

## ARTICLE

# Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions

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### Introduction

Since September 11, 2001, a major challenge facing U.S. policymakers has been how to conduct a global war on terror given the limited forum for kinetic war in Afghanistan and Iraq.<sup>1</sup> Outside of the 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.<sup>2</sup> The United States has primarily

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<sup>1</sup> The United States under the Bush administration also chose an immediate kinetic response to 9/11, rather than seeking solutions through international institutions. *See* HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 131 (2005) (noting the relative lack of extraditions relating to terrorism cases since 9/11 as a result of the military focus in the war on terror). Though beyond the scope of this paper, there are other kinetic responses likely outside the operational battlefields in Afghanistan and Iraq, as well as an informal infrastructure for extradition. *See, e.g.*, Eric Schmitt & Mark Mazzetti, *Secret Order Lets U.S. Raid Al Qaeda*, N.Y. TIMES, Nov. 9, 2008, <http://www.nytimes.com/2008/11/10/washington/10military.html> (discussing the Bush administration's classified policy of expansive self-defense, which granted U.S. special operations forces and CIA operatives the legal authority to conduct operations against terrorists in third countries without the sovereign nation's consent); *see also* DUFFY, *supra*, at 131.

<sup>2</sup> Of course, the U.S. military actions in Iraq are also arguably beyond the scope of legal and legitimate uses of force under the law of international armed conflict, since the United States did not receive UN Security Council authorization and the action arguably did not

pursued other international mechanisms to prosecute terrorist suspects outside of the military theaters.<sup>3</sup> The main international enforcement option the United States has developed through the United Nations (UN) since 9/11 has been a sanctions regime grown out of UN Security Council Resolution 1267 (UNSCR 1267).<sup>4</sup> The UN Security Council passed 1267 in 1999 to target individuals and entities belonging to or associated with the Taliban.<sup>5</sup> Following 9/11, the Security Council enacted additional resolutions implementing and reforming 1267, and greatly expanding the number of individuals listed to include Al Qaeda affiliates.<sup>6</sup>

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arise out of self-defense. *See* U.N. Charter art. 51 (requiring Security Council authorization for uses of force not taken in self-defense); U.N. Charter art. 2, para. 4 (prohibiting just war and forceful reprisals). Regardless of the legality of the U.S. actions in Iraq, unilateral actions against terrorist suspects taken abroad outside operational theaters would normally require third-party cooperation or assent.

<sup>3</sup> These kinds of international efforts include capacity building to support the development of host nation's law enforcement and military ability, using Interpol red notice lists to encourage in-country arrest, prosecution or extradition of terrorist suspects, as well as the efforts discussed in this article to designate terrorists under UNSCR 1267. *See generally* Chester A. Crocker, *Engaging Failed States*, 82 FOREIGN AFF., Sept.-Oct. 2003, at 32 (discussing the broader capacity building strategy the United States developed to fight counterinsurgencies as part of the war on terror); Stewart Patrick & Kaysie Brown, *The Pentagon and Global Development: Making Sense of the DoD's Expanding Role*, CENTER FOR GLOBAL DEVELOPMENT, WORKING PAPER NUMBER 131 (November 2007) (noting that beyond the wars in Afghanistan and Iraq, "[the Department of Defense] has expanded . . . its operations in the developing world to include a number of activities that might be more appropriately undertaken by the State Department, USAID and other civilian actors"); Mathieu Deflem, *Interpol and the Policing of International Terrorism: Developments and Dynamics since September 11*, in *TERRORISM: RESEARCH, READINGS, & REALITIES* 175 (Lynne L. Snowden & Bradley C. Whitsel eds., 2005) (After 9/11, "[Interpol] decided to tackle terrorism and organized crime more effectively and that the highest priority be given to the issuance of so-called Red Notices (international Interpol warrants to seek arrest and extradition) for terrorists sought in connection with the attacks.").

<sup>4</sup> Following 9/11 and the invasion of Afghanistan, one group of policymakers and scholars favored creating an international criminal tribunal through the UN to try captured terrorist suspects in anticipation of the hurdles of trying these individuals in U.S. custody. However, the Bush administration decided to use military commissions instead of an international forum. *See* JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* 25–26 (2008); Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13 (2003).

<sup>5</sup> Jorge Godinho, *When Worlds Collide: Enforcing United Nations Security Council Asset Freezes in the EU Legal Order*, 16 EUROPEAN L.J. 67, 67 (2010).

<sup>6</sup> *Id.*

However, since the expansion of the individuals listed and entities designated under 1267,<sup>7</sup> resulting in the increased number of asset freezes conducted post-9/11,<sup>8</sup> a number of appeals have challenged the legality of these sanctions, which do not provide for judicial review or a right to defense. Lawsuits contesting the application of 1267 have been ongoing in the United States, Belgium, Italy, the Netherlands, Pakistan, Switzerland, and Turkey.<sup>9</sup> Already several supranational and international judicial bodies have ruled against the application of the sanctions, holding in favor of due process rights for designated individuals. A landmark decision released from the European Court of Justice (ECJ) in September 2008, *Kadi and Al Barakaat International Foundation v. Council and Commission*,<sup>10</sup> the result of appeals in two cases, *Kadi v. Council and Commission*<sup>11</sup> and *Yusuf and Al Barakaat v. Council and Commission*,<sup>12</sup> found that the imposition of UNSCR 1267-mandated asset freezes without a hearing, proper defense, or judicial review violated the fundamental rights of the petitioners.<sup>13</sup> This decision was revolutionary in that a supranational body reviewed the implementation of a binding resolution of the Security Council exercised under Article VII of

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<sup>7</sup> See *id.* (noting the expansion of the original 1267 list in 2000 to include Osama bin Laden and Al Qaeda affiliated individuals); Martin Nettesheim, *UN Sanctions Against Individuals — A Challenge to the Architecture of the European Union Government 2* (Walter Hallstein-Institut für Europäisches Verfassungsrecht Humboldt-Universität zu Berlin, WHI - Paper 1/07, Feb. 27, 2007) (discussing the growth in targeted sanctions against individuals over the past decade).

<sup>8</sup> 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, 686 (2008) (“Since 2001, the U.S. Treasury Department, mainly through the efforts of its Office of Foreign Assets Control (“OFAC”), has been responsible for substantially increasing the number of “persons” listed as [Specially Designated Global Terrorists].”)

<sup>9</sup> Analytical Support and Sanctions Monitoring Team, Ninth Report, Letter dated May 11, 2009 from the Chairman of the Security Council Comm. established pursuant to resolution 1267 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, Annex I, U.N. Doc. S/2009/245 (May 13, 2009), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2009/245](http://www.un.org/ga/search/view_doc.asp?symbol=S/2009/245) [hereinafter Ninth Report of Sanctions Monitoring Team]; Victor D. Comras, *UN Terrorist Designation System Needs Reform*, PERSPECTIVES ON TERRORISM, July 2008, at 10, available at <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/53/110>.

<sup>10</sup> Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R. I-6351 [hereinafter *Kadi & Al Barakaat*].

<sup>11</sup> Case T-315/01, *Kadi v. Council & Comm’n*, 2005 E.C.R. II-3649 [hereinafter *Kadi*].

<sup>12</sup> Case T-306/01, *Yusuf & Al Barakaat Int’l Found. v. Council & Comm’n*, 2005 E.C.R. II-3533 [hereinafter *Yusuf & Al Barakaat*].

<sup>13</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 329.

the UN Charter.<sup>14</sup> In 2008, the UN Human Rights Committee also heard a challenge against the imposition of 1267 sanctions.<sup>15</sup> In another blow to the sanctions regime, the Committee found the imposition of sanctions on individuals was a violation of articles 12 and 17 of the International Covenant on Civil and Political Rights (ICCPR).<sup>16</sup> The European Court of Human Rights is also preparing to hear another challenge to 1267, as an appeal of a Switzerland Federal Supreme Court decision upholding 1267 sanctions is currently pending.<sup>17</sup>

Commentary surrounding the ECJ's controversial decision in *Kadi and Al Barakaat* has both praised the decision for expanding human rights protections, as well as criticized the ECJ for applying a pluralistic and "selective" interpretation of international law.<sup>18</sup> This article argues that this criticism of the ECJ's approach ignores the reasoning provided by the court for striking down the EU's implementing regulations, which rested on consistent, universal notions in international law of the application of fundamental human rights norms. The court was also careful to supply reasoning for overruling the regulations that relies on an interpretation of the UN Charter itself.<sup>19</sup> Part I of this article presents this argument, provides a close reading of the *Kadi and Al Barakaat* decision, and gives an overview of the other international and domestic legal challenges to the imposition of 1267 sanctions.

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<sup>14</sup> See Jean-Charles Brisard, *The European Court of Justice Challenging the UN Terrorism Sanctions Regime: A Legal Perspective*, JCB BLOG (Sept. 8, 2008, 7:00 PM), [http://jcb.blogs.com/jcb\\_blog/2008/09/the-european-co.html](http://jcb.blogs.com/jcb_blog/2008/09/the-european-co.html) (calling the ECJ decision a "stunning and unprecedented blow to the international terrorism sanctions regime"); see also Elizabeth F. Defeis, *Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community*, 30 FORDHAM INT'L L.J. 1449, 1461–62 (2007) (predicting the possible ramifications of the ECJ decision in the appeals of *Kadi* and *Yusuf and Al Barakaat*). Equally revolutionary was the CFI's application of a right to due process as a *jus cogens* norm in the lower court's decision in *Kadi and Al Barakaat*. *Id.*

<sup>15</sup> U.N. Human Rights Comm., *Sayadi v. Belgium*, Comm'n No. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (2008) [hereinafter *Sayadi*].

<sup>16</sup> *Id.* ¶ 10.8.

<sup>17</sup> *UN Sanctions Case Goes to Grand Chamber*, ECHR BLOG (Oct. 21, 2010, 5:29PM), <http://echrblog.blogspot.com/2010/10/un-sanctions-case-goes-to-grand-chamber.html> (discussing the case of *Youssef.Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment, Case No 1A 45/2007, ILDC 46, BGE 133 II 450 (Supreme Court of Switzerland) (2007), in which the complainants brought an application to the court over two years ago, but in October 2010, the Ordinary Chamber of the court relinquished jurisdiction and the case was relegated to the Grand Chambers).

<sup>18</sup> See *infra* notes 70–78 and accompanying text.

<sup>19</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 288.

In Part II, this article examines the due process procedural problems in terrorism designation cases, demonstrating that the fundamental problem preventing adequate due process in 1267 cases is the secret intelligence evidence used in designations.<sup>20</sup> While some scholars suggest looking to domestic norms to remedy this due process problem,<sup>21</sup> Part III of this article suggests the creation of an international standard for due process involving secret intelligence evidence based on the jurisprudence of international criminal courts, specifically the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). International criminal courts like the ICTY and ICTR allow for the admission of any evidence that would be of “probative value” to the court’s decision, including illegally collected evidence.<sup>22</sup> The courts also provide mechanisms for ensuring confidentiality of evidence, which has resulted in the United States providing classified intelligence evidence to the tribunals.<sup>23</sup>

Creating a universal standard for the review of secret intelligence would help solve the due process problems of UNSCR 1267 and would also pave the way for future international efforts to combat terrorism. The lack of judicial review and the inability of individuals to defend themselves against the sanctions regime stem from the lack of a review process for secret intelligence evidence. Without a judicial forum that properly protects secret intelligence, the United States will remain unwilling to provide an international judicial body with the evidence necessary for judicial review.<sup>24</sup> Thus, creating mechanisms to review secret intelligence evidence will enable the UN to enact judicial review at the international level, ensuring targeted individuals receive due process protections and have an adequate opportunity to defend themselves before the imposition of sanctions.

### I. Explaining the Due Process Challenges to UNSCR 1276

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<sup>20</sup> See *infra* notes 118–96 and accompanying text.

<sup>21</sup> See, e.g., Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT’L L. 3 (2009).

<sup>22</sup> See Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶ 28 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 1, 2004).

<sup>23</sup> See *infra* notes 215–19 and accompanying text.

<sup>24</sup> See *supra* note 4 and accompanying text explaining the U.S. reluctance to form an international tribunal to prosecute suspected terrorists post-September 11.

UNSCR 1267 almost immediately spurred litigation in domestic legal forums because of the lack of judicial review and due process in listing individuals and entities under the designation.<sup>25</sup> The ECJ ruling in *Kadi and Al Barakaat* represented the most prominent of these cases and elicited the most scholarly critique. However, case law surrounding Executive Order 13224 in the United States,<sup>26</sup> as well as less noted cases in Switzerland, Pakistan, Turkey, Great Britain, and the Human Rights Committee, also illustrated the problems of implementing the targeted sanctions.<sup>27</sup> While some critics claimed the *Kadi* decision represented a rejection of international institutions,<sup>28</sup> the ruling did not promote a pluralist approach to international law. Rather, as a whole, the cases challenging UNSCR 1267 demonstrate the fundamental due process problems of the designation process.

#### A. The UNSCR 1267 Designation Process

The UN Security Council created UNSCR 1267 in 1999 to target individuals and entities belonging to or associated with the Taliban.<sup>29</sup> The sanctions require member states to freeze the assets of individuals and entities on the list as well as to prevent the availability of further funds.<sup>30</sup> Individuals also face travel restrictions once designated. The process begins with member states submitting evidence to the Sanctions Committee in order to designate individuals and entities.<sup>31</sup> Although the evidence provided forms the basis for worldwide sanctions, the amount of detailed information submitted and available to member states on each designated individual or entity often remains slim, with the member states only providing a brief “statement of the case.”<sup>32</sup> One scholar noted in criticizing

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<sup>25</sup> BARDO FASSBENDER, TARGETED SANCTIONS AND DUE PROCESS 5 (2006), available at [http://untreaty.un.org/ola/media/info\\_from\\_lc/Fassbender\\_study.pdf](http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf).

<sup>26</sup> See, e.g., *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 878–84 (N.D. Ohio 2009); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007); *Complaint, Yassin Abdullah Kadi v. Paulson*, No. 1:09-CV-00108 (D.C. Cir. Jan. 16, 2009).

<sup>27</sup> See Ninth Report of Sanctions Monitoring Team, *supra* note 9, Annex I.

<sup>28</sup> See *infra* notes 72–78 and accompanying text.

<sup>29</sup> Godinho, *supra* note 5, at 67.

<sup>30</sup> *Id.* at 72.

<sup>31</sup> S.C. Res. 1735 ¶ 5, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

<sup>32</sup> *Id.* Simon Chesterman has also noted that the lack of information in 1267 designations stems from the intentionally vague criteria for listing. Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1112 (2006) (“The criteria for the inclusion on the list have been left intentionally vague.”).

the sanctions regime, “[a]ll indications are that the committee was not provided with concrete evidence supporting the inclusion of each and every name on the ‘blacklist.’”<sup>33</sup> Under UN Security Council Resolution 1735, which updated procedures for listing and delisting under UNSCR 1267, states are only required to provide the Committee with specific information supporting the determination that the individual or entity meets the criteria to be designated as affiliated with the Taliban or Al Qaeda, the nature of the information, and supporting information or documents “that can be provided.”<sup>34</sup> A state, therefore, is not mandated to submit classified intelligence evidence should the state decide it cannot release the information, and in practice, the amount of information provided can vary greatly — from one conclusory paragraph to over a page of information.<sup>35</sup> As a result, the UN receives heavily redacted information with vague details.<sup>36</sup> With this information, the UN Monitoring Committee creates a narrative summary of the facts, which is published along with the listing of the individual or entity.<sup>37</sup> Formally, the Committee makes the final determinations on listing without providing a hearing or any public review process. The Committee simply approves the designation provided by the member states in a confidential “no-objection” procedure.<sup>38</sup> Critics of the process have noted the inherent politicization of such a closed-door approach, which allows for the United States to effectively control the listing and delisting processes based on bilateral intelligence and law enforcement exchanges.<sup>39</sup>

Controversy over the sanctions process began soon after the major expansion of the list following September 11th. Initial due process issues with UNSCR 1276 included the lack of a mechanism to petition for delisting<sup>40</sup> and the lack of an opportunity for a hearing to review the evidence used for the listing. There were also no legal rules that formally established

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<sup>33</sup> Godihno, *supra* note 5, at 72.

<sup>34</sup> S.C. Res. 1735, *supra* note 31, ¶ 5.

<sup>35</sup> Thomas J. Biersteker & Sue E. Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* 26 (Watson Institute Targeted Sanctions Project, Working Paper, 2006), available at [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf).

<sup>36</sup> See Chesterman, *supra* note 32, at 1112.

<sup>37</sup> *Narrative Summaries and Reasons for Listing*, UNITED NATIONS, <http://www.un.org/sc/committees/1267/narrative.shtml> (last visited Mar. 5, 2011).

<sup>38</sup> Chesterman, *supra* note 32, at 1115.

<sup>39</sup> See *id.* at 1118–19.

<sup>40</sup> See Comras, *supra* note 9, at 13; see also STRENGTHENING UN SANCTIONS, *supra* note 35, at 3.

the conditions necessary for de-listing. Instead, de-listing was left to the discretion of the Security Council and often involved negotiations with the designating member state, in most cases the United States, for approval of de-listing.<sup>41</sup> Criticism also included complaints about inaccuracies in the list and insufficient identifying data for the listed individuals. In the private sector, banking institutions found they needed more information on an individual than was provided in the designation in order to freeze the right assets.<sup>42</sup>

The initial due process concerns evolved into the two main legal issues arising in the cases challenging 1267 within the European Union. First, do UN member states and supranational bodies like the ECJ have jurisdiction to review resolutions of the UN Security Council falling under Chapter VII authority of the UN Charter?<sup>43</sup> Two provisions within the UN Charter arguably deny a member state or supranational body from conducting any judicial review of Chapter VII resolutions. According to Article 103 of the UN Charter, member states are obliged to comply with Security Council resolutions made under Chapter VII. Even in the case that judicial review does occur, Article 105 provides the UN absolute immunity from any legal proceeding before a member state national court. Scholars argued that these provisions amounted to a “denial of legal remedies” for the individuals and entities the UN sanctions target.<sup>44</sup> The second legal issue was whether the fundamental rights of the individuals and entities had been violated in the process of implementing 1267 asset freezes.

### *B. A Close Reading of Kadi and Al Barakaat*

In *Kadi and Al Barakaat*, the ECJ decided both these legal issues in favor of the petitioners. First, the Court found that some review of binding UN Security Council resolutions could occur in the process of internal implementation.<sup>45</sup> This approach differed dramatically from the review process the lower court had employed. Second, the Court held that a lack of any judicial review in implementing 1267 violated the petitioners’ fundamental rights.<sup>46</sup>

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<sup>41</sup> See Chesterman, *supra* note 32, at 1116–19; Fassbender, *supra* note 25, at 4.

<sup>42</sup> Comras, *supra* note 9, at 12–13.

<sup>43</sup> See Fassbender, *supra* note 25, at 4–5.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 327.

<sup>46</sup> *Id.* ¶ 348.

The *Kadi and Al Barakaat* case challenged the Council of the European Union's (EC) implementing legislation for 1267. From 2000 to 2003, the EC adopted a series of regulations implementing the provisions of United Nations Security Council Resolutions 1267, 1333, 1390, and 1452.<sup>47</sup> These regulations implemented the Security Council's sanctions against individuals and entities associated with Al-Qaeda and the Taliban, providing measures to freeze their assets and prohibit their travel. The later regulations implemented the UN resolutions that attempted to reform UNSCR 1267 by providing additional rights to sanctioned individuals and entities.<sup>48</sup> These regulations allowed the individuals and entities to retain funds for basic necessities and for legal counsel.<sup>49</sup>

In 2001, the Council froze the funds of Yassin Abdullah Kadi, a resident of Saudi Arabia, and the Al Barakaat International Foundation, established in Sweden. The petitioners appealed to the Council's Court of First Instance (CFI), challenging the asset freezing on the grounds that the Council's regulations violated three of their fundamental rights: the right to be heard, the right to respect for property, and the right to an effective judicial review.<sup>50</sup> The CFI reasoned that the first issue before the court was whether the court had jurisdiction to review the legality of a Community regulation implementing a Chapter VII UN Security Council resolution.<sup>51</sup> In order to determine the issue of jurisdiction, the court looked to the obligations of member states in implementing Chapter VII resolutions. The court determined that Chapter VII resolutions are binding on the Community, as member states are obligated to implement Security Council

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<sup>47</sup> The Corresponding EC Regulations are: Council Regulation 337/2000, 2000 O.J. (L 43) 1 (EC), Council Regulation 467/2001, 2001 O.J. (L 67) 1 (EC), Council Regulation 881/2002, 2002 O.J. (L 139) 9 (EC), and Council Regulation 561/2003, 2003 O.J. (L 82) 1; *Kadi & Al Barakaat*, *supra* note 10, ¶ 18–42.

<sup>48</sup> See *infra* notes 119–40 and accompanying text for a discussion of the UN reforms to 1267.

<sup>49</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 45.

<sup>50</sup> *Id.* ¶ 49.

<sup>51</sup> *Id.* ¶ 73. The court also dealt with the issue of Community competence to impose economic sanctions through implementing regulations. The CFI held that Articles 301 and 60 of the European Council provided grounds for issuing implementing regulations; however, the ECJ added that Article 308 also provided a basis for adopting the regulation since it related to the operation of the common market. This distinction between the two decisions, though, is beyond the scope of this paper. *Id.* ¶¶ 65, 211–13. For further commentary on the Community competence aspect of the case, see Takis Tridimas & Jose A. Gutierrez-Fons, *EU Law, International Law, and Economic Sanctions against Terrorism: The Judiciary in Distress?*, 32 FORDHAM INT'L L.J. 660, 670 (2009).

resolutions falling under Chapter VII of the UN Charter.<sup>52</sup> The court also found that the Council could not alter the content of the resolutions based on issues of legality, nor could the Community set up mechanisms for review that would give rise to altering the resolutions.<sup>53</sup> According to the CFI, however, the Council could check the lawfulness of the Security Council's resolutions under *jus cogens*, the "higher rules of public international law binding on all subjects of international law."<sup>54</sup>

Despite finding jurisdiction to review the legality of Security Council resolutions, the CFI dismissed the petitioners' challenge because it found the resolutions did not infringe on the petitioners' fundamental rights and therefore did not violate *jus cogens*. Specifically, the court did not find a violation of the right to respect of property, finding that the asset freezing was not "arbitrary, inappropriate, or disproportionate."<sup>55</sup> The court reasoned that the freezing of property pursued a "fundamental public interest," was temporary, could be reviewed "after certain periods," and allowed for targeted individuals to present their case to the Sanctions Committee for review at any time.<sup>56</sup> The regulations also did not violate the right to be heard since there was no *jus cogens* principle mandating a hearing in cases of this nature.<sup>57</sup> Finally, the court found that the lack of judicial review was acceptable because the Security Council decided it was "not advisable" to establish an international court for a ruling on the facts.<sup>58</sup> This did not violate *jus cogens* rights according to the court because the interest in having judicial review did not outweigh the "essential public interest in the maintenance of international peace and security."<sup>59</sup>

The ruling struck some legal scholars as puzzling since there remains no firm international consensus that *jus cogens* rights include a right to due process.<sup>60</sup> Creating jurisdiction for review on a debated and shifting set of rights seemed an unusual method for handling the legal problems of UNSCR 1267. The court also did not explain exactly how the rights

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<sup>52</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 74.

<sup>53</sup> *Id.* ¶ 84.

<sup>54</sup> *Kadi*, *supra* note 11, ¶ 226; *Yusuf & Al Barakaat*, *supra* note 12, ¶ 277.

<sup>55</sup> *Kadi*, *supra* note 11, ¶ 243–51; *Yusuf & Al Barakaat*, *supra* note 12, ¶ 294–302.

<sup>56</sup> *Id.*

<sup>57</sup> *Kadi*, *supra* note 11, ¶ 261; *Yusuf & Al Barakaat*, *supra* note 12, ¶ 306.

<sup>58</sup> *Kadi*, *supra* note 11, ¶ 268; *Yusuf & Al Barakaat*, *supra* note 12, ¶ 315.

<sup>59</sup> *Kadi*, *supra* note 11, ¶ 289.

<sup>60</sup> See Defeis, *supra* note 14, at 1458–59 (noting that the CFI did not specify what rights this new *jus cogens* norm precisely included).

enumerated were part of *jus cogens*, thereby leaving the standard for violating this emerging *jus cogens* right vague.<sup>61</sup>

In a landmark ruling at the European Court of Justice (ECJ), the court rejected the CFI's decision and ruled the Council's regulations did violate fundamental rights and should be annulled and remedied.<sup>62</sup> The crux of the decision turned on the court's rejection of the CFI's ruling that the Council could not internally review the legality of a regulation implementing a UN Security Council Chapter VII resolution.<sup>63</sup> The ECJ distinguished between reviewing the resolution itself and reviewing the Council's own implementing regulations. The court found that the court could review the internal regulations implementing a resolution without "challenging the primacy" of that resolution in international law.<sup>64</sup> In fact, the Council had an obligation to review all regulations imposed by an international agreement to ensure that the regulations respected fundamental rights.<sup>65</sup> The ECJ also found that nothing within the UN Charter prohibited member states from adopting additional internal judicial review procedures in implementing resolutions.<sup>66</sup>

In this way, the ECJ completely avoided providing a review on whether 1267 and the follow-on resolutions violated *jus cogens*. This approach also enabled the court to sidestep the jurisdictional issue of whether the court could review the legality of a Security Council resolution. It was enough that the Council's regulations violated the Community's internal laws protecting fundamental rights.<sup>67</sup>

The court found that the regulations had in fact violated four aspects of fundamental rights guaranteed in Community law: the right to be heard, the right to defense, the right to effective judicial review, and the right to respect for property. Critically, because the Council did not provide Kadi and Al Barakaat with the evidence used against them, their right to defense

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<sup>61</sup> *Id.*

<sup>62</sup> The Court reviewed two issues, first whether the EC had competency to create the implementing regulations, and then whether these regulations infringed on fundamental rights. The Court found the EC did have competency, however, this issue is beyond the scope of this paper. *Kadi & Al Barakaat*, *supra* note 10, ¶ 236.

<sup>63</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 327.

<sup>64</sup> *Id.* ¶ 288.

<sup>65</sup> *Id.* ¶ 285.

<sup>66</sup> *Id.* ¶ 299.

<sup>67</sup> *Id.* ¶ 329.

and their right to be heard were not respected.<sup>68</sup> The ECJ provided the Council a period of time in which to bring the regulations in line with the Council's laws on fundamental rights. Within that period, not to exceed three months, the asset freezes were to remain in place.<sup>69</sup>

### C. Responding to *Kadi and Al Barakaat's* Critics

Some commentary on the *Kadi and Al Barakaat* decision has been favorable, emphasizing how the decision strengthened the role of human rights in reviewing targeted UN sanctions.<sup>70</sup> Other commentators have interpreted the *Kadi and Al Barakaat* decision as an example of the trend exhibited by European courts toward a more pluralistic approach to the application of international law.<sup>71</sup> This latter interpretation of the *Kadi and Al Barakaat* decision, however, does not account for the ways in which the Court carefully avoided undermining the UN Charter's supremacy. The Court chose not to subvert the resolution itself by ruling the sanction void due to a violation of a *jus cogens* norm. Instead, the Court preserved the resolution's binding mandate on the EC and restricted the decision's scope to the internal implementation of the sanction. Thus, at the international level, the ruling speaks more to the flaws of the judicial review process underpinning UNSCR 1267 than to the ECJ's approach to interpreting international law.

#### 1. Critique: The ECJ Decision as a Rejection of International Institutions

Scholars have critiqued *Kadi and Al Barakaat* as a rejection of international law and as an example of a pluralistic or dualist approach to the application of international law.<sup>72</sup> Critics taking this perspective have

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<sup>68</sup> *Id.* ¶ 348.

<sup>69</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 375–77.

<sup>70</sup> See, e.g., Katja S. Ziegler, *Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights*, 9 HUM. RTS. L. REV. 288, 302 (2009) (describing the ECJ decision “human rights friendly”); Piet Eeckhout, *Kadi and Al Barakaat: Luxembourg is Not Texas — or Washington DC*, EJIL TALK! (Feb. 25, 2009), <http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/>

(noting “the Court applied norms which the UN itself promotes and seeks to enforce”).

<sup>71</sup> See *infra* notes 72–78 and accompanying text.

<sup>72</sup> See, e.g., Johannes Reich, *Recent Development: Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999)*, 33 YALE J. INT'L L. 505, 510 (2008); Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes*,

even compared the ECJ opinion in *Kadi and Al Barakaat* with the U.S. Supreme Court decision in *Medellin*<sup>73</sup> to suggest the existence of an emerging global trend of selectively applying international law domestically.<sup>74</sup> Grainne de Burca places the opinion within a broader set of ECJ case law, arguing that this line of cases demonstrates the ECJ's "significant ambivalence" to the EU's approach to international law.<sup>75</sup> Under this analysis, *Kadi and Al Barakaat* presents a turn away from the constitutionalist approach to international law — in which the EU adhered to international law and showed fidelity to international institutions — and instead reflects the more "ad hoc exceptionalism" of the United States' pluralistic approach.<sup>76</sup>

De Burca and other scholars have argued that other ECJ cases, such as *Bosphorus Hava Yolları Turizm ve Ticaret AS v. Minister for Transportation, Energy & Communications*, similarly show the European courts refusing to apply the UN Charter's "supremacy clause."<sup>77</sup> These scholars emphasize that in both *Bosphorus* and *Kadi and Al Barakaat* the Court reviewed an act implementing a UNSC resolution and found the act could not violate fundamental rights "at least equivalent" to those defined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>78</sup> Thus, according to this view, the rulings act as a rejection of UN supremacy, applying a pick-and-choose approach to international law and institutions.

## 2. Response: The ECJ Carefully Framed the Decision within Existing UN Charter Rules

A broad sweeping portrayal of the ECJ decision as counter to international law, however, misconstrues the line of ECJ case law purportedly indicating a pluralistic approach. For instance, the cases Grainne de Burca references in her critique are mostly General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO)

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10 CHI. J. INT'L L. 91 (2009); Tridimas & Gutierrez-Fons, *supra* note 51; Ziegler, *supra* note 70 ("In contrast to the CFI, the ECJ clearly adopts a strong and consistent dualist approach . . .").

<sup>73</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>74</sup> Grainne de Burca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 3 (2010).

<sup>75</sup> *Id.* at 6.

<sup>76</sup> *Id.*

<sup>77</sup> Reich, *supra* note 72, at 510; Tridimas & Gutierrez-Fons, *supra* note 51, at 683.

<sup>78</sup> Reich, *supra* note 72, at 510.

cases.<sup>79</sup> She acknowledges that these cases are outliers,<sup>80</sup> due to the nature of multilateral trade.<sup>81</sup> It is also not clear EU courts have applied a pluralistic approach when considering other case law concerning the implementing regulations of UNSC resolutions. For example, in *Bosphorus*, the ECJ ultimately did not overturn an implementing regulation of a UNSC resolution, which in effect allowed the Irish government to impound a Turkish company's aircraft.<sup>82</sup> The court ruled that in implementing UNSC resolutions, the Community could place substantial limits on fundamental rights.<sup>83</sup>

This article advocates a different reading of the holdings in *Bosphorus* and *Kadi and Al Barakaat*. In both cases, the ECJ separated the review of the implementing legislation from review of the action of the UN Security Council.<sup>84</sup> As a result of this separation, it can be viewed as consistent with a constitutionalist approach to international law for the EC to create implementing legislation that conforms to its own Conventions concerning fundamental human rights because these regulations still give effect to the UNSC required actions.<sup>85</sup> Thus, in *Kadi and Al Barakaat*, the Court required the domestic mechanism to change but did not hold that the UN Security Council resolution was not binding. In fact, the Court referenced the UN Charter in concluding that a state could review its own implementing regulations of UNSC resolutions.<sup>86</sup> The Court ruled against the EC regulations not to countervail or obstruct the binding international

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<sup>79</sup> *E.g.*, Case C-308/06, Int'l Ass'n of Indep. Tanker Owners (Intertanko), Int'l Ass'n of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Comm., Lloyd's Register, Int'l Salvage Union, v. Sec'y of State for Transp., 3 C.M.L.R. 9 (2008).

<sup>80</sup> Burca, *supra* note 74, at 6 n.21.

<sup>81</sup> Reich, *supra* note 72, at 510.

<sup>82</sup> Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transp., Energy & Comm'ns*, 1996 E.C.R. I-3935, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995J0084:EN:PDF>.

<sup>83</sup> *Id.* ¶¶ 21–27. In subsequent proceedings, the judgment of the ECJ was confirmed by the European Court of Human Rights. See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 42 Eur. Ct. H.R. 1 (2006), available at <https://www.suepo.org/rights/public/archive/bosphorus.pdf>.

<sup>84</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 299.

<sup>85</sup> This article is not the first to criticize scholarly commentary framing *Kadi and Al Barakaat* as strictly dualist or pluralistic. See Eeckhout, *supra* note **Error! Bookmark not defined.** (“However, I find the notion of dualism much less helpful for the purpose of characterizing the Court's reasoning.”).

<sup>86</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 299.

sanction,<sup>87</sup> but rather to amend the implementation so that it conformed to the ECJ's internal system of laws.<sup>88</sup>

The above constitutionalist interpretation of *Kadi and Al Barakaat* demonstrates the divergence of the ECJ decision is in its application of international law from the U.S. Supreme Court's application in *Medellin*. The Supreme Court in *Breard v. Greene*,<sup>89</sup> the case that initiated the *Medellin* litigation, effectively ignored an ICJ ruling and also found that a domestic law created after the treaty in question superseded U.S. obligations to implement conflicting provisions. This decision exemplified the dualist construction of international law, in which domestic law can trump an international obligation.<sup>90</sup> The *Medellin* litigation also provides an interesting counterpoint to *Kadi and Al Barakaat*. In *Breard*, the Supreme Court effectively denied criminal due process rights to a Paraguayan national, who alleged the state had deprived him of his consular rights under the Vienna Convention during his state criminal trial.<sup>91</sup> In defiance of the ICJ ruling requiring the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . . ,"<sup>92</sup> the Supreme Court allowed the Paraguayan citizen to be executed without providing any collateral relief for the alleged violation of his consular rights.<sup>93</sup> In contrast, the ECJ's provision for additional due process rights in *Kadi and Al Barakaat* presented a markedly opposite holding. In *Kadi and Al Barakaat*, the ECJ did not undermine the supremacy of international acts, but rather required implementing an admittedly binding international act in a method that would still respect the individual's fundamental rights.<sup>94</sup>

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<sup>87</sup> *Id.* ¶ 288.

<sup>88</sup> *Id.* ¶ 281.

<sup>89</sup> 523 U.S. 371, 378 (1998).

<sup>90</sup> Janet Koven Levit, *Does Medellin Matter?*, 77 FORDHAM L. REV. 617, 624 (2008) ("Medellin is thus a "knock out" to the ICJ's institutional standing and a reaffirmation of American dualism, disentangling the domestic legal system from the international."); John Harrison, *International Adjudicators And Judicial Independence*, 30 HARV. J.L. & PUB. POL'Y 127, 127-28 (subscribing to the dualist approach to international law and citing *Medellin v. Dretke* as an example of this approach).

<sup>91</sup> *Breard*, 523 U.S. at 373.

<sup>92</sup> *Id.* at 374.

<sup>93</sup> *Id.* at 378.

<sup>94</sup> See also Eeckhout, *supra* note 70 (distinguishing *Kadi* from *Medellin* and noting that *Medellin* involved a domestic rejection of individual rights conferred under international law, as well as a rejection of a ruling of the highest international court).

International law scholars point to the ECJ's failure to explicitly reference the supremacy of the UN Charter, based on Article 103, as demonstrating the ECJ's dualist approach and as an effectual renunciation of UN supremacy.<sup>95</sup> However, as Piet Eeckhout notes in his commentary on the decision, the ECJ's failure to specifically address Article 103 of the UN Charter does not amount to the creation of positive law concerning the supremacy (or lack thereof) of UNSC resolutions.<sup>96</sup> The one line concerning the supremacy of a UN resolution, in fact, specifically noted that the ECJ's decision would "not entail any challenge to the primacy of that resolution in international law."<sup>97</sup>

The ECJ did criticize the Court of First Instance's approach in reviewing the EC regulation based on *jus cogens* principles.<sup>98</sup> However, this criticism does not necessarily equate with applying a dualist approach to international law despite the suggestion of one scholar.<sup>99</sup> The Court never explicitly limited the applicability of customary international law on EC regulations. It merely required an even more limiting method of reviewing whether there had been an infringement on fundamental rights by requiring the regulation to conform to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The question of whether *Kadi and Al Barakaat* represents a constitutionalist or pluralistic decision is an important one to ask. This article argues that the due process problems of 1267 could be solved by the creation of an international evidentiary standard, which would strengthen international organizations. The cases challenging 1267 should be viewed not as rejections of international institutions, but rather as signs that further international efforts are needed to appropriately implement the designations. The ECJ decision represented a court unwilling to undermine a UNSCR resolution but looking for a mechanism to provide due process rights in implementation. This article proposes that reform at the international level can provide such a mechanism.

#### D. Other Domestic Challenges to 1267

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<sup>95</sup> Burca, *supra* note 74, at 29.

<sup>96</sup> Eeckhout, *supra* note 70.

<sup>97</sup> *Kadi & Al Barakaat*, *supra* note 10, ¶ 4.

<sup>98</sup> *Id.* ¶ 87; *see also* Ziegler, *supra* note 70 (noting the ECJ criticized the CFI's review of the EC regulation based on *jus cogens* norms).

<sup>99</sup> Ziegler, *supra* note 70, at 293.

The ECJ has not been alone in finding that the designation process does not provide sufficient due process protections.<sup>100</sup> A number of other challenges have occurred since 1267's creation, indicating that the current listing procedures may not provide sufficient judicial review to withstand domestic challenges.

In November 2007, Switzerland's Federal Supreme Court in a 1267 appeal found against the sanctioned individual, Youssef Nada.<sup>101</sup> Although the court noted the sanctions system "still show[ed] major shortcomings in terms of fundamental rights," it did not hold that the UNSC sanction violated *jus cogens* norms.<sup>102</sup> The court effectively sidestepped the issue by finding that the UNSC sanctions process normally does not include opportunities for individuals "to lodge appeals to international or national instances." Thus, there is no "state consensus . . . that would recognize internationally binding guarantees for proceedings for the protections of the individual."<sup>103</sup>

The court noted the much more extensive fundamental rights normally guaranteed under domestic Swiss law. These include the rights of property, commercial freedom of action, and procedural guarantees.<sup>104</sup> The court also noted these rights exist under the ECHR and the ICCPR but are not included among the "inalienable core of the international conventions on human rights," specifically European Convention on Human Rights Article 15(2) and ICCPR Article 4(2) and, are therefore not *jus cogens* rights.

The Swiss court's decision, however, occurred prior to *Kadi and Al Barakaat* and followed the CFI's analysis closely in coming to the above conclusions.<sup>105</sup> Thus, the court may have decided differently had this case followed the ECJ opinion. Youssef Nada's challenge also did not end with this decision. His case is currently pending before the European Court of Human Rights.<sup>106</sup> Whether that court looks to the ECJ decision in *Kadi and*

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<sup>100</sup> See Ninth Report of Sanctions Monitoring Team, *supra* note 9, Annex 1.

<sup>101</sup> *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Case No. 1A 45/2007; ILDC 461 (CH 2007) BGE 133 II 450 (Switz.).

<sup>102</sup> *Id.* ¶ 7.4.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* ¶ 7.3.

<sup>105</sup> *Id.* ¶ A2.

<sup>106</sup> Ninth Report of Sanctions Monitoring Team, *supra* note 9, ¶ 24. Youssef Nada brought an application to the European Court of Human Rights on February 19, 2008. In March

*Al Barakaat*, the CFI's holding below, or creates an entirely new precedent will potentially have a great impact on the fate of the 1267 sanctions.

In December 2008, the UN Human Rights Committee heard another 1267 challenge originating from a domestic lawsuit against the implementation of the designation in Belgium.<sup>107</sup> The two listed individuals, a husband and wife working for the European branch of the Global Relief Foundation, brought suit against the Belgian government challenging the freezing of all their financial assets.<sup>108</sup> Belgium's Court of First Instance ruled in their favor and ordered the state to initiate de-listing procedures with the UN 1267 Committee to remove the couple's names from the list.<sup>109</sup> Despite this ruling, Belgium did not take action until a subsequent order from the court.<sup>110</sup> The court also declared the parties innocent of any charges.<sup>111</sup> The parties subsequently brought their allegations that Belgium had violated the ICCPR in freezing their assets to the Human Rights Committee.

The Human Rights Committee found the imposition of sanctions on individuals was a violation of articles 12 and 17 of the ICCPR.<sup>112</sup> Article 12 protects an individual's freedom of movement within a state and freedom to leave that state,<sup>113</sup> while Article 17 protects an individual's right to

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2010, the UN Sanctions Committee removed Youseff Nada from the 1267 list. Press Release, Security Council, Security Council Al-Qaida and Taliban Sanctions Committee Removes Names of Three Entities From Consolidated List, U.N. Press Release SC/987 (Mar. 11, 2010), available at <http://www.un.org/News/Press/docs/2010/sc9877.doc.htm>. The Swiss list subsequently also reflected this change. *Ordonnance Instituant des Mesures à L'encontre de Personnes et Entités Liées à Oussama ben Laden, au Groupe «Al-Qaïda» ou aux Taliban*, Modification du 22 Mars 2010, available at <http://www.admin.ch/ch/f/as/2010/1235.pdf>. Despite the delisting, the parties did not settle the dispute and his case was relegated to the Grand Chambers of the ECJ in October 2010. It remains pending. Press Release, European Court of Human Rights, Grand Chamber to Examine Case About Measures Taken Under United Nations Security Council Resolutions Against Al-Qaëda (Oct. 20, 2010) available at <http://www.monckton.com/docs/general/NadavSwitzerlandECtHR.pdf>.

<sup>107</sup> *Sayadi*, *supra* note 15.

<sup>108</sup> *Id.* ¶¶ 1, 2.2.

<sup>109</sup> *Id.* ¶ 2.5.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* ¶ 2.6.

<sup>112</sup> *Id.* ¶ 10.8

<sup>113</sup> International Covenant for Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including

privacy.<sup>114</sup> In restricting the individuals' liberty of movement, Belgium violated Article 12, paragraph 3 because "the restrictions of the [individual's] rights to leave the country" were not "necessary to protect national security or public order."<sup>115</sup> As a remedy, the Committee held that Belgium "has the duty to do all it can to have their names removed from the list as soon as possible," as well as an obligation to compensate the individuals, and to ensure that no further violations occur.<sup>116</sup>

As discussed in greater depth in Part II, the United States has also faced legal challenges of Executive Order (E.O.) 13224, the domestic order mirroring the 1267 designations.<sup>117</sup>

## II. Due Process Concerns Stem from the Process of Submitting Secret Intelligence for UNSCR 1267 Designations

Commentary on *Kadi and Al Barakaat* has mostly addressed either the positive impact of this decision on human rights law or how the decision represents a pluralistic approach to international law. However, few commentaries have addressed the process that prompted the challenge to the 1267 sanctions. Despite years of UN efforts to reform the 1267 process to provide for greater due process rights, the ECJ opinion specifically notes these efforts as insufficient. Nor does the commentary present proposals to solve the fundamental problems with targeted UN sanctions. If UNSCR 1267 is one of the only methods of pursuing terrorists through internationally binding legal actions, then the process of designating and removing individuals from the 1267 list deserves greater examination.

This section provides a background on the UN attempts to reform the designation process and argues that the primary reason for the continued lack of judicial review is the U.S. concern with providing secret

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his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.”).

<sup>114</sup> *Id.* art. 17 (“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”).

<sup>115</sup> *Id.*

<sup>116</sup> *Sayadi*, *supra* note 15, ¶ 12.

<sup>117</sup> *See infra* notes 141–96 and accompanying text.

intelligence evidence to an international review board.<sup>118</sup> Although member states' sovereign interests also likely limit UN implementation of meaningful judicial review, these concerns do not explain the complete lack of more meaningful reform after several UN attempts since the resolution's creation. The lack of due process ultimately will remain an issue in implementing these types of targeted sanctions until there is a method in place to submit redacted secret intelligence for review before an independent judicial body. As Part III will suggest, however, current models for submitting this evidence to international judicial bodies already exist and could be implemented.

*A. The Lack of Intelligence Evidence Prevents Meaningful UN Reform*

In the wake of the challenges to UNSCR 1267, the UN attempted to address the due process problems behind the sanctions regime by enacting several reforms to the listing and de-listing process.<sup>119</sup> None of the reforms included independent judicial review,<sup>120</sup> however, and therefore none would solve the fundamental problems with the sanctions identified in *Kadi and Al Barakaat*. In 2009, the UN Monitoring Committee considered additional reforms, but again, the proposed methods avoided the possibility of judicial review.<sup>121</sup> As Simon Chesterman notes, the lack of intelligence evidence available to the UN serves to limit any actual review of the sanctions themselves.<sup>122</sup> The UN reforms instead attempt to sidestep this issue by providing that if domestic challenges reveal evidence that contradicts the sanctions' facts, then the individuals can forward this information to the Committee.<sup>123</sup> In effect, the Committee has tried to protect the sanctions

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<sup>118</sup> Simon Chesterman has also argued that the unwillingness of states to provide secret intelligence evidence underpins the due process problems of 1267 designations. The classification of the evidence forms the basis for the states' denial of access to the information, which then inhibits not only the designated individual's access to the evidence, but also that of the UN. Chesterman, *supra* note 32, at 1118 (2006) ("As the European Court of First Instance observed in the *Yusuf* and *Kadi* cases, any opportunity for an individual whose assets are frozen to respond to the veracity and relevance of facts used to justify this action is definitely excluded: 'Those facts and that evidence, once classified as confidential or secret by the State which made the Sanctions Committee aware of them, are not, obviously, communicated to him, any more than they are to the Member States of the United Nations to which the Security Council's resolutions are addressed.'").

<sup>119</sup> See *infra* notes 126–33.

<sup>120</sup> See *infra* notes 129–31.

<sup>121</sup> See *infra* notes 134–37.

<sup>122</sup> See *supra* note 118.

<sup>123</sup> See *infra* notes 134–37.

regime without addressing the underlying problem of a lack of secret intelligence evidence.

The major UN reform efforts began following the 2005 CFI decisions in *Kadi and Yusuf and Al Barakaat*. A 2006 UN-commissioned study supported the CFI's finding that the court did have jurisdiction to conduct an indirect review of Security Council resolutions to determine whether the resolutions violated *jus cogens*.<sup>124</sup> The study also found that a due process *jus cogens* right existed and should include four elements in the context of targeted Chapter VII UN Security Council sanctions against individuals and entities: 1) the right to notice of the Council's measures as soon as possible; 2) the right to a hearing before the Council within a reasonable time; 3) the right to representation; and 4) the right to an effective remedy before an impartial institution.<sup>125</sup> Of the four elements, the UN has only implemented the first — right to notice — since the study was commissioned in 2006.<sup>126</sup> Resolution 1735 required the UN Monitoring Committee to notify the Permanent Missions of countries where the listed individual or entity was believed to be located within two weeks of adding a name to the consolidated list.<sup>127</sup> In 2007, the UN Monitoring Committee also began extensive notification procedures whenever the committee updated the list of targeted individuals or entities. This included the required notification of the Permanent Mission, providing immediate press releases as soon as an update to the list occurred, and circulating emails to more than 300 contact points provided by member states and other international and regional organizations to notify them of the change to the consolidated list.<sup>128</sup>

The UN Monitoring Committee has also undertaken a number of reforms in an attempt to update the sanction's listing and delisting procedures in response to critiques of UNSCR 1267, but none of the reforms have included establishing independent judicial review. In 2007, the UN Monitoring Committee updated its guidelines to reflect the reforms the

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<sup>124</sup> Fassbender, *supra* note 25, at 6–7.

<sup>125</sup> *Id.* at 8.

<sup>126</sup> See Analytical Support and Sanctions Monitoring Team, Report, Letter dated Jan. 8, 2008 from the Chairman of the Security Council Comm. established pursuant to resolution 1267 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, U.N. Doc. S/2008/25 (Jan. 17, 2008) [Hereinafter 2008 Report of Sanctions Monitoring Team].

<sup>127</sup> S.C. Res. 1735, *supra* note 31, ¶ 10.

<sup>128</sup> *Id.*

Security Council passed in Resolutions 1730 and 1735.<sup>129</sup> Resolution 1730 mandated the establishment within the Secretariat of a new administrative focal point to receive petitions of listed individuals and entities requesting de-listing in order to make the de-listing process more efficient and ultimately fairer.<sup>130</sup> The committee's new guidelines updated the de-listing procedures to reflect this change.<sup>131</sup> Also in response to requirements in Resolution 1735, the committee amended half the list of Taliban individuals and entities in order to introduce additional identifiers.<sup>132</sup> The 2007 reforms additionally provided broader exemptions to asset freezes, extended the period for considering exemptions, and de-listed twelve entities and four individuals pursuant to their petitions.<sup>133</sup> However, despite the recommendations in the UN commissioned study, the Committee did not introduce any mechanisms for third-party judicial review of the designations.

Even after the UN attempts to reform UNSCR 1267 in 2006-2007, the ECJ still found in September 2008 that the UN designation process violated the individual's and entity's fundamental rights. The decision in *Kadi and Al Barakaat* demonstrated that the UN reforms to the designation process had not been enough to remedy domestic challenges concerning the lack of due process. Though the Committee had improved the notification process and de-listing procedures — arguably providing a fairer process which would rectify mistakes in the sanctions list more quickly — the underlying problem of lack of judicial review remained. Since the ECJ decision, the elements in the 2006 UN commissioned study recommending impartial review along with representation will likely now be the standard required domestically in EU member states. And after *Kadi and Al Barakaat*, appellants challenging the 1267 sanctions will be able to cite precedent to argue for domestic judicial review as a part of internal 1267 implementation.

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<sup>129</sup> UNSCR 1735 also required states provide more detailed information to the Committee when submitting individuals or entities for listing, including: "(i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information and (iii) supporting information or documents that can be provided." *Id.* ¶ 5.

<sup>130</sup> S.C. Res. 1730, ¶ 1, U.N.Doc. S/RES/1730 (Dec. 19, 2006).

<sup>131</sup> 2008 Report of Sanctions Monitoring Team, *supra* note 126, § III ¶ 4.

<sup>132</sup> S.C. Res. 1735, *supra* note 31, ¶¶ 24–26; 2008 Report of Sanctions Monitoring Team, *supra* note 126, § III ¶ 7.

<sup>133</sup> 2008 Report of Sanctions Monitoring Team, *supra* note 126, § III ¶ 7.

One possible result of the *Kadi and Al-Barakaat* decision is further UN reform of the designation process without creating actual judicial review at the international level. This could assist the UN Sanctions Committee in saving the legitimacy of the sanctions, but likely would not lead to greater due process protections. In fact, in 2009, the Committee began providing a short “narrative summary of reasons” for listing, which typically includes a few conclusory paragraphs on the individual.<sup>134</sup> In the latest UN Monitoring Committee report, the Committee also suggested a radical idea in light of the *Kadi and Al Barakaat* decision — allow challenges within member states to serve as the informal judicial checks of the designations.<sup>135</sup> Though the Committee did not state this outright, the report proposed that “if a listed person can demonstrate to the satisfaction of a national court that some element of a narrative summary of reasons for listing is wrong, the State defending the action should forward this information to the Committee.”<sup>136</sup> While the report did not further explain what the Committee should do with this information, it noted that the Committee “may benefit” from this process.<sup>137</sup>

Thus, the Committee effectively created a supremacy saving, backstop measure by allowing the Committee to still consider potentially exculpatory evidence that might come out in domestic judicial challenges without actually requiring the Committee to include judicial review within the designation process. If evidence presented to the domestic court clearly undermines the “narrative summary of reasons” and the veracity of the designation information, the Committee will be able to de-list an individual before the court rules publicly condemning the designation.<sup>138</sup> This could save the sanctions regime from other high-publicity cases like *Kadi and Al Barakaat* without actually requiring the Committee to include judicial review within the designation process.

The Committee’s suggestion demonstrates that the 1267 challenges stem from underlying problems with the intelligence evidence.<sup>139</sup> The report

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<sup>134</sup> *Narrative Summaries of Reasons for Listing*, *supra* note 37.

<sup>135</sup> Ninth Report of Sanctions Monitoring Team, *supra* note 9, ¶ 23.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> This cynical interpretation reflects the extremely political nature of the 1267 process, whereby the United States has negotiated the listing of war on terror suspects with the four other veto-power nations on the UN Security Council.

<sup>139</sup> See *supra* note 32 and accompanying text showing how the ECJ decision partially hinged on the lack of evidence; see also *infra* notes 141–96 and accompanying text for a fuller

reveals that one of the Committee's main concerns with domestic challenges is that a designated individual could present a convincing narrative of facts that contradicts the designation. Since the evidence submitted to the Committee is significantly redacted, not publicly available, and not judicially reviewed,<sup>140</sup> a powerful in-court narrative presenting evidence countering the designation would subvert the basis for the designation. The Committee would not have any compelling evidence to present in a public and independent forum to counter that narrative.

*B. The Underlying Problem: U.S. Secret Intelligence Evidence in Terrorist Designation Cases*

The United States provides most of the intelligence evidence used to create the 1267 designations.<sup>141</sup> The designations often originate with domestic listings of terrorist individuals and entities under Executive Order 13224.<sup>142</sup> E.O. 13224 is the domestic equivalent of UNSCR 1267 and provides the basis for U.S. nominations to the UN Monitoring

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discussion of how a lack of intelligence evidence creates the due process problems in asset freezing cases.

<sup>140</sup> The UN Human Rights Committee's description of the facts in the Nabil Sayadi and Patricia Vinck case provides an example of this opaque process. There, Belgium was required to provide information on the individuals to the UN Sanctions Committee, but did so before the conclusion of the criminal investigation. In spite of the dismissal of the investigation, the individuals' names remained on the list. U.N. Human Rights Comm., 94th Sess., Annex: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 10.13, U.N. Doc. CCPR/C/94/D/1472/2006 (Dec. 29, 2008).

<sup>141</sup> See Chesterman, *supra* note 32, at 1118 (noting that the United States proposes the majority of designations).

<sup>142</sup> See Exec. Order No. 13,224, 66 Fed. Reg. 49079 (Sept. 23, 2001) (blocking property and prohibiting transactions with those who commit, threaten to commit, or support terrorism). For example, Hasan Abdullah Hersi al-Turki was listed under E.O. 13224 on June 3, 2004, and designated under 1267 on July 6, 2004, Hilarion del Rosario Santos III was listed under E.O. 13224 on June 16, 2008, and designated under 1267 on June 4, 2008, and Nayif Bin-Muhammad al-Qahtani was listed under E.O. 13224 on May 11, 2010, and designated under 1267 on May 11, 2010. *Individuals and Entities Designated by the State Department Under E.O. 13224*, U.S. DEP'T OF STATE, <http://www.state.gov/s/ct/rls/other/des/143210.htm> (last modified Feb. 24, 2011); *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*, UNITED NATIONS, <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf> (last modified Feb. 9, 2011). This demonstrates how closely U.S. E.O. 13224 listings correlate with the timing of UN 1267 designations.

Committee.<sup>143</sup> The U.S. designation packets submitted to the UN provide redacted information based on the UN guidelines for listing individuals and entities under UNSCR 1267.<sup>144</sup> Under the U.S. domestic listing process, the Treasury Department compiles classified information on suspected terrorist individuals and entities. Once the Treasury Department lists a suspected terrorist entity or individual, the Department can impose a number of limitations on the suspected terrorist, which mirror the UN 1267 sanctions.<sup>145</sup> The U.S. process for designating terrorist individuals and entities under E.O. 13224, however, has also resulted in due process challenges. One of the most severe problems for designated individuals and entities attempting to challenge asset freezing has been the Treasury Department's seizure and confiscation of evidence during investigation and trial.<sup>146</sup> The plaintiff may have not be able to access his or her own business records during the trial in order to prove the designation was an error<sup>147</sup> because the United States has largely prevented plaintiffs challenging asset seizure from accessing and presenting classified intelligence evidence in court.<sup>148</sup> Thus, once the Treasury Department seizes documents and classifies them, the evidence becomes largely inaccessible for the designated individual or entity — even though the evidence might be his own business records. At the heart of these challenges, then, is the question of how a designated entity or individual can have adequate due process when the government does not give access to secret intelligence evidence. In this way, the asset freezing litigation in U.S. federal courts has raised similar due process problems relating to classified intelligence evidence as the 1267 challenges in Europe.<sup>149</sup>

It is particularly important to consider the U.S. domestic cases because the records and the process for designating terrorist suspects domestically feed directly into the designation process with the UN 1267

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<sup>143</sup> Based on author's experience working on 1267 designation packets at the Defense Intelligence Agency.

<sup>144</sup> See *supra* note 129 describing the information states are required to provide under UNSCR 1735 when submitting names of targeted individuals and entities for listing.

<sup>145</sup> See *infra* notes 161–63 and accompanying text.

<sup>146</sup> See *infra* notes 171–73 and accompanying text.

<sup>147</sup> See *infra* note 171.

<sup>148</sup> See Stampley, *supra* note 8, at 708.

<sup>149</sup> See *infra* notes 159–67 and accompanying text.

Committee.<sup>150</sup> Thus, the U.S. challenges demonstrate that the evidentiary basis for the listing is potentially insufficient even within the U.S. context. Since U.S. listings form the basis for most UN listings, the ultimate problem of due process stems primarily from insufficiently reviewed evidence being submitted to the UN.<sup>151</sup>

Contrary to some U.S. critics' statements that the ECJ decision in *Kadi and Al Barakaat* reflects the problems of the EU's counterterrorism policy,<sup>152</sup> the United States has also seen an increase in litigation and scholarly debate on the issue of due process rights as they apply to asset freezing under E.O. 13224. U.S. critics of the ECJ decision in *Kadi and Al Barakaat* cite the U.S. system of handling designations and asset seizures under E.O. 13224 as a model for effective designation. The U.S. process of review relies on the deferential administrative legal review process and the Administrative Procedure Act (APA) to handle legal challenges.<sup>153</sup> However, the process for review in the United States does not automatically provide for a judicial hearing to review the evidence against the designated individual or entity and, until recently, did not guarantee legal representation.<sup>154</sup> As a result, similar due process concerns have arisen in the United States. So far, the court decisions have mostly upheld the Treasury Department's actions, specifically allowing Treasury's Office of Foreign Assets Control (OFAC) to "freeze pending investigation" (FPI).<sup>155</sup> FPI allows OFAC to freeze an entity's assets indefinitely with no prior notice and no hearing in order to investigate for the purpose of designating the entity a Specially Designated Terrorist Group (SDTG).<sup>156</sup>

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<sup>150</sup> Other states, such as Switzerland, maintain domestic lists updated to reflect the UN 1267 list. The United States, in contrast, submits the vast majority of 1267 designations, and so its domestic designations often preempt UN designations. *See supra* note 141.

<sup>151</sup> Simon Chesterman notes that the UN often does not have a chance to review the intelligence forming the basis for the designations, since states submitting designation packets often keep the intelligence evidence supporting the designation classified. *See* Chesterman, *supra* note 32, at 1118.

<sup>152</sup> *See, e.g.,* David Nordell, *The Wheels of Justice Grind Exceedingly Problematic*, THE TERROR FINANCE BLOG (Sept. 4, 2008, 8:29 AM), [http://www.terrorfinance.org/the\\_terror\\_finance\\_blog/2008/09/the-wheels-of-j.html](http://www.terrorfinance.org/the_terror_finance_blog/2008/09/the-wheels-of-j.html).

<sup>153</sup> *See* Comras, *supra* note 9.

<sup>154</sup> *See* Stampley, *supra* note 8, at 699, 702.

<sup>155</sup> *See* OMB WATCH & GRANTMAKERS WITHOUT BORDERS, COLLATERAL DAMAGE: HOW THE WAR ON TERROR HURTS CHARITIES, FOUNDATIONS, AND THE PEOPLE THEY SERVE 25, 27 (2008), available at <http://www.ombwatch.org/files/npadv/PDF/collateraldamage.pdf>.

<sup>156</sup> *See id.* at 25.

In 2009, in the first case ruling against an OFAC asset freezing, a federal district court found that the Treasury Department had violated an Islamic charity's Fourth Amendment rights by seizing assets without obtaining prior judicial review.<sup>157</sup> On May 10, 2010, the court found that the proper remedy would be a post-seizure probable cause hearing.<sup>158</sup> Consequently, the government may now have to produce some evidence to demonstrate cause for the asset seizure. This case demonstrates that the lack of judicial review in E.O. 13224 asset freezing cases has created similar due process problems to those in *Kadi and Al Barakaat*.

The main hurdle entities face in contesting E.O. 13224 asset seizures thus mirrors that faced at the international level in disputing UN designation under 1267: the lack of access to classified material prevents the individual or entity from having a meaningful adversarial review of evidence before an impartial adjudicator. This section will provide a basic overview of the laws that allowed for post 9/11 FPI under the USA PATRIOT Act and then discuss the critical due process problems that classified intelligence poses to these administrative proceedings.

### *1. The Treasury Department's Extra-Judicial Power to Freeze Assets*

President Bush issued E.O. 13224 immediately after 9/11 under the authorities granted the executive through the International Emergency Economic Powers Act (IEEPA) of 1977,<sup>159</sup> which restricts the executive's power to impose sanctions on nations except during a national emergency.<sup>160</sup> E.O. 13224 allows the executive through the Treasury Department to designate an entity as a terrorist group in order to take administrative actions to freeze the group's assets. The USA PATRIOT Act

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<sup>157</sup> See *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 878–84 (N.D. Ohio 2009).

<sup>158</sup> See *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 646–53 (N.D. Ohio 2010).

<sup>159</sup> Pub. L. 95-223, 91 Stat. 1625, 1626–29 (codified as amended at 50 U.S.C. §§ 1701–1706 (2006)).

<sup>160</sup> See JOHN ROTH ET AL., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 76 (2004), available at [http://www.911commission.gov/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://www.911commission.gov/staff_statements/911_TerrFin_Monograph.pdf).

of 2001<sup>161</sup> added to the power of E.O. 13224 by allowing the Treasury Department to impose all the blocking effects of the designation at the point of opening the investigation and before the designation had been decided or finalized.<sup>162</sup> This aspect of the PATRIOT Act has been widely criticized because it allows the government to seize with no notice, no hearing, and without any time limit on the asset freezing. OFAC also has no legal obligation to disclose the classified evidence justifying the FPI.<sup>163</sup>

Challenging OFAC's actions in court has also proven difficult because the administrative seizure of assets and the Specially Designated Terrorist Group (SDTG) designation process is governed by the judicial review provision in the APA. Under this provision, OFAC's actions will be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>164</sup> The D.C. Circuit has used the three-part due process test for administrative property seizures in *Mathews v. Eldridge* to review the constitutionality of OFAC's actions under E.O. 13224 and the PATRIOT Act and has held that the Treasury Department has not denied due process.<sup>165</sup> The three-part test weighs the private interests involved in the property seizure, the risk of erroneous deprivation, and the government interests involved.<sup>166</sup> In asset freezing cases, the courts have found the government interests of national security outweigh the private interests involved and the risk of erroneous deprivation.<sup>167</sup>

The most recent challenge to the process of freezing assets without any judicial review, *KindHearts for Charitable Humanitarian Development, Inc. v.*

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<sup>161</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>162</sup> See Memorandum of Points and Authorities in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 7, *Kindhearts for Charitable Humanitarian Dev., Inc. v. Paulson*, No. 02400 (Oct. 9, 2008), available at [http://www.aclu.org/pdfs/safefree/kindhearts\\_memo.pdf](http://www.aclu.org/pdfs/safefree/kindhearts_memo.pdf) [hereinafter *Kindheart Plaintiff's Motion*].

<sup>163</sup> See *id.* at 7.

<sup>164</sup> 5 U.S.C. § 706(2)(A) (2006); see *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003).

<sup>165</sup> See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003); *Global Relief Foundation v. O'Neill*, 315 F.3d 748 (7th Cir. 2002).

<sup>166</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>167</sup> *Stampley*, *supra* note 8, at 709; see also *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629–30 (1989)) (listing the government interests that may be served by seizing assets).

*Geithner*, presented a unique attack on the Treasury Department's tactics. Muslim-Americans created KindHearts after the post-9/11 crackdown on Al-Haramain<sup>168</sup> in an attempt to establish a charity to which Muslim-Americans could donate that would strictly adhere to the new Department of Treasury guidelines for reporting and tracking charitable funds under the PATRIOT Act.<sup>169</sup> Despite KindHearts' goal of conforming to the new regulations, however, OFAC froze its assets in February 2006. OFAC kept the FPI hold without designating the group, bringing any formal charges, presenting any evidence to KindHearts, or even allowing KindHearts access to its own files and information.<sup>170</sup> In November 2008, a federal judge in Ohio granted the first motion in the KindHearts case against the Treasury Department and imposed a restraining order on the Department's freeze.<sup>171</sup> One of the plaintiff's main arguments was that the withholding of the intelligence evidence and the failure of the government to provide any factual or legal basis for the property seizure constituted a violation of due process rights by failing to provide constitutionally-required notice.<sup>172</sup> Critical to providing due process under *Mathews* is the release of the classified intelligence evidence forming the basis of the government's legal or factual claims to the plaintiff's attorneys in order to allow for adversarial testing.<sup>173</sup> At trial, plaintiff's counsel argued that the risk of erroneous deprivation is arguably higher when there is no outside review of the

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<sup>168</sup> Al-Haramain is an affiliate of the Al-Haramain Islamic Foundation, a worldwide Muslim charity based in Saudi Arabia. In 2004, the Treasury Department designated Al-Haramain as a SDTG and OFAC froze the group's assets. In 2006, Al-Haramain challenged the government's surveillance and brought a discovery request in federal district court. After years of litigation, the court ruled in 2010 that the Bush administration should have obtained warrants for the wiretaps of Al-Haramain. See *In re NSA Telecomms. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010). Al-Haramain Islamic Foundation and many of its branches remain UNSCR 1267 designated entities. See *The Consolidated List, Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, UNITED NATIONS, <http://www.un.org/sc/committees/1267/consolist.shtml>.

<sup>169</sup> Eric Lichtblau, *Judge Faults Freezing of Assets in Terror Case*, N.Y. Times, Aug. 19, 2009, <http://www.nytimes.com/2009/08/20/us/20terror.html>; Kindheart Plaintiff's Motion, *supra* note 162, at 3–4.

<sup>170</sup> Kindheart Plaintiff's Motion, *supra* note 162, at 3–4.

<sup>171</sup> *Judge Says Shuttered Charity Must Be Given Due Process*, OMBWATCH, <http://www.ombwatch.org/node/3816> (Oct. 21, 2008).

<sup>172</sup> Kindheart Plaintiff's Motion, *supra* note 162, at 25 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333–34).

<sup>173</sup> See *id.* at 25–26 (“If a notice does not inform an affected person of the government's charges and evidence against him, he is unable ‘to present his side of the story’ to rebut that evidence and the notice is constitutionally inadequate.”) (internal citation omitted).

material supporting the seizure of property.<sup>174</sup> In August 2009, the court ruled against the Treasury Department, finding the freeze pending investigation had constituted a Fourth Amendment violation.<sup>175</sup> The court remanded to OFAC, requiring that the government meet with the judge so the judge could determine which classified intelligence evidence OFAC would have to redact and submit to the plaintiff in order to provide sufficient notice.<sup>176</sup> Thus, even in the United States, a challenge to extrajudicial asset freezing based on designations demonstrated that this process significantly infringes on fundamental rights.

## 2. *The Benefits of Judicial Review of Intelligence Evidence in Asset Freezing Cases*

It is important to briefly emphasize why judicial review remains so crucial even in the context of civil or quasi-criminal cases involving terrorism designations. In 2004, a 9/11 Commission report suggested that the risk of erroneous deprivation is especially great in terrorist financing cases. The 9/11 Commission warned the government in its report on terrorist finance that the standard of review of evidence used to designate suspected terrorist individuals and entities was so deferential to the executive that errors in asset freezing could and have occurred.<sup>177</sup> The Commission also found that during the period following 9/11 the push for designations caused “chaos” within OFAC.<sup>178</sup> Some officials were concerned that the haste of designations could result in error.<sup>179</sup> In the case of the Minnesota-based Al-Barakaat charity for example, the Commission found that intelligence analysts based the asset seizure on incorrect intelligence resulting in erroneous deprivation.<sup>180</sup> OFAC moved forward quickly with the designation of Al-Barakaat because the intelligence community relied on a derivative designation theory, which held that any branch office of an entity could be designated a terrorist entity if intelligence analysts could show ties with the main entity and show the main entity financed

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<sup>174</sup> Stampley, *supra* note 8, at 704.

<sup>175</sup> KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857, 878–84 (N.D. Ohio 2009).

<sup>176</sup> KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010).

<sup>177</sup> ROTH ET AL., *supra* note 160, at 84.

<sup>178</sup> *Id.* at 79.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 84–86.

terrorism.<sup>181</sup> After the designation process, however, the United Arab Emirates (UAE) allowed U.S. investigators to review the bank accounts that allegedly tied Al-Barakaat to Al-Qaeda.<sup>182</sup> During this investigation, an FBI investigator found discrepancies between the OFAC designation package and the evidence obtained in the UAE.<sup>183</sup> Ultimately, the U.S. investigation did not find any evidence connecting Al-Barakaat to terrorist activity.<sup>184</sup>

The case study exemplifies that a lack of judicial review of intelligence evidence in designation and asset seizure cases can lead to erroneous deprivation. In the case of the private entities involved, the consequences are great, effectively resulting in the end of charitable activities and the creation of a permanent stain on the organization's reputation.<sup>185</sup> The risk posed by unchallenged intelligence evidence, however, also stands to hurt the government. Where unscrupulous and error-ridden intelligence provides false evidence, the government has lost resources and political capital by not having a more thorough adversarial review process.

Expanding on this line of argument, Eric Gouvin argues that the PATRIOT Act measures do not establish an effective method of preventing terrorist financing because the new rules mandating banks to submit larger amounts of data on suspicious activity are merely flooding intelligence analysts with reports and not providing targeted investigative data that could be useful in court prosecutions.<sup>186</sup> The number of suspicious activity reports banks filed with Treasury from 1996 to 2003 has reportedly increased by 453%.<sup>187</sup> Gouvin argues that the "intelligence paradigm" of combating terrorism is ultimately fruitless when the information ceases to be useful in assisting law enforcement action.<sup>188</sup> The 9/11 commission report on terrorist financing also noted that the approximately \$300,000 used in

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<sup>181</sup> *Id.* at 79.

<sup>182</sup> *Id.* at 82.

<sup>183</sup> ROTH ET AL., *supra* note 160, at 82–83.

<sup>184</sup> *Id.* at 83.

<sup>185</sup> OMBWATCH, COLLATERAL DAMAGE: HOW THE WAR ON TERROR HURTS CHARITIES, FOUNDATIONS, AND THE PEOPLE THEY SERVE 23 (2008), <http://www.ombwatch.org/files/npadv/PDF/collateraldamage.pdf>.

<sup>186</sup> See Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955 (2003).

<sup>187</sup> David Zaring & Elana Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1416 (2007).

<sup>188</sup> See Gouvin, *supra* note 186, at 973–81 (describing the numerous flaws in using the intelligence model of collecting more financial data to try to prevent terrorist attacks).

funding the attacks on 9/11 passed through banks in an inconspicuous manner that would not have ended up in one of the post-9/11 mandated suspicious activity reports now inundating the desks of intelligence analysts.<sup>189</sup>

This argument may challenge U.S. courts to reconsider the government interest prong of the *Mathews* due process test. Creating designations based on untested classified foreign intelligence could hurt the government interest of effectively, expediently, and efficiently obstructing and prosecuting terrorism. One of the reasons for the erroneous deprivation in the Al-Barakaat case was that government analysts put together cases built on large amounts of classified foreign intelligence that could not be adequately supported through a thorough law enforcement investigation.<sup>190</sup> Ultimately this did not serve the government's interests for a number of reasons: 1) the criminal proceedings against Al-Barakaat were dismissed, 2) government resources were wasted, 3) the failed prosecution undermined efforts to push for international designations of the group, 4) the reliance on incorrect intelligence undermined legitimacy for the United States in the war on terror, and 5) shutting down a charity that provided relief to Muslims globally undermined the strategic goal of winning Muslim hearts and minds.<sup>191</sup> Relying on flimsy intelligence evidence also did not serve the government's interest in conducting expedient and efficient prosecutions. The 9/11 Commission found that because the OFAC measures were taken "with limited evidence," the reviews under higher evidence standards in court forced OFAC to unfreeze much of the assets.<sup>192</sup> This process wasted OFAC resources and resulted in a failed prosecution.<sup>193</sup> Despite the much broader powers granted to the Treasury to freeze assets and obtain charities' documents, the resulting evidence has not been more successful in increasing money-laundering convictions and the failure rate for federal money laundering investigations remains at 99.9%.<sup>194</sup>

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<sup>189</sup> ROTH ET AL., *supra* note 160, at 53.

<sup>190</sup> *Id.* at 82-83.

<sup>191</sup> Garry Wenkins argues persuasively that the administrative actions freezing Muslim charities' funds have hurt U.S. national security. In shutting down philanthropic donations abroad the United States has stopped a major source of soft power that is especially important in countering the radical ideology of Islamic extremism. *See* Garry W. Jenkins, *Soft Power, Strategic Security, And International Philanthropy*, 85 N.C. L. REV. 773, 777-79 (2007).

<sup>192</sup> ROTH ET AL., *supra* note 160, at 47.

<sup>193</sup> *Id.*

<sup>194</sup> Zaring & Baylis, *supra* note 187, 1413.

Thus far, appeals courts have not found that depriving an individual or entity subject to FPI or SDTG designation access to classified intelligence evidence is a violation of due process rights under the *Mathews* test.<sup>195</sup> However, the 2009 district court ruling in *KindHearts* finding the Treasury Department's FPI unconstitutional may force the government to begin providing some intelligence evidence to individuals and entities designated under E.O. 13224.<sup>196</sup>

### III. Proposal: Create an International Standard for the Review of Secret Intelligence Evidence

The previous sections of this article identified the problem currently hindering the implementation of 1267 designations. Because the classified intelligence material used in designations does not present publicly available, challengeable evidence, there is no method for adequate judicial review. This not only infringes on the due process rights of sanctioned individuals and entities, but also potentially wastes UN and member state resources on incorrectly designated entities.<sup>197</sup> This section proposes creating an international standard for the review of secret intelligence evidence based on the rules that govern the ICTY and ICTR. This international standard for review would enable the UN to create a separate judicial review mechanism to allow for adversarial testing prior to designating an individual or entity. This would serve to preempt domestic challenges to UNSCR 1267 by creating independent judicial review at the international level. Thus, the sanctions regime would be protected from future challenges like *Kadi and Al Barakaat*. Providing judicial review would also serve to re-legitimize the sanctions regime after the critical decisions of the ECJ and the Human Rights Committee.

#### A. Existing Domestic Standards for Admitting Classified Intelligence Evidence

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<sup>195</sup> See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002); *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 738 (D.C. Cir. 2007), cert. denied, 128 S. Ct. 92 (2007); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 19 (D.C. Cir. 1999); *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001).

<sup>196</sup> *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 878–84 (N.D. Ohio 2009).

<sup>197</sup> See *supra* notes 186–89 and accompanying text.

Though the nature of secret intelligence renders it difficult to conduct judicial review at any level, standards for how to introduce and use this evidence already exist in both domestic courts and in international judicial bodies. These standards could provide a basis for creating an international standard that would solve the due process problems currently stymieing the 1267 listing process.

Various domestic models provide more or less access to classified intelligence evidence to individuals facing a deprivation of liberty or property. Israel, for instance, provides statutorily for *in camera* review of evidence without a detainee or his lawyer present if “disclosure of the evidence to either of them may impair state security or public security.”<sup>198</sup> Other systems provide the detained individual with a special advocate, who can view the secret intelligence evidence and advocate on behalf of the detainee.<sup>199</sup> This article does not attempt to review all of the domestic evidentiary rules relating to secret intelligence evidence, but simply notes the divergent approaches.<sup>200</sup>

The question of secret intelligence evidence has not been completely resolved in U.S. domestic cases involving war on terror detainees since 9/11.<sup>201</sup> The Classified Information Procedures Act governs a defendant’s rights to classified information in the criminal context and provides that defendants have a right to discoverable “material” and exculpatory evidence in a summarized form.<sup>202</sup> In some post-9/11 detainee cases, the courts have also provided additional access to classified information. In *Parhat v. Gates*<sup>203</sup> and *Bismullah v. Gates*,<sup>204</sup> for example, the D.C. Circuit found that the government could only protect the detainee’s due process rights by providing the court and defense counsel access to classified information to assess the government’s submitted evidence. In order to accomplish this, the *Bismullah* court allowed the defense counsel security clearances and

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<sup>198</sup> Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 § 6(c) (1979) (Isr.).

<sup>199</sup> Barak-Erez & Waxman, *supra* note 21, at 25.

<sup>200</sup> For a more thorough review, see generally *id.*

<sup>201</sup> For an overview of the different standards for classified intelligence evidence used in the criminal, immigration, and detention contexts, see Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962 (2005).

<sup>202</sup> Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C.A. app. 1-16 (West 2000 & Supp. 2004)); see also Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 291 n.73 (1986).

<sup>203</sup> *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

<sup>204</sup> *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007).

mandated the government to turn over all “Government Information.”<sup>205</sup> It remains unclear, however, whether this standard, which applies in the context of habeas proceedings, would ever apply in asset freezing cases. As discussed above, the government has broad discretion in omitting classified intelligence from the administrative record in asset freezing cases.<sup>206</sup>

*B. Creating an International Standard for the Submission of Secret Intelligence Evidence*

The jurisprudence of international criminal courts provides a wealth of case law dealing with evidentiary standards in the context of an international judicial body. The war crimes and genocide cases before these courts also involve issues of national security with similarly sensitive sources of evidence to those used in 1267 designations. Thus, this article proposes looking to these bodies to borrow a standard for the review of classified intelligence evidence. Creating an international standard for reviewing secret information would allow the UN to initiate judicial review of 1267 designations in order to preempt domestic challenges.

*1. Using ICTY and ICTR Jurisprudence to Create an International Standard for Intelligence Evidence*

Evidentiary procedures within the ICTY and ICTR show how an international judicial body could be a potentially effective forum for the review of classified intelligence evidence. The ICTY and ICTR courts provide a considerable amount of confidentiality, and the United States has previously entrusted intelligence intercepts to the court’s review.<sup>207</sup> The courts also admit a broad amount of evidence, including hearsay and illegally collected evidence, if the evidence would have value in determining a case’s outcome.<sup>208</sup> Creating a similar independent international court to

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<sup>205</sup> *Id.* at 185 (granting defense counsel access to Government Information, but denying petitioner’s request for further discovery).

<sup>206</sup> *See supra* note 195 and accompanying text.

<sup>207</sup> *See infra* notes 215–19 and accompanying text. The United States has also worked closely to provide evidence to the prosecutor in the Special Court for Sierra Leone. *See* Prosecutor v. Sesay, Kallon, & Gbao, Case No. SCSL-04-15-T, Motion Seeking Disclosure of the Relationship Between the United States of America’s Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor, (Nov. 1, 2004).

<sup>208</sup> *See* Patricia Wald, *Fair Trials for War Criminals*, 4 INT’L COMMENTARY ON EVIDENCE art. 6 (2006).

provide a legitimate forum for judicial review of 1267 sanctions and travel bans could address the issue of due process violations and assist in the international effort to prosecute terrorist facilitation networks.

In the ICTY and ICTR, the rules for admitting evidence are more flexible than those that govern both U.S. criminal and civil courts. ICTY Rule 89 sets up a broad metric for evidence admissibility, providing that any evidence that would offer “probative value” can be admitted.<sup>209</sup> This admissibility metric has allowed the court to review hearsay evidence, potentially illegally obtained intelligence intercepts,<sup>210</sup> and sensitive, national security-related evidence *in camera*.<sup>211</sup> Although ICTY Rule 95 prohibits admitting evidence that was “obtained by methods which cast substantial doubt on its credibility,” the courts have interpreted this rule liberally and found that it does not necessarily bar illegally collected evidence.<sup>212</sup> In *Kordic* and *Brdjanin*, the court found that especially during war, intelligence collected using clandestine eavesdropping techniques does not fall within the ban of Rule 95.<sup>213</sup> Evidence obtained illegally, therefore, is not necessarily excluded; instead the judges can evaluate and admit any evidence based on its quality and value.<sup>214</sup> This standard could allow for foreign collected intelligence evidence in terrorism cases that might not be admissible in a U.S. court to be used to successfully uphold the designation of a suspected terrorist in an international court.

The ICTY also does not require a possessor of intelligence information to turn over the information when that state or organization is not its owner or originator.<sup>215</sup> This creates an additional safeguard for states concerned with revealing third-party sources of highly sensitive material.<sup>216</sup>

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<sup>209</sup> RULE OF PROCEDURE AND EVIDENCE, ICTY, Rule 89, *available at* [http://www.icls.de/dokumente/icty\\_rules.pdf](http://www.icls.de/dokumente/icty_rules.pdf);

<sup>210</sup> Prosecutor v. Brdjanin, Case No. IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, ¶ 53 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 3, 2003).

<sup>211</sup> Wald, *supra* note 208, at 5.

<sup>212</sup> See, e.g., Prosecutor v. Kordic and Crkez, Case No. IT-95-14-2-T at T 13694; *Brdjanin*, *supra* note 210.

<sup>213</sup> *Kordic*, *supra* note 212, at T 13670.

<sup>214</sup> *Brdjanin*, *supra* note 210, ¶ 55.

<sup>215</sup> Prosecutor v. Milutinović, Case No. IT-05-87-AR108, Decision on Request of the North Atlantic Treaty Organisation for Review (May 15, 2006); see also Jacob Katz Cogan, *International Decision: Prosecutor v. Mllutinovic et al.*, 101 A.J.I.L. 163 (2007) (commenting on the ICTY decision).

<sup>216</sup> This is crucial because it would provide a mechanism for preventing review of third-party human intelligence, a highly sensitive body of intelligence in the war on terror.

In *Prosecutor v. Milutinovic*, the court relied on Article 29 of the ICTY Statute and ICTY Rule 54b in holding that a party seeking the production of evidence by a state must satisfy four elements: “the specificity of the requested documents, the relevance of those documents to a contested issue in the case, the necessity of such documents ‘for a fair determination’ of that issue, and the steps that were taken by the party to secure the state’s assistance.”<sup>217</sup> Even if those elements are satisfied, however, the State producing the intelligence can still rely on Rule 70, which allows the prosecutor not to disclose certain confidential information that has been provided “solely for the purpose of generating new evidence.”<sup>218</sup> Rule 66 also allows states to withhold certain classified information for purposes of national security.<sup>219</sup> The ICTY rules thus provide significant flexibility for states to provide classified intelligence without necessarily revealing the evidence to the defendant and without revealing third-party sources.

I propose that the UN create an independent judicial review mechanism for 1267 designations based on the evidentiary rules and precedents of the ICTY and ICTR. This proposal is relatively simple, but has not yet been suggested as a method for solving the due process problems in implementing 1267. By borrowing evidentiary rules from the ICTY and ICTR, the UN will be able to establish an independent review body that allows challenges to the designations before the Monitoring Committee adds individuals or entities to the 1267 list.<sup>220</sup> Thus, once placed on the list, the member states could implement the designations without having to conduct any additional judicial review and could refer to the UN judicial review process if the designated individuals brought new challenges.

## 2. Response to Counterarguments

Although my proposal is relatively simple, I anticipate a number of potential criticisms from both Western and non-Western states. This section addresses and responds to each in turn.

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<sup>217</sup> Cogan, *supra* note 215 at 165.

<sup>218</sup> RULE OF PROCEDURE AND EVIDENCE, ICTY, Rule 70(B), available at [http://www.icts.de/dokumente/icty\\_rules.pdf](http://www.icts.de/dokumente/icty_rules.pdf); see also Chesterman, *supra* note 32, at 1122 (noting how useful Rule 70 has been in allowing the prosecutor access to military intelligence).

<sup>219</sup> RULE OF PROCEDURE AND EVIDENCE, ICTY, Rule 66.

<sup>220</sup> For a summary of the proposals from member states regarding the types of judicial review bodies appropriate for 1267 review, see Chesterman, *supra* note 32, at 1116.

*a. Potential U.S. and Western Criticism*

This article argues that issues with intelligence evidence underpin the due process problems of 1267 implementation because the lack of intelligence evidence prevents any kind of judicial review. One potential counterargument, though, is that states' sovereign interests represent the main challenge opposing judicial review at the international level. The creation of an international standard for intelligence evidence, then, would not ameliorate the problem of 1267 implementation if states remained unwilling to submit the listing process to some form of international judicial review.

This argument certainly has some merit. The UN may have decided not to implement any form of judicial review in part due to the strong member state objections to other international mechanisms for judicial review, such as the International Criminal Court.<sup>221</sup> In this case, however, the resistance to greater international involvement more likely stems from the underlying concern of divulging secret intelligence to an international body.<sup>222</sup> In fact, following 9/11 and the invasion of Afghanistan, one group of policymakers and scholars favored creating an international criminal tribunal through the UN to try captured terrorist suspects in anticipation of the challenges they would face trying these individuals in U.S. custody.<sup>223</sup> The Bush administration, however, decided to use military commissions instead of an international forum precisely because of concerns with providing intelligence evidence to an international body.<sup>224</sup> Though state sovereignty certainly inhibits other forms of international judicial review, the main stumbling block to a more thorough review of 1267 designations and the primary concern of the chief contributor of the designations — the

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<sup>221</sup> See *supra* notes 119–40 and accompanying text concerning the UN's reform of the 1267 process; see also Dapo Akande, *The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT'L & COMP. L.Q. 309 (1997); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 438, 443 (2003) (noting the “noisy U.S. opposition” to the International Criminal Court, as well as state resistance to the creation of an international judicial system);

<sup>222</sup> See Jessica Almqvist, *A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions*, 57 INT'L & COMP. L.Q. 303 (2008) (commenting on how the global “securitization” of terrorism renders judicial review difficult and noting the UN Security Council committees' reliance on intelligence and security information in combating terrorism).

<sup>223</sup> Goldstone & Simpson, *supra* note 4.

<sup>224</sup> See MAHLER, *supra* note 4, at 25–26.

United States — is the problem of providing secret intelligence evidence to an international body.<sup>225</sup>

However, sovereign interests against international judicial review could still prompt member states to oppose any implementation of an international standard for review of intelligence evidence.<sup>226</sup> 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. There are also legitimate feasibility concerns with providing this evidence to an international body.<sup>227</sup> Additionally, even if ICTY standards are implemented, this ultimately might not meet the due process requirements of courts like the European Court of Human Rights.<sup>228</sup> Critics of the ICTY have argued that the tribunal's evidence rules do not sufficiently protect the due process rights of the accused, pointing to procedures that have eroded the accused's right to discover potentially exculpatory secret intelligence evidence.<sup>229</sup> Thus, even with these reforms, challenges to 1267 might continue. Finally, the time and cost of having independent judicial review might further hamper the 1267 designation process and make member states less willing to submit designation packets.<sup>230</sup>

*b. Response to U.S. and Western Criticism*

Some judicial review, though, would likely answer the fundamental problems the ECJ identified in *Kadi and Al Barakaat* with the implementing

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<sup>225</sup> Chesterman, *supra* note 32, at 1118.

<sup>226</sup> See *supra* notes 207–20 and accompanying text describing the proposed international standard.

<sup>227</sup> For example, there are a number of administrative difficulties involved in redacting intelligence enough to allow for the intelligence to provide useful evidence without compromising sources and methods.

<sup>228</sup> For example, in the Belgium case *Sayadi*, see *supra* note 15, the Human Rights Commission reviewed the material in the designation and determined that this was not sufficient. See *supra* notes 107–16 and accompanying text. If the independent judicial review body came to decisions based on insufficient, overly redacted intelligence, then similar challenges could possibly occur even with the added independent review.

<sup>229</sup> See Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 YALE J. INT'L L. 477, 487–89 (2006).

<sup>230</sup> Already, the number of designations has started to dissipate and critics of the designation process have called the process an untenable method of prosecuting terrorism. See Chesterman, *supra* note 32, at 1119 nn.216–17.

regulations. The creation of a method for evaluating this classified material would answer the basic lack of independent judicial review, which has not been addressed in any of the previous UN reforms.<sup>231</sup> Though it would require additional administrative hurdles prior to designation, this could incentivize member states to only submit the most obvious and critical cases for designation under a worldwide mandated sanction. Arguably, this added hurdle could assist in deterring the current waste of government and UN resources on designating individuals and entities with less clear ties to Al Qaeda or the Taliban.<sup>232</sup>

The United States also has a strong state interest in creating new mechanisms for review. Since states will likely continue to battle domestic challenges in implementing regulations, there is arguably a strong interest in resolving due process problems at the outset. Additionally, as discussed above, the international standards for presenting intelligence evidence actually favor the prosecution more than some domestic rules, including U.S. evidentiary rules.<sup>233</sup> Finally, if further domestic challenges undermine the implementation of 1267, the sanction will cease to be as effective internationally.<sup>234</sup> Since the United States cannot control the implementation process in the EU, it is arguably in the interest of the United States to promote international review mechanisms that it could help shape.

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<sup>231</sup> See *supra* notes 119–40 and accompanying text.

<sup>232</sup> See *supra* note 178–89 and accompanying text discussing the potential for U.S. government resources to be wasted on erroneous terrorist designations.

<sup>233</sup> Consider for example the expansiveness of Rule 95, which allows for the admission of some illegally collected evidence. In contrast, the exclusionary rule in U.S. criminal procedure prohibits the admission of some evidence gathered in violation of a criminal defendant's rights. See *Weeks v. United States*, 232 U.S. 383, 393 (1914) ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.").

<sup>234</sup> In fact, the Monitoring Committee has already expressed concern that member states are not rigorously enforcing sanctions. See Analytical Support and Sanctions Monitoring Team, Fourth Report, Letter dated Mar. 8, 2006 from the Chairman of the Security Council Comm. established pursuant to resolution 1267 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, ¶ 57, U.N. Doc S/2006/154 (Mar. 10, 2006), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2006/154](http://www.un.org/ga/search/view_doc.asp?symbol=S/2006/154).

Finally, initiating some process for judicial review could assist in revitalizing U.S. legitimacy in the global effort to halt terrorist financing. The repeated challenges to the sanctions regime in Europe have called into question U.S. efforts to maintain a closed-door, political process for designating individuals and entities. In agreeing to an international judicial review mechanism, the United States could answer the critics of the designation process by demonstrating that the evidence used to designate the targeted individuals can withstand independent scrutiny.

*c. Potential Non-Western Criticism*

The standards for reviewing intelligence evidence presented above to some extent revolve around common law and Western notions of due process.<sup>235</sup> Problems with creating an international standard, though, could arise because theories of adjudication differ among member states.<sup>236</sup> For instance, under the natural law theory of presenting evidence in common law, a person denied some liberty must have a sufficient ability to review the evidence presented against him or her in order to present a rebuttal. Though this does not translate into full review where the evidence may be classified, this does require that the individual have access to a certain core of information.<sup>237</sup> U.S. due process rights provide for this natural right by requiring notice and an opportunity to respond.<sup>238</sup>

Arguably, a non-Western perspective may take exception to the idea of a natural right to judicial review. Other permanent members of the Security Council, such as China, may oppose creating a binding international mechanism of judicial review for a sanctions regime.<sup>239</sup> Ultimately, if every member state's definition of due process varies, no set requirement for evidence would ever universally solve due process concerns.

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<sup>235</sup> For an argument on how natural law defines international norms, see LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 15 (1981).

<sup>236</sup> See Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 *YALE J. INT'L L.* 331, 339–44 (2009) (describing the differences between positivist, natural law, and public order theories of international law).

<sup>237</sup> Barak-Erez & Waxman, *supra* note 21, at 12.

<sup>238</sup> *Id.*

<sup>239</sup> For example, a number of countries including China have not fully ratified the ICCPR, the international treaty which requires states provide certain fundamental due process rights, such as the right to trial for criminal defendants and the right to liberty and security of the person. See ICCPR, *supra* note 113, art. 9.

Only once a clear *jus cogens* formed around the requirements of due process and judicial review would the creation of universal evidentiary standards become a timely issue. Even then, non-Western states would be unlikely to follow a European or Western court finding that such a *jus cogens* right had emerged.

*d. Response to Non-Western Criticism*

International criminal tribunals and the International Criminal Court have already implemented standards of due process in international judicial bodies.<sup>240</sup> In the past fifteen years, international criminal law has developed dramatically through courts such as the ICTY and ICTR, the International Criminal Court, as well as various hybrid international criminal courts, like the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Ad-Hoc Court for East Timor.<sup>241</sup> These courts span the globe and do not reflect solely Western concepts of justice.<sup>242</sup> The development of International Human Rights Law has also created norms of due process that increasingly apply to all states regardless of judicial structure.<sup>243</sup> Some scholars even argue that the Court of First Instance was correct in ruling in *Kadi and Al Barakaat* that there is an emerging *jus cogens* norm requiring due process before a denial of a fundamental right.<sup>244</sup> Thus, even though non-Western countries may have different theories of adjudication, the fundamental due process right of independent judicial review has become an almost universally applicable norm. Therefore, this Article's proposal to provide evidentiary mechanisms

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<sup>240</sup> See generally Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381 (2001).

<sup>241</sup> See generally GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* (2005); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436 (2002).

<sup>242</sup> But see Nick Grono, *The Role of International Justice Mechanisms in Fragile States*, INTERNATIONAL CRISIS GROUP, Oct. 9, 2009, available at <http://www.crisisgroup.org/en/publication-type/speeches/2009/the-role-of-international-justice-mechanisms-in-fragile-states.aspx> (describing criticism of international criminal law: "[I]nternational justice, as exemplified by the ICC and universal jurisdiction, is a Western tool, deployed against the global south.").

<sup>243</sup> See generally HENRY J. STEINER ET. AL, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* (3d ed. 2008).

<sup>244</sup> ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 10 (2d ed. 2010) (noting but disagreeing with commentary finding that due process rights have become a *jus cogens* norm).

to allow for this kind of review does not diverge drastically from standards already required in most states, both Western and non-Western.

Non-Western states should also consider these review mechanisms as specifically aimed at remedying the problem of individualized UN sanctions. Targeted sanctions against individuals arguably require a different method of review than other sanctions carried out under Chapter VII of the UN Charter, which typically target states.<sup>245</sup> The individualized sanctions impose mandated worldwide consequences on designated individuals without any current form of review.<sup>246</sup> As others have already pointed out in the scholarly debate on individualized sanctions, this poses a phenomenal and novel restriction on individuals that arguably warrants some additional protections.<sup>247</sup> Thus, the establishment of a norm for the review of classified intelligence evidence in the context of individualized sanctions would not necessarily have to apply to all international judicial review bodies. Instead, non-Western countries may be able to agree that at least in the context of imposing worldwide sanctions against individuals, there should be some standard for presenting and reviewing incriminating evidence.

### Conclusion

The fight to legally prosecute terrorism will likely dwarf the kinetic fight against terrorism over the next decade. However, one of the only international mechanisms created to specifically prosecute terrorism, UNSCR 1267, will continue to face due process challenges until the UN provides a system for judicial review. In order to provide a mechanism for reviewing 1267 designations, the international community should consider adopting standards for reviewing intelligence evidence in line with those of the ICTY and ICTR. This would solve one large hurdle to creating meaningful judicial review of the 1267 list of designated entities and individuals by providing those designated with access to the intelligence evidence used against them. 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.

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<sup>245</sup> In fact, a number of critiques have been leveled against individually targeted Chapter VII sanctions. *See, e.g.,* Nettesheim, *supra* note 7.

<sup>246</sup> *See supra* notes 29–44 and accompanying text on the process involved in designating entities and individuals under 1267.

<sup>247</sup> Defeis, *supra* note 14.

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