

WILLIAM BARTHOLOMEW

A Due Process Balancing Act: The United States' Influence on the U.N. al-Qaeda Sanctions Regime

59 N.Y.L. SCH. L. REV. 737 (2014–2015)

ABOUT THE AUTHOR: William Bartholomew served as Editor-in-Chief of the 2013–2014 *New York Law School Law Review*. He graduated from New York Law School, *magna cum laude*, in May 2014.

A DUE PROCESS BALANCING ACT

I. INTRODUCTION

One of the most significant challenges the United States faces in stemming the threat posed by global terrorist organizations is reconciling its avowed commitment to preserving and promoting civil liberties with its resort to deeply destructive and intrusive tools to combat that threat. Since launching a “Global War on Terror” in the wake of the September 11, 2001 attacks, the United States has publicly struggled with how to treat detained enemy combatants,¹ gather intelligence,² and pursue a program of targeted killings,³ while at the same time living up to the ideals that it espouses to the world.⁴

In addition to these more publicized means of addressing the threat, the United States also participates in a United Nations-instituted regime of targeted sanctions against individuals and entities with ties to al-Qaeda, the militant Islamist organization responsible for the September 11 attacks.⁵ This broad program, established in 1999 by U.N. Security Council Resolution 1267 (“1267 regime”), imposes an assets freeze, travel ban, and arms embargo on individuals and entities deemed to be associated with al-Qaeda.⁶ While the program allows for harsh penalties,⁷ it does not afford sanctioned parties recourse to impartial, independent judicial review at the U.N. level.⁸

-
1. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).
 2. Ron Wyden et al., *End the N.S.A. Dragnet, Now*, N.Y. TIMES, Nov. 26, 2013, at A25, available at <http://www.nytimes.com/2013/11/26/opinion/end-the-nsa-drag-net-now.html>.
 3. See generally *The Strategic Effects of a Lethal Drones Policy*, AM. SEC. PROJECT, <http://www.americansecurityproject.org/?s=the+strategic+effects+of+a+lethal+drones+policy&submit=> (last visited Apr. 25, 2015).
 4. See, e.g., Barack H. Obama, U.S. President, Speech to the Muslim World, Cairo (June 4, 2009), available at <http://www.nytimes.com/2009/06/04/us/politics/04obama.text.html> (“But I do have an unyielding belief that all people yearn for certain things: the ability to speak your mind and have a say in how you are governed; confidence in the rule of law and the equal administration of justice; government that is transparent and doesn’t steal from the people; the freedom to live as you choose. Those are not just American ideas, they are human rights, and that is why we will support them everywhere.”).
 5. See *Al-Qaeda*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/734613/al-Qaeda> (last visited Apr. 25, 2015).
 6. S.C. Res. 1267, ¶¶ 4–6, U.N. Doc. S/RES/1267 (Oct. 15, 1999). For more information on the al-Qaeda sanctions regime, see generally *Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities*, U.N. SEC. COUNCIL, <http://www.un.org/sc/committees/1267/index.shtml> (last visited Apr. 25, 2015).
 7. “[T]argeted sanctions can impinge upon several kinds of human rights. For instance, travel bans interfere primarily with freedom of movement, whereas financial sanctions have an impact on property rights, as well as possibly affecting a person’s privacy, reputation, and family rights.” WATSON INST. FOR INT’L STUDIES AT BROWN UNIV., STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 9 (2006) [hereinafter WATSON REPORT] (footnotes omitted), available at http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf.
 8. See, e.g., WATSON REPORT, *supra* note 7, at 6–7; BARDO FASSBENDER, TARGETED SANCTIONS AND DUE PROCESS 8 (Mar. 30, 2006), available at http://legal.un.org/ola/media/info_from_lc/Fassbender_study.pdf; Vanessa Baehr-Jones, *Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions*, 2 HARV. NAT’L SEC. J. 447, 467 (2011).

This deficiency creates a problem for many U.N. member states because, under article 25 of the U.N. Charter, members are required to implement the 1267 regime sanctions.⁹ How can a state that is committed to the principles of due process justify imposing these sanctions without judicial review? Some countries have allowed those subjected to these sanctions to challenge them in domestic courts.¹⁰ There is a worry, though, that such challenges could undermine the scheme of worldwide sanctions that the 1267 regime was enacted to implement.¹¹ Sanctions struck down by a particular country's legal system could lose their legal force in that country.¹²

A proposed solution is to create an independent, impartial adjudicatory body with the power to decide whether sanctions should be maintained against an individual or entity.¹³ While establishing such a body may not prevent those targeted by sanctions from bringing challenges in domestic court, it would help ensure that

9. 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.”).

10. For challenges to the implementation of U.N. sanctions in the United States, see *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965 (9th Cir. 2011); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008). For challenges to the implementation of U.N. sanctions in Europe, see, for example, *Case C-402/05, Al Barakaat Int’l Found. v. Council*, 2008 E.C.R. I-06351; *Bundesgericht [BGer] [Federal Supreme Court] Nov. 14, 2007*, 133 *ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II* 450 (Switz.); *Case T-253/02, Ayadi v. Council*, 2006 E.C.R. II-02139; *Al-Jedda v. Sec’y of State for Defence*, [2005] *EWHC (Admin.)* 1809 (Eng.).

11. See August Reinisch, *Should Judges Second-Guess the UN Security Council?*, 6 *INT’L ORGANIZATIONS L. REV.* 257, 284 (2009).

Any outside judicial review of acts of an international organization is likely to cast doubts on the obligatory character of such acts, in particular, if they are meant to be binding according to their internal rules. . . . This is particularly true if the judicial review is not exercised by an internal mechanism, but by external bodies such as national courts.

. . . .

If a national court finds fault with a UN Security Council resolution, the most likely outcome is that the resolution will be deprived of its binding force within that national legal system. . . . Inevitably, this leads not only to a weakening of the authority of the UN Security Council resolution but also to a fragmentation of the single obligatory character of such instruments.

Id.

12. *Id.*

13. See, e.g., Dominic Hoerauf, *The United Nations Al-Qaida Sanctions Regime After U.N. Resolution 1989: Due Process Still Overdue?*, 26 *TEMP. INT’L & COMP. L.J.* 213, 230 (2012) (“It would be extremely beneficial to elevate the status of the [Ombudsperson] from a quasi-decision-maker to a de jure-decision-maker in an effort to establish a truly independent review.”); 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, 37 (2010) (“An independent tribunal composed of security-savvy judges and selected by the [U.N. Security Council], which has the power to hear target complaints and issue binding delisting decisions on the Sanctions Committee, constitutes the mechanism best-suited to the task.”); Baehr-Jones, *supra* note 8, at 489 (“Judicial review at the international level would help prevent domestic challenges to the implementation of the sanction and preserve the legitimacy of the sanctions regime.”); WATSON REPORT, *supra* note 7, at 44–45; FASSBENDER, *supra* note 8.

A DUE PROCESS BALANCING ACT

the 1267 regime sanctions are only maintained against those who deserve them by giving those targeted significant due process protection at the U.N. level.¹⁴

The creation of such a body, though, is doubtful. The United States—a permanent member of the Security Council with the ability to veto any Security Council decision—would likely oppose it because such a reform would not serve the United States’ political or tactical interests. Moreover, it is not clear that such an adjudicatory body would aptly provide sanctioned individuals and entities greater due process protection than they already have.¹⁵

Under current practice, sanctioned parties may petition an Ombudsperson to plead their cases before the body responsible for making sanction decisions—the Sanctions Committee.¹⁶ While the Ombudsperson lacks the power to issue a binding decision on whether sanctions should be maintained in a specific case, the petition process does provide those subject to the 1267 sanctions a genuine opportunity to plead their cases before the Committee. This note argues that the Ombudsperson mechanism, combined with the opportunity to challenge the application of sanctions in domestic courts, provides the best procedural safeguards that can be implemented under the 1267 regime today. To make its case, this note focuses on the due process protections available to those subject to the 1267 sanctions in the United States.

Part II of this note provides a brief overview of the history and circumstances that led to the establishment of the 1267 regime. Part III describes the current practices and reforms of the 1267 regime and addresses the calls for the establishment of an impartial, independent adjudicatory body at the U.N. level to review Sanctions Committee decisions. Part IV discusses how the 1267 regime is integrated into U.S. law, and how these sanctions have been challenged before U.S. courts. Part V concludes by explaining how establishing an impartial, independent adjudicatory body at the U.N. level is unfeasible, and why the Ombudsperson mechanism, together with domestic judicial review, provides those subject to the 1267 sanctions with adequate due process.

II. U.N. SANCTIONS AND THE ESTABLISHMENT OF THE 1267 REGIME

A. *The Move Away from Comprehensive Sanctions*

The use of sanctions is by no means a new development; the tactic has been around for millennia.¹⁷ The notion behind imposing sanctions is that their use can

14. See Genser & Barth, *supra* note 13, at 31–33.

15. See discussion *infra* Part V.

16. S.C. Res. 1989, ¶ 21, U.N. Doc. S/RES/1989 (June 17, 2011).

17. As far back as 432 B.C., Athens imposed trade sanctions upon the city-state of Megara, one of a number of events that eventually led to the Peloponnesian War. See Joanmarie M. Dowling & Mark P. Popiel, *War by Sanctions: Are We Targeting Ourselves?*, CURRENTS: INT’L TRADE L.J., WINTER 2002, at 8; Michael Paulson, *History of U.S. Sanctions Shows Most Haven’t Worked*, SEATTLE POST-INTELLIGENCER, May 11, 1999, available at <http://www.corpwatch.org/article.php?id=14581>.

change a target's behavior without the need to resort to armed conflict, thus, in theory, preserving lives.¹⁸

Supporting its mission to “maintain international peace and security,”¹⁹ the United Nations, in article 41 of its Charter, grants the Security Council the power to impose sanctions, which member states are required to implement.²⁰ While the Council has enjoyed this power since the establishment of the United Nations in 1945, it only began to exercise it regularly in the 1990s.²¹ Indeed, the Council used it so frequently that the 1990s became known as the “sanctions decade.”²²

The Security Council's wide use of sanctions during these years exposed major problems with how the tactic was being implemented. For example, use of comprehensive

18. Dowling & Popiel, *supra* note 17. As Woodrow Wilson once remarked:

A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation can resist.

Id.

19. U.N. Charter art. 1, para. 1.

20. Article 41 of the U.N. Charter grants the Security Council the power to impose various kinds of sanctions:

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

U.N. Charter art. 41. Article 25 of the U.N. Charter requires member states to carry out the decisions of the Security Council:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

U.N. Charter art. 25.

21. U.N. sanctions were only used twice before 1990, against Southern Rhodesia in 1968, S.C. Res. 253, U.N. Doc. S/RES/253 (May 29, 1968), and South Africa in 1977, S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

22. *See generally* DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990s* (Lynne Rienner 2000).

It would be befitting to refer to the post Cold War era as the sanctions era. Several sanction regimes were adopted by the Security Council from 1990 to the present. Sanctions were imposed against; Iraq (1990), the former Yugoslavia (1991), the Federal Republic of Yugoslavia (1992), Libya (1992), Somalia (1992), Haiti (1993), UNITA (1993), Rwanda (1994), Liberia (1994), the Bosnian Serbs (1994), Sudan (1996), Sierra Leone (1997), the Federal Republic of Yugoslavia (1998), the Taliban (1999), Eritrea and Ethiopia (2000), Zimbabwe (1998), Iran (1979), Libya (2011), Syria (2011) and Iran (2012).

Mediel Hove, *The Debates and Impact of Sanctions: The Zimbabwean Experience*, 3 INT'L J. Bus. & Soc. Sci. 72, 73 (2012), available at http://www.ijbssnet.com/journals/Vol_3_No_5_March_2012/8.pdf.

A DUE PROCESS BALANCING ACT

sanctions, such as trade and financial embargos on entire countries, were found to have done far more harm than good.²³ The case of Iraq illustrates this best.

In response to Iraq's invasion of Kuwait in 1990, the Security Council imposed a comprehensive trade and financial embargo on Iraq that largely lasted until the regime of Iraqi strongman Saddam Hussein was toppled by the U.S.-led invasion in 2003.²⁴ These comprehensive sanctions are widely blamed for contributing to the suffering of the Iraqi people under the Hussein regime.²⁵

The dire toll that comprehensive sanctions take on a civilian population is not the only reason they are criticized. Because many sanctioned countries are not governed by democratically elected officials, civilians in these countries have little, if any, power to actually change the policies pursued by their governments.²⁶ Instituting these sanctions on an entire population, with the hope that people will pressure the government into changing its policies, is thus misguided—at least where the people do not enjoy the luxury of democratic governance.²⁷ In addition, under a comprehensive sanctions regime, commerce can be moved to black markets, which only the ruling elites control and have access to.²⁸ As a result, “the weakest in society become the true victims” of comprehensive sanctions regimes.²⁹

At the turn of the millennium, with this experience behind it, the United Nations committed to making its sanctions “smarter” by targeting only those actors whose

-
23. See WATSON INST. FOR INT'L STUDIES AT BROWN UNIV., BACKGROUND PAPER ON TARGETED SANCTIONS 2 (2004) [hereinafter BACKGROUND PAPER], available at http://www.watsoninstitute.org/pub/Background_Paper_Targeted_Sanctions.pdf. In the 1990s, the Security Council instituted comprehensive sanctions regimes against three countries: Iraq (S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990)), Yugoslavia (S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992) & S.C. Res. 942, U.N. Doc. S/RES/942 (Sept. 23, 1994)), and Haiti (S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994)). See also BACKGROUND PAPER, *supra*, at 6.
24. See S.C. Res. 661, *supra* note 23, ¶¶ 3(c), 4 (mandating that no country make available to Iraq any commodities or financial resources unless “intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs”); *UN Lifts Sanctions Against Iraq*, BBC (Dec. 15, 2010), <http://www.bbc.co.uk/news/world-middle-east-12004115>.
25. Tellingly, one study found that the infant mortality rate in Iraq had more than doubled between 1990 and 1998. See, e.g., MOHAMED M. ALI ET AL., ANNUAL MORTALITY RATES AND EXCESS DEATHS OF CHILDREN UNDER FIVE IN IRAQ, 1991–98, at 5 & fig.1(a) (2003), available at http://nointervention.com/archive/Iraq/org/excess_mortality_in_Iraq.pdf; Michael Powell, *The Deaths He Cannot Sanction; Ex-U.N. Worker Details Harm to Iraqi Children*, WASH. POST, Dec. 17, 1998, at E01, available at <http://www.public.asu.edu/~wellsda/foreignpolicy/Halliday-criticizes-sanctions.html>. But see Michael Spagat, *Truth and Death in Iraq Under Sanctions*, SIGNIFICANCE (Sept. 2010), available at <http://personal.rhul.ac.uk/uhte/014/Truth%20and%20Death.pdf> (arguing that the child-mortality statistics may have been manipulated by the Saddam Hussein regime).
26. Dowling & Popiel, *supra* note 17, at 9.
27. *Id.*
28. August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 851 (2001).
29. *Id.*

behavior it hoped to change.³⁰ The ability of the United Nations to effectively and fairly implement targeted sanctions would become of utmost importance as a new threat to the global order soon reared its head: Terrorism.

B. The Emergence of Global Terrorism and the Establishment of the 1267 Regime

On the morning of August 7, 1998, two massive bombs exploded within five minutes of each other: one outside the U.S. embassy in Nairobi, Kenya, and the other outside the U.S. embassy in Dar es Salaam, Tanzania.³¹ In total, 234 people were killed, and over 4,650 were wounded. Although a group calling itself the Islamic Army for the Liberation of the Holy Places publicly claimed responsibility for the attack, an investigation later revealed a tie to Osama bin Laden,³² leader of the Islamic militant organization al-Qaeda.³³

This was not the first time al-Qaeda had attacked the United States,³⁴ but it spurred the Security Council, led by the United States, to finally confront the growing threat.³⁵ On October 15, 1999, the Security Council passed Resolution 1267. The Resolution imposed a travel ban and assets freeze on members of the Taliban, then in control of Afghanistan, to coerce that regime into giving up bin Laden, whom the Taliban was sheltering at the time.³⁶ Since Resolution 1267, subsequent resolutions have transformed the 1267 regime into an assets freeze, travel

-
30. See KOFI A. ANNAN, "WE THE PEOPLES": THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 50 (2000). The United Nations has not completely turned away from comprehensive sanctions. In 2006, the U.N. Security Council passed resolution 1737, which imposes limited sanctions on Iran on account of its refusal to halt the pursuit of nuclear weapons. See S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006). The sanctions were expanded in 2007 with the passage of Resolution 1747. The resolution calls upon "all States and international financial institutions not to enter into new commitments for grants, financial assistance, and concessional loans, to the government of the Islamic Republic of Iran, except for humanitarian and developmental purposes." S.C. Res. 1747, ¶ 7, U.N. Doc. S/RES/1747 (Mar. 24, 2007).
31. *Fast Facts: The Embassy Bombings in Kenya and Tanzania*, CNN, <http://www.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/> (last updated Oct. 6, 2013).
32. *Timeline: Al Qaeda's Global Context*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/knew/etc/cron.html> (last visited Apr. 25, 2015).
33. See *Al-Qaeda*, ENCYCLOPEDIA BRITANNICA, *supra* note 5.
34. Western intelligence officials believe that al-Qaeda's first attack targeting the United States occurred on December 29, 1992, when a hotel in Aden, Yemen housing U.S. military personnel on their way to Somalia was bombed, killing two Australian tourists. See *Timeline: Al Qaeda's Global Context*, *supra* note 32. It is believed that al-Qaeda may also have had a role in the February 26, 1993 bombing of the World Trade Center in New York City, which killed six and wounded 1,500. See *id.* Al-Qaeda's operations against the United States culminated with the September 11, 2001 attacks, during which al-Qaeda operatives hijacked four commercial airliners, flying two into the World Trade Center in New York City, one into the Pentagon in Washington, D.C., and crashing another into a field in Pennsylvania. In total, over 3,000 people were killed. *Id.*
35. William Diaz, *Dualist, But Not Divergent: Evaluating United States Implementation of the 1267 Sanctions Regime*, 5 LIBERTY U. L. REV. 333, 338 (2011); Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275, 294 (2008).
36. See S.C. Res. 1267, *supra* note 6, ¶ 4.

A DUE PROCESS BALANCING ACT

ban, and arms embargo on all individuals and entities associated with al-Qaeda.³⁷ Today, these measures apply to those who are:

- (a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
- (b) Supplying, selling or transferring arms and related materiel to;
- (c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof[.]³⁸

In addition, these measures apply to any individual or entity that is “either owned or controlled, directly or indirectly, by, or otherwise supporting, any individual, group, undertaking or entity associated with Al-Qaida.”³⁹

The 1267 regime remains a mainstay of the international response to the threat of global terrorism. Although the United States has killed bin Laden, pulled troops out of Iraq, and appears to be winding down its war against al-Qaeda in Afghanistan, the threat posed by global terrorism has not diminished. Rather, it remains more potent than ever. According to a 2014 report by the Institute for Economics & Peace, the number of deaths attributable to terrorism worldwide increased five-fold between 2000 and 2013, rising from 3,361 deaths in 2000 to 17,958 in 2013.⁴⁰ Also, with the rise of the Islamic State of Iraq and the Levant (ISIL) in Syria and Iraq in 2014, the threat posed by global terrorism is perhaps now more serious than ever.⁴¹ The tools to combat the threat of global terrorism remain vitally important today.

The 1267 regime differs from other U.N. sanctions regimes in several important ways. First, it focuses on people and entities that are not necessarily located in, or

37. See S.C. Res. 1333, ¶ 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000) (freezing the assets of bin Laden and “individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization”). The 1267 regime is now really two separate regimes. One Sanctions Committee deals with sanctions against al-Qaeda, the other with sanctions against the Taliban. See S.C. Res. 1988, ¶ 2, U.N. Doc. S/RES/1988 (June 17, 2011) (deciding that sanctions against those “designated as the Taliban, and other individuals groups, undertakings and entities associated with them” shall be administered by a new Sanctions Committee); see also Press Release, Security Council, New Name for Sec. Council Comm. Established Pursuant to Resolution 1267 (1999), U.N. Press Release SC/10312 (July 7, 2011), available at <http://www.un.org/News/Press/docs//2011/sc10312.doc.htm>.

38. S.C. Res. 2083, ¶ 2, U.N. Doc. S/RES/2083 (Dec. 17, 2012).

39. *Id.* ¶ 3.

40. INST. FOR ECON. & PEACE, GLOBAL TERRORISM INDEX 2014: MEASURING AND UNDERSTANDING THE IMPACT OF TERRORISM (2014), available at http://www.visionofhumanity.org/sites/default/files/Global%20Terrorism%20Index%20Report%202014_0.pdf.

41. ISIL is sometimes referred to as the “Islamic State of Iraq and al-Sham (ISIS).” ISIL is a militant group that seeks to establish an Islamic caliphate in Central Asia. As of January 2015, it controls significant territory in Syria and Iraq. See *Islamic State in Iraq and the Levant (ISIL)*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1963547/Islamic-State-in-Iraq-and-the-Levant-ISIL> (last updated Feb. 10, 2015). The U.N. Security Council deems ISIL to be associated with al-Qaeda, thus subjecting ISIL members and supporters to the 1267 regime. See Martin Scheinin, *ISIS/ISIL Remains Associated with Al-Qaida Because the UN Security Council Says So?*, JUST SECURITY (Sept. 15, 2014, 10:15 AM), <http://justsecurity.org/15014/isisil-remains-al-qaida-security-council-so/>.

acting on behalf of, any specific state.⁴² Second, the sanctions are not directly targeted at specific incidents, but at terrorist activities in general.⁴³ Third, the sanctions are preventive in nature, rather than punitive—meaning that they are not necessarily imposed because of what an individual or entity has done in the past, but because of what an individual or entity could do in the future.⁴⁴ Because of this, these sanctions can potentially be applied to a very wide range of individuals and entities.⁴⁵ Indeed, at one point, over half of all parties subject to U.N. sanctions were sanctioned under the 1267 regime.⁴⁶

Given the scope of the 1267 regime, it is vitally important that some sort of limitation be imposed upon the discretion of the Security Council in selecting the targets of these sanctions. Since the establishment of the 1267 regime in 1999, subsequent resolutions have sought to address this problem by granting those targeted some measure of due process. The operation of the 1267 regime, and how it has been reformed over the years, is discussed below.

III. THE OPERATION AND REFORM OF THE 1267 REGIME

For all the reforms that have been instituted during the nearly sixteen years that the 1267 regime has been operating, applying and repealing sanctions is still a political process subject to the discretion of the Security Council and the Sanctions Committee—not an independent, impartial adjudicator. Yet, the reforms that have been instituted have vastly improved the procedural protections available to those targeted by this regime.

A. Listing

Resolution 1267 established a Sanctions Committee that works as the executive body of the sanctions regime.⁴⁷ The Committee is made up of all fifteen members of the Security Council⁴⁸ and is responsible for maintaining a Consolidated List of all

42. Johnstone, *supra* note 35, at 295.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* By 2008, five hundred names had been put on the 1267 sanctions list. *Id.*

47. S.C. Res. 1267, *supra* note 6, ¶ 6.

48. The Security Council is made up of five permanent members and ten non-permanent members that are elected by the General Assembly for two-year terms. The five permanent members are the United States, the United Kingdom, France, Russia, and China. *See* U.N. Charter art. 23. As of March 2015, the ten non-permanent members are Angola, Chad, Chile, Jordan, Lithuania, Malaysia, New Zealand, Nigeria, Spain, and Venezuela. *See Current Members*, U.N. SEC. COUNCIL, <http://www.un.org/en/sc/members/> (last visited Apr. 25, 2015); *see also* SEC. COUNCIL COMM. PURSUANT TO RESOLUTIONS 1267 (1999) & 1989 (2011), GUIDELINES OF THE COMMITTEE FOR THE CONDUCT OF ITS WORK 1, § 1(b) (2013) [hereinafter COMMITTEE GUIDELINES], available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

A DUE PROCESS BALANCING ACT

individuals and entities targeted by the 1267 regime.⁴⁹ It is also responsible for ensuring that U.N. member states are taking appropriate measures to implement the 1267 sanctions.⁵⁰

Under current practice, names can be added to the Consolidated List after a member state (the “designating country”) submits a statement of case to the Sanctions Committee laying out, in “as much detail as possible,” its basis for asserting that an individual or entity is associated with al-Qaeda.⁵¹ Upon submitting the statement of case, the Committee has ten business days to consider the listing request. If no member of the Committee objects within the ten-day period, the listing request will be granted.⁵² The Committee will update the Consolidated List with the identifying information of the new individual or entity, and a brief narrative summary of the reasoning for the listing will be published on the Committee’s web site.⁵³ The Secretariat will inform all members of the addition to the list and will also, to the extent possible, inform the permanent mission of the country or countries where an individual or entity is believed to be located. If the newly listed party is an individual, that person’s national country will also be notified.⁵⁴

B. De-listing

There have been many valuable improvements to the 1267 regime’s de-listing procedure since the regime was instituted in 1999. Because listed individuals and entities will not be informed that the Sanctions Committee is considering them for listing,⁵⁵ they can only challenge their listings after they have become subject to the sanctions. Therefore, the de-listing procedure is crucial.

49. See S.C. Res. 1267, *supra* note 6, ¶ 6(d).

50. *Id.* ¶¶ 6(a), 9–10.

51. S.C. Res. 1735, ¶ 5, U.N. Doc. S/RES/1735 (Dec. 22, 2006). Information supporting a statement of case includes, but is not limited to:

- (1) specific information demonstrating that the individual/entity meets the criteria for listing set out in paragraphs 2 and 3 of resolution 2083 (2012); (2) details of any connection with a currently listed individual or entity; (3) information about any other relevant acts or activities of the individual/entity; (4) the nature of the supporting evidence (e.g. intelligence, law enforcement, judicial, open source information, admissions by subject, etc.); [and] (5) additional information or documents supporting the submission as well as information about relevant court cases and proceedings.

COMMITTEE GUIDELINES, *supra* note 48, § 6(h).

52. COMMITTEE GUIDELINES, *supra* note 48, § 7(s).

53. *Id.* § 6(q). For a narrative summary of those currently listed, see *Narrative Summaries of Reasons for Listing*, SEC. COUNCIL COMM. PURSUANT TO RESOLUTIONS 1267 (1999) & 1989 (2011) CONCERNING AL-QAIDA & ASSOCIATED INDIVIDUALS & ENTITIES, <http://www.un.org/sc/committees/1267/narrative.shtml> (last visited Apr. 25, 2015).

54. COMMITTEE GUIDELINES, *supra* note 48, § 6(t).

55. Informing an individual or entity that it might be subject to a global assets freeze would cause that party to immediately transfer its assets out of the global banking system, rendering the sanctions useless. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 77 (D.D.C. 2002) (“Money is

Until the adoption of Security Council Resolution 1730 in 2006, only a targeted individual or entity's country of residence or citizenship could request removal from the Consolidated List.⁵⁶ Requiring state sponsorship to remove a party from the list presented a clear problem: The target's country of residence or citizenship could simply refuse to submit a de-listing request, no matter how unjust the imposition of sanctions.⁵⁷ Resolution 1730 addressed this problem by creating a "focal point" to receive de-listing requests directly from those targeted by the 1267 regime.⁵⁸

The focal point's role is to essentially act as a conduit between a target seeking de-listing, the target's country of residence or citizenship, and the designating country. The focal point would receive a petition for de-listing directly from the target, and then forward it to the designating country and the target's country of residence or citizenship.⁵⁹ These countries would then be given three months to consider whether to support the de-listing request.⁶⁰ If one of these countries recommended or opposed de-listing, that recommendation or opposition would be forwarded to the Sanctions Committee for consideration.⁶¹ If none of the countries responded, the de-listing petition would go directly to the Committee for consideration.⁶² However, the Committee would have to decide by consensus to remove the individual or entity from the Consolidated List⁶³—which was unlikely to happen.

The focal-point mechanism established by Resolution 1730 created an avenue for a sanctioned individual or entity to directly petition the Committee for relief. This was a big improvement over the previous practice, and subsequent resolutions built upon this focal-point mechanism to grant targeted parties greater due process protections through the de-listing procedure.

Under current procedure, a target can be removed from the Consolidated List by the request of any U.N. member state, or by direct petition to the Sanctions Committee Ombudsperson.⁶⁴ While none of these processes provide for review by an

fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets"), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003); *see also* Global Relief Found., Inc. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002) ("The Constitution would indeed be a suicide pact, if the only way to curtail enemies' access to assets were to reveal information that might cost lives." (citation omitted)). Hence, sanctioned individuals and entities are not given any pre-designation notice.

56. *See* WATSON REPORT, *supra* note 7, at 34 ("One of the most contentious issues regarding delisting" is that "only the target's country of residence or citizenship may request removal from the 1267 Consolidated List"). *But see* S.C. Res. 1730, ¶ 2, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

57. *See* WATSON REPORT, *supra* note 7, at 36.

58. *See* S.C. Res. 1730, *supra* note 56, at 2.

59. *Id.* ¶¶ 1, 5.

60. *Id.* ¶ 6(c).

61. *Id.* ¶ 6(a).

62. *Id.* ¶ 6(c).

63. *See* COMMITTEE GUIDELINES, *supra* note 48, § 4(a).

64. *See id.* § 7.

A DUE PROCESS BALANCING ACT

independent, impartial adjudicator, they do make it more difficult to keep a target on the Consolidated List.

Now, any U.N. member state may petition the Committee to have a target de-listed.⁶⁵ Upon receiving such a petition, the Committee will have ten business days to consider the petition and, if no member of the Committee objects, the petition will be granted.⁶⁶ Additionally, any objection to the de-listing petition must be supported by the objecting member's reasoning.⁶⁷

If the designating country requests that a target be de-listed, the target is in a more advantageous position. In such a case, a single objection will not be sufficient to preclude relief.⁶⁸ Instead, if a Committee member objects, the de-listing petition is tabled for sixty days, after which it will be granted unless: (1) all members of the Committee object in writing to the de-listing proposal; or (2) one or more members of the Committee requests that the de-listing petition be forwarded to the Security Council for decision.⁶⁹ Under Security Council procedures, nine out of fifteen votes are required to pass a resolution, and any proposed measure can be vetoed by one of the five permanent members of the Council.⁷⁰

In addition, a sanctioned individual or entity can directly petition for de-listing through the Office of the Ombudsperson.⁷¹ This office was established by Security Council Resolution 1904 in 2009 and is headed by an individual appointed by the Secretary-General in consultation with the Sanctions Committee.⁷² It is vested with far more power than the focal-point mechanism that it replaced.⁷³ Upon receiving a petition for de-listing from, or on behalf of, a target, the Ombudsperson is to embark upon a six-month-long investigation during which the Ombudsperson will request information on the target and opinions about the de-listing request from the state that added the target to the list, the target's state of residence or incorporation, and any U.N. bodies or states deemed relevant by the Ombudsperson.⁷⁴ After this period of investigation, the Ombudsperson is to deliver a Comprehensive Report to the Sanctions Committee, which lays out the arguments for and against granting the de-listing request and gives the Ombudsperson's recommendation on whether to de-list the target.⁷⁵ After considering the Comprehensive Report, the Committee

65. *Id.* § 7(a).

66. *Id.* § 7(f).

67. *Id.* § 7(i).

68. *Id.* § 7(t).

69. *Id.*

70. *See* U.N. Charter art. 27.

71. COMMITTEE GUIDELINES, *supra* note 48, § 7(x).

72. S.C. Res. 1904, ¶ 20, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

73. *See id.* ¶ 21.

74. COMMITTEE GUIDELINES, *supra* note 48, § 7(z); S.C. Res. 2083, *supra* note 38, Annex 2.

75. COMMITTEE GUIDELINES, *supra* note 48, § 7(aa); Diaz, *supra* note 35, at 345.

must invite the Ombudsperson to orally present his or her findings and conclusions before the Committee.⁷⁶

If the Ombudsperson recommends rejecting the de-listing request, the petition will not be granted.⁷⁷ However, if the Ombudsperson recommends granting the de-listing request, then the petition will follow the same process that it would had it been submitted by the designating country.⁷⁸

C. Room for Reform?

Despite vastly improving previous Sanctions Committee practice, the Office of the Ombudsperson has been criticized as “an empty vessel, providing a procedural and communicative interface, while wholly lacking substantive adjudicative powers.”⁷⁹ Indeed, the establishment of the office falls short of providing the level of due process called for by two notable reports on U.N.-targeted sanctions.⁸⁰

In 2005, the U.N. Office of Legal Affairs commissioned Bardo Fassbender, then-associate professor of law at Humboldt University of Berlin, to conduct a study on ways to ensure that individuals and entities targeted by U.N. sanctions are afforded fair and clear procedures to challenge the sanctions against them.⁸¹ Fassbender proposes that these fair and clear procedures include the following elements to ensure that the due process rights of sanctioned individuals and entities are protected:

- (a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;
- (b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;
- (c) the right of such a person or entity of being advised and represented in his or her dealings with the Council;
- (d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.⁸²

While it can be argued that the Office of the Ombudsperson offers a sanctioned party some measure of the rights described in subparagraphs (a) through (c), it does not provide access to an independent, impartial decisionmaker.

76. COMMITTEE GUIDELINES, *supra* note 48, § 7(dd).

77. *Id.* § 7(ff).

78. *Id.* § 7(gg)-(ll).

79. Diaz, *supra* note 35, at 346.

80. See FASSBENDER, *supra* note 8; WATSON REPORT, *supra* note 7.

81. FASSBENDER, *supra* note 8, at 3.

82. *Id.* at 8 (emphasis omitted).

A DUE PROCESS BALANCING ACT

Another report, authored by the Watson Institute for International Studies, focuses on the ability of targeted individuals and entities to have access to an effective remedy. It emphasizes the importance of giving sanctioned parties access to:

- (1) an independent and impartial authority, [that has]
- (2) the power to grant appropriate relief; [and provide]
- (3) procedural guarantees such as accessibility for individuals or entities affected.⁸³

The Watson report, though, does recognize that there is staunch opposition from Security Council members to any sort of binding judicial review of Committee decisions.⁸⁴ In addition to recommending an independent arbitral or judicial panel to review Committee decisions—with those decisions binding on the Committee—the report also offers three recommendations that resemble the current Ombudsmen mechanism, under which decisions are not binding on the Committee.⁸⁵

Establishing an independent adjudicatory body whose decisions are binding on the Committee would provide those targeted by sanctions with adequate due process protection. However, as the Watson report recognizes, these measures are likely not feasible. It is unlikely that the five permanent members of the Security Council would readily cede their veto power over all Committee decisions, and it is not clear that establishing such a body would best promote the Committee's mission.⁸⁶

Additionally, establishing such an authority could create two significant problems for the United States: the first political, the second tactical. First, it could require the United States to implement sanctions against an individual or entity that have been upheld by a U.N. adjudicatory body but struck down by a U.S. court. If the final decision whether to lift or retain sanctions remains with the Committee, though, the United States would be less likely to face this dilemma because it could lobby the Committee to lift any sanctions under the procedures for de-listing requests detailed above.

Second, such an authority could undermine the United States' ability to conduct the Global War on Terror as it sees fit. With such an authority, the decision to impose sanctions on a party would no longer lie with the Sanctions Committee—a

83. WATSON REPORT, *supra* note 7, at 44 (footnotes omitted).

84. *Id.* at 47.

85. *Id.* at 44–46.

86. An update to the Watson report recognizes that independent judicial review of Sanctions Committee decisions may not be the best option.

[T]he provision of due process has to be balanced with the Council's responsibility to maintain international peace and security in a manner that respects both to the greatest extent possible. Just as non-compliance with norms of due process has undermined the effectiveness of UN targeted sanctions, an excessively narrow and rigid institutional framework of formal judicial review could impair the ability of the 1267 Committee to take effective decisions in the collective interest.

WATSON INST. FOR INT'L STUDIES AT BROWN UNIV., DUE PROCESS AND TARGETED SANCTIONS: AN UPDATE OF THE "WATSON REPORT" 37 (Dec. 2012) [hereinafter WATSON REPORT UPDATE], available at http://www.watsoninstitute.org/pub/Watson%20Report%20Update%202012_12.pdf.

political body upon which the United States exerts a great deal of influence—but with an independent adjudicatory body whose decisions the United States would not control. As such, the establishment of the type of independent, impartial authority called for by these reports is not a realistic solution because the United States would oppose it.

IV. THE UNITED STATES' IMPLEMENTATION OF THE 1267 SANCTIONS AND DOMESTIC JUDICIAL REVIEW

A. The Integration of the 1267 Sanctions into U.S. Law

The United States implements U.N. sanctions, such as the ones prescribed by the Sanctions Committee, by integrating them into its domestic law. Three authorities provide the vehicle through which 1267 sanctions are enforced in the United States.

The U.N. Participation Act of 1945 grants the president of the United States broad authority to implement any sanctions that the Council decides to levy pursuant to its powers under article 41 of the U.N. Charter.⁸⁷ The president's power under the U.N. Participation Act is supplemented by the International Emergency Economic Powers Act (IEEPA),⁸⁸ which gives the president express authority to freeze assets subject to U.S. jurisdiction,⁸⁹ upon declaring a national emergency to deal with a foreign threat.⁹⁰ In the aftermath of the September 11 attacks, and pursuant to his powers under the IEEPA, President George W. Bush declared there to be such a threat and issued executive order 13224, which delegated to the secretary of state, secretary of the treasury, and the attorney general the power to impose financial sanctions on a wide swath of individuals and entities determined by the executive branch to be associated with foreign terrorist organizations.⁹¹ The 1267 sanctions regime, which the United States is required to implement under article 25 of the

87. U.N. Participation Act of 1945 § 5, 22 U.S.C. § 287c(a) (2013).

88. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701–1707 (2012)).

89. Upon declaring a national emergency pursuant to 50 U.S.C. § 1701, the president may:

[I]nvestigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States[.]

50 U.S.C. § 1702(a)(1)(B).

90. *Id.* § 1701(a). § 1701(a) provides that:

Any authority granted to the President by section 1702 of this title may be exercised 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, if the President declares a national emergency with respect to such threat.

Id.

91. *See generally* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

A DUE PROCESS BALANCING ACT

U.N. Charter, is directly integrated into U.S. law through this executive order.⁹² President Bush renewed this order every year, and President Barack Obama has done the same to date; its measures remain in place today.⁹³

Most pertinently, section 1 of the order directs that an assets freeze be imposed upon:

- (b) *foreign persons* determined . . . to have committed, or to pose a significant risk of committing, acts of terrorism that threaten [the United States] . . .
- (c) *persons* determined . . . to act for or on behalf of [foreign terrorists] or . . .
- (d) *persons* determined . . . (i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of [foreign terrorists]; or (ii) to be otherwise associated with [foreign terrorists] . . .⁹⁴

Sections 1(c) and (d) have a particularly wide reach, directing that sanctions be imposed upon any person, foreign or domestic, who the executive branch has determined acts “for or on behalf of,” supports, or is “otherwise associated” with foreign terrorists.⁹⁵ Thus, for parties sanctioned under the 1267 regime, any assets subject to U.S. jurisdiction may be frozen pursuant to this executive order.

B. Judicial Review in U.S. Courts

Because 1267 sanctions are implemented through U.S. law, they are subject to challenge in U.S. courts. This creates a tension between the United States’ obligation to give effect to U.N. Security Council decisions, and a person’s right under the U.S. Constitution to challenge the United States’ seizure of his property before a court.⁹⁶

92. *Id.*

I, GEORGE W. BUSH, President of the United States of America, find that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in UNSCR 1368 of September 12, 2001, and UNSCR 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and in furtherance of my proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, hereby declare a national emergency to deal with that threat.

Id. Executive Order 13224’s application is not limited to parties sanctioned by the U.N. Security Council, but rather extends to any individual or entity that comes within the scope of the president’s authority under the statute. *See* 50 U.S.C. § 1702(a)(1)(B) (granting the president power to freeze and confiscate any assets or property “in which any foreign country or a national thereof has any interest”).

93. Louisa C. Slocum, Comment, *OFAC, The Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion*, 65 ADMIN. L. REV. 387, 398 (2013).

94. Exec. Order No. 13,224 § 1, 66 Fed. Reg. at 49,079–80 (emphasis added).

95. *Id.*

96. “Executive Order 13224 is subject to domestic judicial review on Constitutional grounds, including the right to federal due process under the Fifth Amendment . . .” Diaz, *supra* note 35, at 354.

This state of affairs carries the risk that a U.S. court could strike down the enforcement of U.N. sanctions against an individual or entity, notwithstanding the United States' obligation under article 25 of the U.N. Charter to fully implement those sanctions.⁹⁷ While such a situation has not yet occurred, recent challenges to these sanctions in U.S. courts show that it is possible.⁹⁸ At least three cases challenging the application of sanctions have been brought in U.S. courts by parties subject to the 1267 regime.⁹⁹ These cases illustrate the extent to which U.N. sanctions can be reviewed, albeit indirectly, in U.S. courts.¹⁰⁰

In *Global Relief Foundation, Inc. v. O'Neill*, Global Relief challenged the U.S. government's seizure of its assets, arguing that (as a U.S. corporation) the sanctions cannot apply to it, that the United States impermissibly relied on classified evidence, and that it should have been afforded notice and an opportunity for a hearing before the seizure.¹⁰¹ The U.S. Court of Appeals for the Seventh Circuit held in favor of the government on all three claims.¹⁰²

Global Relief contended that the IEEPA only grants the government the authority to freeze assets in which a foreign national has an "interest"¹⁰³ and, because Global Relief (as a U.S. corporation chartered under Illinois law) is a U.S. citizen, its assets cannot be frozen pursuant to IEEPA authority.¹⁰⁴ However, the court rejected this argument, reasoning that "[t]he function of the IEEPA strongly suggests that beneficial rather than legal interests matter."¹⁰⁵ Therefore, even if a U.S. citizen has legal title to the assets, they can be frozen if the government determines the assets are being used to benefit foreign terrorists.¹⁰⁶

97. *Id.* at 350–52.

98. *See id.* at 352 (“[D]omestic review of Resolution 1267 implementation allows an open possibility that it may be overruled on domestic constitutional grounds . . .”); *see also* cases cited *infra* note 99.

99. *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965 (9th Cir. 2011); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008).

100. U.N. sanctions are being reviewed “indirectly” because the petitioner is not challenging the propriety of the 1267 sanctions regime. Rather, the petitioner is challenging the rules and procedures followed by the U.S. government in enforcing 1267 sanctions.

101. *Global Relief*, 315 F.3d at 752–54.

102. *Id.*

103. *Id.* at 752 (citing 50 U.S.C. § 1702(a)(1)(B) (2012)).

104. As the Seventh Circuit noted, Global Relief’s “argument is straightforward: a U.S. corporation is a U.S. citizen; the corporation owns all of its property (including its bank accounts); this property therefore cannot be ‘property in which any foreign country or a national thereof has any interest’ for the purpose of § 1702(a)(1)(B).” *Id.*

105. *Id.* at 753. The Seventh Circuit went on to note that “the focus must be on how assets could be controlled and used, not on bare legal ownership.” *Id.* (“What sense could it make to treat al Qaeda’s funds as open to seizure if administered by a German bank but not if administered by a Delaware corporation under terrorist control?”).

106. *Id.*

A DUE PROCESS BALANCING ACT

The *Global Relief* court also approved of the government's reliance on classified intelligence, which could be reviewed ex parte by the district court. The court noted that "[t]he Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives."¹⁰⁷ In addition, the court held that Global Relief was not entitled to a pre-seizure notice and hearing because "that would allow any enemy to spirit assets out of the United States."¹⁰⁸ The court conceded that deferred notice and the opportunity to be heard post-seizure increase the risks of error, but reasoned that "these risks must be balanced against the potential for loss of life if assets should be put to violent use."¹⁰⁹

In *Al-Aqeel v. Paulson*,¹¹⁰ the U.S. District Court for the District of Columbia addressed an argument not at issue in *Global Relief*. In that case, the government argued that Al-Aqeel did not have any rights under the Constitution because he was not a U.S. citizen, nor did he have a sufficient connection to the United States.¹¹¹ As the court noted: "A citizen of a foreign state 'without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'"¹¹² However, "[a]liens who have 'come within the territory of the United States and developed substantial connections with this country,' by contrast, are entitled to constitutional protections."¹¹³ The court concluded that Al-Aqeel's existing connections to the United States entitled him to the protections of the Constitution: He was a board member and corporate officer of the Al-Haramain Islamic Foundation, an Islamic charity chartered in Oregon, and had visited the United States a number of times to conduct business on the Foundation's behalf.¹¹⁴ However, the court held that Al-Aqeel's due process rights were not violated because, as in *Global Relief*, post-seizure notice and opportunity for a hearing were all the due process clause required.¹¹⁵

The Al-Haramain Foundation brought its own challenge against sanctions levied against it in *Al Haramain Islamic Foundation, Inc. v. United States Department of Treasury*.¹¹⁶ Al-Haramain argued that its substantive rights were violated because the imposition of sanctions was not supported by substantial evidence,¹¹⁷ and that, alternatively, its procedural due process rights were violated because the government

107. *Id.* at 754 (citation omitted).

108. *Id.*

109. *Id.*

110. 568 F. Supp. 2d 64 (D.D.C. 2008).

111. *Id.* at 69.

112. *Id.* (quoting *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

113. *Id.* (quoting *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 201 (D.C. Cir. 2001)).

114. *Id.* at 70.

115. *Id.* at 71–72.

116. 686 F.3d 965 (9th Cir. 2012).

117. *Id.* at 976.

impermissibly relied on classified evidence and failed to provide it with adequate notice and an opportunity to respond.¹¹⁸

The U.S. Court of Appeals for the Ninth Circuit rejected Al-Haramain's substantive claim, noting that review of this sort of claim "in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential."¹¹⁹ Taking this deferential stance, the court reviewed both the classified and unclassified evidence offered by the government and "conclude[d] confidently" that substantial evidence supported the government's designation of Al-Haramain.¹²⁰

As for Al-Haramain's procedural claim, the Ninth Circuit applied the balancing test developed in *Mathews v. Eldridge*.¹²¹ This test weighs: "(1) [the person's or entity's] private property interest, (2) the risk of an erroneous deprivation of such interest through the procedures used, as well as the value of additional safeguards, and (3) the Government's interest in maintaining its procedures, including the burdens of additional procedural requirements."¹²² The court recognized the strong interests on both sides. On the one hand, Al-Haramain's assets in the United States were frozen, precluding all of its operations in the country.¹²³ On the other hand, though, the government had a strong interest in national security.¹²⁴

Reviewing the government's reliance on classified intelligence and the notice it provided to Al-Haramain through this lens, the Ninth Circuit concluded that Al-Haramain was not afforded adequate process under the due process clause.¹²⁵ The court held that the government may use classified evidence, but that it should have provided Al-Haramain with a declassified summary of it.¹²⁶ The government's obligation to do this, the court reasoned, would not be unduly burdensome in this case.¹²⁷ Additionally, the court chastised the government for failing to notify Al-Haramain of why it was subject to sanctions, leaving the organization guessing as to how to challenge its designation.¹²⁸ Although the government's shortcomings

118. *Id.* at 979.

119. *Id.* (quoting *Islamic Am. Relief Agency (IARA-USA) v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007)).

120. *Id.*

121. 424 U.S. 319 (1976).

122. *Al Haramain*, 686 F.3d at 979 (citing *Mathews*, 424 U.S. at 334–35).

123. *Id.* at 979–80 ("In sum, designation is not a mere inconvenience or burden on certain property interests; designation indefinitely renders a domestic organization financially defunct.").

124. *Id.* at 980 ("It is beyond dispute that 'the Government's interest in combating terrorism is an urgent objective of the highest order.'" (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 4, 28 (2010))).

125. *Id.* at 988.

126. *Id.* at 982–84.

127. *See id.* at 984 ("[T]he small burden on the agency of providing mitigation measures does not outweigh the potential value to [Al-Haramain].").

128. *Id.* at 984–88.

A DUE PROCESS BALANCING ACT

deprived Al-Haramain of its due process rights, that deprivation was harmless, the court held, and Al-Haramain was therefore not entitled to a remedy on these grounds.¹²⁹

Global Relief, Al-Aqeel, and Al Haramain together show that those subject to the 1267 regime in the United States are afforded some measure of due process, most importantly access to an independent, impartial adjudicator. Under the precedents set by these cases, the U.S. government can levy sanctions against both citizens and non-citizens, and non-citizens may also claim constitutional protection if they have sufficient ties to the United States.¹³⁰ A substantive challenge—that is, a challenge to the merits of the government’s designation decisions under the 1267 regime—is unlikely to prevail due to the “extreme deference” the court will give to government decisions in this sensitive area.¹³¹ However, a petitioner will be afforded his day in court and is entitled to adequate notice of why he or she was sanctioned and, in some cases, a declassified summary of the classified intelligence relied on by the government.¹³² Hence, while it is unlikely that such a challenge would prevail due to the strong deference provided to government decisions in this sensitive area, a petitioner subject to 1267 sanctions, as enforced by the United States, will be afforded his day in court, as well as access to an independent, impartial adjudicator.

V. CONCLUSION: JUDICIAL REVIEW OF SANCTIONS COMMITTEE DECISIONS IS INFEASIBLE AND UNNECESSARY

It is unlikely that the U.N. Security Council will agree to subject Sanctions Committee decisions to binding judicial review. The tactical and political cost to the United States, a permanent member of the Council with veto power over all its decisions, would be too great. It is also not clear whether establishing such a review mechanism would be an improvement over the current Ombudsperson system. For these reasons, those who wish to ensure that parties targeted by the 1267 regime receive adequate due process should focus on improving the Ombudsperson system.

The United States has a strong tactical interest in ensuring that worldwide, uniform sanctions are applied against individuals and entities suspected of supporting terrorist activities.¹³³ Some argue that allowing domestic courts to review Committee decisions could result in an uneven application of sanctions and that independent, impartial judicial review at the U.N. level would eliminate this problem.¹³⁴ However, subjecting sanctions decisions to such review would undermine the United States’

129. *Id.* at 988–90.

130. *See generally* *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008).

131. *See Al Haramain*, 686 F.3d at 979.

132. *See id.* at 982–88.

133. Baehr-Jones, *supra* note 8, at 447–48 (“Outside operational theaters, the United States arguably does not have the legal authority to unilaterally apprehend terrorist suspects, freeze terrorist funds, or disrupt cells and networks abroad. . . . The main international enforcement option the United States has developed . . . has been the [1267 sanctions regime].”).

134. *See* Reinish, *supra* note 11.

ability to conduct the Global War on Terror as it sees fit.¹³⁵ With the rapid rise of ISIL¹³⁶ in 2014, it is perhaps more important than ever before for the United States and the international community to possess the tools necessary to combat the threat of terrorism.¹³⁷

Additionally, subjecting sanction decisions to binding judicial review could impose a political cost on the United States. If a U.N. adjudicator holds that sanctions are justified against an individual or entity, but a U.S. court finds otherwise, the United States would likely break its commitment under article 25 of the U.N. Charter and decide to lift the sanctions. Although the United States has regularly chosen to ignore its U.N. commitments in favor of the judgments of its own courts,¹³⁸ such choices bear the political cost of exposing the United States to the criticism that it only abides by its international commitments when doing so serves its own interests. Under the current system, this is less likely to happen because, even if a designated individual or entity prevails in a U.S. court, the United States could still lobby the Committee to have the sanctions dropped.

Current practice carries less political cost for the United States. Currently, it is unlikely that all parties subject to 1267 sanctions have access to independent judicial review in their home countries—especially in countries without a robust legal system. But, importantly, those subject to sanctions in the United States do have access to such review, as demonstrated by *Global Relief, Al-Aqeel, and Al Haramain*.¹³⁹ This access should stem criticism, at least in the United States, that the application of these sanctions is arbitrary and unsupported.

Beyond these political and tactical costs, it is not clear that judicial review at the U.N. level would be an improvement over the current practice. These U.N. courts would face the problem that much of the intelligence countries rely on to add a name to the Consolidated List is classified.¹⁴⁰ Countries will likely be unwilling to offer

135. See WATSON REPORT UPDATE, *supra* note 86, at 37 (“[A]n excessively narrow and rigid institutional framework of formal judicial review could impair the ability of the 1267 Committee to take effective decisions in the collective interest.”).

136. See *supra* note 41 for background information on ISIL.

137. According to the 2014 Global Terrorism index, deaths from terrorism rose from 11,133 in 2012 to 17,958 in 2013. See *Global Terrorism Index 2014: Measuring and Understanding the Impact of Terrorism*, INST. FOR ECONS. & PEACE (2014), available at http://www.visionofhumanity.org/sites/default/files/Global%20Terrorism%20Index%20Report%202014_0.pdf.

138. See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that the judgment of the International Court of Justice does not create directly enforceable domestic federal law); *Diggs v. Richardson*, 555 F.2d 848 (D.D.C. 1976) (holding that a U.N. Security Council resolution was not self-executing and that the United States did not have to comply with it in the absence of implementing domestic legislation).

139. See generally *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965 (9th Cir. 2012); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008).

140. See Baehr-Jones, *supra* note 8, at 465–66 (“[T]he primary reason for the continued lack of judicial review is the U.S. concern with providing secret intelligence evidence to an international review board.”).

A DUE PROCESS BALANCING ACT

such classified intelligence as evidence to an international court.¹⁴¹ This would frustrate the court's ability to properly decide sanction application issues. Commentators have noted that there is precedent for submitting classified evidence to an international tribunal, and such models may be replicated with any Sanctions Committee review court.¹⁴² However, the United States is likely not eager to share such sensitive intelligence with an international court—especially when its political and tactical interests weigh against establishing such a tribunal—and would probably veto any such proposal.¹⁴³

The United Nations has a vital interest in ensuring that the sanctions it applies are both deserved and effective.¹⁴⁴ Its experience with comprehensive sanctions regimes in the 1990s, such as the one applied against Iraq, shows that sanctions can cause debilitating harm to innocent people, yet utterly fail to accomplish their objectives.¹⁴⁵ By establishing an independent body to review Committee decisions, such gratuitous harm would likely be avoided, ensuring that sanctions are applied against the right people and entities, do not harm innocents, and are legally justifiable.¹⁴⁶ For the reasons explained above, however, the establishment of such a body is unlikely.

This does not mean that sanctioned individuals and entities are not afforded *any* measure of due process. The Ombudsperson mechanism established in 2009 does give sanctioned parties an opportunity to plead their cases at the U.N. level. Currently, sanctioned parties can petition the Ombudsperson to have their names cleared from the Consolidated List.¹⁴⁷ After conducting an investigation, the Ombudsperson recommends whether to retain the listing. If the Ombudsperson recommends de-listing, the petition will be granted unless all members of the Committee object in writing or the Security Council decides to reject it.¹⁴⁸

This leaves the five permanent members of the Security Council with a veto over all de-listing decisions, but it at least provides an avenue for petitioners to plead their

141. *See id.* at 484–85 (“[T]he main stumbling block to a more thorough review of 1267 designations and the primary concern of the chief contributor of the designations—the United States—is the problem of providing secret intelligence evidence to an international body.”).

142. *See id.* at 481–82 (“The [International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda] provide a considerable amount of confidentiality, and the United States has previously entrusted intelligence intercepts to the court’s review.”); *see also* Genser & Barth, *supra* note 13, at 38–39.

143. *See* Baehr-Jones, *supra* note 8, at 485 (“If states like the United States remain hesitant to allow defense counsel in domestic terrorism cases to review classified intelligence, the likelihood of garnering political will for international review of this evidence is arguably low.”).

144. WATSON REPORT, *supra* note 7, at 7 (“Failure to make the sanctions process more transparent, accessible, and subject to some form of review threatens to undermine the credibility and effectiveness of UN sanctions generally.”).

145. *See supra* text accompanying note 25.

146. *See* WATSON REPORT, *supra* note 7, at 7.

147. COMMITTEE GUIDELINES, *supra* note 48, § 7(x).

148. *Id.* § 7(ii).

cases and a genuine opportunity to have their sanctions lifted. In addition, individuals and entities subject to U.N. sanctions in the United States have access to U.S. courts to contest those sanctions. When weighed against the international community's interest in combating terrorism, these opportunities for review offer those subject to sanctions adequate due process. Because of this, and because an independent adjudicator is not a feasible option, further calls for reform should focus on preserving and strengthening the Ombudsman mechanism already in place.