, 2009) (asserting that “[Resolution 1267] was a significant step forward in the fairness and transparency of the sanctions regime, thus improving its effectiveness and legitimacy”).

The Ombudsperson operates in an intermediary administrative capacity. The Ombudsperson informs the petitioner of delisting procedure, fields questions, and informs the petitioner as to whether a delisting request properly addresses the original designation criteria.<sup>64</sup> Petitions are then forwarded by the Ombudsperson to the 1267 Committee, designating State(s), States(s) of residency/nationality, relevant United Nations bodies, and States deemed relevant by the Ombudsperson.<sup>65</sup> The Ombudsperson engages in dialogue with the above mentioned parties in order to determine opinions as to whether the delisting request should be granted, while also gathering “information, questions or requests for clarifications that these States would like to be communicated to the petitioner regarding the delisting request . . . .”<sup>66</sup>

The Ombudsperson also forwards delisting requests to the Monitoring Team who then provide all relevant information available to the Monitoring Team, including decisions and proceedings, news reports, and information that States or relevant international organizations have previously shared within the 1267 Regime.<sup>67</sup> After an information-gathering period, the Ombudsperson facilitates a period of engagement, including dialogue with the petitioner.<sup>68</sup> During this period, the Ombudsperson may ask the petitioner to provide additional information and clarifications for the 1267 Committee’s consideration.<sup>69</sup>

Based on an analysis of all available information, the Ombudsperson provides the 1267 Committee with the principal arguments concerning delisting.<sup>70</sup> The 1267 Committee reviews this Comprehensive Report, ultimately deciding the delisting request, and informing the Ombudsperson

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64. *Committee Guidelines, supra* note 22, Annex, ¶ 10 (“After the Committee consideration, the Committee shall decide whether to approve the delisting request through its normal decision-making procedures”).

65. S.C. Res. 1904 *supra* note 18, Annex, II, ¶ 2 (“For delisting petitions not returned to the petitioner, the Ombudsperson shall immediately forward the delisting request to the members of the Committee, designating State(s), State(s) of residence and nationality or incorporation, relevant United Nations bodies, and any other States deemed relevant by the Ombudsperson. The Ombudsperson shall ask these States or relevant United Nations bodies to provide, within two months, any appropriate additional information relevant to the delisting request.”).

66. *Id.* ¶ 2(b).

67. *Id.*

68. *Id.* ¶ 3(a).

69. *Id.* ¶ 6(a).

70. *Id.* ¶ 7(c).

of the decision, who, in turn, notifies the petitioner.<sup>71</sup> This dynamic suggests the Ombudsperson may influence the decision making process based on its submissions, but substantive decision-making remains wholly reserved by the 1267 Committee. In addition, the Ombudsperson, in its information gathering remains beholden to the whims of states who may be unwilling to disclose sensitive intelligence that may have been relied upon in advocating the initial listing.

While facilitating communication and easing the transfer of information may increase transparency and perceptions of legitimacy, the Ombudsperson essentially operates as an empty vessel, providing a procedural and communicative interface, while wholly lacking substantive adjudicative powers. In addition, the Ombudsperson's contributions to transparency are essentially hamstrung, as all communications with the petitioner "shall respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States."<sup>72</sup> Thus, the sensitive nature of communications and the need for confidentiality maintain primacy over transparency, regardless of the Ombudsperson's mandate.

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71. *Id.* ¶¶ 11–13.

11. If the Committee decides to grant the delisting request, then the Committee shall inform the Ombudsperson of this decision. The Ombudsperson shall then inform the petitioner of this decision and the listing shall be removed from the Consolidated List.

12. If the Committee decides to reject the delisting request, then the Committee shall convey to the Ombudsperson its decision including, as appropriate, explanatory comments, any further relevant information about the Committee's decision, and an updated narrative summary of reasons for listing.

13. After the Committee has informed the Ombudsperson that the Committee has rejected a delisting request, then the Ombudsperson shall send to the petitioner, with an advance copy sent to the Committee, within fifteen days a letter that:

- (a) Communicates the Committee's decision for continued listing;
- (b) Describes, to the extent possible and drawing upon the Ombudsperson's Comprehensive Report, the process and publicly releasable factual information gathered by the Ombudsperson; and,
- (c) Forwards from the Committee all information about the decision provided to the Ombudsperson pursuant to paragraph 12 above.

72. *Committee Guidelines*, *supra* note 22, Annex, ¶ 14 ("In all communications with the petitioner, the Ombudsperson shall respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States.").

### 3. A Brief Comparison of Resolution 1373 and Resolution 1267 Implementation and Review

While Resolutions 1373 and 1267 concern similar content, they fulfill distinct roles, and demand different approaches to implementation.<sup>73</sup> In offering a discussion of domestic implementation of Resolution 1267, certain distinctions should be noted in comparison to Resolution 1373.

Resolution 1267 is overseen by the 1267 Committee, a subsidiary organ of the Security Council.<sup>74</sup> In contrast, practice under Resolution 1373 is overseen by the Counter-Terrorism Committee, a Security Council Committee guided by, and overseeing implementation of Security Council Resolutions 1373 and 1624.<sup>75</sup> The 1267 Committee was initially established on October 15, 1999 as part of the imposition of sanctions on the Taliban and Al-Qaeda.<sup>76</sup> The 1267 Committee is solely a sanctions committee.<sup>77</sup> In contrast, the CTC is neither a sanctions committee, nor does it keep a list, it simply monitors the implementation of Resolution 1373.<sup>78</sup> While the 1267 Committee and the CTC both operate to implement counter terrorism measures, their roles are distinct yet complementary.<sup>79</sup> The 1267 Committee and the CTC are complementary insofar as each committee oversees the implementation of specific counter terrorism measures created by the Security Council, but do so from different perspectives.<sup>80</sup>

With regard to mandate, the CTC monitors the implementation of Resolution 1373, while further working to facilitate assistance to states having difficulties in implementing.<sup>81</sup> In contrast, the 1267 Committee

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73. See generally Press Release, Security Council, Distinctions Between Security Council Committees Dealing With Terrorism, U.N. Doc, SC/7827 (July 28, 2003).

74. S.C. Res. 1267, *supra* note 1, ¶ 1(b). The 1267 Committee is comprised of all Security Council members.

75. Press Release, Security Council, Distinctions Between Security Council Committees Dealing With Terrorism, U.N. Doc, SC/7827 (July 28, 2003); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT. L. 901, 902 (2002); Comparative Table Regarding The United Nations Security Council Committees Established Pursuant to Resolutions 1267 (1999), 1373 (2001) and 1540 (2004), available at <http://www.un.org/en/sc/ctc/>.

76. *Id.*

77. S.C. Res. 1267, *supra* note 74; Press Release, *supra* note 75, ¶ 1(a).

78. *Supra* note 75.

79. *Id.* Although the 1267 Committee and the CTC share the same objective of fighting terrorism, the activities of the two committees are different but complementary in combating terrorism.

80. *Id.*

81. Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307,

oversees implementation-targeted sanctions for those included on the 1267 Committee's Consolidated List. The 1267 Committee and CTC both report to the Security Council independent of each other. In discussing United States practice under Resolution 1267, consideration of Resolution 1373 is essential insofar as domestic implementation of Resolution 1267 has effectively been subsumed within the broader implementation of Resolution 1373.

### III. UNITED STATES PRACTICE—IMPLEMENTING RESOLUTION 1267

#### A. *United States Implementation and Domestic Merger of Resolution 1267 with Resolution 1373*

While UNSC Resolution 1267 and UNSC Resolution 1373 are separate in content and in their administration at the international level, United States practice reflects a merger of the content of Resolution 1267 into the broader implementation of Resolution 1373, while still remaining compliant with UNC Article 25.<sup>82</sup> From its initial passage, United States implementation of Resolution 1373 has combined law enforcement efforts,<sup>83</sup> multilateral cooperation,<sup>84</sup> and frameworks for three listing regimes. Included amongst these listing regimes is asset freezing through implementation of Resolution 1267 via Executive Order 13224.<sup>85</sup> Executive

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343-44 (2009) (describing the CTC as “particularly vital to the success of this resolution, as it was to be the major-capacity building mechanism that would give the states the capability to implement and enforce the resolution’s mandates”).

82. Letter Dated Feb. 19, 2004 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001). As early as 2001, the United States has included Executive Order 13224 as part of compliance with Resolution 1373. Note that Executive Order 13224 listing encompasses Resolution 1267 listing while also adding domestic entries unrelated to Al-Qaeda or the Taliban. <http://www.unclef.com/en/sc/ctc/docs/founding/s-2004-124.pdf>

83. *Id.* (discussing law enforcement based implementation of Resolution 1373, including: (1) creation of a Foreign Terrorist Task Force; (2) creation of the Interagency Financial Investigation Group; and (3) prosecution of Al-Qaeda suspects; enhanced visa/passport protection; (4) Regional cooperation on border security).

84. *Id.* (indicating support for: (1) UN Convention for the Suppression of the Financing of Terrorism; (2) UN Convention for the Suppression of Terrorist Bombings; and (3) coordination of multilateral cooperation in line with UNSCR operational information.).

85. Exec. Order No. 13224, 66 Fed. Reg. 49,079 (2001) (listing “foreign terrorist groups” (FTO) and criminalizing material support under the Antiterrorism and Effective Death Penalty Act (18 U.S.C. § 2339B(g)(6)); Terror Exclusion List (restricting entry into the United States, under Section 411 of the USA PATRIOT Act of 2001, Pub. L. No. 107-

Order 13224 implements Resolution 1267 while also extending domestic listing and asset freezing beyond those included in the Security Council's Consolidated List.

The three listing regimes instituted within the United States warrant brief differentiation. Executive Order 13224 is an act of the Executive, implementing Resolution 1267.<sup>86</sup> Specifically, it concerns the freezing of assets, including blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism, so-called Specially Designated Global Terrorists (SDGT).<sup>87</sup> This is the only United States listing regime that will be dealt with in detail below. Additional domestic lists do not involve implementation of Resolution 1267, thus they warrant less attention within this article. The first of these additional lists operates under the Antiterrorism and Effective Death Penalty Act (AEDPA), criminalizing material support to designated foreign terror organizations.<sup>88</sup> In addition, the Terror Exclusion List, part of the Immigration and Nationality Act, is yet another listing regime.<sup>89</sup> Those listed under the Terror Exclusion List are prohibited from entering the United States.<sup>90</sup> Listing under the AEDPA or the Immigration and Nationality Act should not be confused with Executive Order 13224, the key provision in implementing Resolution 1267 domestically.

In assessing the function of Executive Order 13224 as one, in a group of internal-domestic listing regimes, the United States implementation of Resolution 1267 lacks the complementary relationship to Resolution 1373 demonstrated at the United Nations level. In contrast, domestic implementation within the United States suggests an incorporation of Resolution 1267, via Executive Order 13224 into a system retaining domestic discretion for judicial review reserved for implementation of

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56, § 411, 115 Stat. 272, 346 (2001), available at <http://www.state.gov/s/ct/rls/other/des/123086.htm> (last visited July, 2011)).

86. Exec. Order No. 13224; S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

87. Exec. Order No. 13224. The Executive Order invokes Resolution 1267, but does not mention S.C. Res. 1373, P 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (SDGT designation is not specific to Al-Qaeda or Taliban).

88. Pub. L. No. 104-132, 110 Stat. 1214 subtitle B sec. 321 (codified in part at 18 U.S.C. §§ 2331–2339D (2006)); U.S. Dep't of State, Foreign Terrorist Organizations, Jan. 19, 2010, <http://www.state.gov/s/ct/rls/other/des/123085.htm> (providing FTO List and an overview of the designation process. Portions of this legislation addressing the death penalty lack substantive bearing on the issue of terror financing).

89. Terror Exclusion List, restricting entry into the United States, under Section 411 of the USA PATRIOT Act of 2001.

90. *Id.*

Resolution 1373. Simply stated, the United States exercises review over Resolution 1267 implementation in the same fashion it does over measures within the scope of Resolution 1373.<sup>91</sup>

*B. United States Subordination of Resolution 1267 to a Domestic Constitutional Order*

The United States remains constitutionally entrenched in an objectively dualist approach toward the implementation of treaty and other international obligations, including the listing/sanctions regime created under Resolution 1267. While subjecting Resolution 1267 implementation to domestic judicial review risks a violation of UNC Article 25, this has not yet occurred.<sup>92</sup>

To understand the United States' practice in implementing Resolution 1267, the nation's constitutional order warrants an overview. Within the United States, there exists no higher law than the Constitution of the United States of America.<sup>93</sup> Enumerated natural rights within the Constitution, including a prohibition on the deprivation of life, liberty, or property by the federal government, absent due process of law, take primacy over both state law and federal statute.<sup>94</sup> Simply stated, in the event of a conflict, law

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91. For example, the Court of First Instance of the European Union has addressed the discretion reserved within Resolution 1373, in *Case T-228/02, Org. des Modjahedines du peuple d'Iran v. Council of the European Union*, E.C.R. II-4665 (2006) (finding that Resolution 1373 leaves discretion to the Member States in determining procedure and designating individuals or entities for sanctions).

92. U.N. Charter art. 25 (requiring Member States to "accept and carry out the decisions of the Security Council").

93. *See, e.g.*, *Reid v. Covert*, 354 U.S. 1 (1957); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a session of any portion of the territory of the latter, without its consent.").

94. U.S. CONST. amend. V (providing that no person shall "be deprived of life, liberty, or property, without due process of law"); *Noble v. Union River Logging*, 147 U.S. 165 (1893). This prohibition applies to both persons and corporate entities; *Barron v. Baltimore*, 32 U.S. 243 (1833). This constitutional protection binds the federal government, but not states. *See also* Bardo Fassbender, United Nations, Office of Legal Affairs, TARGETED SANCTIONS AND DUE PROCESS 9 (2006), (citing the Fifth Amendment as a procedural safeguard historically rooted "in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action").

outside the Constitution yields to the fundamental rights guaranteed by the Constitution.

Within the United States Constitution, treaty obligations carry the weight and authority of federal statute.<sup>95</sup> An international treaty is supreme, insofar as it binds national and state courts.<sup>96</sup> However, when there is a clash between constitutionally guaranteed rights and international obligation, courts will apply the Constitution domestically, even if it yields a violation of international obligation.<sup>97</sup> Thus, treaty obligation within the United States Constitution is equal in weight and authority to federal statute, and as such, yields to the primacy of constitutionally guaranteed rights.<sup>98</sup>

It bears mentioning that within the framework of United States treaty obligations, the United Nations Charter is supreme to all other treaty obligations.<sup>99</sup> While the position of the United States as a party to the United Nations Charter accepts the Charter as the supreme treaty above all other treaty obligations, the Charter still remains analogous to federal statute in the domestic system, and as such, subject to review on fundamental Constitutional grounds regardless of the potential risk of violating UNC Article 25 in the process. In summation, Security Council Resolutions are integrated into the domestic legal order via Executive Order. As such, implementation is reviewable by the domestic judiciary on constitutional grounds, including a right to due process of law. As such,

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95. U.S. CONST. art. VI )“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”. *See also* *Ware v. Hylton*, 3 U.S. 199 (1796) (“[T]reaties which were then made, or should thereafter be made, under the authority of the United States, should be the supreme law of the land . . . .”); *Baker v. City of Portland*, 2 F. Cas. 472, 474 (C.C.D. Or. 1879) (“This treaty . . . is the supreme law of the land, and the courts are bound to enforce it fully and fairly. . . . The state cannot legislate so as to interfere with the operation of this treaty or limit or deny the privileges and immunities guaranteed by it . . . .”).

96. *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909) (“A treaty . . . by the express words of the Constitution, is the supreme law of the land.”).

97. *Medellin v. Texas*, 552 U.S. 491, 509 (2008) (“Indeed, a later-in-time federal statute supersedes inconsistent treaty provisions.”) (citing *Cook v. United States*, 288 U.S. 102, 120 (1933) (holding that where treaty obligation and federal statute clash, courts will apply the Constitution domestically, even if in violation of domestic law)).

98. *Reid v. Covert*, 353 U.S. 1 (1957).

99. U.N. Charter art. 103 (“In 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.”).

domestic review of Resolution 1267 implementation allows an open possibility that it may be overruled on domestic constitutional grounds, irrespective of a potential transgression under UNC Article 25.

*C. The Promulgation of Domestic Rules and Regulations Pursuant to Executive Order 13224*

United States implementation of United Nations Security Council Resolutions, including Resolution 1267, are governed by federal statute, specifically, the United Nations Participation Act of 1945.<sup>100</sup> Rather than implement Security Council Resolutions by merely transposing the requirements of the Security Council, Resolutions are implemented by the President of the United States via an executive act.<sup>101</sup>

Domestic implementation of Resolution 1267 is a convoluted affair as it combines an order of the executive with an annual presidential declaration of national emergency, under the International Emergency Economic Powers Act IIEPA.<sup>102</sup> The IIEPA empowers the President to block a variety of transactions, and even prevent humanitarian donations if they are determined to risk impairing the ability to deal with a declared

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100. United Nations Participation Act of 1945, 22 U.S.C. § 287c(a) (2006). Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.

*Id.*

101. *See* Mississippi v. Johnson, 71 U.S. 475 (1866) (discussing the nature and effect and authority of Executive Orders, and examining the role of Executive Orders in fulfilling the president's executive role).

102. U.S.C. §§ 1701, 1702(a)(1) (2008). This statute authorizes the president "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." Measures to deal with these threats include prohibiting financial transactions. 50 U.S.C. § 1622(d) (requiring declaration and publication in the Federal Register within 90 days before anniversary). The NEA provides presidential declaration of emergencies terminates on its anniversary, absent a renewing declaration. Executive Order 13224 continues to operate based on this annual renewal. 75 Fed. Reg. 55661 (Sept. 10, 2010).

emergency.<sup>103</sup> Essentially, this declaration of national emergency provides the pretext under which the President may act to freeze the assets of individuals or entities.

Executive Order 13224(1) provides that parties will be listed if determined “to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States . . . .”<sup>104</sup> “Terrorism” is defined in Executive Order 13224(2)(d).<sup>105</sup>

The actual freezing of assets, and subsequent administrative review, is performed within the Executive Branch by the Department of the Treasury. The Department of the Treasury promulgates rules and regulations, and maintains the list of individuals and entities subject to targeted sanctions. Specifically, the Office of Foreign Assets Control [OFAC] (part of the Treasury) administers the implementation of Executive Order 13224.<sup>106</sup> OFAC listing of Specially Designated Global Terrorists generally lacks transparency. In practice, “a number of U.S. agencies, including the Treasury, State, Justice, the FBI and the intelligence community, review open source and confidential information, including tips and leads, about persons and entities who commit, threaten to commit or support terrorism.”<sup>107</sup>

Information gathered on entities under consideration for listing is then reviewed by the National Security Council, which makes a final

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103. 50 U.S.C. § 1702(b)(2)(A).

104. Exec. Order No. 13224(1)(b).

105. Exec. Order No. 13224sec. 3 (d)(i–ii)  
(d) the term “terrorism” means an activity that—  
(i) involves a violent act or an act dangerous to human life, property, or infrastructure; and  
(ii) appears to be intended—  
(A) to intimidate or coerce a civilian population;  
(B) to influence the policy of a government by intimidation or coercion;  
(C) or to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

106. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPARTMENT OF THE TREASURY, TERRORIST ASSETS REPORT 1 (2007). The OFAC identifies legal persons for designations, assists in compliance with sanctions, assesses penalties for violation of sanctions, and coordinates internationally to implement targeted sanction strategies.

107. Int’l Information Programs, U.S. Dep’t of State, Background on Terror Assets Designation Process (Feb. 28, 2002), *available at* <http://usinfo.org/wf-archive/2002/020228/epf405.htm> (last visited July 2, 2011).

recommendation for listing to OFAC.<sup>108</sup> Despite a number of involved agencies, listing and freezing of assets is performed within the Department of the Treasury, by the OFAC, in consultation with a range of other agencies. Designation as an SDGT (listing under Executive Order 13224) results in a prohibition on the transfer of funds to these individuals or entities, absent a waiver via license.<sup>109</sup>

For the sake of clarity, the implementation of Resolution 1267 warrants a brief review. Implementation is handled almost exclusively through the Executive Branch of the United States Government via an Executive Order. The United States Congress empowers the President to implement Security Council Resolutions by virtue of the United Nations Participation Act. It is under this authority that the President has issued Executive Order 13224, which relies upon the Department of the Treasury (an entity within the Executive Branch of government) to list parties and freeze assets. Finally, it should be noted that Executive Order 13224 is subject to domestic judicial review on Constitutional grounds, including the right to federal due process under the Fifth Amendment of the United States Constitution.

#### *D. Domestic Review under Executive Order 13224*

##### *1. Administrative Review*

Legal entities designated as SDGTs may first challenge their designation administratively, by submitting a request for removal, including a written statement as to the nature of the supposed error.<sup>110</sup> Administrative review is distinct from judicial review as it is performed within the Department of the Treasury (specifically the OFAC). Pursuant to 31 C.F.R. § 501.807, a “person may seek administrative reconsideration of his, her or its

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108. The National Security Council is the President’s principal forum for considering national security and foreign policy matters with his senior national security advisors and cabinet officials. *National Security Council*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/nsc> (last visited July 2, 2011); Int’l Information Programs, *supra* note 107.

109. Global Terrorism Sanctions Regulations, 31 C.F.R. §§ 594.202(a)–(d), 595.202(a)–(d) (2004) (permitting collection for lawful payments owed by a designated legal person via the issuance of a license).

110. Procedures for Unblocking Funds Believed to Have Been Blocked Due to Mistaken Identity, 31 C.F.R. §§ 501.806–807 (2008). For a detailed appraisal of the functions of administrative review in the United States legal system, see JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985); MICHAEL HEAD, *ADMINISTRATIVE LAW: CONTEXT AND CRITIQUE* (2d ed. 2008).

designation . . . and thus seek to have the designation rescinded.”<sup>111</sup> This regulation permits the listed person to “submit arguments or evidence that the person believes establishes that insufficient basis exists for the designation.”<sup>112</sup> In addition, a designated SDGT is entitled to request an administrative hearing,<sup>113</sup> and receive a written determination of a request for reconsideration.<sup>114</sup>

During this process, a listed party may request a meeting with OFAC for a review of its listing, but these meetings are not as of right, and are not required.<sup>115</sup> Thus, listed parties are not entitled to a hearing before an administrative judge where they can offer evidence.<sup>116</sup> In addition, the quality of evidence relied upon in listing and freezing assets may include a variety of sources that would not suffice at a proper trial.<sup>117</sup>

Perhaps the most disconcerting feature of administrative review remains its secretive nature. While the United States will issue written administrative determinations to those challenging SDGT designation, it continues to avoid disclosure of the actual evidence relevant to the SDGT’s designation.<sup>118</sup>

## 2. Independent Judicial Review

After administrative remedies are exhausted, judicial review is available in federal court, including a hearing with full trial rights.<sup>119</sup> As discussed

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111. *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 71 (D.D.C. 2008).

112. *Id.* (requiring exhaustion of administrative remedies).

113. 31 C.F.R. § 501.807(c).

114. 31 C.F.R. § 501.807(d).

115. 31 C.F.R. §§ 501.806–807 (2004).

116. 31 C.F.R. § 501.807.

117. John D. Cline, *The President’s Power to Seize Property in the Post-September 11 World: The International Emergency Economic Powers Act*, CHAMPION, Oct. 2003, at 19 (noting that the sources include media reports, statements by anonymous informants, and intelligence reports from foreign countries, which may contain hearsay and speculation).

118. *See, e.g., Serge Schmemmann, A Nation Challenged: Sanctions and Fallout; Swedes Take Up the Cause of 3 on U.S. Terror List*, N.Y. TIMES, Jan. 26, 2002, at A9 (discussing Swedish frustrations with the listing of its nationals on the 1267 Consolidated List, by the United States, in the absence of sharing evidence).

119. *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 71 (D.D.C. 2008) (inferring a requirement to exhaust administrative review prior to seeking judicial review); U.S. Const. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

above, federal due process standards contained within the United States Constitution govern due process challenges to listing. Analysis of the judgments challenging the implementation of Executive Order 13224 reveals a relatively low bar for sufficient due process, a general deference to the administrative process, and a markedly dualist and domestically minded approach. In reviewing challenges of those simultaneously listed under Resolution 1267 and Executive Order 13224, federal courts have not alluded to Resolution 1267, *jus cogens*, nor acknowledged obligations under UNC Article 25. Instead, courts have favored review on solely domestic constitutional grounds. In addition, challenges brought in federal courts have had the convenience of hearing parties that were originally suggested to the Resolution 1267 committee by the United States. This has proven to be of great convenience in conferring the ability for the courts to engage in substantive review of grounds for listing SDGTs without needing to rely on foreign states to provide evidence. As logic would dictate, parties listed by the United States are suggested based on evidence to which the government of the United States is privy. This puts reviewing courts in a position to review claims on the individual merits, rather than merely engage the methods of implementation.<sup>120</sup>

Of the domestic cases challenging the asset freezing of Executive Order 13224, no party has succeeded on constitutional due process grounds, including three cases that reviewed the asset freezing of individuals simultaneously present on the Executive Order 13224 list and the Resolution 1267 Consolidated List.<sup>121</sup> A review of case law demonstrates domestic due process standards comport with the implementation of Resolution 1267. In assessing the security stakes involved in pre-designation notice, the Seventh Circuit Court of Appeals described such notice as a “suicide pact.”<sup>122</sup> This proclamation of a so-called “suicide pact” is bolstered by the argument that prior notice would permit listed organizations to move funds prior to freezing.<sup>123</sup>

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120. *See, e.g.*, Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R I-6351 (noting that in the absence of available substantive evidence to support listing, the ECJ was limited to evaluating the legality of regulations implementing Resolution 1267); *see supra* Part III.

121. At the district level, these cases are: *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 585 F. Supp. 2d 1233 (D. Or. 2008); *Paulson*, 568 F. Supp. 2d at 72; *Global Relief Found., Inc. v. O’Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002).

122. *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (describing pre-designation notice as a “suicide pact” (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963))).

123. *Id.* at 754.

Appealing to the urgency of security, it has been held constitutional for Executive Order 13224 to merely provide post-deprivation notice and hearing. In addition, post-deprivation notice has been ruled sufficient where the Department of the Treasury posts a press release serving as notice of the deprivation on its website.<sup>124</sup> Review of evidence in camera has also been upheld as constitutional.<sup>125</sup> Taken in their totality, these decisions demonstrate a willingness to sacrifice the due process protection of individuals in favor of a need for security and the confidentiality of sensitive intelligence.

In *Holy Land Foundation v. Ashcroft*, justification for the due process afforded, namely the lack of a pre-deprivation notice and hearing, was stated as follows:

- (1) the deprivation was necessary to secure an important governmental interest;
- (2) there has been a special need for very prompt action;
- and (3) the party initiating the deprivation was a government official responsible for determining, under the standards, of a narrowly drawn statute, that it was necessary and justified in the particular instance.<sup>126</sup>

The list designating SDGTs under Executive Order 13224 includes individuals and entities beyond the Consolidated List under Resolution 1267. Consequently, individuals challenging their domestic listing under Executive Order 13224, may not even be listed on the Security Council's Consolidated List. Thus far, there have been instances where entities simultaneously sanctioned under the Executive Order 13224 and listed under Resolution 1267 have challenged their designation in the federal courts of the United States. In the three cases discussed below, not one mention of Resolution 1267 is made in the federal jurisprudence in analyzing the domestic implementation of Resolution 1267, nor is there a single mention of *jus cogens* norms. Rather, these cases are reviewed on purely domestic constitutional grounds. In reviewing the claims, courts have had access to substantive evidence by virtue of the United States

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124. *Paulson*, 568 F. Supp. 2d at 71.

125. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003).

126. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.D.C. 2002). Although the petitioner in *Holy Land* is not present on the Consolidated List for Resolution 1267, its challenge is analogous to the domestic challenge of any other party listed under regulatory regime created by Executive Order 13224. The Consolidated List, *supra* note 18.

undertaking the initial listing of these parties domestically, and then recommending their listing to the Resolution 1267 committee. The availability of such evidence has facilitated review on the merits, even if evidence is heard in camera. This is a luxury not afforded to legal orders that may be reviewing a claim from a party that it had not initially listed, and may lack access to a substantive justification for listing under Resolution 1267.

The Global Relief Foundation, a charity organization listed by the United States Department of the Treasury on October 18, 2002, and listed on the 1267 Consolidated list on October 22, 2002 challenged its designation domestically.<sup>127</sup> Ultimately, on appeal to the Seventh Circuit Court of Appeals, the court upheld the designation, while further finding that the consideration of *ex parte* evidence, and the lack of pre-deprivation hearing were constitutional.<sup>128</sup>

Aqeel Abdulaziz Al-Aqeel, listed by the United States Department of the Treasury on June 2, 2004, and listed on the 1267 Consolidated list on July 6, 2004 challenged his designation domestically.<sup>129</sup> The *Al-Aqeel* court upheld the listing, validating the lack of a pre-designation process and *ex parte* in camera review, while requiring an exhaustion of administrative remedies.<sup>130</sup> The court further found the post-designation process to be compliant with the requirements of due process under the Fifth Amendment of the United States Constitution.<sup>131</sup>

Saudi-based charity, Al Haramain Islamic Foundation, was targeted for sanctions by the United States on September 9, 2004.<sup>132</sup> The U.S.-based branch of Al Haramain Foundation was then listed on the Resolution 1267

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127. The Consolidated List, *supra* note 18; Press Release, U.S. Dep't of the Treasury, Treasury Department Statement Regarding the Designation of the Global Relief Foundation (Oct. 18, 2002), available at <http://www.treasury.gov/press-center/press-releases/Pages/po3553.aspx>.

128. *O'Neill*, 315 F.3d at 754.

129. The Consolidated List, *supra* note 18; Press Release, U.S. Dep't of the Treasury, Additional Al-Haramain Branches, Former Leader Designated by Treasury as Al Qaida Supporters Treasury Marks Latest Action in Joint Designation with Saudi Arabia (June 2, 2004), available at <http://www.treasury.gov/press-center/press-releases/Pages/js1703.aspx>.

130. *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 72 (D. D.C. 2008).

131. *Id.* at 71.

132. Press Release, U.S. Dep't of the Treasury, U.S.-Based Branch of Al Haramain Foundation Linked to Terror Treasury Designates U.S. Branch Director (Sept. 9, 2004), available at <http://www.treasury.gov/press-center/press-releases/Pages/js1895.aspx>.

Consolidated List on September 28, 2004.<sup>133</sup> Like *Al-Aqeel* and *Global Relief Foundation*, the court in *Al Haramain* found sufficient due process was satisfied within the Executive Order 13224 Regime.<sup>134</sup>

In their totality, *Al-Aqeel*, *Global Relief Foundation*, and *Al Haramain* have amounted to an indirect review of Resolution 1267. In theory, the United States could be in violation of UNC Article 25. However, this has not yet happened.

The availability of substantive evidence for review warrants mention. The United States could hypothetically lack compelling substantive evidence to support its deprivation of due process in reviewing claims by parties brought in the future; particularly, parties that the United States did not initially request for listing to the 1267 Committee. While this has not yet occurred, it could provide a scenario where those conducting administrative and judicial review would be tasked with reconciling national due process standards with potentially deficient supporting substantive evidence.<sup>135</sup> This could further entail the potential infeasibility of unilaterally offering redress to the listed party.<sup>136</sup> The value of substantive evidence for supporting listing cannot be understated, as it risks limiting the scope of review by courts considerably. Notably, in deciding *Kadi*, the Court of First Instance and European Court of Justice were incapable of truly evaluating the substantive merits of listing, due to the absence of actual records and evidence justifying a listing that was initiated by a party outside of their legal order (in that case, the United States).<sup>137</sup>

Critics of the Resolution 1267 Regime have acknowledged the potential for regional and national court judgments to challenge Security Council sanctions, potentially overturning implementation.<sup>138</sup> While these eventualities have been realized in other legal orders, practice within the United States remains both dualist and compliant, as indirect judicial

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133. The Consolidated List, *supra* note 18.

134. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233, 1254 (D. Or. 2008) (holding that the legal entity listed was afforded sufficient due process for the purposes of the Fifth Amendment).

135. *See supra* Part II.

136. *See supra* Part III.

137. Case T-306/01, *Yusuf & Al Barakaat Int'l Found. v. Council and Comm'n*, 2005 E.C.R. II-3533, ¶ 191; Case T-315/01, *Kadi v. Council and Comm'n*, 2005 E.C.R. II-3649; Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-635 (annulling EC regulations implementing Resolution 1267, the court effectively claimed a right to review the substantive evidence listees as part of affording an effective remedy).

138. WATSON INSTITUTE, *supra* note 20, at 7-8.

review of Resolution 1267 implementation has yet to run afoul of obligations under Article 25 of the United Nations Charter.

#### IV. THE IMPLICATIONS OF DUALIST IMPLEMENTATION OF RESOLUTION 1267

##### A. *Domestic Legitimacy Vested through Greater Legal Process*

###### 1. Legitimacy Through Judicial Procedure

Central to the criticism of the 1267 Regime is a persistent perception of unfairness, including displeasure with due process standards.<sup>139</sup> The United Nations Office of Legal Affairs has further cited a lack of transparency and accessibility as threats to the credibility and effectiveness of the Resolution 1267 Regime.<sup>140</sup> Even if the 1267 Committee procedures have improved, including the appointment of an Ombudsperson, the body of evidence relied upon in listing remains largely confidential, and delisting requests continue to lack independent judicial review.

In distinguishing United Nations practice under Resolution 1267 from domestic practice under Executive Order 13224, the repeated lack of successful challenges to listing in the United States reflects continued harmony with the Security Council, while simultaneously affording substantially greater process than that offered by the United Nations. The quality of review in the United States has further been contingent on the fact that challenging parties were originally listed by the 1267 Committee pursuant to the request of the United States. This creates a scenario where the United States may reference and consider substantive evidence in a domestic challenge to listing that may otherwise be unavailable to other countries within the Resolution 1267 Regime.<sup>141</sup>

While the appointment of the Ombudsperson at the United Nations level acts to increase communication and transparency, it is not a substitute for independent judicial review. Challenging listing under Executive Order 13224 combines an initial administrative process with an opportunity for judicial review that is absent within the United Nations. In the United States, the quality of due process has generally yielded to the urgency of security interests. Significant hurdles for any claimant include the

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139. *Id.* at 7.

140. FASSBENDER, *supra* note 94, at 5-6.

141. By virtue of the fact that parties challenging listing domestically within the United States were initially listed by the United States. A notable distinction from the *Kadi* case.

constitutionality of denying pre-deprivation hearing, the admission of in camera evidence, and the broad deference afforded by federal judges to administrative findings.<sup>142</sup> While the outcomes for those challenging listing domestically have not favored the claimants, the greater quality of process provided for in the United States vests asset freezing within the United States with an arguably greater level of legitimacy.

Specifically, challenging Executive Order 13224 within the federal courts of the United States is at minimum, regardless of outcome, independent judicial review.<sup>143</sup> This is in stark contrast to United Nations practice where delisting challenges lack independent judicial review, instead falling under the auspices of the Security Council, both the promulgating and reviewing power under Resolution 1267.<sup>144</sup>

In essence, the argument can be made that independent review is process that equates to substance, vesting challenges to terror asset freezing with legitimacy. The United Nations's current review process simply cannot match that of the United States, absent creation of its own independent judicial framework.<sup>145</sup> This notion that subjective perceptions of legitimacy

142. See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 68, 76 (D.D.C. 2002); *Global Relief Found., Inc., v. O'Neill*, 207 F. Supp. 2d 779, 808 (N.D. Ill. 2002); Nicole Nice-Petersen, *Justice for the "Designated": The Process that is due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L. J. 1387, 1388 (2005) (noting that exigent security circumstances result in greater deference to the Executive); Robert E. O'Leary, *Improving the Terrorist Finance Sanctions Process*, 42 N.Y.U. INT'L L. POL. 563 (2010) ("Under the current process, judicial review is 'essentially futile' since courts use the arbitrary and capricious standard of review and give extreme deference to executive actions related to national security and foreign policy." (citing Danielle Stampely, Comment, *Blocking Access to Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire an Attorney?*, 57 AM. U. L. REV. 683, 719-20 (2008))).

143. U.S. Const. art. III (establishing a Judicial Branch, independent from the Executive Branch tasked with implementing Resolution 1267).

144. Review is conducted by the Resolution 1267 Committee, a subsidiary body of the United Nations Security Council, composed of Security Council members. *Committee Guidelines*, *supra* note 22, ¶ 7;

Direct[ing] the [1267] Committee to continue to work, in accordance with its guidelines, to consider delisting requests of Member States for the removal from the Consolidated List of members and/or associates of Al-Qaida, Usama bin Laden, or the Taliban who no longer meet the criteria established in the relevant resolutions, which shall be placed on the Committee's agenda upon request of a member of the Committee. . . .

S.C. Res. 1904, ¶ 22 U.N. Doc. S/RES/1904 (Dec. 17, 2009).

145. The creation of a judicial review mechanism has been explored by commentators. See, e.g., Jared Genser & Kate Barth, *When Due Process Become Dangerous: The Security*

are rooted in procedural or substantive processes is neither new, nor novel, but is clearly applicable to the Resolution 1267 Regime.<sup>146</sup> While the prospect falls outside the scope of this article, it also bears mentioning that any court created within, or parallel to the Security Council poses significant challenges within the United Nations legal order. In addition, should the Security Council decide to create a court, this fledgling tribunal would likely lack the established procedural processes, jurisprudence, and perceived legitimacy of a long functioning national legal order. A newly established international legal framework would face obstacles stemming from an ongoing resistance of states to share substantive evidence in the form of sensitive intelligence. This issue of available substantive evidence continues to restrict and complicate review of Resolution 1267 related listing at the 1267 Committee, and would likely continue to complicate matters should a tribunal be established. While the availability of substantive evidence also affects review within regional or national legal orders, review within the United States has not been profoundly hindered thus far.

While review of implementing measures in United States courts risks potential conflicts with obligations under UNC Article 25, its ability to vest the otherwise extra-legal processes of Resolution 1267 with the legitimacy of a proper hearing from an independent judiciary, at minimum, aids the legitimacy and transparency of Resolution 1267's domestic implementation.

## 2. Access to Substantive Evidence in Domestic Review as a Unique Convenience

The legitimacy of domestic implementation of Resolution 1267 within the national legal order of the United States is further bolstered by a feature critical to courtroom challenges thus far. Those challenging listing in the

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*Council 1267 Regime and the Need for Reform*, 33 B.C. INT'L & COMP. L. REV. 1 (2010) (proposing the creation of an independent tribunal with the power to hear delisting requests and issue binding delisting decisions); Michael Bothe, *Security Council's Targeted Sanctions Against Presumed Terrorists*, 6 J. INT'L CRIM. JUST. 541, 553 (2008) ("It is somewhat difficult to imagine the Security Council establishing an independent tribunal to review its decisions.").

146. Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275, 277 (2008) ("Thomas Franck, for example, presents a subjective concept of legitimacy that turns on the perceptions, beliefs, and expectations of those to whom the rules are addressed. Rules that are perceived as both procedurally and substantively just exert a compliance pull on states, even in the absence of enforcement." (citing THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995))).

United States were actually listed domestically and subsequently recommended for listing to the Resolution 1267 Committee by the United States.

While evidence may remain secret and reviewed in camera by United States courts, the potential for a domestic court to substantively review evidence is somewhat novel under Resolution 1267. Substantive review has occurred in cases challenging implementation of Resolution 1267 under Executive Order 13244 by virtue of the United States having originally listed the claimant parties. As a consequence of this initial domestic listing, and subsequent recommendation for addition to the Consolidated List by the United States, substantive evidence is available to the government in reviewing claims. In comparison, a legal order that is not responsible for an initial listing may enter into an untenable position should a national challenge their placement on the Consolidated List in a national court. Under this scenario, it is possible that a national court may have limited, if any, access to substantive evidence justifying placement on the Consolidated List. As such, a court may have little, if any capability to review the substantive merits of a claim.

In the United States, there has not yet been a challenge by a party that was not approved for domestic listing prior to appearance on the Resolution 1267 Consolidated List. Should such a scenario arise, a court may struggle with assessing substantive evidence to support listing, absent adequate intelligence collection, or sufficient cooperation in receiving evidence from a state initially advocating the listing. For now, the availability of substantive evidence to domestic courts remains a convenience afforded to the United States that the European Court of Justice notably lacked in rendering the *Kadi* judgment.<sup>147</sup> In fact, the European Court of Justice (ECJ) in *Kadi* was limited to annulling regulations implementing Resolution 1267, rather than providing substantive review, due to a lack of available evidence justifying listing. Simply stated, the ECJ's approach was limited, as it could not review the merits of substantive evidence to which it lacks access.

Ultimately, the prospect of a domestic case in the United States where there is insufficient evidence available to justify listing remains uncertain. The likelihood of a substantive lack of evidence is not ascertainable and remains contingent on United States intelligence and information gathering

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147. See Case T-306/01, *Yusuf & Al Barakaat Int'l Found. v. Council and Comm'n*, 2005 E.C.R. II-3533, ¶ 319; Case T-315/01, *Kadi v. Council and Comm'n*, 2005 E.C.R. II-3649; Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-6351, ¶ 378 (annulling regulations implementing Resolution 1267).

for parties present on the Consolidated List. Given governmental secrecy, it is difficult to ascertain the scope and availability of intelligence justifying listing for these parties. Finally, should review be undertaken without sufficient evidence to render a judgment against the claimant, a domestic court could potentially rule implementation under Executive Order 13224 as unconstitutional, and as such, invalid. This would likely lead to an outcome contravening the requirements of Resolution 1267, culminating in a violation of international obligation under Article 25 of the United Nations Charter.

While dualist implementation of Resolution 1267 by the United States risks consequent conflict with Security Council primacy, the retention of autonomous discretion has actually remained harmonious while vesting domestic implementation of Resolution 1267 with a legitimacy lacking in United Nations practice. A formal hearing, testimony, the taking of evidence, established procedural rules, and judges independent of the implementing body, provide a quality of process, legitimacy and transparency to Executive Order 13224 simply lacking at the Security Council level. Thus far, United States practice implementing the Resolution 1267 Regime has managed to comply with UNC Article 25 while vesting targeted sanctions with enhanced transparency, more defined procedure, and independent judicial review, further legitimizing targeted sanctions.

*B. Shifting the Burden for Reform: The International Implications of Dualist Implementation*

While dualist implementation has vested Resolution 1267 with legitimacy within the constitutional framework of the United States, implementation outside the United States has not been as harmonious with regional or national due process standards.<sup>148</sup> In contrast to the jurisprudence of the ECJ, challenges in the United States have neither annulled implementation, nor evaluated asset freezing in the broader

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148. See, e.g., Case T-306/01, Yusuf & Al Barakaat Int'l Found. v. Council and Comm'n, 2005 E.C.R. II-3533; Case T-315/01, Kadi v. Council and Comm'n, 2005 E.C.R. II-3649; Joined Cases C-402 & 415/05P, Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 2008 E.C.R I-6351; U.N. Human Rights Comm., Sayadi v. Belgium, Comm'n No. 1472/2006, ¶ 2.4, U.N. Doc. CCPR/C/94/D/1472/2006 (2008) (noting that the proceedings were brought before the UNHRC after the domestic proceedings found due process violations, but was unable to afford a suitable remedy). Given the proclaimed perpetual nature of the so-called "War of Terror," this remains a future possibility, should Resolution 1267 continue to operate for an extended period, or in perpetuity.

context of an obligation to the Security Council or United Nations Charter.<sup>149</sup>

The standards for due process afforded under Resolution 1267 have proven harmonious under judicial scrutiny in the United States. This is indicative, at minimum, of successful vetting of Resolution 1267's requirements prior to passage, specifically the notion that its requirements would be constitutionally sound. In actuality, Resolution 1267 and the consequent Executive Order 13224 are not even novel within the legal order of the United States, as evidenced by a previous domestic sanctions regime instituted during the Clinton Administration for the freezing of terror related assets.<sup>150</sup> The Clinton Administration, like the Bush Administration,<sup>151</sup> exercised executive powers under the IEEPA to freeze assets of individuals, including terrorists attempting to interfere in the Middle East peace process.<sup>152</sup> Like Executive Order 13224, the Clinton Administration implementation of Executive Order 12947 targeted individuals and entities, affording similar procedural and due process protections. Thus far, the United States appears to have sacrificed little, if

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149. *See, e.g.*, *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 71-72 (D.D.C. 2008); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233 (D. Or. 2008); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 72 (D. D.C. 2008); *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002);

The most highly visible and significant decision to date was made by the highest court in the European Union, the European Court of Justice (ECJ), which decided in favor of two legal challenges on 3 September 2008 and annulled the European Union regulation implementing UNSCR 1267 with specific reference to the two cases. In its judgments in the cases of *Kadi and Al Barakaat* (joined cases C-402/05 P and C-415/05 P), the Court distinguished between the imposition of the sanctions by the 1267 Committee and the implementation of the sanctions at the EU level, holding that the latter are bound by fundamental rights when implementing the sanctions, and that therefore they must ensure that the persons affected have the right to be informed of the reasons for their listing and the right to contest those reasons before an independent body.

BIERSTEKER & ECKERT, *supra* note 4, at 7-8.

150. Exec. Order No. 12,947, 3 C.F.R. 319 (1995); *see also* Exec. Order No. 12,978, 60 Fed. Reg. 54, 579 (Oct. 21, 1995) (noting the title of the order "Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers").

151. The administration of George W. Bush (2001-2009).

152. Exec. Order No. 12,947, 3 C.F.R. 319 (1995).

any, due process protection, which it would have otherwise favored in the absence of Resolution 1267.<sup>153</sup>

While outcomes have not been positive for those challenging their listing domestically, access to domestic review of substantive evidence has afforded greater protections than at the United Nations. While domestic administrative review lacks transparency, the federal judiciary continues to grant great deference to administrative findings.<sup>154</sup> Even if the prospects for a successful challenge to Executive Order 13224 appear remote, there is certainly legitimacy to be derived from formal hearings and substantive review.

In reviewing struggles with implementation within other legal orders, especially within the European Union, the quality of process and potential for competent review, flowing from Resolution 1267, has proven troublesome outside the United States. This has essentially created a scenario where Member States, or in the case of the EU, a regional order that is not a “Member State,” must embrace a nationally or regionally deficient due process standard, or come into conflict with the Resolution 1267 Regime.

Thus, United States influence in establishing the Resolution 1267 Regime, suggests a scenario where if not for harmonious due process standards, the Resolution would have been subject to veto in the Security Council. In voting for passage of Resolution 1267, the United States demonstrated acquiescence to standards capable of harmonious domestic implementation. In comparison to United States dualism, the approach of the EC diverges greatly, as implementation within the regional legal order amounts to an “automatic transposition of any list of persons or entities drawn up by the Sanctions Committee in accordance with the applicable

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153. Compare Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) with Exec. Order No. 12,947, 3 C.F.R. 319 (1995).

154. See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.D.C. 2002); *O'Neill*, 207 F. Supp. 2d at 808; *Paulson*, 568 F. Supp. 2d at 71-72; *Al Haramain Islamic Found. Inc.*, 585 F. Supp. 2d 1233; Nice-Petersen, *supra* note 142, at 1388 (noting that exigent security circumstances result in greater deference to the Executive); O'Leary, *supra* note 142, at 563 (“Under the current process, judicial review is “essentially futile” since courts use the arbitrary and capricious standard of review and give extreme deference to executive actions related to national security and foreign policy.” (citing Danielle Stampley, Comment, *Blocking Access to Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire an Attorney?*, 57 AM. U. L. REV. 683, 719-20 (2008))).

procedures, without any autonomous discretion whatsoever being exercised. . . .”<sup>155</sup>

In practice, EC implementation has diverged from United States practice as the EC ceded the prospect for autonomous review via monist implementation while apparently maintaining a higher standard of due process, and lacking access to sufficient substantive evidence justifying the listing of claimant parties. While the Court of First Instance reiterated the transpositional nature of Resolution 1267 implementation, this tension between a lack of autonomous review and due process requirements is evident in the ECJ’s annulment of regulations implementing Resolution 1267 in the *Kadi & Al Barakaat International Foundation*.<sup>156</sup>

In the United States, implementation of Resolution 1267 through Executive Order separates domestic law from international obligation, resulting in the retention of autonomous review. While judiciaries outside of the United States have demonstrated a willingness to engage, or at least acknowledge root international obligations associated with the Resolution 1267 Regime, the United States has remained compliant with Resolution 1267 while generally omitting even an acknowledgment of the United Nations or the Security Council in its jurisprudence.<sup>157</sup>

Prior to challenges to implementation of Security Resolution 1267 within the EU, the European Court of Human Rights had declared “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.”<sup>158</sup> This willingness to subordinate a regional order to the supremacy of the United Nations Charter has apparently yielded in response to the challenges under the Resolution 1267

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155. Case T-306/01, *Yusuf & Al Barakaat Int’l Found. v. Council and Comm’n*, 2005 E.C.R. II-3533, ¶ 214 (discussing Resolution 1267 implementation via Regulation [881/2002]).

156. Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R I-6351, ¶ 378.

157. *Compare Paulson*, 568 F. Supp. 2d at 71-72; *Al Haramain Islamic Found., Inc.*, 585 F. Supp. 2d 1233; *O’Neill*, 207 F. Supp. 2d 779 (avoiding discussion of international obligation) *with* Case T-306/01, 2005 E.C.R. II-3533; Case T-315/01, *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3649; Joined Cases C-402 & 415/05P, 2008 E.C.R I-6351; (In re *Al-Jedda*) *v. Sec’y of State for Def.*, [2007] UKHL 58, [2008] 1 A.C. 332; *Abdelrazik v. Minister of Foreign Affairs*, [2009] F.C. 580 (Can.).

158. *Behrami v. France, Saramati v. France*, App. Nos. 71412/01, 78166/01, 45 Eur. H.R. Rep. SE10 (2007), ¶ 149.

Regime. Such is the case in *Kadi*.<sup>159</sup> In *Kadi*, the ECJ annulled the European Community's implementation of the Resolution 1267 Regime, ruling that it violated EU norms for fair procedure and protection of property.<sup>160</sup> It has been claimed that this pluralistic approach stands as a challenge to the supremacy of the United Nations Security Council, while further placing a burden upon the Security Council to further reform Resolution 1267 Regime.<sup>161</sup>

While the full implications posed by *Kadi* to the EC legal order fall outside the scope of this article, the annulment of the relevant implementing regulations is demonstrative of the difficulties posed by the perceived unsuitable quality of due process currently afforded by Resolution 1267. The approach of the ECJ in annulling regulations, rather than engaging in substantive review of the reasons for listing, further demonstrates the continued issue of access to evidence posed by the secretive nature of Resolution 1267 listing practices. This issue of deficient evidence has not yet arisen in reviewing listing within the United States, partly due to the convenience that claimant-parties have all been recommended for listing by the United States, suggesting the availability of a body of intelligence justifying listing that may not be otherwise widely shared within the Resolution 1267 Regime.

In the absence of a challenge to Security Council primacy by the United States, the greatest challenges to Security Council authority and pressure to reform the Resolution 1267 Regime has emerged from a legal order that implements Security Council resolutions in a monist fashion. While the EC is itself a creature of international law and an entity that has historically taken international obligations quite seriously, its response to Resolution 1267 in *Kadi* proves to be sharply dualist.<sup>162</sup> As has been recently asserted,

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159. Case T-306/01, 2005 E.C.R. II-3533; Case T-315/01, 2005 E.C.R. II-3649; Joined Cases C-402 & 415/05P, 2008 E.C.R. I-6351. See generally Gráinne de Búrca, *The European Court of Justice and the International Order After Kadi*, 51 HARV. INT'L L.J. 1 (2010) (giving an extensive analysis of the post *Kadi* legal order).

160. Joined Cases C-402 & 415/05P, 2008 E.C.R. I-6351.

161. de Búrca, *supra* note 159, at 5 n.17 (“Others may view [*Kadi*] as a message from the ECJ to the U.N. Security Council about the need for reform of the sanctions regime.”); *id.* at 49 (“[T]he ECJ has chosen to use the much-anticipated *Kadi* ruling as the occasion to proclaim the primacy of its internal constitutional values over the norms of international law.”).

162. Fiona de Londras & Suzanne Kingston, *Rights, Security, and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe*, 58 A. J. COMP. L. 359, 402 (2010) (“Although the Community was treaty-based, and thus ostensibly a typical creature of international law, the ECJ lost no time in unilaterally

in rendering *Kadi*, the ECJ risks undermining its long held image as a virtuous international actor committed to international law, while further challenging the primacy of the United Nations Security Council.<sup>163</sup>

In advocating for, and subsequently implementing Resolution 1267 domestically, the United States embraced a regime with little likelihood of conflict with domestic due process standards, creating a scenario where the pressure for reform has emerged from a legal order that typically takes a more mindful approach to international obligations. This has further created a situation where dualist implementation, that largely avoids articulating any direct responsibility to the Security Council, has permitted for more adherent practice under Resolution 1267 than that of a legal order willing to transpose Security Council Resolutions. The United States remains dualist yet compliant, while EC implementation and subsequent review is initially monist, and ultimately, in conflict with the primacy of the Security Council.

While the United States is not always regarded as a model citizen within the international community, its compliance under Resolution 1267 may cast it as such in the narrow context of targeted sanctions. In contrast, and in consideration of the *Kadi* case and the annulment of EC implementing regulations, a legal order traditionally adherent to international obligations appears unintuitively out of step with the Security Council. However, a survey of the broader landscape suggests that Resolution 1267 is a burden on civil liberties, which the United States may be more willing to bear in comparison to other legal orders. In addition, the argument can be made that the legitimacy vested through independent judicial review, and accessibility to substantive evidence thus far, makes this burden more bearable than within other legal orders. In advocating for and willingly shouldering this burden, the United States has essentially shifted the demand for reform to the 1267 Regime to legal orders that favor greater protection for listed individuals.<sup>164</sup>

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declaring that the EEC Treaty was no ‘ordinary’ international treaty. . .”); de Búrca, *supra* note 159, at 3-4 (“It is all the more remarkable that a major judgment about the role of international law, which expresses important parts of its reasoning in chauvinist and parochial tones, was delivered not by a powerful nation-state, but by an international organization, which is itself a creature of international law.”).

163. de Búrca, *supra* note 159, at 1 (“[T]he ECJ’s approach risks undermining the image the EU has sought to create for itself as a virtuous international actor maintaining a distinctive commitment to international law and institutions.”).

164. This protection should be considered in an overall empirical manner, irrespective of a willingness to domestically review challenges to listing. With regard to a perceived mounting urgency for reform, see Christopher Michaelsen, *The Security Council’s Practice of Blacklisting Alleged Terrorists and Associates: Rule of Law Concerns and Prospects for*

V. RESOLUTION 1267 AS A RESTRAINT ON UNITED STATES  
UNILATERALISM

*A. International Obligation as a Limitation on Domestic Redress When in  
Compliance with Resolution 1267*

In comparison to Resolution 1373, Resolution 1267 carries strict implementation requirements, resulting in a restriction on unilateral capacity to remove individuals and entities from the Consolidated List. States must freeze assets in accordance with the Consolidated List or risk violation of Charter Obligations under Article 25.<sup>165</sup> Even if a state unilaterally acts to unfreeze assets, in violation of Resolution 1267, the success of this unilateral action is logistically hampered by other states remaining observant of Resolution 1267.<sup>166</sup>

*B. Sayadi and the Human Rights Concerns of Limited Redress*

Domestic claims launched within the United States, challenging listing and asset freezing under Executive Order 13224, have been unsuccessful thus far. Should a party eventually succeed, the viability of a remedy outside of successful lobbying for delisting by the 1267 Committee may prove elusive. While the domestic legal order of the United States may be poised to violate obligations under Article 25 of the United Nations Charter, the scope of remedy afforded by the United States is practically limited to unfreezing only the assets that it controls. The United States may opt to unfreeze the assets of a listed individual unilaterally, but may find itself beholden to other states in order to perform such a feat.

Since the creation of Resolution 1267's Consolidated List, over five hundred individuals or entities have been listed.<sup>167</sup> Those subjected to asset

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*Reform*, 8 N.Z. J. PUB. & INT'L L. 71 (2010) (arguing that a lack of political will among U.N. Member States in the Security Council has so far prevented comprehensive reform, but the need for reform is becoming increasingly urgent).

165. U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

166. Article 25 of the United Nations Charter requires Member States to carry out Resolution 1267 in accordance with the Security Council. In addition, obligations under the United Nations Charter are supreme to all other treaty obligations of Member States. U.N. Charter arts. 25; *id.* at 103 ("In 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.").

167. The Consolidated List, *supra* note 18 (noting that of the over 500 listed parties, approximately 100 are entities, the rest are individuals).

freezing have not only been deprived absent pre-designation hearing and notice, they are often minimally informed of the facts leading to their listing.<sup>168</sup>

In practice, extralegal processes are ultimately governed by political wrangling and negotiation, rather than review based in a discernible legal process. Listed parties have relied heavily on the willingness of their state of residence or citizenship to advocate on their behalf in achieving an agreement for removal from the Consolidated List.<sup>169</sup>

These tensions are evident in the case with Nabil Sayadi and his wife/secretary Patricia Vinck. Sayadi, a Lebanese born resident of Belgium, founded and directed the European branch of the Global Relief Foundation. The United States Federal Bureau of Investigation accused this Islamic charity of having ties to terrorist cells.<sup>170</sup> When Belgium provided their names to the Resolution 1267 Committee for listing, neither had been arrested nor convicted of any terror-related offense. Moreover, at the time of Sayadi's listing, only states could petition for delisting. What followed is a scenario where a party, once added to the Consolidated List, could not be

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168. There is typically little advance consultation with affected Member States (of residence or nationality of the listed individual), particularly if they are not currently serving on the Security Council. Only those countries that are current members of the Security Council automatically receive and are able to review statements of case, but not all Member States. This raises questions about the transparency of the listing process, with some Member States arguing that a version of the statement of case (a redacted version, deleting sensitive information) should be made more widely available.

WATSON INSTITUTE, *supra* note 20, at 28.

169. Jared Genser & Kate Barth, *When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform*, 33 B.C. INT'L & COMP. L. REV. 1, 2 (2010) (citing WATSON INSTITUTE TARGETED SANCTIONS PROJECT, STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 37 (2006), available at [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf)) (“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.”).

170. Such ties include allegations of funding and involvement in the bombings of United States embassies in Kenya and Tanzania. See Press Release, U.S. Dep't of the Treasury, Treasury Department Statement Regarding the Designation of the Global Relief Foundation (Oct. 18, 2002), available at <http://www.treasury.gov/press-center/press-releases/Pages/po3553.aspx>; 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).

removed by the state that initially recommended it for listing (Belgium). This highlights the potential limits on unilateralism evident in the Resolution 1267 Regime. Once a party is listed, delisting becomes inherently extralegal, as it is not the product of judicial decision, but rather that of international politicking within the United Nations.

While Belgian courts eventually cleared Sayadi of having Al-Qaeda ties, this did not unfreeze his assets, given the procedure for delisting under Resolution 1267. Thus, Resolution 1267 rendered Belgium's domestic legal order ineffective to provide a palatable legal remedy to listed individuals. This placed Belgium in a position where only convincing 1267 Committee members to delist could produce a just outcome. Thus, the delisting of Sayadi, while containing a domestic judicial element, ultimately yielded to political bargaining and persuasion.

In practice, domestic review by the very state that advocated for listing under Resolution 1267 could not unfreeze Sayadi's assets. A political appeal to the 1267 Committee was the only practical, and eventually effective remedy.<sup>171</sup> It took over four years from the Belgian ruling, finding no justification for listing, until Sayadi and Vinck were removed from the Resolution 1267 Consolidated List.<sup>172</sup>

*Sayadi* has further introduced the concept of holding states liable for overeager and premature advocacy listing under Resolution 1267. The Human Rights Committee (HRC), limited its analysis to violations of the International Covenant on Civil and Political Rights (ICCPR).<sup>173</sup> In doing so, it ultimately found Belgium liable for the initial listing as a violation of Sayadi and Vinck's rights under the Covenant.<sup>174</sup>

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171. *UN committee removes 8 from Taliban sanctions list*, REUTERS AFRICA (Oct 27, 2009), available at <http://af.reuters.com/article/idAFN2726283620091027> (reporting that the "delisted individuals were Patricia Rosa Vinck and Nabil Sayadi, a husband and wife living in Belgium . . .").

172. *Id.*

173. 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) (claiming violations of Articles 2, 4, 12, 14, 15, 17, 18, 22, 26, and 27 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)).

174. U.N. Human Rights Comm., *Sayadi v. Belgium*, Commc'n No. 1472/2006, ¶ 3.4 ("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.").

Even if Resolution 1267 required Belgium to propose suspected terrorists for listing, the HRC found Belgium was at fault to the degree that suggestion for listing was premature.<sup>175</sup> While Belgium, or any other state acting unilaterally, lacks the subsequent capability to delist, the state was responsible to do what was within its power to achieve delisting, compensate the wronged parties, and to “ensure that similar violations do not occur in the future.”<sup>176</sup> Implicit in this decision is the notion that Resolution 1267 operates as an inherent hindrance to unilateral action in delisting, and a ceding of sovereignty over a state’s own residents or nationals.

Generally, states that are home to listed parties are unable to offer an effective domestic legal remedy, as all delisting decisions rest with the 1267 Committee. A state unwilling to breach international obligations under Resolution 1267 remains solely bound to discretion of the 1267 Committee in providing justice to wrongly listed parties. In addition, even if a state is willing to breach its obligations under the Resolution 1267 Regime, its capabilities to unilaterally unfreeze assets are hindered by the cooperation of all other states remaining compliant within the Resolution 1267 Regime.

In comparison to Belgium’s *Sayadi* predicament, if a domestic court within the United States were to rule the implementation of Resolution 1267 to be disharmonious with constitutional due process guarantees, the claimant would be granted redress under the national constitution, likely in conflict with obligations under UNC Article 25. While ruling Executive Order 13224 unconstitutional implies a breach of Article 25, overruling domestic implementation of Resolution 1267 would not necessarily guarantee an effective unfreezing of all relevant assets. The ability of the United States, or any other Member Nation, to unfreeze assets targeted by the Resolution 1267 Regime would likely require interstate cooperation, absent a monopoly of control over all assets relevant to the specific case by the acting state. Basically, a state cannot unilaterally unfreeze assets which it lacks control over, even if it wants to.

Even if the United States is poised to potentially overrule Resolution 1267 implementation in the future, the initial ceding of sovereignty implicit in Resolution 1267’s passage would linger beyond any domestic demise of

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175. U.N. Charter, art. 103 (stating the supremacy of the United Nations Charter to all other international obligations.).

176. U.N. Human Rights Comm., *Sayadi v. Belgium*, Commc’n No. 1472/2006, ¶ 10.3, 12, 13, U.N. Doc. CCPR/C/94/D/1472/2006 (2008) (“[E]ven though the State party is not competent to remove the authors’ names from the United Nations and European lists, it is responsible for the presence of the authors’ names on those lists.”).

its implementation. Ultimately, the ability of the United States to both disregard its UNC Article 25 obligation, and successfully unfreeze assets beyond its immediate control, would likely require a triumph of politics over law. Specifically, the unfreezing of assets, absent the formal consent of the Resolution 1267 Committee, would depend on a successful exercise of political influence or perhaps coercion upon relevant states to transgress their own obligations under Article 25.

*C. The Politicization of Delisting and Limits of United States  
Unilateralism with regard to Afghan Peace and Reconciliation*

While United States implementation of Resolution 1267 remains dualist, this does not afford the luxury of unhindered unilateral action within the context of this sanctions regime. Even if unwilling to subordinate its domestic constitutional order to binding Security Council Resolutions, the United States, in approving the creation of the 1267 Regime, effectively ceded sovereignty irrespective of its own discretion over domestic implementation. The United States must engage the 1267 Regime in pursuing political or military objectives where such goals are intertwined with the content of Resolution 1267. Thus, the United States' courts may be postured to violate the United Nations Charter obligation under Article 25, but national action is still restricted by the very virtue of the 1267 Regime's existence as it cannot unilaterally unfreeze assets in the pursuit of its self-interested agenda.<sup>177</sup>

These limitations on unilateral action are evident in tensions arising from the controversy concerning the delisting of Taliban and those allegedly reformed-Taliban. In pursuing military or political objectives stemming from its leadership role in NATO operations, the United States may exert significant influence within the Security Council, but must still contend with the divergent interests of other Security Council members. As the United States' former Special Representative for Afghanistan and Pakistan, Richard Holbrooke stated in January 2010: "[L]et me remind you that this is not an American decision. It's a UN Security Council decision, and other nations have a vote, and indeed four other nations have a veto on this issue.

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177. Ambassador Richard Holbrooke, U.S. Special Representative for Afghanistan and Pakistan, London Conference on Afghanistan, Answers questions on U.S. efforts in Afghanistan and Pakistan (Jan 28, 2010) *available at* <http://www.america.gov/st/texttrans-english/2010/February/20100204115213xjsnommis0.5005152.html> (noting unilateral delisting is impossible since France, UK, China, and Russia have a veto on United States efforts to remove individuals and entities from the Consolidated List.).

So whatever the U.S. did, it would require the consent of other countries and I'm virtually certain that wouldn't be forthcoming anyway."<sup>178</sup>

In June of 2010, *The New York Times* reported the United Nations was accelerating efforts that could lead to the delisting of Taliban leaders from the Consolidated List.<sup>179</sup> The 1267 Committee sent a delegation to Kabul to study the Consolidated List and make recommendations for possible changes.<sup>180</sup> Delisting of former-Taliban members was previously employed as a political tactic to advance peace and reconciliation in Afghanistan. For example, in January 2010, five Taliban associated individuals were conveniently delisted prior to the London Conference on Afghanistan.<sup>181</sup>

In July of 2010, the *Washington Post* reported Afghan President, Hamid Karzai sought removal of up to 50 former Taliban officials from the Resolution 1267 Consolidated List.<sup>182</sup> In seeking to have former-Taliban figures delisted, the Karzai government was influenced by its desire for peace, reconciliation, and political settlement within Afghanistan.<sup>183</sup> Afghan outreach to the United Nations was met with calls for more evidence to demonstrate the reformed nature of these former-Taliban figures.<sup>184</sup> Overall, permanent members of the Security Council have taken different positions on broad-sweeping requests to delist Taliban associated individuals. While the United States has advocated consideration on a case-by-case basis, Russia and China have frequently objected to such efforts, citing their unique security concerns.<sup>185</sup>

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178. *Id.*

179. Rod Nordland, *United Nations Could Hasten Removal of Taliban Leaders from Terror Blacklist*, N.Y. TIMES, June 13, 2010, at A16, available at <http://www.nytimes.com/2010/06/13/world/asia/13afghan.html>.

180. *Id.*

181. *Id.*

182. Colum Lynch & Joshua Partlow, *Karzai to Push for Removing Up to 50 ex-Taliban Officials from U.N. Blacklist*, WASH. POST, July 12, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/11/AR2010071103505.html>.

183. *Id.*

184. *Id.*

185. Rod Nordland, *United Nations Could Hasten Removal of Taliban Leaders from Terror Blacklist*, N.Y. TIMES, June 13, 2010, at A16 (according to United States ambassador Karl W. Eikenberry); Mark Landler & Thom Shanker, *U.S. May Label Pakistan Militants as Terrorists*, N.Y. TIMES, July 13, 2010, at A4 ("But Mr. Karzai is eager to extend an olive branch to higher-level figures as well. His government wants to remove up to 50 of the 137 Taliban names on the United Nations Security Council's blacklist. Mr. Holbrooke, the special envoy to Pakistan and Afghanistan, said the administration-supported efforts to cull

Officials within the 1267 Committee have voiced resistance to delisting solely as a means of encouraging the peace process.<sup>186</sup> The Russian Federation, a permanent member of the Security Council and consequently, a permanent presence on the 1267 Committee, has frequently resisted removal of former-Taliban officials, citing scant evidence, and concern over the broader strategic role of the Taliban on Islamist movements outside of the region.<sup>187</sup> Russia also continues to resist delisting, citing concerns regarding Taliban-linked drug trafficking in its own territory.<sup>188</sup> This fixture within the 1267 Committee has also been reluctant to agree to removing names, even of deceased Taliban, arguing this could free funds for terror related purposes.<sup>189</sup> In contrast, the United States continues to advocate a policy of case-by-case review, favoring delisting for “[i]ndividuals who have cut ties with Al-Qaeda and accepted the Afghan constitution and given up the fight.”<sup>190</sup>

In October of 2010, Afghanistan’s new Peace Council called for removing individuals from the 1267 Sanctions list as a means of aiding peace talks.<sup>191</sup> Arsala Rahmani,<sup>192</sup> claimed that failure to delisting approximately 150 individuals under the 1267 Regime would be a stumbling block to negotiating Afghan peace.<sup>193</sup> In response, the United States Department of State cited the broadly cooperative requirements of delisting actions and an ongoing evaluation of the Consolidated List

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the list, but would approve names only on a case-by-case basis. Certain figures, like Mullah Omar, the Taliban leader, remain out of bounds, he said.”).

186. Colum Lynch & Joshua Partlow, *Karzai to push for removing up to 50 ex-Taliban officials from U.N. blacklist*, WASH. POST, July 12, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/11/AR2010071103505.html> (“Thomas Mayr-Harting, an Austrian diplomat responsible for overseeing the terrorism list, has made it clear that a specially charged U.N. committee he leads will not approve the delisting solely to boost the peace process. He has also voiced frustration that Afghanistan has not made a detailed case for delisting.”).

187. *Id.*

188. Louis Charbonneau, *U.N. Sanctions dropped against 5 senior Taliban*, REUTERS (July 30, 2010) available at <http://af.reuters.com/article/worldNews/idAFTRE66T4FZ20100730>.

189. *Id.*

190. *Id.* (quoting U.S. State Department spokesman P.J. Crowley).

191. Deb Reichmann, *Afghan peace council members want gesture from US*, ASSOCIATED PRESS, Oct. 12, 2010, available at <http://abcnews.go.com/International/wireStory?id=11862333>.

192. Member of the Afghan Peace Council and formerly a high level minister in the Taliban regime.

193. Deb Reichmann, *supra* note 191.

underway in collaboration with the United Nations, Member States, and the Security Council.<sup>194</sup>

Delisting considerations, in the interest of Afghan peace and reconciliation, reinforce the extra-legal and overtly political nature of the Resolution 1267 Regime. Members, notably the United States, in comparison to Russia and China, have taken divergent approaches toward broad delisting requests, likely reflecting a tension between security concerns and divergent stakes in Afghan security, reconciliation, and the success of NATO efforts.

The United States has an arguably greater interest than other Resolution 1267 Committee members in delisting as a tool toward securing Afghan peace and stability, insofar as the United States participation in NATO operations dwarfs that of other states.<sup>195</sup> However, as mentioned by former-Special Representative Holbrooke, the United States remains beholden to the overall Resolution 1267 Regime in pursuing delisting efforts tailored to serve these interests. Irrespective of its dualist implementation of Resolution 1267, the United States, by virtue of advocating for the creation of the Resolution 1267 Regime, has ceded sovereignty insofar as it cannot unilaterally delist in pursuit of its own military or political objectives. The United States may wield significant influence within the Security Council, but it remains bound to a necessity for cooperation in effective delisting under Resolution 1267.

## VI. CONCLUSION

The domestic implementation of Resolution 1267 by the United States is indicative of a national legal order unwilling to fully subordinate itself to the edicts of the United Nations Security Council, even if it has encouraged and approved of such edicts. The United States has retained autonomous discretion over implementation of Resolution 1267 insofar as it has reserved the ability to perform administrative and judicial review, independent of the Security Council. While this approach superficially suggests a threat to Security Council primacy, to some degree it has had the

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194. *Id.*

195. The ongoing War in Afghanistan includes approximately 130,432 NATO—International Security Assistance Force troops, including approximately 90,000 from the United States. Note that Russia and China are not NATO members and have no troops present. As for the other members of the Security Council's Permanent Five, the UK has 9,500 troops and France has 3,750. Figures dated Oct. 25, 2010. International Security Assistance Force (ISAF): Key Facts and Figures, *available at* <http://www.isaf.nato.int/images/stories/File/Placemats/25OCT10%20Placemat%20page%201,2,3.pdf>.

opposite effect, legitimizing asset-freezing mechanisms through enhanced process and substantive review, while simultaneously remaining compliant with obligations under Article 25 of the United Nations Charter.

To date, domestic courts within the United States continue to review Resolution 1267 implementation, and a successful challenge on constitutional due process grounds, does imply a potential violation of UNC Article 25. This has not yet occurred. While other legal orders have encountered frustrations with due process protection and a lack of available substantive evidence to support listing, the United States has avoided either dilemma by virtue of the convenience that challenging parties thus far were initially recommended for listing by the United States. This has afforded the availability of substantive evidence, enabling domestic courts to consider the merits for listing. This dynamic has vested domestic implementation within the United States with enhanced legitimacy, while further shifting the onus for reform of the Resolution 1267 Regime onto legal orders unable to reconcile internal due process requirements with the potential unavailability of substantive evidence.

Even if the United States has resisted subjugating its constitutional order to the demands of the Security Council, Resolution 1267 still represents a distinct ceding of sovereignty by the very virtue of the Regime's existence. In taking a proactive role in establishing the 1267 Regime, the United States remains bound to the determinations of the 1267 Committee as this body may practically inhibit unilateral action in the context of unfreezing assets, consequently frustrating the political or military objectives of the United States in its so-called War on Terror. Ultimately, the exercise of domestic discretion over Resolution 1267 implementation may place the Security Council under the scrutiny of United States courts, but this has neither resulted in a violation of UNC Article 25, nor has it amounted to a license for unrestricted unilateral action within the subject matter of the Security Council's 1267 Regime.