The UN 1267 Sanctions Regime: Due Process and Intelligence Evidence

by

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Abstract

This article examines the UN Security Council’s 1267 sanctions regime. Initially adopted in 1999, the sanctions regime has undergone various reforms in response to criticisms from various channels, including domestic and regional courts. Despite the reforms, the 1267 regime continues to fall short of the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law. Reviewing recent developments, the article addresses the need for additional safeguards and possible reform options. In particular, the paper explores international standards for reviewing secret intelligence evidence based on the jurisprudence of international criminal tribunals and argues that such evidentiary procedures have the potential to be used as a guide for reviewing 1267 listing.
# TABLE OF CONTENTS

INTRODUCTION ........................................................................................................................................... 1

PART I.  BACKGROUND OF THE 1267 SANCTIONS REGIME AND TERRORIST LISTING ................................................. 3

PART II.  THE 1267 SANCTIONS REGIME – DUE PROCESS AND HUMAN RIGHTS DENIAL ............................................. 10

PART III.  DOMESTIC AND REGIONAL LEGAL CHALLENGES TO THE 1267 SANCTIONS REGIME ........................................... 13

A. Domestic and Regional Implementation of the 1267 Regime ............................................................................. 15

B. Legal Challenges of the 1267 Regime and individual remedies .................................................................... 25

PART IV.  CREATION OF THE 1267 OMBUDSPERSON – DUE PROCESS IMPLICATIONS .................................................... 27

PART V.  DUE PROCESS DEFICITS AND SECRET EVIDENCE .................................................................................. 31

A. Absence of Judicial Review in the 1267 Sanctions Regime ........................................................................... 33

B. Availability and Reliability of Intelligence Evidence .................................................................................... 33

PART IV.  INTRODUCING AN INTERNATIONAL STANDARD OF REVIEW FOR INTELLIGENCE EVIDENCE ................. 37
INTRODUCTION

The UN Security Council Resolution 1267 targets individuals and entities that are Taliban and Al Qaida affiliates. By virtue of this Resolution, listed individuals or entities are subjected to a series of sanctions which includes an international asset freeze and travel ban that UN member states are then obliged to implement using their own domestic laws. Since the inception of the 1267 Sanctions Regime, the legality of these sanctions has come under severe criticism from UN Member States, scholars, and various domestic and regional courts dealing with legal challenges to the 1267 regime. Despite the reforms, the 1267 regime continues to fall short of the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law. In particular, the regime fails to provide enlisted individuals and entities with the right to effective review by a competent and independent review mechanism, right to counsel with respect to all proceedings and the right to an effective remedy.\(^1\)

In the *Kadi II* judgment\(^2\), the General Court concluded that despite the reforms of the 1267 regime, namely the creation of the focal point and the Office of the Ombudsperson, “the review carried out by the Community judicature of Community measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them”\(^3\). The Security Council has responded to these criticisms with various reforms, including the latest adoption of Security Council Resolutions 1988 and 1989\(^4\). However, these reforms still fall short of addressing due process concerns and issues of disclosure of secret evidence. Even after the introduction of the Ombudsperson, the due process objections remain given that the Ombudsperson is not the final arbiter. The ultimate decision

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\(^2\) Case T-85/09, Yassin Abdullah Kadi v European Commission, General Court of the European Union (September 30, 2011)

\(^3\) Case T-85/09, Kadi v Commission, ¶129, (September 30, 2011)

remains essentially diplomatic and not one of an independent and impartial body for determining facts of law in respect of listing of an individual.

This paper explores these issues in six parts. Part I provides an overview of the 1267 Sanctions Regime and the various domestic and regional legal challenges to the imposition of 1267 sanctions. Part II examines the characterization of the regime and consequent due process and human rights denials. Part III reviews domestic and regional implementation of the 1267 regime, legal challenges, and remedies for designated individuals and entities. Part IV examines the creation of the 1267 Ombudsperson and whether the introduction of this reform rectifies the regime’s due process deficits. In Part V, this paper looks at the procedural deficits of the 1267 regime, demonstrating that the secret intelligence evidence used in listing individuals and entities remains the ultimate obstacle preventing adequate due process in listing procedures. In Part VI, this paper explores international standards for reviewing secret intelligence evidence based on the jurisprudence of international criminal tribunals and the lessons that can be learnt for 1267 regime. The evidentiary procedures within the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have the potential to be used as a guide for a similar international forum for reviewing 1267 listing.

The reforms to the 1267 regime up to this point have not resolved issues of disclosure of secret evidence and intelligence. The calls for due process protections are currently ever more urgent, given the continuous violation of an array of human rights by the 1267 regime. The use of administrative procedure in the 1267 regime rather than criminal trials has had severe consequences on listed individuals and entities. This includes weakening the burden of proof, limiting the presumption of innocence, modifying evidentiary rules to permit secret evidence and other types of evidence that would not be admissible in criminal trials. In this paper, it is proposed that despite contrary arguments, the severity of 1267 sanctions warrant bringing it within the sphere of criminal sanctions.
Consequently, such designations must not be accepted on less evidence that is required in a criminal trial.

Lack of due process ultimately remains an issue until there is a method in place for an independent judicial body to review redacted secret intelligence. In this paper, it is proposed that an independent judicial review mechanism based on rules of evidence of international tribunals such as the International Criminal Court for the former Yugoslavia (ICTY) should be used to address current due process deficits of the 1267 regime. Through this approach, all evidence used to sustain listing will be disclosed to designated individuals and entities while at the same time allowing for Member States to disclose secret evidence on the assurance that their sources and methods will not be disclosed. This approach could also prevent innocent individuals from being listed for many years before having the evidence against them tested in domestic courts. This method undoubtedly has its own challenges including the opposition of sovereign member states and the problem of reliability of secret evidence. These limitations may however be inevitable in a system looking to reconcile procedural protections for the defendants with that of states looking to protect the source and method of their intelligence.

I. BACKGROUND OF THE 1267 SANCTIONS REGIME AND TERRORIST LISTING

Evolution of the 1267 Sanctions Regime’s Listing and Delisting Procedure

The 1267 regime is a UN Security Council sanctions regime in response to threats by Al Qaida, obliging UN Member States to impose specified sanctions against individuals and entities associated with the Taliban and Al Qaida. Security Council Resolution 1267 and later 1333 (2000) was a response under Chapter VII of the UN Charter to deal with terrorism seen as a threat to international peace and security. The initial Resolution 1267 imposed a flight ban and freeze of funds directly and indirectly controlled by the Taliban. The Subsequent Security Council Resolution 1333 however imposed an assets freeze on
individuals and entities “associated with” Osama bin Laden, which included the Al Qaida network.\(^5\)

Chapter VII of the UN Charter provides the foundation and limitations of any acts taken by the Security Council. Article 39 of the UN Charter regulates the determination of the existence of a threat to peace, breach of peace, or act of aggression. Despite the wide discretion granted to the Security Council to determine what amounts to threat of peace, it has often been argued that this must be linked to a specific concrete situation.\(^6\) That is, the Security Council should use its powers to counter specific concrete situations posing threat to international peace and security, in accordance to the principle of proportionality. It is this proportionality principle that puts into question the indefinite and severe sanctions imposed by the 1267 sanctions regime under Chapter VII of the UN Charter. In 2010, the UN Special Rapporteur on human rights and counter-terrorism reported that the imposition of sanctions by the Security Council on individuals and entities under the system were *ultra vires* the powers conferred on the Security Council under Chapter VII of the UN Charter. Moreover, according to the report, while the Security Council has taken on a judicial or quasi-judicial role, its procedures continue to fall short of the fundamental principles of the right to fair trial as reflected in international human rights treaties and customary international law.

Since the initial adoption in 1999, the 1267 regime has been modified by a series of resolutions.\(^7\) The regime requires UN member states to implement an asset freeze, a travel ban and an arms embargo against Al Qaida, the Taliban, and individual and entities associated with them. The sanctions are imposed by reference to a consolidated list that is regulated by a Committee of the Security Council (hereinafter the “1267 Committee”). The 1267 Committee considers requests to list or de-list individuals and entities from the

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consolidated list. Through this process, the members of the Committee maintain enormous power through a *de facto* veto which allows the listing or de-listing proposals of individuals or entities be blocked by a single member.

Designation of individuals and entities begins with member states submitting evidence to the 1267 Committee. However, the information available to member states on each designation is limited with the provision of only a brief “statement of the case.”\(^8\) In an aim to streamline the listing and de-listing procedure, the Security Council adopted Resolution 1735 in December 2006, which established a procedure for notifying listed individuals and a summary of reasons for being listed.\(^9\) Although Resolution 1735 did finally provide designated individuals with notification of their listing, this was only after the fact and did not give individuals and entities an opportunity to prevent their inclusion on the list. Moreover, Resolution 1735 only mandates states to provide specific information “that can be provided” supporting the determination that the individual or entity meets the criteria to be designated.\(^10\) Therefore, member states are not obligated to submit classified intelligence evidence should the state decide it cannot release the information. As noted by Tladi and Taylor, to justify the lack of proof required, the resolutions adopted under the 1267 regime continue to reiterate the preventative nature of the regime and the inapplicability of criminal standards.\(^11\) This point has also been raised by the UN Human Rights Committee which has held that the 1267 regime does not constitute a criminal sanction triggering fair trial protections under Article 14 of the ICCPR.\(^12\)

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The 1267 Committee receives heavily redacted information with vague details, which is used to create a narrative summary of facts published in support of the listing. The Committee makes its determination on listing without a hearing, with approvals made in a confidential “no-objection” procedure. This closed-door approach has been criticized for its inherent politicization, with the 1267 listing and de-listing procedure based on bilateral intelligence and law enforcement exchanges.

The 1267 regime, particularly with the expansion of the list after September 11th, has been scrutinized for its lack of conformity with international human rights standards. The invasive nature of the regime and its lack of transparency have led to the scrutiny of the compatibility of the regime with human rights standards and due process. Such deficits stem from the regime’s lack of a mechanism to petition de-listing and the lack of an opportunity for a hearing to review the evidence used for listing. Moreover, the process of de-listing often involving negotiations with member states, in most cases the United States, for approval of de-listing. Other criticisms include insufficient information on listed individuals, which for example make it difficult for banking institutions to freeze the right assets.

Since its inception, the 1267 regime has been under heavy criticism in the academic world for its deficits in human rights and due process standards. The due process concerns result in violation of numerous human rights, including freedom of movement.

13 Chesterman, supra note 8, at 1112.
15 Chesterman, supra note 8, at 1115.
16 Chesterman, supra note 8, at 1116-19.
the right to property and the right to dignity.\textsuperscript{19} The calls for inclusion of due process standards in the 1267 regime include the requirement for greater information and transparency and the opportunity for those listed to have their case heard. It also includes calls for the right to review and effective remedies. In light of the regime’s potential to violate an array of human rights, the call for due process protection becomes all the more important. The regime has also been subject to a wide range of domestic and transnational legal challenges. The Security Council has in turn responded to these challenges through improvements to the 1267 regime with a series of subsequent resolutions.

The most significant refinements to the 1267 regime have been for the process of de-listing. In 2006, the Security Council adopted Resolution 1730\textsuperscript{20}, which established a Focal Point within the secretariat to receive de-listing requests. The establishment of a focal point was a significant improvement because it allowed individual access to initiate delisting requests as opposed to relying on their country of nationality or residence to petition on their behalf. Nevertheless, the focal point fell short of addressing criticisms as it did not have the authority to conduct an independent review of listings or provide remedies to designated individuals. Delisting requests submitted either by designated individuals or member states is reviewed by the Sanctions Committee, which makes a decision by the consensus of its fifteen Members.\textsuperscript{21} Despite these reforms, there is still no review body with the power to give an effective remedy to designated individuals at the UN level.

In June 2010, the 1267 regime made another attempt to comply with due process norms by the adoption of Resolution 1904.\textsuperscript{22} The UN Secretary General appointed Kimberly Prost as the Ombudsperson who would perform the mandated “tasks in an independent

\textsuperscript{19} See for example Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 E.C.R. I-6351, The ECJ found that “the plea raised by Mr. Kadi that his fundamental right to respect for property has been infringed was well founded”.


\textsuperscript{21} Id. ¶ 14.

and impartial manner and shall neither seek nor receive instructions from any
government." The Ombudsperson will replace the Focal Point as the only channel for
designated individuals to directly challenge the UN for delisting under the 1267 sanctions
regime. The effect of establishing the Ombudsperson will be discussed in a later section
but for now it is suffice to say that although this new procedure provides some limited
due process protection, the regime still lacks an effective independent review mechanism
with power to provide remedies.

In the most recent attempt to strengthen due process standards, the Security Council
adopted two resolutions 1988 and 1989, splitting up the Taliban sanctions regime
from the Al Qaida sanctions regime. The decision to divide the consolidated list reflects
the rhetoric that Al Qaida and Taliban have become different animals with different goals
and areas of operation. Resolution 1988 creates a new sanctions regime related to the
Taliban with a new committee and a new “Taliban List”. The criterion for listing on the
Taliban List is “threat to the peace, stability and security of Afghanistan” rather than
“terrorism”. The new committee considers delisting every six months and delisting
requests must include recommendations from the Afghan government’s High Peace
Council in the hope to encourage political solutions to the conflict on the ground. Some
commentators have suggested this to be a positive development in allowing negotiation
with key Taliban figures whose key demand has been removal of international sanctions
and that the prospect of delisting could entice some leaders to lay down their arms. This
however does not assist individuals who are at odds with the Afghan government or have
been wrongly placed on the consolidated list. Resolution 1988 takes away the
Ombudsperson process from individuals and entities in the new Taliban List, including
those previously listed in the 1267 regime. This essentially removes the limited due
process protection afforded to designated individuals through Resolution 1904.
Moreover, as noted by Tladi and Taylor, the new listing criteria of “threat to peace,

23 Id. ¶ 20.
26 Matthew Levitt and Sam Cutler, “UN Promotes the Taliban from Al Qaida”, Washington institute,
<http://www.washingtoninstitute.org/policy-analysis>
stability and security”, could be used to sanctions individuals who sought change or expressed views different from the views of the Afghan government.\(^{27}\)

Prior to the latest divisions in Resolutions 1988 and 1989, the 1267 sanctions constituted the first time the UN Security Council imposed open-ended sanctions without any link to a specific territory or State. This brought into question the compatibility of the regime with the powers of the Security Council under Chapter VII of the UN Charter. The 1267 sanctions had no limitation in time and space and potentially indefinite in duration. The new Taliban Sanctions under Resolution 1988 shifts back to a country-specific temporary measure but the Al Qaida list retains its previous status in terms of not being linked to a specific territory or State. As noted by Ginsborg and Scheinin, while both Resolutions 1988 and 1989 take important steps, each retain considerable shortcomings under human rights and United Nations law.\(^{28}\)

Unlike Resolution 1988, Resolution 1989 – Al Qaida Resolution – provides some improvements for due process protection. The most important aspect of this Resolution is the provision of the sunset clause. The Resolution contains two types of sunset clauses: the first linked to the Ombudsperson process and the second, a more general sunset clause. In the first clause, once the Ombudsperson recommends de-listing, the designated individual would be delisted unless all members of the Committee disagreed with the recommendation. This addresses some of the previous deficits of the Ombudsperson process in that the recommendations have some effect and cannot simply be ignored. Moreover, by reversing the onus and placing it on Member States wishing to retain a listing, the process would encourage the provision of reasons by those states. The second more general sunset clause of Resolution 1989 is in relation to de-listing requests by member states. Upon de-listing requests by a designating state, an individual or entity would cease to be on the list on the expiry of 60 days, unless all Committee members agree otherwise.

\(^{27}\) Tladi and Taylor, *Supra* note 11, p. 786.

In theory Resolutions 1988 and 1989 provide an enhancement of due process rights for designated individuals and entities. In reality, this process remains subject to diplomacy and inter-governmental politics. Both sunset clauses in Resolution 1989 are subject to the Security Council’s decision-making process in Article 27 of the Charter, which permits states seeking to maintain a de-listing to block the sun setting. Therefore, the veto carrying members would essentially regain their veto vote through the Security Council’s decision-making process. The new resolutions do nothing to provide full and rigorous judicial review. The sunset clauses do not change the decision-making structure in that de-listing can be blocked by one veto-holding member or six non-veto-holding members.\(^{29}\) The new Resolutions 1988 and 1989 also fail to address the lack of information and reasons for listing and the qualifier “as much relevant information as possible” remains in place. There is still no obligation on the 1267 Committee to provide reasons for its decisions. The unavailability of supporting evidence and material to the Sanctions Committee, the Ombudsperson, or any other Member State involved means that meaningful assessment of listing is highly unlikely, regardless of whether the listing is appropriate and justified. Petitioners who are denied delisting are typically not informed of any reasons for the negative decision or the identity of the state, which opposed their delisting requests.

II. THE 1267 SANCTIONS REGIME – DUE PROCESS AND HUMAN RIGHTS DENIAL

The 1267 regime has been criticized for its severe interference with fundamental rights of individuals and entities. Initially, freezing of assets denied listed individuals access to funds necessary for basic expenses, such as food and housing and interfered with their right to life, health, and adequate standard of living.\(^{30}\) The Security Council later

\(^{29}\) Tladi and Taylor, *Supra* note 11, p. 788.

\(^{30}\) Universal Declaration of Human Rights (UDHR), Resolution 217 (III), UN Doc. A/810 91, UN General Assembly, 10 December 1948, Article 3 and 25; ICCPR, Article 6; ICESCR, Article 11 and 12, ECHR, Article 2.
introduced certain exceptions for funds determined by relevant states to be necessary for basic expenses, allowing individuals access to these funds.\(^{31}\)

Asset freezing also infringes on the right to peaceful enjoyment of property and due to its prolonged and indefinite nature is akin to confiscation.\(^{32}\) Furthermore, individuals placed on the Consolidated List face interference with right to private life, family life and reputation and respect for dignity and honor.\(^{33}\) The sanction regime’s travel ban interferes with the individual’s freedom of movement.\(^{34}\)

Security Council decisions authorized under Chapter VII are binding, pursuant to Article 25 of the UN Charter. In accordance to Article 103 of the UN Charter, Council decisions can prevail over any treaty or customary law, except \textit{jus cogens}. However, this does not exempt the UN Charter from its obligation to operate within the framework of the UN Charter, which includes respect for human rights. With the Exception of \textit{jus cogens}, the Security Council may derogate or limit certain human rights if necessary for the maintenance of international peace and security. The Security Council is nevertheless obligated under the principle of proportionality to ensure that human rights restrictions are proportionate to the aims pursued by the sanctions.\(^{35}\) Therefore, the question becomes whether the indefinite and far-reaching interference with human rights of listed individuals is proportionate to the aim of suppressing terrorism.

The 1267 Sanctions Regime denies basic due process rights to individuals placed on the Consolidated List despite their guarantee by a number of human rights instruments. Article 10 of the Universal Declaration of Human Rights (UDHR) entitles everyone to “a fair and public hearing by an independent and impartial tribunal, in the determination of

\(^{32}\) UDHR, Article 17, ECHR, Article 1.
\(^{33}\) UDHR, Article 12; ICCPR, Article 17; ECHR, Article 8.
\(^{34}\) UDHR, Article 13; ICCPR, Article 12
his rights and obligations and of any criminal charge against him”\textsuperscript{36}. Article 8 of UDHR guarantees everyone “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”\textsuperscript{37} Furthermore, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides that “in determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”\textsuperscript{38} Article 2(3) of the ICCPR further requires that any person whose rights or freedoms are violated must have an effective remedy. It also requires that a person claiming such remedy must have his right determined by a competent judicial, administrative, or legislative authority.\textsuperscript{39}

Article 14 of the ICCPR guarantees procedural fairness mostly tied to criminal charges. However, Article 14 also required a fair and public hearing when determining a person’s “rights and obligations in a suit at law”. Therefore, whenever rights or obligations are at issue, there must at least be a hearing by an independent tribunal, with increased due process expectations when a criminal charge is involved.\textsuperscript{40} The 1267 Sanctions regime is labeled as an administrative regime with preventative purposes. However, given the punitive nature of the regime, one can argue that in reality the regime functions in the criminal sphere. The UN Human Rights Committee however has declined to accept this argument and has rejected to view the 1267 Regime as involving criminal charges, triggering full application of Article 14. The 1267 Sanctions Committee and Monitoring team have also criticized suggestions of fulfilling national criminal requirements before assets can be frozen. The reasons provided by the Monitoring Team has been that many States have not criminalized relevant acts of international terrorism, evidence against alleged terrorists remains classified, and that the procedure does not involve criminal

\textsuperscript{36} UDHR, Article 10  
\textsuperscript{37} UDHR, Article 8  
\textsuperscript{38} UDHR, Article 14(1)  
\textsuperscript{39} UDHR, Article 2(3)  
\textsuperscript{40} Forcose & Roach, \textit{Supra} note 18.
punishment or criminal procedure. The 1267 Committee views the sanctions as temporary with a preventative aim; the funds remain the property of the accused to which they will regain access when they are delisted.

While it cannot be denied that listing individuals on the Consolidated List is a strange type of criminal charge, the severity of the sanctions warrants bringing it within the sphere of criminal sanctions. The punitive effects of this severity prevail over the preventative effect. While labeled as administrative detention, in reality the 1267 regime operates as an alternative to criminal trials. The sanctions are imposed on those involved in financing terrorism which is a serious criminal activity under both international and national law. Moreover, the sanctions have dire economic consequences as they deny individuals their livelihood and could remain in place indefinitely. In light of this severity, it is not clear why one must accept such designations on less evidence than is required in a criminal or even civil trials. It can be argued that while the effects of 1267 sanctions are similar to forfeiture, a designated person or entity does not have the same rights available in a civil forfeiture action. The desire not to disclose secret intelligence to designated individuals should not be used to naturally classify the 1267 regime as administrative.

II. DOMESTIC AND REGIONAL LEGAL CHALLENGES TO THE 1267 SANCTIONS REGIME

Since its creation, the 1267 regime has been heavily criticized by domestic and transnational courts and tribunals, NGOs, listed individuals and entities, and UN Member States. The criticisms have stemmed from the regime’s lack of procedural due process rights and an effective remedy. Furthermore, over the past decade and post September

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42 The Eminent Jurists Panel of the International Commission of Jurists has said that the 1267 regime is deemed to be arbitrary and discriminatory by various member states and that the regime is “unworthy” of international institutions; Watson Report also held the most pressing human rights concerns regarding the 1267 regime to be the perceived difficulty for the individuals to challenge the sanctions taken against them,
11th, there have been a growing number of domestic and regional court challenges to the listing/delisting procedure of the 1267 regime. The lack of judicial remedies at both the national and international level against Security Council decisions has forced individuals and entities to resort to domestic courts, attacking the domestic acts adopted in implementation of the relevant resolutions.43

Due process concerns have evolved into two main legal issues arising in cases challenging the 1267 regime at the domestic and regional level. The first legal issue has been whether domestic and supranational bodies have jurisdiction to review UN Security Council resolutions falling under Chapter VII authority of the UN Charter. Two provisions of the UN Charter arguably deny such jurisdiction. Article 103 of the UN Charter obligates member states to comply with Security Council resolutions made under Chapter VII. Further, Article 105 provides the UN absolute immunity from any legal proceedings before domestic courts. This has been the subject of criticism from scholars who argue that these provisions amount to a “denial of legal remedies” for individuals and entities subject to the sanctions regime.44 The second legal issue is whether the implementation of the 1267 asset freezes has resulted in the violation of the fundamental rights of individuals and entities.

While the legal challenges have not questioned the Security Council’s authority to impose sanctions, they have complicated implementation efforts, generating concerns about the legitimacy of targeted sanctions and the effectiveness of the tool.45 These legal challenges have attracted attention from scholars and various nations and have clearly provoked the Security Council to take incremental measures to reform the 1267 regime’s procedure to make it more aligned with internationally accepted minimum standards for


transparency and due process. Legal challenges of the 1267 regime have constituted a threat to its enforceability and credibility. Further, the survival of the 1267 regime is jeopardized by selective implementation by member states due to domestic legal challenges.\(^{46}\)

\[A. \text{Domestic and Regional Implementation of the 1267 Regime}\]

Article 41 of the UN Charter imposes international obligations on Member States by virtue of Article 25 of the UN Charter. Security Council sanctions take effect through implementation of domestic acts by individual Member States. A number of cases can be mentioned to demonstrate the domestic courts’ usual engagement with the sanctions regime. In \textit{Kadi} the applicant challenged the decision of the Turkish Council freezing his assets pursuant to the 1267 regime before the Turkish Council of State.\(^{47}\) In English courts, a number of applicants\(^{48}\) have sought to quash the domestic orders implementing the 1267 and 1373 sanctions regime. In a number of other cases, applicants have resorted to domestic courts against Member State’s refusal to take action. In \textit{Nada}, the applicant challenged the refusal of Swiss authorities to remove him from the list subject to 1267 sanctions\(^{49}\). In \textit{Abdelrazik}, the applicant challenged the conduct of the Canadian authorities in preventing him from returning from Sudan as a result of the 1267 sanctions.\(^{50}\)

Many other challenges have been brought before domestic courts against acts of domestic implementation of 1267 sanctions,\(^{51}\) as well as before supranational courts such as the

\(^{46}\) For example, Forcense and Roach (\textit{Supra} note 18) have referred to a “national-level repudiation of the 1267 regime” which could potentially prevent the survival of the 1267 regime.


\(^{50}\) \textit{Abdelrazik v. Canada}, 2009 F.C. 580, para. 51.

\(^{51}\) Reports of Analytical Support and Sanctions Monitoring Team to the 1267 Committee in UN Doc S/2009/245 at 36-9; S/2008/324 at 36-7; S/2007/677 at 40-2; S/2007/132 at 38-40; S/2006/750 at 47-50; S/2006/154 at 45-7; S/2005/572 at 48-51; S/2005/83 at 52-5.
courts of the European Union.\textsuperscript{52} The latter’s decisions are particularly important in informing the states’ dual obligations under international law and domestic constitutional law. The purpose here is to review key domestic and regional decisions on the 1267 Regime and its impact on both the sanctions regime and individuals and entities subjected to asset freezes.

Individuals on the 1267 List have challenged domestic implementing measures on the basis of domestic law as well as international law. In particular, individuals have invoked international human rights instruments such as ECHR and ICCPR as well as customary norms of \textit{jus cogens} as protection of their fundamental rights. The issues in courts has mostly revolved around determining appropriate circumstances under which domestic and regional courts may interfere with the implementation of a binding Security Council resolution on human rights grounds.

Article 103 of the UN Charter provides “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Therefore Article 103 purports to give primacy to Security Council resolutions over other human rights obligations that flow from treaty law. Moreover, Article 25 commits members of the UN to “accept and carry out decisions of the Security Council in accordance with the present Charter.” Therefore, member states may not invoke the provisions of their domestic law as justification of failure to abide by decisions of the Security Council. The 1267 regime affords member states no margin of appreciation in regards to their implementations of the resolution. Consistent with the requirements of Article 25 and 103, all states must implement the 1267 sanction regime even if the minimal due process protections for individuals are in flagrant violation of a state’s other binding international or regional legal obligations, such as those enshrined in the ICCPR and ECHR.

\textsuperscript{52} ECJ Kadi I & Kadi II; T-318/01 Othman v Council and Commission, 2009 E.C.R. II-01627
The first legal issue dealt in courts has been whether domestic and supranational bodies have jurisdiction to review UN Security Council Resolutions falling under Chapter VII authority of the UN Charter. The courts’ reaction has been predominantly in two folds. First, in some cases the courts have accepted the contingency of domestic measures upon Security Council measures and have refused to engage in domestic review. Second, in other cases, the courts have disregarded to a large extent the necessary and absolute connection of the domestic act to the underlying 1267 Resolution and have proceeded to review the domestic measure independently.53

In the cases mentioned above and discussed in more detail below, the courts have annulled domestic implementing measures, relying on its incompatibility with other domestic rules. This invokes a dualist understanding of the relationship between international and domestic law. Inevitably, the annulment of domestic implementing measures puts member states in breach of their international obligations under Resolution 1267 and Article 25 of the Charter. The ECJ in Kadi however softened the dualist argument by claiming that the review of domestic measures does not also subject the international measure to review or challenge its primacy. Effectively the court claims that while it has an international obligation, it should also have the freedom to comply with that obligation in the fashion that domestic law prescribes.

The second legal issue is whether the implementation of the 1267 asset freezes has resulted in the violation of the fundamental rights of individuals and entities. In Canada, two individuals have been caught by the 1267 regime. Liban Hussein’s was added to the 1267 list shortly after September 11th and subsequently removed from the list after the United States acknowledged listing him in error.54 Abousfian Abdelrazik was the other


individual placed on the consolidated list. Abdelrazik, a Sudanese-born Canadian citizen, had been repeatedly detained without charge by Sudanese authorities while on a trip to Sudan. In 2006, Abdelrazik was placed on the Consolidated List which led to an asset freeze and travel ban. Abdelrazik’s attempts to return to Canada failed mostly due to resistance by Canadian authorities to allow his return.

Abdelrazik brought a challenge in the Federal Court arguing that the Canadian government had violated his Section 6 Charter right which guarantees Canadian citizens the right to enter Canada. In response, the Canadian government argued that “it is not as a consequence of any of Canada’s actions that Mr. Abdelrazik has been prevented from entering Canada; rather it is as a consequence of his listing by the 1267 Committee.” The Federal Court did not find this argument persuasive and instead engaged in interpreting Security Council Resolution 1822 in such a way that Abdelrazik’s return would not result in breaching Canada’s obligations. The Federal Court concluded that the sanctions breached Abdelrazik’s rights under the Canadian Charter of Rights and Freedoms.

Justice Zinn criticized the 1267 listing process as Kafkaesque which denied individuals any real right to review the evidence against them. The court further criticized the regime for its lack of transparency and its denial of individuals to a hearing before an independent and impartial body that is authorized to review the Sanctions Committee’s listing decisions and delist the individuals based on facts or law.

Another individual complaint against the 1267 regime was by a couple against Belgium in the Human Rights Committee (HRC) that was decided in October 2008. The case concerned a Belgian couple alleged to have financially assisted individuals associated with Al Qaida. Following a judicial decision in their favour from the Brussels Court of First Instance and multiple unsuccessful attempts by the Belgian government to delist the couple, a complaint was filed against Belgium with the HRC. Similar to the Canadian

55 Id. para. 23.
56 Abdelrazik v. Canada, Supra note 50, para. 53.
57 Id.
Government in Abdelrazik, the Belgian government argued that the HRC lacked jurisdiction to review UN sanctions under Chapter VII of the UN Charter. The HRC disagreed with Belgium and concluded that while it could not rule on the legality of Security Council measures, it had jurisdiction to consider whether Belgium had violated rights set in the ICCPR.

The HRC found Belgium in violation of its obligations under ICCPR and held that it had an obligation to provide the complainant with an effective remedy, which entailed making every effort to delist the complainants’ names and avoid similar violations in the future. The HRC was unambiguous in its holding that “State measures taken to give effect to Security Council Resolutions must respect human rights”. However, the committee held that the 1267 sanctions regime was not akin to criminal penalty that required fair trial and legality of penalties provisions of Article 14 and 15 of the ICCPR.

A particular approach taken by courts has been to disregard the absolute connection of the domestic act to the underlying 1267 Resolution and proceed to review the domestic act independently; the court sees no restraint from the Security Council measure and adopts a higher standard of review. In this approach the courts have argued that they are merely reviewing a domestic measure subject to domestic law and the standard of review applicable to administrative acts. Through this approach the courts avoid the obstacles posed by Article 103 of the UN Charter. As suggested by Tzanakopolous, when courts adopt this approach there is “no longer a need to consider a hierarchy of norms under international law—a domestic act infringing on a (constitutionally guaranteed) fundamental right is liable to be quashed or set aside in accordance with the hierarchy of norms with the partial domestic legal order.” Only when the courts have adapted this

59 Sayadi Case ¶ 6.1.
60 Id. ¶ 7.2.
61 Id. ¶ 12.
63 ECJ Kadi, Supra note 18.
64 Tzakanapolous, Supra note 53, at p. 65.
approach, has it had some realistic albeit limited impact on the lives of designated individuals. By recognizing that by engaging the domestic measure it does not also engage the sanction regime, the courts have then proceeded to review domestic measures for compliance with domestic and regional human rights legal orders.

The European Court of Justice in *Kadi* engaged in such independent review on the basis of domestic and regional law. This decision was important in highlighting the need for judicial review of domestic implementation of Resolution 1267 in the absence of adequate procedures at the UN level. The Court held that “obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principle of the EC Treaty, which included the principle that all Community acts must respect fundamental rights…”65. Subsequently, the ECJ overturned the decision of the CFI and held that EU courts must ensure full review of the lawfulness of all community acts, including those implementing Security Council resolutions, to ensure their compliance with fundamental rights.66 The court also stated that there was no basis in the EC Treaty for granting immunity from jurisdiction for a Community regulation solely based on the primacy of member states’ obligations at the level of international law.67

Given that the Community regulation was the exact replica of the Security Council Resolution, the Court indirectly reviewed the compliance of the 1267 regime with international due process standards. Interestingly enough, the ECJ declared that if the UN legal system provided the individuals or entities an opportunity to be heard through a mechanism of administrative review, the court would not intervene in any way whatsoever. Nevertheless, as such a mechanism was not in place, the court annulled the contested regulation as it concerned Kadi and potentially placed the member of the European Union in breach of international law.68

66 *Id.*
67 *Id.* para. 300.
68 *Id.* para. 368-69.
Following the ECJ’s reasoning in *Kadi*, the Court of First Instance (CFI) likewise annulled the EU regulations implementing the 1267 Regime against another individual Mohammed Othman.\(^{69}\) The Court remarked that individuals on the 1267 List are subjected to the regime’s restrictive measures for an indefinite period of time without the option of judicial challenge.\(^{70}\) Accordingly, the CFI found that imposition of the measures required under the 1267 Regime infringed the applicant’s fundamental rights to due process and subsequently annulled the EC measure\(^{71}\).

The Supreme Court of the United Kingdom has also reviewed the domestic implementation of the 1267 regime and its compliance with due process standards.\(^{72}\) In determining whether the national regulations placing asset and travel bans on the targeted individuals were unlawful\(^{73}\), the court concluded that *Al-Jedda*\(^{74}\) had established precedent that “Article 103 leaves no room for any exception, and that the European Convention rights fall into the category of obligations under an international agreement over which obligations under the UN Charter must prevail.”\(^{75}\) Nevertheless, the court suggested that *Al-Jedda* "leaves open for consideration how the position may be regarded under domestic law.”\(^{76}\) The Supreme Court found that the Al Qaida Order breached fundamental rights under domestic law. The implementing measure was annulled on the basis that it violated the 1946 United Nations Act.\(^{77}\) The Court observed that the regime

\(^{69}\) *Othman v. Council of the European Union and Commission of the European Communities*, T-318/01 (June 11, 2009).

\(^{70}\) *Id.* at para. 66.

\(^{71}\) *Id.* at para. 67.


\(^{73}\) Based on section 1(1) of the 1946 United Nations Act, the Treasury implemented into UK domestic law the relevant Security Council resolutions regulating the Al Qaida and Taliban sanctions regime by adopting the Al Qaida and Taliban Order (AQO).\(^{73}\) The AQO provides for enforcement of the legislation by the European Union (EU) implementing Security Council Resolution 1267. It also provides for enforcement of Council Regulation (EC) No. 881/2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al Qaida network, and the Taliban.

\(^{74}\) R (Al-Jedda) v. Sec'y of State for Def., [2007] UKHL 58.

\(^{75}\) *HM Treasury v. Ahmed*, at 411-12.

\(^{76}\) Note the decision of the Grand Chamber in Al-Jedda did not further clarify this point.

\(^{77}\) *Id.* at 412.

\(^{77}\) *Id.* at 400; This statute provides the executive in the United Kingdom discretion to adopt regulations outside of parliamentary scrutiny when it acts to implement certain mandates of the Security Council, but such regulations "must be either 'necessary' or 'expedient' to enable those measures to be 'applied' effectively." United Nations Act, 1946, 9 & 10 Geo. 6, c. 45, § 1 (U.K.).
was ‘drastic’ and ‘oppressive’ and the consequences of implementing the regime were described as ‘traumatic’.

The UK Supreme Court also considered whether the establishment of the Ombudsperson under Security Council Resolution 1904 remedied the due process concerns. The Court scrutinized the 1267 regime’s continuing lack of compliance with due process concerns and concluded that “while these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy.” Ultimately, the Ombudsperson was not seen as a remedy to the Sanction Regime’s due process deficiencies.

In December 2009, following the ruling of the ECJ in *Kadi*, the amended regulation resulted in the immediate relisting of Mr. Kadi, subjecting him afresh to the 1267 sanctions regime. Subsequently, Kadi brought a fresh challenge against that regulation before the General Court. On September 30, 2010, the General Court rendered its decision in *Kadi II* and followed the ECJ’s reasoning in *Kadi I* and confirmed a trend of defiance of Security Council sanctions. In this case, the intervening states once again argued that the binding nature of the Security Council measure left them no margin of discretion but to blacklist Kadi. In response, the General Court does acknowledge that the 1267 regime imposes strict obligations. It nevertheless follows the ECJ in rejecting the argument for marginal review and engages in a full review. The General Court emphasizes the importance of engaging in ‘full review’ of the domestic implementing measure for compliance with fundamental rights ‘without affording the measure any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations’. ‘That must remain the case’, the court continues, ‘at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of

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78 *Supra* note 72, at 78.
79 Council Regulation (EC) No. 881/2002 was amended by Council Regulation (EU) No. 1286/2009, which provides for a listing procedure that attempts to ensure that the fundamental rights of the defense, and, in particular, the right to be heard, are respected.
80 *Kadi II, Supra* note 2, para. 126.
effective judicial protection’.

That is, the Community must provide safeguards while it is lacking at the UN level.

The General Court in *Kadi II* also addressed the much-debated issue of preventative versus punitive nature of the 1267 sanctions. The Court conducted a full review of the lawfulness of the contested regulation in light of fundamental rights which it argued was justified in light of the draconian nature and long-lasting effects of the fund-freezing measures:

> In the scale of a human life, 10 years in fact represent a substantial period of time and the question of classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal now to be an open one.

In a recent development, in July 2011, the European Court of Human Rights delivered its judgment in *Al-Jedda v. United Kingdom* concerning an apparent norm conflict between the European Convention on Human Rights (ECHR) and the role of Article 103 of the UN Charter. The UK House of Lords in an earlier decision had decided that despite a norm conflict between Resolution 1646 and Article 5 ECHR, pursuant to Article 103 that conflict had to be resolved in favour of the Resolution. The Court drew attention to Article 24(2) of the UN Charter, which required the Security Council to discharge its duties in accordance to the purpose and principles of the United Nations. The Court then held:

> In interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nation’s important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council

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81 Id, para. 127.
82 Id, para 187.
83 Kadi, *Supra* note 3, para. 150.
84 App. No. 27021/08, 7 July 2011.
to intend states to take particular measures, which would conflict with their obligations under international human rights law.\(^{85}\)

As Milanovic suggests, this strong interpretive presumption can prove to be a key tool for security human rights compliance with respect to Security Council decisions and to promote accountability. If the Council now truly wishes to release states from their human rights obligations, it will have to do so through clear and unambiguous language—language that could have political repercussion for members.\(^{86}\)

The above legal challenges have motivated the 1267 regime to take incremental steps to bring the regime in compliance with principles of justice. The subsequent resolutions however have done little to address lack of due process and remedies to designated individuals and entities. The 1267 regime as it currently stands remains inherently wanting in respect to compliance with rights to a judicial remedy. As elaborated later in this paper, a judicial structure similar to that of ad-hoc international tribunals has the potential to address some of the deficiencies of the current regime.

In all cases of annulment of domestic measures described above, such quashing was justified under domestic law considerations. The domestic legal arguments relied upon to annul the impugned acts refer to the protection of fundamental rights, namely the right of a fair trial, right to access to the court, right to be heard, and right to an effective remedy. And although these decisions have been immensely important as a symbolic gesture to protect fundamental rights, they have not as discussed below led an actual allowance of the remedy sought—delisting. Designated individuals have had to challenge their listing in one forum after another and in some instances required to repeat the process multiple times after being re-designated under new laws or regulations. The only effective way to terminate freezing of the assets imposed under the sanctions regime has been to secure the individual’s removal from the Consolidated List.

\(^{85}\) Al-Jedda, _Id._, para. 102.

As it stands, the 1267 regime remains deficient in complying with designated individual’s rights to a judicial remedy. In circumstances where individuals are denied an effective means to challenge the sanctions regime, it is difficult to justify the aims of fighting international terrorism as proportionate to the means used. A fair balance between the protection of human rights and the need to fight international terrorism can be ensured through independent judicial review conducted at the UN level. This point is explored further in a later part of this paper.

**B. Legal Challenges of the 1267 Regime and Individual Remedies**

The 1267 regime has provoked frustration and outburst from regional and domestic judges as seen in the *Kadi* and *Abdelrazik* decisions. These decisions have not however led to the direct delisting of individuals from the 1267 List. The disconnected review approach adopted by the courts may have led to the most drastic decisions in defiance of the 1267 regime but these have not translated into a direct benefit for the listed individuals.

Despite the decisions of the ECJ and Grand Chamber, Mr. Kadi remains on the 1267 List with his assets frozen. Other subsequent General court decisions that annulled sanction regulations have also not led to his delisting. The European Commission seems to be only empowered to forward to the Sanctions Committee the results of its review of the listing. The decision of whether such person or entity is to be removed from the list seems to remain in the Sanctions Committee’s discretion. Moreover, If an individual challenges his listing before the General Court and requests annulment of a regulation, the Commission could simply adopt a new regulation confirming the current listing in Annex I of Council Regulation (EC) No 881/2002. That is, the Commission may decide

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87 Three other individuals, namely Abd Al-Rahman Al-Faqih, Ghuma Abd’Rabbah and Tahir Nasuf remain on the list despite the General Court of the EU decision in September 2010 to annul sanction regulations with respect to these parties.
that on the basis of allegedly new facts, the individual should be put back on the list. The proceedings could therefore in principle continue indefinitely with the individual re-appearing before a General Court with a new challenge only to be relisted again.\textsuperscript{88} Furthermore, the proceedings before the General Court take a very long time; Mr. Kadi for example has spent more than seven years in the proceedings before the General Court and the ECJ.

Even if individuals are successful before EU courts after many years of litigation, this would secure the removal of their names from Annex 1 and not the Consolidated List. This would in turn cause a conflict between Member States’ obligations to terminate sanctions against such individuals once their names are removed from Annex 1 versus their obligations under international law to comply with Security Council’s decisions. This ultimately leads to inconsistent implementation of the sanctions regime in different Member States and render the regime ineffective.

In the UK courts, individuals have challenged their designation through judicial review procedures. The courts are only able to order the Foreign and Commonwealth office to start the process of delisting with no guarantee that such recommendations would result in actual delisting from the Sanctions Committee. Moreover, individuals would remain in Annex 1 of Council Regulations (EC), which has direct effect in the UK. Therefore the UK would find itself in breach of its obligations under the EU and UN.\textsuperscript{89}

Similarly, although the Federal Court of Canada provided Abousfian Abdelrazik with a strong domestic remedy that secured his return to Canada, it did not result in the release of his assets or the removal of his name from the no-fly list. Justice Zinn’s strong criticism of the Kafkaesque 1267 regime did not lead to a direct remedy against UN listing. The Canadian government continued to apply the sanctions against him once he


\textsuperscript{89} Supra note 72, at 99.
returned to Canada. Abdelrazik’s assets were frozen and he was unable to open a new bank account in Montreal due to his 1267 listing and was also denied child assistance benefits. 90 Abdelrazik’s delisting only came directly from the 1267 Committee in December 2011 as a result of recommendations by the Ombudsperson. 91 No meaningful reasons were given for both listing and delisting of Abdelrazik, primarily because countries remain in control of intelligence used to recommend listing or block delisting.

The indefinite duration of the 1267 sanctions regime and denial of financial assets amounts to punitive actions that entitles those affected to legal and human rights protection. 92 Therefore, regardless of the characterization of the regime by the Security Council, the inevitable harmful effects of the regime make procedural due process standards a necessity.

II. CREATION OF THE 1267 OMBUDSPERSON – DUE PROCESS IMPLICATIONS

The appointment of the Ombudsperson under Security Council Resolution 1904 has been the most recent and important attempt by the 1267 regime to address due deficit criticisms. The primary function of the Ombudsperson is to investigate delisting requests, compile new information to present to the Sanctions Committee, engage in dialogue with the petitioner, and draft a final report concerning the delisting request. 93 The new procedure established under Resolution 1904 is an improvement in that it allows the petitioner to engage in dialogue with the Ombudsperson in order to receive more detailed

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93 S.C. Res. 1904, supra note 22, Annex II.
information concerning their designation. Further, it imposes an obligation on the Committee to provide comments when rejecting delisting requests. However, the new procedure falls short of international legal standards guaranteeing the listed individual full due process rights. In particular, listed individuals and entities are denied the right to effective review by a competent and independent review mechanism, right to counsel, and the right to an effective remedy.

The creation of the Ombudsperson is significant in that it is the first and only independent body allowed to review specific decisions of the Security Council. This power is special because the Security Council has traditionally refused to allow an independent body to review the substance of its decisions related to the maintenance of international peace and security. The review powers of the Ombudsperson however remain limited in scope in that it has no power to grant any sort of remedy to the listed petitioner, including appropriate relief in cases with human rights violations or provide adequate compensation to individuals and entities unfairly listed. This lack of full decision-making power means that the Ombudsperson cannot be regarded as a tribunal within the meaning of Article 14 of the ICCPR.

The establishment of the Ombudsperson does not rectify due process deficits of the 1267 regime due to the lack of authority to make binding decisions on delisting requests. Designated individuals remain without recourse to an effective remedy before an impartial institution. Although the Ombudsperson is impartial and independent, granting of a remedy remains with the Security Council which is a partial and political body. While the Ombudsperson is given the power to make recommendations for delisting, the 1267 Sanctions Committee retains the power to decide to continue the sanctioning

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measure. Consequently, unless the Ombudsperson is granted the power to make binding recommendations, the 1267 regime remains deficient of satisfying due process standards.

A further limitation to the Ombudsperson process is the lack of secret evidence and denial of access to intelligence. Member states are able withhold information they prefer to keep confidential, which essentially precludes the Ombudsperson from effectively reviewing a delisting request. The system therefore continues to lack transparency, as there is no obligation for the Committee to publish in full the Ombudsperson’s recommendations.

An effective remedy under international law is only available when a decision is based on facts and the law and free from political influence or restrictions; under the 1267 regime, the decisions are discretionary without any legal rules to grant delisting of designated petitioners. Delisting decisions are made in confidence by the consensus of the Sanctions Committee and therefore remain highly politicized. The creation of the Ombudsperson does not grant designated individuals the right to be heard by the same body that has the power to make delisting decisions and thus fails to address the accessibility deficit of the regime. Petitioners only have the rights to be heard by the Ombudsperson who lacks the authority to make a binding decision regarding delisting. Moreover, as noted by Genser and Barth, even though the Ombudsperson can accept delisting requests from targeted individuals, these individuals “are not allowed to present their own case; rather they must simply wait for termination of the investigation and issuance of recommendation.” Therefore, the regime still denies designated individuals to directly challenge the decisions that affect their rights. Commentators have consistently called for this kind of accessibility, as it is the key to due process reform.

The newly adopted Resolutions 1988 and 1989 make further changes to the Ombudsperson process. Resolution 1988 creates a new “Taliban List” and takes away the

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97 *Id*, at 740
99 *Id*, at 32.
Ombudsperson process from individuals and entities in this new list. This essentially removes the limited due process protection afforded to designated individuals through Resolution 1904. It is unclear why individuals who previously had access to the Ombudsperson through their designation in the 1267 list are now denied that procedure. The second Resolution—Al Qaida (1989)—contains sunset clauses, one of which is linked to the Ombudsperson process. In this clause, once the Ombudsperson recommends de-listing, the designated individual would be delisted unless all members of the Committee disagreed with the recommendation. This addresses some of the previous deficits of the Ombudsperson process in that the recommendations have some effect and cannot simply be ignored. Moreover, by reversing the onus and placing it on states wishing to retain a listing, the process would encourage the provision of reasons by those states. While in theory this provides an enhancement of due process rights, in reality, the process remains subject to diplomacy and inter-governmental politics. The sunset clauses in the 1989 Resolution are subject to the Security Council’s decision-making process in Article 27 of the Charter, which permits states seeking to maintain a de-listing to block the sun setting. Therefore, the veto carrying members would essentially regain their veto vote through the Security Council’s decision-making process. The new resolutions do nothing to provide full and rigorous judicial review.

It remains to be seen whether the new delisting procedures of Resolution 1989 would influence judicial reaction to the 1267 regime. The effectiveness of the Ombudsperson process is dependant on the political commitment of Member States and their willingness to accept and respect the review powers of the ombudsperson. Some scholars have suggested that if it becomes regular practice for Member States not to contest the recommendations of the Ombudsperson, then it may be preferable for individuals to seek delisting through the Ombudsperson before exercising a review of the merits of the implementing measures in domestic courts. However, this puts the delisting procedure at the mercy of the political will of the Member States who should not only accept the de

100 Scheinin and Ginsborg, Supra note 28, at 13.
facto powers of the Ombudsperson but also be willing to share secret evidence with the Ombudsperson in order to conduct an effective review process.

In sum, while the establishment of the Ombudsperson is an improvement, it fails to provide complete due process procedures to designated individuals. The regime now allows for enhanced communication between targeted individuals and the Sanctions Committee. However, the fact remains that designated individuals still lack the right to an effective remedy and judicial review of listing/delisting decisions.

III. DUE PROCESS DEFICITS AND SECRET EVIDENCE

A. Absence of Judicial Review in the 1267 Sanctions Regime

Despite incremental reforms to the 1267 regimes outlined above, efforts to make listing compliant with due process standards remain insufficient. While the Sanctions Committee has attempted to reform the listing and delisting procedure in response to critiques of the regime, none of the reforms have addressed independent judicial review. Moreover, the reaction of domestic and supranational courts in response to challenges to the 1267 regime indicate that reforms have not been enough to remedy due process deficits.

The due process criticism of the 1267 sanctions regime have included both calls for greater information and transparency and the opportunity for the enlisted individuals and entities to have their case heard. The 1267 sanctions regime, in its current form, has taken on a judicial or ‘quasi-judicial’ character. The Security Council is thereby said to be exercising supranational sanctioning powers over individuals and entities, through a
permanent global terrorist list.\textsuperscript{101} Aside from the debate regarding the appropriate scope of the Security Council’s supranational powers, the main deficits of the regime is that of transparency and the rights of enlisted individuals to be heard. That is, although the Security Council has taken on a quasi-judicial function, it has failed to observe the procedural requirements universally applied to courts and tribunals, or an appropriate equivalence.

Judicial review remains crucial in the quasi-judicial function exercised by the Sanctions Regime due to the possibility of erroneous listing. In the United States, a 9/11 Commission report in 2004 suggested that the risk of errors is particularly great in terrorist financing cases. In the report on terrorist finance, the Commission warned that the standard of review of evidence used to designate suspected terrorist individuals and entities was so deferential to the executive that errors in could have occurred.\textsuperscript{102} For example, in the case of Al-Barakaat Charity, the Commission found that asset seizure was based on incorrect intelligence resulting in erroneous deprivation.\textsuperscript{103} The Treasury Office of Foreign Assets Control (OFAC) had designated Al-Barakaat due to affiliation with terrorism financing. After the designation of the charity, United Arab Emirates allowed U.S. investigators to review bank accounts that allegedly tied Al-Barakaat to Al Qaida, which led to the discovery of discrepancy between the information held by OFAC and the evidence obtained in the UAE. Ultimately, no evidence was found connecting Al- Barakaat to terrorism.\textsuperscript{104} The consequences of erroneous asset freezes are grave, resulting in essentially the end of the charitable activities and the reputation of the organization.

The limited protection of the 1267 sanctions regime can be contrasted with the elaborate safeguards in place within the ad hoc tribunals for the former Yugoslavia (ICTY) and

\textsuperscript{102} See John Roth et al., “National Commission on Terrorist Attacks upon the United States” (2004), Monograph on Terrorist Financing: Staff Report to the Commission 76 <http://www.911commission.gov/staff.statements/911_TerrFin_Monograph.pdf>.
\textsuperscript{103} Id. at 84-86.
\textsuperscript{104} Id. at 83.
Rwanda (ICTR), also creatures of the UN Security Council. The statutes of both tribunals contain detailed protection for the accused, including a right to be informed of the nature and cause of the charges against him or her. The 1267 sanctions regime has been characterized as administrative as opposed criminal by various commentators and the judiciary – a point often raised for distinguishing the sanctions regime from international criminal tribunals. In Kadi\textsuperscript{105}, the CFI characterized the regime as preventative as opposed to punitive and this was determinative in deciding that “a temporary precautionary measure restricting the availability of the applicants’ property,” did not violate fundamental rights of the individual concerned. However, as noted by Simon Chesterman, labeling these sanctions as a temporary precautionary measure is questionable given the difficulty enlisted individual face to be de-listed.\textsuperscript{106} While terrorist listing cannot be inherently characterized as criminal sanctions, the severe consequences on designated individuals and entities through domestic implementation of the regime certainly results in criminal like effects.

\textbf{B. Availability and Reliability of Intelligence Evidence}

Disclosure of evidence has remained at the heart of the legal problems resulting from the 1267 regime. The courts have noted that when dealing with issues of national security and terrorism, they must apply techniques that balance legitimate security concerns about the nature and sources of information and the need to accord the individual a sufficient measure of procedural justice.\textsuperscript{107} The Court in Kadi II emphasized this:

The community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.\textsuperscript{108}

\textsuperscript{105} Case T-315/01 Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, European Court of First Instance, 21 September 2005.


\textsuperscript{107} Id., para. 134.

\textsuperscript{108} Case T-85/09, \textit{Kadi v Commission}, para. 142
The European Court of First Instance in *Organization des Modjahedines du peuple d’Iran (OMPI)* raised similar concerns. The OMPI listing resulted from the implementation of Security Council resolution 1373, which unlike the 1267 regime, is administered at the regional and national level, through autonomous sanctions lists. In *OMPI*, the court held that the judicial review of the lawfulness of a sanctions regime extends to the examination of facts and evidence for its justification.

As long as the 1267 regime is characterized as administrative, designated individuals are denied full disclosure of evidence held against them. The preventative labeling of the regime allows for limitation of disclosure for public interest reasons – for example, through production of truncated evidence or the use of special advocates. However, the problem gets complicated when the reviewing court itself may not have access to secret evidence and it remains unclear whether the 1267 Committee would be willing to provide the courts with relevant information and give deference to their decisions. As suggested by some commentators, unless the 1267 regime discloses evidence to the courts, effective judicial review may be inherently impossible.

Disclosure issues are further complicated by the suggestion that the 1267 Sanctions Committee may itself not have access to evidence and is listing individuals on the basis of undisclosed intelligence. Subsequent reforms, including Security Council Resolution 1735, required member states to submit information to the extent possible. Member states are therefore not mandated to release classified intelligence should they decide not to do so, resulting in the submission of heavily redacted documents with vague details. Member states are likely to protect their geopolitical interests and intelligence by sharing limited evidence even with their allies.

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109 Case T-228/02, *Organization des Modjahedines du peuple d’Iran (OMPI) v Council of the European Union*, European Court of First Instance (Second Chamber), (December 12, 2006), paras. 154, 155 and 159.
111 Ibid.
Ginsborg and Scheinin for example draw attention to Libya’s membership in the Security Council in 2008 and 2009, when the 1267 Committee was conducting review of all entries in the Consolidated List. It is unlikely that the United States was sharing actual evidence with Libya, even if their relationship was warmer than average at the time.\textsuperscript{112} Intelligence may therefore be shared bilaterally between two member states but not presented collectively to the committee as a whole. While this suggests that a more productive means of challenging listing arise from bilateral intelligence relationships, it also means that a member state’s relationship with a powerful source of intelligence like the U.S. is crucial.

Another crucial concern is method of collection of secret intelligence and its potential for human rights violations. While disclosure of secret evidence from member states is significant for transparency of the 1267 regime, it is important to also consider the quality of secret evidence and whether it was acquired by illegal means. For example, although reforms to the 1267 regime introduced narrative summaries in relation to designated individuals to outline allegations of links to Al Qaida, the source of intelligence behind these listings remain unclear. In the case of Abdelrazik for example, the narrative summary alleged that he was closely “tied to senior Al Qaida leadership” and closely “associated with Abu Zubayda”. This is alarming given that Zubaydah was tortured by the United States while in custody and now no longer considered by the U.S. government to be a member of Al Qaida.\textsuperscript{113}

Although the 1267 regime is characterized as an administrative and preventative regime by the 1267 Committee, so far it has not followed administrative models for examining secret evidence; the 1267 regime does not have an expert adjudicator or special advocate to test the reliability of the evidence. Moreover, the introduction of the Ombudsperson under Resolution 1904 does not get to the root of secret evidence problems. While the

\textsuperscript{112} Chesterman, \textit{Supra} note 5.
\textsuperscript{113} Forcese and Roach, \textit{Supra} note 18, at 256.
Ombudsperson, unlike the special advocate, is able to communicate the content of any secret evidence with the petitioner, subject to the conditions placed by the countries sharing the intelligence, she may not have access to all the necessary evidence. As suggested by Forcense and roach, it is unrealistic to expect intelligence agencies to disclose their sources to the world, but they must disclose their sources and methods to some decision-maker, ideally a security-cleared counsel, who can at least review the merits of the listing decisions. This approach is feasible if one accepts that the 1267 regime should be characterized as administrative. If however, as developed in this paper, the 1267 regime is characterized as criminal, withholding evidence from the accused cannot be an option.

Ultimately the reforms to the 1267 regime up to this point have not resolved issues of disclosure of secret evidence and intelligence. None of the attempts by the UN to address due process problems has included independent judicial review. Reliance on secret intelligence as evidence to justify the strong sanctions of the listing regime has been seen as the central reason for the regime’s unwillingness to implement an independent judicial review body. However, it is important to note that secret evidence is commonly used in international forums, where appropriate safeguards are in place to encourage member states to share intelligence, albeit perhaps in a limited and redacted form.

The Security Council has in the past, implemented adjudicative structures affecting individuals –for example, the ad hoc tribunals of ICTY and ICTR. The evidentiary procedures within the ICTY and ICTR have the potential to be used as a guide for a similar international forum for reviewing 1267 terrorist listing. The jurisprudence of international criminal courts can be used to determine current rules of evidence dealing with intelligence and whether these rules can be adequately utilized in the context of listing and terrorism finance sanctions.

\[114 \textit{Supra} \text{ note 18, at 269.}\]
PART VI. INTRODUCING AN INTERNATIONAL STANDARD OF REVIEW FOR INTELLIGENCE EVIDENCE

Although the nature of secret intelligence makes it difficult to conduct judicial review at any level, evidentiary rules of secret evidence already exists in both domestic and international forums. At the domestic level, various approaches are used to provide individuals facing deprivation of liberty at least the basic gist of allegations. Countries like Israel have a judicial management approach emphasizing robust court scrutiny of secret evidence. In Canada and the United Kingdom, special advocates represent the detainee’s interest with respect to secret evidence.

At the international level, criminal tribunals provide a model for rules of evidence in the context of an international judicial body. Important lessons can be learnt from the history of ICTY and ICTR about the implications of using and protecting national security evidence in an international forum. The ICTY currently has one of the most well developed bodies of law governing procedural rights relating to sensitive national security evidence. Furthermore, the resolutions of each tribunal provide elaborate due process protection for the accused.

As previously discussed, the sanctions imposed against individuals and entities under the 1267 regime are particularly severe. The effects of being placed on the consolidated list are draconian, akin to the imposition of severe criminal sanctions. However, the political nature of the regime means that the imposition of sanctions requires far less evidence of wrongdoing than the imposition of criminal penalty. The Security Council has argued that the 1267 sanctions are temporary administrative measures and preventative in nature

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and thus criminal standards set out under national law are not applicable.\textsuperscript{117} Despite such characterizations of the regime, the reality is that individual sanctions give rise to severe consequences akin to criminal sanctions without any international legal mechanism to review the accuracy of the information forming the basis of listing. This means that there is a high likelihood that individuals may be placed on the consolidated list on mistaken identity. The open-ended nature of targeted sanctions makes them equivalent to permanent measures. Consequently, regardless of their classification by the Security Council, the sanctions regime falls within the scope of criminal sanctions for the purpose of international human rights law and thus procedural due process safeguards should apply.\textsuperscript{118} The reasoning arises from the principle that provides in cases of criminal charges an independent and impartial tribunal is required under international human rights law.\textsuperscript{119}

The central challenge to using national security evidence involves balancing the rights of the defendant’s and the desire for due process on the one hand with demands for state secrecy on the other. This balance becomes more challenging when considering “rights” of unpopular defendants like Slobodan Milosevic and terror suspect as opposed to rights for victims. The history of international criminal tribunals highlights the need for clear rules of procedure that are flexible enough to accommodate state demands for source protection without completely compromising the disclosure rights of the defendant.

Ultimately the challenge results from access to secret evidence from states unwilling to share such evidence unless provided an assurance that valuable source and methods will not be compromised. States may demand that secret evidence only be used by the prosecutor and not disclosed to defense and if so, only in camera hearings. This in turn jeopardizes the rights of the accused to know the evidence against them and the ability of the court to challenge the authenticity of such evidence.

\textsuperscript{117} See S.C. Res. 1735, \textit{supra} note 9.
\textsuperscript{119} ECHR (art. 9), UDHR (art. 10), and ICCPR (art. 14).
In the face of the conflict between rights of defendants and national security interests, the jurisprudence and experience of ICTY in particular can be used as a potential model for other international courts. The rules of procedure in place at the ICTY and lesson learnt about diplomacy and secret evidence can act as a template for other international judicial bodies, including one that could be created to review terrorist listings.

The ICTY provides a good example of the difficulty of soliciting evidence from states without a power to compel discovery. Richard Goldstone, the first chief prosecutor of ICTY has explained the crucial role of diplomacy to achieve state cooperation relating to secret evidence. The need to reconcile procedural protections for the defendants with that of states looking to protect the source and method of their intelligence led to the creation of particular rules at the ICTY. The initial discovery rules of the ICTY allowed for mandatory disclosure of basic threshold information, such as material that supported indictments as well as exculpatory information. However, the rules later clarified that “lead” evidence provided in confidence by a state and not intended to be used at trial does not have be disclosed to the accused.

ICTY rule 70(b) states:

If the prosecutor is in possession of information which has been provided to the prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial info and its origin shall not be disclosed by the prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

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121 ICTY R.P. & EVID. 66(A) and ICTY R.P. & EVID. 68.
122 ICTY R.P. & Evid. 66 (c), rev. 3 (Jan. 30, 1995).
123 Id., Rule 70(b)
Therefore, if the evidence is not intended to be used in trial or simply used to generate new evidence, it will not be disclosed to the accused. If however the evidence is relevant and must be used at trial, it must be disclosed to the accused. In a later amendment under rule 54, a national security exemption was added to the general obligation to produce documents and information. This rule was further amended to restrict ICTY’s power to compel verification of state confidential information in the event that the state ultimately consented to the information’s use in court. These rules were meant to create an incentive for cooperation by permitting the sharing of information and guaranteeing the confidentiality of the information and its source. For example, the ICTY managed to secure the testimony of former UN Ambassador Richard Holbrooke in Milosevic’s trial, only after intense negotiations between the United States and prosecutors regarding rules of secret evidence and intelligence. It is not surprising that the ICTY would want to accommodate the demands of the United States—a top intelligence collector in the world.

International criminal courts are particularly vulnerable to pressures for protection of secrecy due to their dependence on states to provide crucial information. As commented by some scholars, without the confidentiality provided by ICTY Rule 70, it would be almost impossible to envisage a tribunal, of which the prosecution is an integral organ, being able to fulfill its functions.124 Inevitably therefore, powerful states are likely to hold disproportionate power in the balancing game of rights of disclosure and the protection of secret evidence. A rule requiring the prosecutor to withhold information from the accused that suggest actual innocence is very troubling and contrary to notions of due process. This clearly demonstrates the difficulty faced by international tribunals in balancing the rights of the defendant and state demands for secrecy guarantees.

Nevertheless, at times, certain intelligence driven information has proved so valuable that the prosecution has convinced the state to allow its introduction as evidence in court. The

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124 Chesterman, Supra note 8.
evidential procedures of the ICTY and ICTR allow for broad admissibility. Rule 89 of the ICTY allows for admissibility of evidence so long as it’s of probative value to the outcome of the case.\textsuperscript{125} This has allowed the court to review hearsay evidence, potentially illegally obtained intelligence intercepts, and sensitive national security evidence \textit{in camera}.\textsuperscript{126} Rule 95 of the ICTY prohibits evidence “obtained by methods that cast substantial doubt on its credibility”. However, the courts have interpreted this rule liberally, evaluating evidence based on its probative value, which may mean the inclusion of unlawful evidence.\textsuperscript{127}

While the ICTY cases and rules of procedure show the need for developing a flexible framework that allows for compromise measures. The International Criminal Court (ICC) for example has taken a much more explicit approach to drafting procedural rules governing a state’s national security information than was done in early years of the ICTY. Article 72 of the Rome Statute, which specifies the applicable procedures when a state refuses to provide information on grounds of national security or objects to a third party’s disclosure of such information, imagines a cooperative and interactive framework in which ICC judges and prosecutors work directly with states to try to achieve solutions such as redactions, summaries, in camera proceedings, or attaining comparable information from a different state source, before deciding whether justice requires the disclosure of the materials.\textsuperscript{128}

The calls for due process protections are currently ever more urgent, given the continuous violation of an array of human rights by the 1267 regime, including freedom of movement, right to property and the right to dignity. Lack of due process ultimately remains an issue until there is a method in place for an independent judicial body to review redacted secret intelligence. As Simon Chesterman notes, the lack of intelligence

\textsuperscript{126} Patricia Wald, “Fair Trials for War Criminals” (2006) 4 INTL COMMENT. EVID.1, at 8.
\textsuperscript{127} Prosecutor v. Kordic and Crkze, Case No. IT-95-14-2-T at T 13694; Brdjanin, supra note 208, at 5. The court found that intelligence collected using clandestine eavesdropping techniques does not fall within the ban of rule 95.
\textsuperscript{128} Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90
evidence available to the UN serves to limit any actual review of the sanctions. The sanctions committee has instead danced around the issue of secret intelligence evidence by indicating that if domestic challenges reveal evidence that contradicts the sanctions’ facts, then the individual can forward this information to the Committee.\textsuperscript{129}

Ultimately, the due process concerns stem from the insufficiently reviewed evidence submitted to the UN. As indicated above, even members of the Security Council may not be aware of the details of intelligence that are kept intentionally vague. A judicial review remains to be crucial then even in the context of quasi-criminal cases involving terrorism listing. An independent judicial review mechanism, based on rules of evidence of international tribunals, has the potential then to challenge designations before individuals are listed. This could also prevent innocent individuals from being listed for many years before having the evidence against them tested in domestic courts. This method undoubtedly has its own challenges including the opposition of sovereign member states. It is likely that the UN has not so far implemented any form of judicial review due to the anticipation of strong objections from member states similar to that shown towards the ICC. States have shown strong concerns for disclosing secret evidence to an international body not only to protect their intelligence but also to avoid being implicated in potential crimes. Moreover, even if standards such as that of the ICTY are implemented, this may not meet the due process requirements of domestic courts. If an independent judicial body reviews decisions based on vague and overly redacted intelligence, then similar challenges could possibly occur even with this additional step.\textsuperscript{130} One may ultimately have to accept this as the inevitable consequence of intelligence as a necessary evil.

\textsuperscript{129} Supra note 8.
\textsuperscript{130} For example, in the Belgium case of Sayadi, the Human Rights Commission reviewed the material in the designation and determined that this was not sufficient.