SECURITY COUNCIL SANCTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS

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INTRODUCTION

Much post-September 11th academic discourse has revolved around the need for checks on governmental power during times of war and emergency. In the United States, the increased power of the federal government has been justified as necessary to check the threat to U.S. security posed by both domestic and international terrorists.[1] Few people disagree with the notion of enhancing the government's capacity to respond to terrorism and protect its citizens. Many people have, however, questioned the degree and manner in which executive powers have been expanded. There is great hesitance among many people to sacrifice civil liberties at the alter of security, particularly when the resulting security gains are uncertain.[2] The task of many scholars has been to describe mechanisms by which government can be given the flexibility needed to respond to terrorist threats and still be restricted from making too deep an inroad on the rule of law or civil liberties.[3] While the specifics of

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1. *See* President George W. Bush, Address to the Nation (Nov. 8, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011108-13.html. ("After September the 11th, our government assumed new responsibilities to strengthen security at home and track down our enemies abroad.").

2. *See, e.g.*, DAVID COLE, ET AL., TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2002) (asserting that the United States must not trample on freedom in responding to the threat of terrorism); STEPHEN J. SCHULHOFER, THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11 (2002) (detailing intrusions on civil liberties in the wake of the September 11th terrorist attacks).

3. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1030–32 (2004) (describing the elements that would make up a proper emergency regime and allow the government to take effective short-term action); Samuel Is-

these mechanisms differ, each of the mechanisms ultimately seeks to create an appropriate equilibrium that respects the dual requirements of liberty and security.

These problems are not only applicable in the domestic context, but they also pervade the international sphere. In response to the threat posed by Al-Qaida and other terrorist organizations, the United Nations Security Council has passed numerous resolutions aimed at combating the effectiveness of terrorists and punishing both terrorists and their collaborators. These measures are vast in scope: they have created an embryonic bureaucracy with executive power to take measures against specific individuals that every member state is then required to enforce. The need for international cooperation in the fight against terrorism is undeniable, and many benefits arise from the coordination of the Security Council resolutions. These actions of the Security Council, however, raise the same tension between the exercise of emergency power and the protection of individual rights. As more public authority is granted to the Security Council, the question of how the limits on that authority will be transferred arises.[4] Ultimately, the question to be considered is similar to the one seen in the domestic context: what mechanisms best ensure the effective implementation of Security Council resolutions and safeguard the rights of those affected by Security Council action?

This paper seeks to address two fundamental questions: first, does the current Al-Qaida sanctioning regime sufficiently protect the rights of those it targets; second, what procedural standards would most effectively safeguard individuals' rights without jeopardizing the goals of the sanctioning regime.

The first question is addressed by the first three sections of the paper. Section I outlines the development of the Security Council's Al-Qaida sanctioning regime and examines the protections it affords to targeted individuals. Section II explores the rights implicated by this sanctioning regime, paying particular attention to the issue of procedural due process rights afforded under U.S. law and through prominent human rights instruments such as the European Convention on Human Rights. Section III examines how the

sacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN L. 1, 5–6 (2004) (offering that the role of courts in protecting civil liberties is limited to ensuring that appropriate institutional processes are used to support the tradeoff between civil liberties and security).

4. *See* Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN YEARBOOK OF INT'L L. 166, 200–01 (2002).

Security Council and member states have attempted to address the need for procedural safeguards, and asserts that the dialogue between the United Nations and member states (including the European Union) has resulted in tenuous political compromises under which the Security Council has attempted to address humanitarian and human rights concerns through ad hoc negotiation and the addition of loose safeguards. It is further offered that, while such a diplomatic model might lead to appropriate outcomes in many cases, it fails to provide satisfactory procedural safeguards for the implementation of these Security Council resolutions.

Section IV turns to the paper's second fundamental question by examining several models that might be employed to ensure that the Security Council implements an effective sanctions regime while protecting individual rights. The first model—dismantling the Security Council regime—is rejected because decentralization of sanctions would entail a loss of legitimacy and effectiveness and would also fail to fully address human rights concerns. The second model—creating an international body under U.N. auspices to review listing decisions—is politically implausible given the hesitancy of governments to create such a body and their special reluctance to share sensitive intelligence information with international entities. Having rejected the first two models, the paper proposes a third model by which the Security Council would allow states to review sanctioning decisions through intergovernmental and interjudicial cooperation. This model would be advantageous over the status quo because it would allow the Security Council to mandate procedural protections that satisfy generally accepted minimum standards of due process. It would also address both the security and legal concerns of governments by allowing for cooperation between the governments involved in the sanctioning decisions. While the novelty of such a mechanism might make implementation politically difficult, this paper concludes that it is plausible should the current conflict between the Security Council and member states remain unresolved.

I.
DEVELOPMENT OF THE SANCTIONING REGIME

It is important to understand the distinctive framework, requirements, and purpose of the sanctioning regime created to deal with Al-Qaida and the situation in Afghanistan.[5] Security Council

5. There is another separate anti-terrorism regime, created under Security Council Resolution 1373, which calls upon states to take multiple actions to com-

Resolution 1267 originated the sanctions against the Taliban by calling upon member states to freeze financial resources of the Taliban and Taliban-controlled undertakings.[6] Furthermore, the resolution called for the creation of a committee, now known as the "1267 Committee," to oversee state implementation of the resolution, report certain violations of the resolution to the Security Council, and designate the financial resources of the Taliban.[7]

A major development in this sanction regime occurred with the passage of Security Council Resolution 1333, which expanded the scope of the asset freeze to include those controlled by Usama bin Laden, Al-Qaida, and affiliates of both.[8] The resolution also expanded the ambit of power for the 1267 Committee by making the committee responsible for maintaining "updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden," including those in the Al-Qaida organization.[9] The resolution calls upon state parties to enforce the freeze, impose penalties on those who violate the asset freeze,[10] and requests that states submit reports to the 1267 Committee on the implementation of the measures imposed by the resolution.[11] A sunset provision of one year was included in the sanctions imposed by Resolution 1333.[12]

Subsequent resolutions have extended the Resolution 1333 regime while seeking to improve its implementation. Resolution 1390 re-authorized the freeze of assets mandated by the previous resolutions and charged states to impose a travel ban on, and prevent the sale of arms to, targeted individuals listed by the 1267

bat terrorism generally. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001). Resolution 1373 requires states to freeze the assets of terrorists and their conspirators. The resolution also creates a committee to oversee implementation of the measures required of states under the resolution. Unlike the Afghanistan/Al-Qaida regime that is the focus of this paper, this committee is not a sanctioning body and does not manage a list of targeted entities and individuals that states are required to sanction.

6. S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg. ¶ 4(b), U.N. Doc. S/RES/1267 (1999).

7. *Id.* ¶ 6.

8. S.C. Res. 1333, U.N. SCOR 55th Sess., 4251st mtg. ¶ 8(c), U.N. Doc. S/RES/1333 (2000).

9. *Id.* ¶ 16(b). This list will be referred to as the "target list" or the "1267 list" throughout this Note.

10. *Id.* ¶¶ 17–18.

11. *Id.* ¶ 20.

12. *Id.* ¶ 23.

Committee.[13] Resolution 1390 called for a twelve-month review of the sanctions, but in effect made the sanctions permanent because the Resolution states that at the end of twelve months, "the Council will either allow these measures to continue or decide to improve them."[14] Subsequently, the Security Council has reviewed the sanctions annually and has sought to improve their implementation.[15] One way in which the Security Council has sought to improve implementation is through the addition of a "Monitoring Group", operating under the direction of the 1267 Committee, to monitor member state implementation of the requirements of Resolution 1333 and subsequent resolutions.[16]

Although sanctions are not a new tool for the Security Council, the Al-Qaida sanctioning regime is unique in two regards. First, the amount of authority given to the 1267 Committee to continually make determinations on individual responsibility is unprecedented. Many Security Council resolutions have created committees to ensure the implementation of sanctions,[17] and some of these committees have implemented sanctions against individuals and non-state entities.[18] No other sanctioning committee, however, has been given the responsibility for continually determining who exactly should face economic sanctions.[19] Because Al-Qaida is a disperse organization with a multitude of loosely connected affiliates, determining who exactly should be sanctioned is much more difficult than sanctioning state actors or particular armed forces. Rather

13. S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452d mtg. ¶¶ 1–2, U.N. Doc. S/RES/1390 (2002).

14. *Id.* ¶ 3.

15. *See* S.C. Res. 1455, U.N. SCOR, 58th Sess., 4686th mtg. ¶¶ 1–2, U.N. Doc. S/RES/1455 (2003); S.C. Res. 1526, U.N. SCOR, 59th Sess., 4908th mtg. ¶ 2, U.N. Doc. S/RES/1526 (2004).

16. S.C. Res. 1363, U.N. SCOR, 56th Sess., 4352d mtg. ¶ 3, U.N. Doc. S/RES/1363 (2001).

17. There have been at least eleven Security Council committees established to help implement sanctions imposed by the Security Council. *Security Council Sanctions Committees: An Overview*, *at* http://www.un.org/docs/sc/committees/INTRO.html (last modified Feb. 17, 2004).

18. *See* S.C. Res. 1173, U.N. SCOR, 53d Sess., 3891st mtg., U.N. Doc. S/RES/1173 (1998) (imposing financial sanctions against an Angolan rebel group).

19. Some committees have been charged with determining who should be included on travel bans and arms embargos. *See* S.C. Res. 1521, U.N. SCOR, 58th Sess., 4890th mtg. ¶ 21(d), U.N. Doc. S/RES/1521 (2003) (charging a committee with listing Liberian individuals on whom a travel ban should be applied). Recently, the Security Council has created a new committee with similar listing responsibilities to freeze the assets of Saddam Hussein and other senior officials of the former Iraqi regime and their family members. S.C. Res. 1518, U.N. SCOR, 58th Sess., 4872d mtg. ¶ 1, U.N. Doc. S/RES/1518 (2003).

than leave this determination to individual states, the Security Council created an internal order responsible for deciding who should be sanctioned. The authority given to the 1267 Committee to make determinations regarding an individual's connection to Al-Qaida is similar to that of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Both the 1267 Committee and the ICTY/R are bodies created under the Chapter VII authority of the Security Council and vested with power to make judgments concerning an individual's involvement in activities condemned by the international community.[20] Unlike these tribunals, however, the 1267 Committee was created with no procedures to guide the decisions of the Committee.[21]

Second, while Security Council sanctions are normally taken under Chapter VII and thus binding on all states, the scope of responsibilities placed on governments under this regime (particularly when combined with the 1373 Counter Terrorism regime)[22] are well beyond those placed on governments in other situations in which the Security Council has imposed sanctions. In responding to terrorism, the Security Council has called upon states to implement the sanctioning decisions of the 1267 Committee,[23] modify their domestic law,[24] punish non-state actors who do not comply with the resolution,[25] ratify treaties,[26] and supply information required by the committees established by the Security Council.[27]

20. *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. U.N. Doc. S/RES/827 (1993); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. U.N. Doc. S/RES/955 (1994).

21. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia (last amended on 19 May 2003), art. 21 ("Rights of the Accused").

22. *See supra* note 5.

23. S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452d mtg. ¶ 2, U.N. Doc. S/RES/1390 (2002).

24. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶ 1(b), U.N. Doc. S/RES/1373 (2001) ("*Decides* that all States shall: . . . (b) Criminalize the wilful provision or collection . . . of funds . . . .").

25. S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg. ¶ 8, U.N. Doc. S/RES/1267 (1999) ("*Calls upon* States to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed . . . ."); *see also* S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg. ¶18, S/RES/1333 (2000).

26. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶ 3(d), U.N. Doc. S/RES/1373 (2001) ("*Calls upon* all States to: . . . (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999").

27. S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg. ¶19, U.N. Doc. S/RES/1333 (2000) ("*Calls upon* all States to cooperate fully with the Committee in

To place such duties upon states is an ambitious expansion of Chapter VII power, yet states have generally been supportive of the resolutions and the need for decisive action by the Security Council.[28] Action by the Security Council provides mobilization and coordination benefits that are vital to combating terrorism. Because terrorism transcends national borders, any effort to combat it must involve complete international cooperation.[29] As the Croatian representative to the United Nations stated:

> Success in combating international terrorism ultimately depends on the ability of our Governments to work together through international cooperation mechanisms. By virtue of its worldwide membership, the United Nations provides a unique institutional framework to do this.[30]

Furthermore, the Security Council possesses the authority under Chapter VII to require states to cooperate by passing binding resolutions.[31] These resolutions seek to induce full cooperation by placing states under the "legal, as well as political and moral, obligation to act . . . ."[32] While the passage of these resolutions signified the exercise of a power heretofore unseen, it was vital to give the

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the fulfillment of its tasks, including supplying such information as may be required by the Committee in pursuance of this resolution").

28. *See e.g.,* U.N. SCOR, 58th Sess., 4710th mtg. at 6, U.N. Doc. S/PV.4710 (2003) (Statement of Mr. Dauth, Australia) ("[T]he United Nations must continue to play a key role in denying terrorists the opportunity to commit their appalling crimes."); *Id.* at 7 (Statement of Ms. Ognjanovac, Croatia) ("The United Nations has proved to be indispensable at the global level as a focal point for integrated action and as the architect of an extensive body of international anti-terrorist legislation.").

29. *See* U.N. SCOR, 58th Sess., 4734th mtg. at 4, U.N. Doc. S/PV.4734 (2003) (Statement of Sir Jeremy Greenstock, Chairman of the Counter Terrorism Committee) ("I believe that collective effort will pay dividends, because no country can prevent terrorism in isolation."); U.N. SCOR, 58th Sess., 4798th mtg. at 27, U.N. Doc. S/PV.4798 (2003) (Statement of Mr. Mekel, Israel) ("It takes only one non-compliant State to provide safe harbour for Al Qaeda, and to enable it to regroup, plan and perpetrate deadly attacks against civilians.").

30. U.N. SCOR, 58th Sess., 4710th mtg. at 8, U.N. Doc. S/PV.4710 (2003) (Statement of Ms. Ognjanovac, Croatia).

31. *See* U.N. SCOR, 58th Sess., 4752d mtg. at 5, U.N. Doc. S/PV.4752 (2003) (Statement of Sir Jeremy Greenstock, U.K.) ("We believe that the Security Council has a responsibility to ensure that every Member State of the United Nations takes action to combat this threat to international peace and security.").

32. U.N. SCOR, 57th Sess., 4453d mtg. at 6, U.N. Doc. S/PV.4453 (2002) (Statement of Mr. Cunningham, U.S.A.).

international community "a power that is commensurate with the threat . . . ."[33]

The Al-Qaida sanctioning regime attempts to provide these collective action benefits in the specific arena of terrorist financing. A large part of the international community's strategy in combating terrorism is to "deprive terrorists of the means to commit their crimes."[34] Freezing the assets of terrorist organizations, their members, and their affiliates is crucial to preventing terrorists from having the wherewithal to carry out terrorist operations. Such a strategy is only effective, however, if there is full implementation by all States. States not cooperating with efforts to freeze the assets of terrorists become safe havens for the financing of terrorist activities. The Al-Qaida sanctioning regime not only mandates state implementation of these asset freezes, but coordinates the implementation. One of the most important ways in which this coordination occurs is through the maintenance of the target list. States are under the dual obligation to provide information on individuals who should be targeted and to enforce measures against those individuals who are targeted. Through the maintenance of this list, states benefit from the intelligence of other states and regional organizations, allowing for a uniform and comprehensive list of entities that pose a terrorist threat. The hope is that having this done through the United Nations will be more effective and legitimate than having one state (such as the United States) attempt to coordinate asset freezes within all states.[35]

33. U.N. SCOR, 58th Sess., 4792d mtg. at 2, U.N. Doc. S/PV.4792 (2003) (Statement of Security Council President Arias, Spain).

34. U.N. SCOR, 58th Sess., 4752d mtg. at 5, U.N. Doc. S/PV.4752 (2003) (Statement of Mr. Negroponte, U.S.A.).

35. Most of the individuals on the list are targeted based on information provided by the United States. *See* Per Cramér, *Recent Swedish Experiences with Targeted U.N. Sanctions: The Erosion of Trust in the Security Council*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 88 (Erika de Wet & André Nollkaemper, eds., 2003). Still, U.N. control of this list is useful because other states might be more willing to share information with the United Nations, and the United Nations has much more legal legitimacy in calling upon states to share information and enforce asset freezes. *See* U.N. SCOR, 58th Sess., 4798th mtg. at 14, U.N. Doc. S/PV.4798 (2003) (Statement of Mr. Pleuger, Germany) ("A major source of credibility for the sanctions regime is the fact that it targets specific individuals or entities on the basis of a consolidated list.").

II.
HUMAN RIGHTS CONCERNS RAISED BY THE SANCTIONING REGIME

Having examined the structure and rationale of the sanctioning regime, we now turn to explore one of the two central questions of this paper: whether the Al-Qaida sanctioning regime sufficiently protects the rights of those targeted by the 1267 Committee. Although the legal applicability of human rights norms to the Security Council is an issue rife with debate,[36] there appears to be general consensus among Security Council members that the sanctioning measures should be employed in a manner consistent with human rights norms.[37] Thus, if the sanctioning regime infringes on these rights, then presumably even the Security Council would agree that it should be reformed.

This section will examine two major rights implicated by the Al-Qaida sanctioning regime: property and due process rights. The nature of each of these rights will be described within the particular context of the Al-Qaida sanctioning regime to illustrate the applicable protections that should be afforded to sanctioned individuals.

A. Property Rights

While the right to the peaceful enjoyment of one's property is not a universally accepted idea, it is a fundamental right in some systems, particularly in Western democratic states. If the sanctions regime is to be seen as legitimate from a Western rights perspective, then it must take into account Western restrictions on arbitrary interference with an individual's property.

36. *See generally* de Wet & Nollkaemper, *supra* note 4 at 171–76; Jose E. Alvarez, *The Security Council's War on Terrorism: Problems and Policy Options*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES, *supra* note 35, at 123–35.

37. *See e.g.*, U.N. SCOR, 57th Sess., 4453d mtg. at 3, S/PV.4453 (2002) (Statement of Secretary General Annan) ("[W]e should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights."); *Id.* at 6 (Statement of Mr. Cunningham, U.S.A.) ("[W]e agree . . . about the connection between the struggle against terrorism and human rights."); *Id.* at 10 (Statement of Mr. Niehaus, Costa Rica) ("The struggle against this scourge should not become an excuse to disregard fundamental rights."); U.N. SCOR, 58th Sess., 4752d mtg. at 8, U.N. Doc. S/PV.4752 (2003) (Statement of Mr. Pleuger, Germany) ("[O]ur fight must always be legitimized under international law. It must respect national and international law, human rights and the United Nations Charter. Human rights in particular should not be suspended on the pretext of combating terrorism. After all, this fight is not only about defending our security, but also about our fundamental values: freedom, democracy and human rights.").

The First Protocol to the European Convention on Human Rights (European Convention) provides in Article 1 that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[38]

Similarly, the Fifth Amendment to the U.S. Constitution protects private property from extra-legal interference and public takings without just compensation.[39] Neither the European Convention nor the U.S. Constitution establishes an absolute right to property, but both utilize legal procedures to protect property from unwarranted interference. Governments may interfere with an individual's property, but only upon a legal determination that such action is warranted. If governments permanently take property, they must provide just compensation.

The Security Council requires states to freeze the assets of individuals and entities on the 1267 list. By restricting access of targeted individuals to their property, such measures clearly impede the individuals' peaceful enjoyment of their possessions. Yet, when considering whether the freezing of assets is an *improper* interference with property rights, both the United States and European courts have deferred to the justifications of governments in finding these governmental actions legitimate.

Cases of the European Court of Justice (ECJ) have held that a similar Security Council sanctioning regime employed against the Federal Republic of Yugoslavia constituted a fundamental interest which justified the negative consequences of infringement of the petitioners' property rights.[40] In these cases, the European Union had adopted regulations to comply with Security Council resolutions that were then contested by claimants as infringing on their right to property. In both cases, the ECJ recognized that the right

38. Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Protocol, art. 1, Europ. T.S. No. 9, 213 U.N.T.S. 262.

39. U.S. CONST. amend. V.

40. Case C-317/00, Invest Import v. Commission, 2000 E.C.R. I-09541, ¶¶ 58–60; Case C-84/95, Bosphorus v. Minister for Transp., Energy and Communications, 1996 E.C.R. I-03953, ¶¶ 25–26.

to property may be "subject to restrictions justified by objectives of general interest pursued by the Community."[41] The ECJ then engaged in a proportionality analysis in determining that the property rights were not violated in either case. In *Bosphorus v. Minister for Transport, Energy and Communications*, the claimant was a Turkish company with no connection to Yugoslavia, except for the fact that they rented, and independently operated, a plane from a Yugoslav airline. Although the impounding of these leased aircraft would have the effect of destroying its air travel business,[42] the ECJ held that the objective was of a fundamental interest for the international community, so the impounding was not disproportionate.[43] In *Invest Import*, applicants argued that since they were privately managed and not influenced by the Yugoslav government, they should not suffer an asset freeze designed to freeze the assets of the Yugoslav government and controlled entities.[44] While the ECJ acknowledged that the negative consequences to the applicants could be substantial in nature, they were still justified by the important international aims pursued by the regulations.[45] Thus, it seems clear that while there is a property right implicated in an asset freeze, the important aims of combating terrorism will likely be sufficient to override this property right in European human rights jurisprudence.

Under United States constitutional law, targeted individuals can also assert a property right under the Fifth Amendment by claiming that an asset freeze functions as a taking. As under European human rights law, such claims would likely be unsuccessful. As the district court stated in *Global Relief Foundation, Inc. v. O'Neill*, "Takings claims have often been raised—and consistently rejected—in the IEEPA context. Many courts have recognized that a temporary blocking of assets does not constitute a taking because it is a temporary action and not a vesting of property in the United States."[46] The denial of the takings claims rests primarily on the temporary nature of an asset freeze. Yet, as has been noted, the duration of the Security Council sanctions is indefinite. At least

41. *Bosphorus*, 1996 E.C.R. I-03953 at ¶ 21; *See also Invest Import*, 2000 E.C.R. I-09541 at ¶ 20.

42. *Bosphorus*, 1996 E.C.R. I-03953 at ¶ 19.

43. *Id.* ¶ 26.

44. *Invest Import*, 2000 E.C.R. I-09541 at ¶ 27.

45. *Id.* ¶ 60.

46. 207 F. Supp. 2d, 779, 802 (N.D.Ill. 2002), *aff'd,* 315 F.3d 748 (7th Cir. 2002); *see also* Propper v. Clark, 337 U.S. 472 (1949); IPT Co. v. U.S. Dept. of Treasury, 1994 WL 613371 (S.D.N.Y. 1994); Holy Land Found. For Relief and Dev. v. Ashcroft, 219 F. Supp. 2d 57, 78 (D.D.C. 2002).

one court has indicated that if a blocking order becomes long term, there may be a claim that the property has vested within the U.S. government.[47] Particularly if there is no opportunity for review or reconsideration of these asset freezes, a strong argument could be made that the property has vested in the government after a long freeze, and should constitute a taking. While the exact point when a temporary asset freeze becomes a permanent taking is unclear, it is safe to assume that the courts will continue to grant great deference to the executive branch in employing asset freezes, particularly in the short run.

B. The Right to Due Process

The primary questions raised by the Al-Qaida sanctioning regime concern the protection of procedural rights that should attach when sanctioning individuals. The general concern involved is straight-forward: sanctions should not be over inclusive by targeting innocent individuals not affiliated with Al-Qaida or the financing of terrorism. Procedural protections help guarantee that sanctions are not imposed arbitrarily or unfairly. In order to ensure fairness, sanctioning decisions of the 1267 Committee should be based on, "clear criteria . . . that would specify under which objective conditions a given individual or entity should be added to [the] list."[48] Furthermore, many commentators have asserted that there should be "an independent, impartial and even-handed procedure during which the evidence against potentially innocent victims of the listing procedure can be rebutted."[49]

Thus, the right being claimed is a procedural one, found in the International Covenant on Civil and Political Rights of 1966 ("ICCPR"),[50] national constitutions, and other human rights instruments. ICCPR Article 14(1) establishes that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal."[51] Article 6 of the European Convention sets out a similar right, and the Fifth Amendment to the U.S. Constitution ensures

47. *Holy Land Found.*, 219 F. Supp. 2d at 78.

48. U.N. SCOR., 58th Sess., 4798th mtg. at 14, U.N. Doc. S/PV.4798 (2003) (Statement of Mr. Pleuger, Germany).

49. de Wet & Nollkaemper, *supra* note 4, at 168.

50. International Covenant on Civil and Political Rights, *adopted by the U.N. General Assembly* Dec. 16, 1966, 999 U.N.T.S. 171.

51. *Id.* art. 14(1).

that there can be no deprivation of life, liberty or property without due process of law.[52]

Under both U.S. and international law, due process is not a static right, but varies according to the nature of the proceedings. The specific content of a due process right depends first on the nature of the proceedings. A fundamental distinction exists between criminal and non-criminal charges, with additional procedural protections attaching to criminal proceedings. For example, the Sixth Amendment to the U.S. Constitution grants rights to the accused in criminal prosecution that are not explicitly granted to litigants in non-criminal settings. The government may impose non-criminal sanctions, such as a penalty imposed by an executive agency, without concern for the procedural protections of the Sixth Amendment. Both the European Convention and the ICCPR also provide a specific list of minimum rights to be accorded to those charged with a crime, including the right to counsel, the right to examine witnesses, and the right to an interpreter.[53]

The Nature of the Security Council Sanctions, Criminal or Civil?

In order to determine the content of due process protections that should be afforded to individuals facing these Security Council sanctions, it is necessary to examine the nature of the sanctions imposed. If these sanctions are to be considered criminal penalties, then it is certain that the current procedural protections would be insufficient to meet the procedural standards imposed by domestic and international law for criminal cases. If, on the other hand, the sanctions involved in this sanctioning regime are considered a civil or administrative matter, then a closer analysis must be undertaken to determine the sufficiency of current procedural protections.

In determining whether the Security Council sanctions are criminal in nature, we first examine the holdings of international human rights bodies. The Human Rights Committee, which serves as the primary body for interpreting the ICCPR, has not elaborated on the meaning of "criminal charge."[54] The jurisprudence of the European Court of Human Rights (ECHR) is more helpful in interpreting Article 6 of the European Convention. The ECHR has established a three-part test to define criminal charge: 1) the state legal system's categorization of the offense; 2) the nature of the

52. *See supra* notes 38–39.

53. ICCPR, *supra* note 50, art. 14(3); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(3), Europ. T.S. No. 5, 213 U.N.T.S. 228.

54. *See* de Wet & Nollkaemper, *supra* note 4, at 177.

offense and penalty; 3) the severity of the penalty.[55] In seeking to apply this test to the Security Council sanctions, scholars have reached different conclusions as to the nature of the sanctions.[56] For example, the nature of the offense at issue can be characterized in vastly different ways. On the one hand, the sanctions concern the financing of terrorism, which the Security Council has clearly indicated is a criminal activity.[57] On the other hand, the nature of these sanctions seems more protective than punitive. Security Council resolutions have other punitive provisions calling for the criminalization of the financing of terrorism;[58] these sanctions seem protective in that they are designed to ensure that terrorist activities do not get financed. Furthermore, criminal sanctions normally establish a proportional relationship between culpability and penalty; the sanctions imposed by the Security Council are not proportionate because they freeze all assets regardless of the asset amount or relative culpability of the target.

Still, there is an undeniable punitive element contained in these sanctions: the stigmatization and loss of livelihood make for a clear punitive character from the perspective of the individuals sanctioned.[59] Individuals placed on the 1267 Committee's list are stigmatized as terrorists.[60] The severity of the sanctions, especially as originally constituted, is indicative of a criminal sanction. Criticisms of the sanctions regime often focus on the inability of sanc-

55. Engel v. Netherlands, 1 Eur. Hum. Rts. Rep. 647, 678–79 (1976).

56. *Compare* Iain Cameron, Report to the Swedish Foreign Office on Legal Safeguards and Targeted Sanctions, § 9.5 (Oct. 2002), *at* http://www-hotel.uu.se/juri/sii/pdf/sanctions.pdf (determining that asset freezes should not be considered a "criminal charge" within the meaning of the European Convention), *with* de Wet & Nollkaemper, *supra* note 4, at 177 (determining that the Security Council asset freezes should constitute a "criminal charge" within the meaning of the European Convention).

57. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶ 1(b), U.N. Doc. S/Res/1373 (2001).

58. *Id.*

59. de Wet & Nollkaemper, *supra* note 4, at 177 n.48 and accompanying text. Mere defamation by the government may by itself implicate the procedural rights of an individual. *See* Rotaru v. Romania, App. No. 28341/95, Eur. Ct. H.R. (2000) *at* http://www.ehcr.coe.int; Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 203–04 (D.C. Cir. 2001) (discussing the cases of Paul v. Davis, 424 U.S. 693 (1976), and Wisconsin v. Constantineau, 400 U.S. 433 (1971), in holding that the government action of designating petitioner as a terrorist organization was more than mere stigmatization and required notice and opportunity to be heard).

60. *See* Case T-306/01 R, Aden v. Council of the Eur. Union, 2002 E.C.R. II-02387 (application for interim measures), ¶ 74.

tioned individuals to receive money to cover living expenses.[61] Although these concerns have been mitigated with the passage of Security Council Resolution 1452 (2002), which allows for the release of financial assets for necessary basic expenses,[62] the sanctions are still likely to have dire economic consequences on the individuals and institutions placed on the 1267 Committee's list. Given the all-encompassing scope of the freeze, the international notoriety that accompanies inclusion on the sanctioning list, and the indeterminate length of the sanctions, a very plausible argument can be made that the Security Council sanctions closely resemble criminal sanctions.

While it is debatable whether the Security Council sanctions are criminal in nature based on the ECHR test, it is clear that many countries have legal provisions whereby their governments can, under certain circumstances, freeze assets as an administrative, noncriminal proceeding.[63] The asset freeze may take place in connection with a criminal investigation, but the actual freezing of assets is not itself a criminal penalty, and therefore is not subjected to the rigorous criminal procedural requirements.[64] Furthermore, when

61. *See Terror Suspect Loses Legal Challenge*, BBC NEWS, Nov. 28, 2001, *at* http://news.bbc.co.uk/1/hi/uk/1680392.stm.

62. S.C. Res. 1452, U.N. SCOR, 57th Sess., 4678th mtg. ¶ 1(a), U.N. Doc. S/RES/1452 (2002).

63. *See, e.g.,* International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701–07 (2000) (granting the President of the United States the power to freeze assets involving foreign nations or nationals during an unusual and extraordinary threat); §§ 2, 7 Auβenwirtschaftsgesetz [AWG] (allowing the German Government to restrict foreign trade and payments for security purposes); Code monétaire et financier, art. L-151-2 (Fr.) (authorizing decrees to freeze accounts when issued on the basis of a report of the minister responsible for economic affairs); Okurasho kawa sekyoku [Foreign Exchange and Foreign Trade Law of Japan], Law No. 228 of 1949, art. 19 (allowing the Minister of Finance to apply a licensing system regulating foreign payments). There is a great deal of information available on state practice via the web sites of both the CTC and the 1267 Committee. *See* "Documents related to the work of the Counter-Terrorism Committee," *at* http://www.un.org/docs/sc/committees/1373/submitted_reports.html; "Reports from member states pursuant to paragraph 6 of Resolution 1455 (2003)," *at* http://www.un.org/docs/sc/committees/1267/1455reportsEng.htm.

64. For example, Article 29 of the Federal Organized Crime Act of Mexico provides that the Public Prosecutor's Office may, under certain circumstances during an investigation, freeze the assets of organized crime members. While the Public Prosecutor's Office does have to attain prior legal authorization, such authorization can be granted without holding a full criminal trial. *See* "Letter dated 21 December 2001 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council," at 5–6, U.N. Doc. S/2001/1254 (2001).

courts have heard cases concerning due process rights and asset freezes, they have generally considered that the protections afforded are much less than those granted to criminal proceedings.[65] Although state classification of proceedings as non-criminal is not dispositive,[66] it is certainly illustrative that many states have allowed administrative or executive bodies to directly implement similar types of asset freezes without criminal proceedings. Given the ambiguous nature of these sanctions and the clear state practice of allowing non-criminal asset seizures, it would be difficult to effectively hold that asset freezes always constitute criminal sanctions.

Specific Due Process Protections Afforded to Asset Freezings as Civil Sanctions

Henceforth, we shall assume that the sanctions imposed by the Security Council do not rise to the level of criminal penalty. If the sanctions were to be considered a criminal penalty, the Al-Qaida sanctioning regime undoubtedly provides insufficient procedural protections. While maintaining that the sanctions are civil in nature lowers the level of due process required, the major human rights instruments do extend the right to a fair and impartial proceeding to non-criminal matters. Because these actions affect the civil rights and obligations of those targeted by restricting their access to financial assets, they fall within the scope of the ICCPR, the European Convention, and the U.S. Constitution. Thus, some measure of due process protection, including an opportunity to defend oneself before an impartial body, should attach to these Security Council sanctions. In order to determine the precise content of an individual's procedural rights in the context of asset freezes, we turn to examine human rights law in Europe, and constitutional/administrative law in the United States.

European Due Process Rights

The text of Article 6(1) of the European Convention lists the basic procedural entitlements: a fair and public hearing that occurs within a reasonable time and before an independent and impartial tribunal that results in a publicly pronounced judgment. Article 6(1) does allow for non-public hearings in cases where national security is involved, so it is likely that any hearings concerning Security Council sanctions need not be public.

The ECHR has allowed for the limitation of due process protections under certain circumstances where the essence of the right

65. *See infra* pp. 506–11.

66. Deweer v. Belgium, 2 Eur. Ct. H.R. (ser. A) 439, 458 (1980).

is maintained and the restrictions are legitimate and narrowly tailored. First, the ECHR held in the case of *Albert and Le Compte v. Belgium* that administrative tribunals do not themselves have to provide for the procedural protections listed in Art. 6(1).[67] Albert and Le Compte were Belgian doctors whose licenses had been suspended by a Belgian administrative body responsible for the licensing of doctors. It was undisputed that the administrative body did not meet the requirements of Art. 6(1), and the doctors argued that Belgium had thus violated the terms of that article. The ECHR held that the administrative body did not have to comply with the requirements of Art. 6(1) so long as that body was "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)."[68] This ruling by the ECHR gives states the needed flexibility of making administrative determinations of civil rights and obligations while still meeting the requirements of Art. 6(1) through judicial review.

The ECHR case of *Waite and Kennedy v. Germany* provides a relevant example of how Article 6 requirements may be tailored in dealing with decisions of international organizations.[69] Waite and Kennedy brought an action concerning an employment dispute against the European Space Agency ("ESA") before a German labor court. After the German courts held that the ESA was immune from jurisdiction, applicants brought a claim against Germany for not allowing a fair hearing by a tribunal. The ECHR, in ruling that there was no violation of Art. 6(1), provided three explanations of European human rights law that are important for our purposes. First, the ECHR recalled that the right to access courts may be subject to limitation so long as a) the very essence of the right is not impaired, b) the limitation pursues a legitimate aim, and c) there is a reasonable relationship of proportionality between the means employed and the aim pursued.[70] Second, the ECHR suggested that States still have a responsibility to ensure that the obligations of Article 6(1) are met when States confer certain competences on international organizations.[71] In other words, under the European Convention, governments cannot absolve themselves from due process obligations by conferring the jurisdiction on an international body. Finally, the ECHR held that Germany could grant immunity

67. Albert and Le Compte v. Belgium, 5 Eur. Ct. H.R. (ser. A) 533, 541–42 (1983).

68. *Id.* at 542.

69. Waite and Kennedy v. Germany, 30 Eur. Ct. H.R. 261 (1999).

70. *Id.* at 273.

71. *Id.* at 274–75.

to the ESA so long as there were reasonable alternative means to protecting the rights of the European Convention.[72] Specifically, the ECHR found that the ESA offered review mechanisms that complied with Art. 6(1), signaling that international organizations can themselves provide appropriate mechanisms to comply with European Convention requirements.[73]

In sum, there are a number of implications for the particular rights that are afforded by European human rights law to asset freezes. First, the initial freezing of assets does not necessarily have to be accompanied by full procedural protections so long as subsequent review is available by a fair and impartial tribunal established under law. Second, states may restrict access to courts established under Art. 6(1) so long as such limitations are justified and narrowly tailored. For example, there may very well be important security interests in delaying access to a full and fair hearing when such a hearing would compromise an ongoing terrorist investigation. Third, either domestic institutions or international organizations with conferred competencies may afford the procedural protections required by the European Convention.

U.S. Constitutional and Administrative Law

In interpreting the due process clause of the Fifth Amendment, the U.S. Supreme Court has established the "general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."[74] But while a "pre-seizure hearing is the constitutional norm, postponement is acceptable in emergencies."[75] In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Supreme Court set out the conditions where such postponement might be appropriate: 1) seizure serves significant government purposes, 2) pre-seizure notice might frustrate the purpose of seizure, 3) seizure is initiated by the government and not self-interested parties.[76] These conditions bear a remarkable similarity to those established by the ECHR, with both establishing the need for a legitimate government interest and a rational relationship between the deviation from normal practice and the accomplishment of that interest.

72. *Id.* at 275–76.

73. *Id.*

74. United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993).

75. Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002).

76. 416 U.S. 663, 679–80 (1974).

Lower courts in the United States have held that the *Calero-Toledo* test is met when assets are frozen under the authority of the International Emergency Economic Powers Act (IEEPA).[77] As the district court in *Holy Land Foundation for Relief and Development v. Ashcroft* stated:

> Money is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless. Indeed, in issuing the Executive Order, President Bush explicitly determined that "because of the ability to transfer funds or assets instantaneously, prior notice to such [designated] persons of measures to be taken pursuant to this order would render these measures ineffectual."[78]

Even commentators who argue that the Security Council measures amount to criminal sanctions admit that any hearing is likely to take place after preventative measures have already been taken.[79] A system where such hearings occurred prior to sanctioning would prove unworkable and counterproductive.

U.S. executive agencies imposing asset freezes are subject to due process requirements, and their decisions are not immune from judicial review. If basic due process requirements are not met pre-deprivation, then targeted individuals and entities must be given notice and an opportunity to be heard after assets have been frozen. The opportunity to be heard does not necessarily consist of a formal hearing. Federal regulations state that individuals "may submit arguments or evidence that the person believes establishes that insufficient basis exists for the designation."[80] While individuals may request a meeting, the agency retains discretion to decline to conduct such meetings.[81] Although such review does not seem independent because it occurs within the same agency that initially imposed the freeze, federal courts have held that the review does not violate the due process clause of the Fifth Amendment.[82]

77. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–07 (2000).

78. 219 F.Supp.2d 57, 77 (2002), *aff'd,* 333 F.3d 156 (D.C. Cir. 2003).

79. *See* de Wet & Nolkaemper, *supra* note 4, at 180.

80. 31 C.F.R. § 501.807(a) (2003).

81. 31 C.F.R. § 501.807(c) (2003).

82. *See* Withrow v. Larkin, 421 U.S. 35, 56 (1975), *cited in* Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779, 805 (N.D.Ill. 2002), *aff'd,* 315 F.3d 748 (7th Cir. 2002).

In addition to agency review, judicial review of final agency decisions is also provided through the Administrative Procedure Act.[83] That act states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[84]

With this provision, targeted individuals can appeal decisions of the administrative bodies, although such decisions will be reviewed with a very deferential standard. In determining whether a decision is arbitrary or capricious, the courts will consider whether there has been a clear error of judgment and whether the agency's reasons conform to minimal standards of rationality.[85] There are less stringent procedural protections afforded to the targeted parties, because review is based solely on the agency record and the government is allowed to submit hearsay evidence as well as classified information *in camera* and *ex parte*.[86]

In summary, both the human rights law of Europe and the Constitutional law of the United States illustrate some of the common claims that can be raised against the Security Council's Al-Qaida sanctioning regime. Both provide for certain procedural protections that should accompany the sanctioning of individuals or entities. Yet the jurisprudence in each has allowed for the loose interpretation of those procedural rights in circumstances such as these, with most protections coming after the sanctioning action has been taken. Examination of the two systems also reveals certain

83. 5 U.S.C. § 704 (2001). Such judicial review would most likely still be constitutionally required absent this legislation.

84. 5 U.S.C. § 706 (2001).

85. Holy Land Found. for Relief and Dev. v. Ashcroft, 219 F. Supp. 2d 57, 66–67 (D.C. Cir. 2002), *aff'd,* 333 F.3d 156 (D.C. Cir. 2003) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 521 (D.C. Cir. 1983).

86. *Global Relief Found.*, 315 F.3d 748, 754 (7th Cir. 2002) ("Administration of the IEEPA is not rendered unconstitutional because that statute authorizes the use of classified evidence that may be considered *ex parte* by the district court."); Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 196, 209 (D.C. Cir. 2001) (discussing judicial review standards included in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)) ("We do not suggest 'that a hearing closely approximating a judicial trial is necessary.'").

differences. The U.S. system allows for review to occur primarily intra-agency with a subsequent (and very deferential) judicial review, while in Europe an independent and impartial tribunal is fundamental to the system of procedural protections.

III.
CURRENT PROCEDURAL PROTECTIONS

Now that we have a better sense of the rights implicated by these sanctions, we turn to examine whether these due process rights are adequately provided for within the Al-Qaida sanctioning regime. In doing so, we will critique the legal and political protections afforded by the United Nations and member states.

A. Security Council Mechanisms

Initially, there were no public standards for decisions made concerning the list of sanctioned individuals maintained by the 1267 Committee. A great deal of deference was accorded to the decisions made by the Committee, and most states operated under the presumption that the decisions made by the Committee were accurate.[87] All of this began to change after the case of three Swedish individuals raised concerns about the possibility of sanctions being applied inappropriately.[88]

In November 2001, based on U.S. intelligence, the 1267 Committee added three Swedish citizens of Somali origin and one non-profit-making association, with which the three individuals were affiliated, to the list of targeted individuals and entities whose assets should be frozen.[89] In the European Union, the Security Council sanctions have been implemented through regulations of the Commission of the European Communities ("Commission") and the Council of the European Union ("Council"), the two chief policy making arms of the European Union.[90] One European Commis-

87. *See* Christopher Cooper, *Shunned in Sweden—How Drive to Block Funds for Terrorism Entangled Mr. Aden—U.S. Cited Him, and the U.N. Added Economic Sanction With Little Public Evidence—His Checks Stop, Bills Don't*, WALL ST. J., May 6, 2002, at A1 ("'In the immediate aftermath of 9/11, there was enormous goodwill and a willingness to take on trust any name that the U.S. submitted,' says a European diplomat assigned to the Security Council. He says it was only later that members realized some of those named had no firm connection to a violent organization.").

88. The names of the individuals in question are Abdirisak Aden, Abdi Abdulaziz Ali, and Youssef Ali. *See Id.*

89. Case T-306/01 R, Aden v. Council of the Eur. Union, 2002 E.C.R. II-02387 (application for interim measures), ¶ 24.

90. *Infra* notes 127–28 and accompanying text.

sion regulation legally required Swedish financial institutions to freeze the assets of these three individuals.[91] The individuals argued their innocence to the Swedish government, which then approached the U.S. government to obtain further information about the evidence against the Swedish subjects. The United States provided Sweden with twenty-seven pages of information, which included twenty-three pages of news-release material.[92] A representative of the Swedish Police stated that the documentation contained nothing that proved the allegations.[93] At the request of the three citizens, the Swedish government subsequently filed an unsuccessful request with the 1267 Committee to have the names of the individuals removed from the list.[94] The Swedish government then entered into negotiations with the United States, and after the three individuals provided detailed personal histories, the United States joined Sweden in requesting the de-listing of two of the three individuals from the 1267 Committee's list. The third individual remains listed.[95]

After this incident, states began to question the methodology for including names on the list.[96] This led to the adoption of guidelines for the conduct of the 1267 Committee's work.[97] Under the guidelines, proposed additions to the list should "include, to the extent possible, a narrative description of the information that forms the basis or justification for taking action . . . ."[98] The de-listing procedure allows the member state of which the target is a resident or citizen (petitioning state) to work bilaterally with the

91. Commission Regulation 2199/2001, art. 1, 2001 O.J. (L 295) 1.

92. Cooper, *supra* note 87.

93. Cramér, *supra* note 35, at 91. This statement was made on December 14, 2001, only four days after the individuals brought an action against the Commission of the European Communities and the Council of the European Union. *See infra* notes 134–40 and accompanying text.

94. Cramér, *supra* note 35, at 93. The United States, the United Kingdom, and Russia blocked the request to de-list the individuals.

95. *Id.* at 94–95.

96. *Third report of the Monitoring Group established pursuant to Security Council resolution 1363 (2001) and extended by resolution 1390 (2002)*, ¶ 19, U.N. Doc. S/2002/1338 ("Several countries have also questioned the methodology used to determine who should appear on the list.").

97. *Guidelines of the Security Council Committee Established Pursuant to Resolution 1267 (1999) for the Conduct of its Work*, Nov. 7, 2002 as amended April 10, 2003, *at* http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf.

98. *Id.* § 5(b). The Committee is to make decisions on adding names on a consensus basis. *Id.* § 9(a).

state that designated the individual (designating state).[99] The petitioning state can then ask the Committee for a de-listing.[100] Decisions on de-listing are made by consensus, and if no consensus is reached, the Chairman attempts to facilitate an agreement between the disagreeing states.[101] Ultimately, the issue may end up before the Security Council for review.[102] At some point, however, there must be unanimous agreement for the de-listing to occur.

The guidelines are a step in the right direction in terms of increasing transparency and accuracy. The procedure led to the de-listing of two Swedish citizens[103] and the Monitoring Group reports that other targeted individuals who seek de-listing have filed démarches with state authorities.[104] Still, the established procedure leaves much to be desired. The requirements for adding names are still vague and relatively standardless. Many of the recommendations made to the Committee focus on the creation of more objective and transparent standards for adding names to the list.[105] These recommendations have thus far gone unadopted. Furthermore, the de-listing procedures are inadequate. There is no opportunity for sanctioned individuals to directly contest their inclusion on the list. They must first get the support of the state of their nationality or residence. If cooperation is not forthcoming from those countries, then the Committee has provided no avenue for an

99. *Id.* § 7(a)–(d). The petitioning state must seek the support of the designating state in submitting the request for de-listing. However, the petitioning state may request de-listing independent of the designating state pursuant to the no-objection procedure.

100. *Id.* § 7(a).

101. *Id.* § 7(e).

102. *Id.*

103. *See* Press Release, U.N. Security Council, 1267 Committee Approves Deletion of Three Individuals and Three Entities from Its List, U.N. Doc. SC/7490 (Aug. 27, 2002) *at* http://www.un.org/News/Press/docs/2002/sc7490.doc.htm.

104. *Report of the Monitoring Group established pursuant to Security Council resolutions 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003)*, ¶ 146, U.N. Doc. S/2003/669 (2003) [hereinafter *Report of the Monitoring Group*]. I have found no evidence that any of these cases have been considered by the 1267 Committee. Indeed, if few of these cases ever make it to the Committee for consideration, this might indicate that the procedure is insufficient. Conversely, it could also mean that the 1267 Committee, despite continuing broad standards, is doing an effective job of listing individuals who really should be targeted.

105. MAKING TARGETED SANCTIONS EFFECTIVE—GUIDELINES FOR THE IMPLEMENTATION OF U.N. POLICY OPTIONS § 348 (Peter Wallensteen et al. eds., 2003) ("Criteria for listing individuals and entities should be . . . determined by the relevant Sanctions Committee in a transparent way. Criteria should meet reasonable standards of significance in relation to the objectives of the sanctions regime."); Cameron, *supra* note 56, § 10.3.

individual to come before the Committee directly. In addition, consensus decisions mean that any one state can prevent de-listing, and the state is not required to provide any reasoning or justification.

The current system of review raises grave doubts about the 1267 Committee's compliance with minimum standards of procedural rights. Under the current guidelines, a substantive review of listing decisions is not guaranteed to occur, and any review that occurs is more political than legal. Given that the same body is responsible for initial placement on the list and the subsequent review of those decisions, it seems that the opportunity for review is neither full nor impartial. Even if certain restrictions on due process can be justified based on security concerns, the restrictions on an individual's due process rights are poorly tailored to these legitimate government interests. Both European and U.S. law mandate a heartier review mechanism than is currently found within the 1267 Committee. The review mechanisms would not pass the scrutiny of the ECHR's Article 6 jurisprudence, and even the United States affords a modicum of judicial review for similar executive actions through the Administrative Procedure Act.[106] Therefore, if sufficient procedural protections are to be afforded to those listed under the Al-Qaida sanctioning regime, those protections must be found at the state level.

B. Mechanisms of State Review

It is somewhat unclear if member states are allowed to provide for their own review of sanctioning decisions taken by the 1267 Committee. The language of the resolutions does not make enforcement of these sanctioning measures subject to domestic procedure or other international obligations. Security Council Resolution 1333 explicitly "*Calls upon* all States . . . to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement . . . ."[107] Even if this language were intended to override prior agreements with sanctioned parties, it stands in sharp contrast to other resolutions under which the requested measures are explicitly conditioned on other provisions of international and domestic law. For example, Security Council Resolution 1373 calls upon all states to "[t]ake appropriate measures *in*

106. *See supra* pp. 508–11.

107. S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg. ¶ 17, U.N. Doc. S/RES/1333 (2000).

conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not [participated in terrorism]."[108] The lack of such a declaration in the pertinent Security Council resolutions suggests that states are intended to apply the Al-Qaida sanctions irrespective of domestic law conflicts. Governments also seem to have adopted this position. In the hearing for preliminary measures in the *Aden* case, the European Union declared that they had an obligation under international law to impose the sanctions, making irrelevant any examination by the E.U. into whether sanctions were justified.[109]

Indeed, the Security Council urges states to develop the legal infrastructure through which such measures can be taken.[110] While for most states this means creating laws so that states may impose these freezes, it could just as well apply to states whose procedural protections might prevent them from fully implementing the freezes without a higher standard of evidence than that which is required by the 1267 Committee. Reports of the 1267 Committee show that in some countries further evidentiary requirements must be met before the freezing actions can be implemented.[111] The Committee neither condemns nor condones such action, but does state that such requirements can "significantly delay implementation of the asset freezing measures."[112]

This places states in a difficult situation. Lacking effective procedural mechanisms at the international level, states will be forced to balance the dual mandates of "effective fulfillment of obligations to implement sanctions under the U.N. Charter and the protection of fundamental legal principles safeguarding individual rights."[113] Article 25 of the U.N. Charter establishes that "[m]embers of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[114] Arti-

108. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶ 3(f), U.N. Doc. S/RES/1373 (2001) (emphasis added). *See supra* note 5.

109. Case T-306/01 R, Aden v. Council, 2002 E.C.R. II-02387 (application for interim measures), ¶¶ 70, 82.

110. *See* S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452d mtg. ¶ 8, U.N. Doc. S/Res/1390 (2002).

111. *Report of the Monitoring Group*, *supra* note 104, ¶ 35.

112. *Id.*

113. Vera Gowland-Debbas, Address before the University of Amsterdam, Centre for International Law, Roundtable on Review of the Security Council by Member States after 11 September 2001 (Oct. 11, 2002) (transcript on file with author), at 9.

114. U.N. CHARTER art. 25.

cle 103 then makes the obligations of the Charter supreme over other international obligations the member state might have. Thus, not to implement the asset freezes called on by the Security Council may constitute a breach of the Charter, regardless of the reason for non-implementation.[115] Conversely, simply implementing the asset freezes without following domestic and international legal protections afforded to such procedures could leave states in violation of their human rights obligations. Implementing-legislation enacted by states will have to meet domestic constitutional muster in most states, regardless of the international implications of such a decision.

In practice, most member states have directly implemented the Al-Qaida sanctions through legislation or executive orders without imposing any review of the listing. In many cases, the law of the member state allows for the executive to issue orders to implement Security Council sanctions. For example, in the Bahamas, the International Obligations (Economic and Ancillary Measures) Act enables the Governor General to take economic measures to implement resolutions of the Security Council.[116] When the Security Council established the Al-Qaida sanctioning regime, the Governor General used his authority under that act to issue an order that allowed for the Attorney General to freeze the accounts of individuals affiliated with Al-Qaida.[117] A similar legal basis and process appears to be used by many countries implementing the sanctions.[118]

115. Whether this would constitute a breach is not certain. Under Article 2(4) of the Charter, states have an obligation to refrain from acting in a manner inconsistent with the purposes of the U.N. Charter. One of the purposes found in Article 1 is the promotion of human rights. Thus, the argument can be made that carrying out the decisions of the Security Council in this situation would not be in accordance with the Charter, and thus not required under Article 25. *See* de Wet & Nollkaemper, *supra* note 4, at 184–187; *Contra* Alvarez, *supra* note 36, at 124 (arguing that "[t]he negotiating history of the phrase in that provision 'in accordance with the present Charter' was intended not to modify or limit the duty of members to accept and carry out Council decisions . . . .").

116. *Commonwealth of the Bahamas Report on U.N. Security Council Resolution 1455*, at 3, U.N. Doc. S/AC.37/2003/(1455)/43 (2003).

117. *Id.* at 5.

118. *See, e.g., Report of Canada pursuant to Security Council resolution 1455 (2003)*, at 2–4, U.N. Doc. S/AC.37/2003/(1455)/20 (2003) (describing Canada's incorporation of the 1267 list through the *United Nations Afghanistan Regulations*); *Report of Australia pursuant to Security Council resolution 1455 (2003)*, at 5–6, U.N. Doc. S/AC.37/2003/(1455)/13 (2003) (describing Australia's incorporation of the 1267 list through the *Charter of the United Nations (Sanctions—Afghanistan) Regulations 2001*).

Even in member states where the freezing of assets would normally require certain legal procedures, states have modified those procedures in order to implement the Security Council resolutions. For example, in Argentina, "the freezing of funds must be ordered by the judiciary, which takes decisions concerning the freezing of funds on a case-by-case basis in the context of a criminal trial."[119] However, since Security Council sanctions are taken under Chapter VII, Argentina considers the sanctions to be the consequence of a breach of international norms established by a competent U.N. organ, and thus empowers Argentine administrative authorities to proceed with the freezing without a judicial order.[120] While this freezing is "without prejudice to subsequent judicial control,"[121] it is a powerful illustration of the deference given to the 1267 Committee's listing decisions. In essence, Argentina is willing to substitute the 1267 Committee for the court system that would normally be involved in these sanctioning decisions.

In both the United States and the European Union, the 1267 list is incorporated through laws that allow for the ordering of sanctions against individuals. In the United States, President Bush issued Executive Order 13,224[122] under the authority of the IEEPA,[123] as well as the United Nations Participation Act of 1945.[124] This order allows the Secretary of the Treasury to block the assets of persons controlled by, or acting on behalf of, foreign persons who have committed or threatened terrorist acts against the United States.[125] Furthermore, the order explicitly determines that prior

119. *Report of the Argentine Republic on the implementation of Security Council resolution 1455 (2003)*, at 4, U.N. Doc. S/AC.37/2003/(1455)/29 (2003).

120. *Id.*

121. *Id.*

122. Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten To Commit, or Support Terrorism, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

123. IEEPA, 50 U.S.C. §§ 1701–07 (2000).

124. 22 U.S.C. § 287c (2004). Interestingly, in both domestic court cases and U.N. reports, the United States primarily relies on the IEEPA as the statutory authority for imposing the sanctions. *See* Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748, 750 (7th Cir. 2002); *United States of America Report of the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001: implementation of resolution 1373 (2001)*, at 6, 11, U.N. Doc. S/2001/1220 (2001).

125. Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten To Commit, or Support Terrorism, Exec. Order No. 13,224 § 1, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

notice would render these measures ineffectual, and that there need be no prior notice of a listing made pursuant to the order.[126]

In the European Union, the Council of the European Union adopted a Council Regulation, which is binding on all member states, that freezes all funds and economic resources held by individuals and entities designated by the Sanctions Committee.[127] The European Commission is also empowered to amend the list based on determinations made by the Security Council or the 1267 Committee.[128] While neither the U.S. nor E.U. provisions mandate that every decision made by the 1267 Committee be incorporated domestically, the United States and European Union have maintained their lists in accordance with listing decisions made by the 1267 Committee.

Although no cases have been brought in the United States specifically concerning the U.N. sanctions, two entities listed on the 1267 Committee's list have challenged asset freezes made under the IEEPA.[129] In *Aaran Money Wire Service, Inc. v. United States*, the plaintiff's case was dismissed as moot after administrative review of the asset freeze led to plaintiff's removal from both the U.S. and U.N. sanctioning lists.[130] In the second case, *Global Relief Foundation, Inc. v. O'Neill*, the court denied plaintiff's motion for a preliminary injunction, but explicitly left open for the district court to determine "whether the evidence supports the agency's belief that GRF uses its assets to support terrorism."[131] Should the district court find that there was insufficient evidence to warrant the asset freeze of the plaintiff, the United States would have to seek removal of Global Relief Foundation from the 1267 Committee's list. While it is likely that removal would be easily accomplished, should a Committee member object and refuse to de-list, the United States could conceivably find itself not imposing sanctions in violation of the sanctioning resolutions, and thus the U.N. Charter.

126. *Id.* § 10.

127. Council Regulation 467/2001, art. 2(1), 2001 O.J. (L 67) 2.

128. Council Regulation 467/2001, art. 10(1), 2001 O.J. (L 67) 3.

129. There is also a third case involving a recent challenge to an asset blocking under the IEEPA. Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156 (D.C.Cir. 2003). Since the case, however, does not involve sanctioning an Al-Qaida affiliate it does not fall under the scope of the 1267 Committee's sanctioning mandate.

130. 2003 WL 22143735 at *3–4 (D. Minn. 2003).

131. 315 F.3d 748, 755 (7th Cir. 2002).

C. Legal Challenges to Sanctioning Measures

Despite the deference generally accorded by member states to the 1267 Committee's listing decisions, targeted individuals have brought domestic judicial proceedings in a number of cases challenging the legality of the sanctioning measures. The Monitoring Group reports that 15% of states submitting compliance updates face judicial challenges by listed individuals.[132] Some of these involve direct challenges to the implementation of sanctions. For example, Luxembourg released funds related to an entity linked with another targeted entity because there was insufficient intelligence information provided to state authorities to justify the blocking of the entity's assets.[133]

Most cases do not involve direct review of sanctioning decisions, but instead involve legal proceedings that are challenges to the legality of the laws and orders that permit the sanctions. As has been discussed, one of the central claims made is that the sanctions are not accompanied by sufficient procedural protections. Individuals claim that they have no opportunity to have these measures reviewed, which violates their due process rights, which in turn makes the laws implementing the sanctions illegal. Three such cases have been filed before the judicial branch of the European Union, including the case involving the three Swedish individuals.[134] Two of these cases challenged the relevant E.U. Regulations on the grounds that they failed to provide for a right to a fair hearing.[135]

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132. *Report of the Monitoring Group*, *supra* note 104, ¶ 146.

133. *Second report of the Monitoring Group established pursuant to Security Council resolution 1363 (2001) and extended by resolution 1390 (2002)*, ¶ 39, U.N. Doc. S/2002/1050 (2002). It appears that this group was not listed on the 1267 list, but was targeted at the request of the U.S. *See* Colum Lynch, *War on Al-Qaeda Funds Stalled*, WASH. POST, Aug. 29, 2002, at A1. It is unclear whether the release of assets was the result of a judicial decision, although the context of the Monitoring Group report suggests that judicial proceedings did occur.

134. Because the European Union implemented the sanctions on a community-wide basis, the European Court of Justice was the appropriate judicial body to hear the claim.

135. Case T-315/01, Kadi v. Council, 2002 O.J. (C 56) 17; Case T-306/01 R, Aden v. Council, 2002 ECR II-2397 ¶¶ 27–28. These two cases appear to have been combined before the European Court of Justice. *See* Constant Brand, *E.U. Court Hears Case on People Wanting to be Removed from Terrorist Blacklist,* ASSOCIATED PRESS, Oct. 14, 2003 *available at* http://www.canoe.ca/CNEWS/World/WarOnTerrorism/2003/10/14/225988-ap.html. The third case does not complain of the right to a fair trial, but claims violations of the prohibition against inhumane treatment as well as breaches of the principle of 'proportionality'. Case T-318/01, Othman v.

In *Aden*, the Swedish individuals sought preliminary measures to suspend the application of the E.U. Regulations against them until the case could be heard on the merits. They argued before the Court of First Instance that the E.U. Regulations:

> infringed the applicants' fundamental rights, in particular the right to a fair hearing. Sanctions were imposed on them although they had not first been heard or given the opportunity to defend themselves, nor had the measures imposing the sanctions been subjected to any judicial review. . . .
> Effective judicial review of the sanctions is impossible because the very basis for the sanctions cannot be checked by the courts. Similarly, it is impossible to review the evidence and investigations on which the sanctions were based since the former are not conceived as the legal consequence of a specific accusation.[136]

The E.U. responded that they were under a "mandatory duty" to impose sanctions on the individuals on the 1267 Committee's list.[137] The Court also relates a credibility argument advanced by the E.U.:

> As regards the interest in safeguarding the credibility of the European Community as a player on the international stage, the Council states that the Community must respect international law either in its own capacity or as the de facto successor to the obligations of the Member States under Article 25 of the United Nations Charter. . . . Both the Council and the Commission consider that the credibility of the Community would be called in question if any person on whom sanctions are imposed could obtain suspension of universal measures at national or regional level without prior consultation with the Security Council, or indeed its agreement.[138]

It is clear that E.U. bodies do not believe that national or regional review of sanctions is authorized by the Security Council. The Court of First Instance avoided ruling on the substantive arguments, denying preliminary measures because they were not urgently needed to avoid serious and irreparable damage.[139] The

Council, 2002 O.J. (C 68) 13. These claims have already been heard, and rejected, by British courts. *See Terror Suspect Loses Legal Challenge, supra* note 61.

136. Case T-306/01 R, Aden v. Council, 2002 E.C.R. II-02387 (application for interim measures) ¶¶ 62, 76.

137. *Id.* ¶ 70.

138. *Id.* ¶ 87.

139. *Id.* ¶¶ 104, 109, 114, 119. Interestingly, relief was not urgent because Swedish authorities had continued to provide social assistance to the individuals

case was heard before the European Court of Justice in October of 2003.[140]

Although a state's judicial review of the legality of 1267 Committee decisions and the implementing legislation risks placing the state in violation of the U.N. charter, domestic and regional courts have not yet denied claims on this basis. Indeed, if the rationale behind *Waite and Kennedy* holds,[141] states implementing the Al-Qaida sanctions may be under an obligation to provide review of these decisions since there are no reasonable alternative means of review employed by the Security Council. Thus far, the Security Council and the 1267 Committee have not criticized member states for allowing these cases to proceed. On the contrary, governments have challenged the Security Council to provide for more protections within the system. As the German representative to the U.N. stated, "we should consider introducing some core elements of due process to be applied by the Security Council, mutatis mutandis. For example, there could be room for the possibility that a targeted individual might bring his case to the Committee for consideration."[142] Thus, until stronger protections are provided for by the 1267 Committee, it is likely that domestic procedural mechanisms will continue to operate, regardless of whether such procedures lead to results in tension with the Security Council's mandate.

D. The Potential for Development of Procedural Protections through Political Compromise

Before turning to examine some possible changes to the structure of the sanctioning regime, it is worthwhile to consider whether such changes are really necessary. While certain changes would undeniably make the system stronger, the development of the system may be best left to the continued interaction between the Security Council, the relevant Security Council committees, and state and regional political and judicial branches. By maintaining the status quo, we retain the questions of the Security Council's legitimacy in mandating sanctions without sufficient procedural protections and domestic courts' authority in reviewing implementation of those

and their families, even though it is very possible that doing so was in violation of the Security Council Resolutions at the time. The court did hold that if these payments should stop, this would constitute a change in circumstances that might warrant another hearing for interim measures. *Id.* ¶¶ 105, 115.

140. Brand, *supra* note 135.

141. *See supra* notes 69–73 and accompanying text.

142. U.N. SCOR, 58th Sess., 4798th mtg. at 14, U.N. Doc. S/PV.4798 (2003) (Statement of Mr. Pleuger, Germany).

sanctions. Perhaps this uncertainty is to be desired, because as long as all parties are uncertain as to their respective positions there will be an incentive to "reach nuanced political compromises which balance the needs of security with the needs of civil-liberty."[143] With regard to the Al-Qaida sanctioning regime, both the Security Council and member states would rather reach a political compromise than have domestic courts begin to cast doubt on the legality of the sanctioning regime. The hope is that such a compromise will adequately address both security concerns and the procedural rights of those listed by the 1267 Committee.

The practical benefits of ambiguity can already be seen in 1267 Committee practice. Protection of individual rights did not even appear on the agenda before the case of the Swedish nationals caught the attention of European states. It was in response to criticisms resulting from this case that the 1267 Committee considered revising the listing and de-listing procedures.[144] Certainly, this development was in response to the possibility of state tribunals declaring the sanctions unwarranted, thus undermining the effectiveness in the system. As de Wet and Nolkaemper state:

> The possibility of review on the national level could serve as an incentive for the Security Council to draft its resolutions in accordance with human rights standards. This would, in turn, make it even more difficult for states to claim the illegality of Security Council resolutions for pre-textual reasons. Without control, which in these circumstances can only be exercised by member states, the paper restrictions on the power of the Security Council would disappear and the limited power that has been delegated to it may become absolute.[145]

Of course, the new procedures are still in their infancy and need time to develop, so there is a continuing tension between the 1267 sanctioning regime and domestic court review of those sanctions. To the extent that the Security Council believes that national courts may act to undermine the sanctions in order to better protect the rights of the targeted, it follows that they will seek enhanced protections in order to avoid the possibility of a rebellion by the state judicial, and possibly even political, branches. The Security Council relies on these state bodies to implement their resolu-

143. Jared Wessel, Safety in Ambiguity, Danger in Positivism: A Case for Leaving the Executive-Legislative Relationship Undefined in an Emergency Powers Regime 3–4 (June 4, 2003) (unpublished manuscript, on file with author).

144. *See Report of the Security Council Committee established pursuant to resolution 1267* (1999), ¶ 11, U.N. Doc. S/2002/1423 (2002).

145. de Wet & Nokaemper, *supra* note 4, at 202.

tions; therefore their cooperation is required. While the Security Council could attempt to take enforcement measures against states that are not in full compliance, the Security Council has always lacked the political will to take enforcement measures against states not complying with sanctioning regimes.[146] Furthermore, the 1267 Committee and Monitoring Group have reprimanded states for their inaction in complying with the Al-Qaida sanctioning regime, but no enforcement measures against non-complying states have been considered by the Security Council. So long as the Security Council is unwilling to enforce their resolutions concerning sanctioning, uncertainty will remain concerning the relationship between the Security Council and member states. This uncertainty might help check the power of the Security Council and promote the development of human rights standards within the Council.

If the current model is maintained, judicial bodies will likely continue to hear claims brought by individuals targeted under the Al-Qaida sanctioning regime. Domestic courts will in many cases be deferential to the more political bodies of the state, but it is also likely that some courts will take an activist stance in support of an individual's right to review and reconsideration of listing decisions. In order to maintain the efficacy of a universal sanctions regime, the Security Council must not let that happen. Thus, it will be pulled into continued dialogue with member state governments and judicial bodies. As these domestic institutions express their concerns, the Security Council will attempt to address those concerns for the purpose of seeking continued compliance. Similarly, the domestic legal process will adapt to meet the unique challenges that arise in implementing worldwide measures. Ultimately, an equilibrium will be found that best implements the sanctioning regime while meeting the security needs of some states and the rights concerns of others.

There does seem to be a major problem with leaving the flaws of the current system to political negotiation. Although it is not disputed that the current situation is ambiguous and thus likely to change, it does not necessarily follow that any compromise reached will remedy the procedural defects present in the current system. Indeed, the compromises that have been reached thus far have been primarily political and not procedural. Even the major proce-

146. For example, many states stopped imposing economic sanctions ordered by the Security Council with respect to Libya, making the sanctioning regime largely ineffective. *See* Louise Fréchette, Address at the Ninety-Third Annual Meeting of the American Society of International Law (Mar. 24–27, 1999), *in* 93 AM. SOC'Y INT'L L. PROC. xiv, xviii-xix (1999).

dural addition of de-listing is designed to encourage political compromise, and not necessarily protect the due process rights of listed individuals. So long as the number of complaints is relatively few, it will be more efficient to arrive at political compromises on a case-by-case basis rather than create new procedural mechanisms that would allow for safeguards for all of those listed.

Case-by-case political negotiation may very well lead to just outcomes in most cases. Assuming that 1) governments will be receptive to the claims of their citizens and residents and 2) those claims will be few in number, the political process is capable of ensuring that the 1267 Committee's list contains few, if any, false positives. The citizens in the Swedish case never had any formal procedural mechanisms to rely on, yet political negotiation among Sweden, the United States, and the Security Council "worked" to the extent that certain individuals who did not belong on the list were ultimately removed. Even if appropriate outcomes will result from political compromise, however, procedural protections need to be ensured so that targeted individuals are not forced to rely on the political process.

Particularly at the international level, decisions on listing or de-listing an individual will likely be tied up with numerous considerations that go beyond the individuals' claims for non-listing. Had Sweden not been convinced of the need to intervene on behalf of its citizens, the political process would have been insufficient to protect the due process rights of those individuals. Furthermore, the more numerous these cases become, the more strain will be put on this political process, making it less reliable in terms of results. Thus, if administrative governance is going to become part of the Security Council's regular activity, leaving problems such as the one seen here to the political process is not an attractive long-term option. Ambiguity may encourage political solutions, but these solutions are unlikely to entail the establishment of procedural protections that are required under virtually all human rights standards.

IV.
POSSIBILITIES FOR ADEQUATE REVIEW

Given the inadequacies of the review mechanism established by the 1267 Committee, the challenges currently faced by states in providing review of 1267 Committee decisions, and the unlikelihood of appropriate procedural protections developing out of the current status quo, we turn to examine the second central question of this paper: how can appropriate protections best be afforded to

targeted individuals under the Security Council's regime? In evaluating different models, it is important not only to ensure an individual's right to a fair and impartial opportunity to be heard, but also to advance the sanctioning regime by protecting security concerns and enhancing international cooperation and implementation of anti-terrorism measures. For example, a mechanism that required the distribution of sensitive classified materials to international courts will not adequately address the security concerns of the United States, making the procedure impractical at best and potentially dangerous at worst.

There are three possible developments, not necessarily mutually exclusive, that will be examined here: 1) elimination of the current sanctions regime, placing responsibility for sanctioning individuals (and protecting their rights) fully on the shoulders of individual states; 2) strengthening the U.N. mechanisms for review, including modifying 1267 Committee listing and de-listing procedures as well as creating an independent review mechanism under the auspices of the Security Council; 3) maintaining U.N. oversight of the sanctions regime, including the adoption by the Security Council of certain standards of review to be applied by domestic bodies, while strengthening state mechanisms for review and promoting inter-judicial and inter-governmental cooperation.[147]

A. Eliminating the Al-Qaida Sanctions Regime at the U.N. Level

This first model proposes a major decentralization of the sanctions regime. States would be responsible for both determining who should be sanctioned and for providing the procedural protections that accompany sanctioning. The coordination role of the Security Council would be replaced by bilateral and multilateral agreements concerning sanctioning. In creating the broader sanctioning regime for all terrorist supporters in Security Council Resolution 1373, the Security Council failed to create a broader list of terrorists and affiliates to be sanctioned.[148] Instead, it left the specifics of who should be sanctioned to state discretion.[149] A strong

147. Another possibility includes the strengthening of existing international judicial bodies such as the International Court of Justice (ICJ) and regional human rights bodies. While having these institutions play a role in review raises unique challenges (and possibly benefits), the general challenges will be the same as those discussed in Section IV.B, *infra*.

148. *See supra* note 5.

149. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶ 1(c), U.N. Doc. S/RES/1373 (2001).

argument can be made that the structural framework established in Resolution 1373 would work just as well in combating Al-Qaida.

Resolution 1373 obliges states to cooperate through bilateral and multilateral arrangements, including the International Convention for the Suppression of the Financing of Terrorism.[150] With this framework of bilateral and multilateral cooperation, there would be no need for the Security Council to maintain a list of individuals to be sanctioned. Instead, states would cooperate with each other to ensure that the assets of financiers and supporters of Al-Qaida are frozen. Once one state has determined that an individual should be sanctioned, it cooperates with other states to ensure that the assets of that individual are frozen worldwide. This could be done formally through agreements to apply the sanctioning decisions reciprocally, or through less formal cooperation on a case-by-case basis. If one of the major purposes of the sanctioning regime is universal applicability, this might be an adequate substitute. While a particular list would no longer be binding on states, as with the current list of the 1267 Committee, the fact that a state institutes a freeze on another individual creates a strong presumption that other states should as well.

The benefits of this system are clear. Security Council committees could still exercise oversight of the implementation of domestic laws and multilateral cooperative efforts, much as the Counter-Terrorism Committee currently does under Security Council Resolution 1373. Those countries currently complying with Resolution 1373 would likely take part in this bilateral process of cooperation. Conversely, countries not complying with 1373 are not likely to be participating in the Al-Qaida sanctioning regime.[151] Thus, it can be argued that there would be no coordination loss from dismantling the Al-Qaida sanctions regime. In addition, de-centralizing the listing process would remove the Security Council, an inherently political body governing interstate relations, from making decisions that have clear legal implications for individuals. If there are no strong benefits arising from centralized control in a non-democratic, political body, then devolution would seem to be the best idea from a

150. *Id.* ¶¶ 2(f), 3(c), 3(d).

151. The number of states submitting reports detailing compliance with Resolution 1373 is much higher than the number of states submitting reports detailing compliance with Resolution 1267 and its progeny. *Compare* U.N. SCOR, 58th Sess., 4798th mtg. at 4, U.N. Doc. S/PV.4798 (2003) (Statement of Chairman Muñoz) (stating that only 64 states had submitted reports to the 1267 Committee), *with* U.N. SCOR, 57th Sess., 4453d mtg. at 4, S/PV.4453 (2002) (Statement of Sir Jeremy Greenstock, U.K.) (stating that 123 states had submitted reports to the 1373 Committee).

democratic perspective. This is especially true in the present case, where the United Nations currently lacks the institutional mechanisms to provide for adequate due process protections for listed individuals.

The main question is whether such a system of devolution will be able to adequately provide the procedural protections that are missing from the current regime. On the one hand, there is no longer a sanctions mandate from the Security Council, meaning that states can use their normal procedural safeguards in imposing asset freezes. Theoretically, each state could apply its own legal safeguards. The bilateral or multilateral agreements could call for other states to impose sanctions once a state has requested sanctions, but then allow the national laws and procedures of each state to apply once sanctions have been imposed. This would afford the sanctioned individuals the opportunity to raise legal challenges to sanctions in any state in which those sanctions were imposed.

A mechanism very similar to this has recently been instituted by the European Union. The "Council Framework Decision on the execution in the European Union of orders freezing property or evidence" establishes mutual recognition of pre-trial freezing orders among all states of the Union.[152] Once the judicial authority of a member state has issued a freezing order in the framework of certain criminal proceedings, they may request that the judicial authority of any other member state also issues a freezing order.[153] While there are certain grounds for non-execution,[154] for the most part, the state receiving the request is required to issue the freezing order as soon as possible.[155] The Framework Decision is very clear that this does not amend the obligation to respect fundamental rights:

> This Framework Decision respects the fundamental rights and observes the principles recognized by Article 6 of the Treaty . . . . This Framework Decision does not prevent any Member State from applying its constitutional rules relating to due process . . . .[156]

Thus, after the freezing orders are given, any interested party may bring legal proceedings in either the state that initially ordered the freeze, or in other states that subsequently issued freezing or-

152. Council Framework Decision, 2003 O.J. (L 196) 45.
153. *Id.* art. 1, 4, 5.
154. *Id.* art. 7.
155. *Id.* art. 5(3).
156. *Id.* pmbl. ¶ 6.

ders.[157] The substantive reasons for issuing the freezing order can only be challenged in the court initially ordering the freeze, and if legal proceedings are held in other states, the initial state must be informed of the proceedings and allowed to submit arguments.[158] Importantly, the Framework Decision calls upon states to provide adequate information to interested parties in order to facilitate the right to bring an action.[159] This provision is critical, for if relevant information is not shared by the state initially sanctioning, it will be hard for other states to provide for appropriate legal proceedings in accordance with its law.

This new system in the European Union has had its critics,[160] and there are distinct problems of trying to apply it to the situation of international sanctions against Al-Qaida. Ultimately, the issue is one of trust. In the European Union, the system is only plausible because there is a certain degree of faith in the institutions of each member state.[161] It seems doubtful, however, that this degree of trust exists on a global scale. Despite the calls of the Security Council for states to share information, there is a great hesitancy among non-allied states to share intelligence information with each other. Thus, the E.U. model, which emphasizes the need to share information, is less plausible in a global context where the information will involve highly sensitive state intelligence. While broad details might be shared to induce political cooperation in imposing a freeze, this information may be inadequate for subsequent review requested by the individual. There may be sufficient evidence to warrant sanctioning the individual, but if the government requesting sanctions is concerned about compromising intelligence services, it might be unwilling to share detailed information with other states. Even *in camera* and *ex parte* procedures may not be sufficient to induce release of the information as such procedures presume a developed and independent judiciary.

This problem could be solved by ensuring that adequate safeguards exist in the state that initiates sanctions. Under this revised model, only the state that first sanctions would be responsible for

157. *Id.* art. 11(1).

158. *Id.* art. 11(2)–(3).

159. *Id.* art. 11(4).

160. *See* Statewatch News online, *EU to Adopt Arbitrary Powers to Freeze Assets and Seize Evidence* (May 1, 2002), *at* http://www.statewatch.org/news/2002/may/01freezing.htm (last visited Mar. 26, 2004).

161. *See* Council Framework Decision, 2003 O.J. (L 196), pmbl. ¶ 4 ("Cooperation between Member States . . . presupposes confidence that the decisions to be recognised and enforced will always be taken in compliance with the principles of legality, subsidiarity and proportionality.").

providing the procedural protections required under its domestic law. If this were adopted there would be less reluctance by governments to share intelligence information because such sharing would be with domestic tribunals. These tribunals are in the best position to consider any factual disputes raised by petitioners. After the tribunal of the initial state has ruled that the evidence is sufficient to warrant freezing assets, the government of that state could request that other states impose the same freeze. Bilateral and multilateral agreements could be arranged by which states could give full faith and credit to the sanctioning decision of the first state. This would eliminate the need for subsequent states to impose their own procedural protections. Also, in the process of drafting those agreements, states could negotiate a reasonable level of procedural protections, so that when subsequent states implement asset freezes they know that at least a certain level of protection has been provided.

This solution does not fully deal with the problems of this decentralized model. First, it may be difficult for the targeted individual to seek a legal remedy in a remote state with a very different legal culture. For example, the United States may seek to sanction a foreign individual with minimal U.S. assets. If that individual has few connections with the United States, it will be difficult to challenge the sanction in the United States. If no such challenge is brought, this system would require other states to sanction the individual without any significant review occurring. Furthermore, if there are different legal standards employed among states, other states may be hesitant to agree to give full faith and credit to the decisions of the first state imposing sanctions. While this problem could be largely addressed through the drafting of agreements that established adequate safeguards, there will still be variance between the protections afforded in different states. States could ultimately refuse to participate in such a regime. States genuinely desiring enhanced procedural protections could unwittingly become safe havens for terrorist financing by not recognizing the sanctions initiated by other states.

Ultimately, the effectiveness of the devolution model depends on the same thing as the more centralized model: state cooperation. States currently not cooperating within the U.N. framework would be unlikely to do so in a bi-lateral framework. The (dis)incentives major states such as the United States would offer for cooperation in the bilateral setting are likely already being offered in the multilateral U.N. setting. If both systems were equally effective at inducing compliance, then perhaps the democratic le-

gitimacy and established procedures of states would favor devolution. However, many will still maintain that the United Nations increases the legitimacy of sanctions vis-à-vis those determined by an individual state and is therefore more effective at inducing cooperation.[162] If this argument is accepted and sufficient procedural protections can be formed within the current system, then devolution would be an inferior option, particularly given the variance problems that will arise with different state procedures.

B. Strengthening Internal Mechanisms within the Security Council

One clear solution to the procedural infirmities of the Al-Qaida sanctioning regime is to change the internal procedures of the 1267 Committee. This could be done in two essential ways: clearer standards and a new review body.

First, clearer standards for the listing of individuals could be issued. Given that the individual's opportunity to contest placement on the list will only occur after listing, clearer standards are not a sufficient solution to the problem of protecting rights. However, clearer standards bring heightened transparency and certainty to the process, which in turn further legitimates the sanctioning decisions that are made, which should increase compliance. In addition, transparent standards simplify subsequent review by giving the reviewing body a straightforward test to apply: Did the person fall within the criteria laid out by the Security Council? If there are evidentiary standards laid out by the 1267 Committee for determining whether individuals have acted on behalf or under the direction of Al-Qaida, then a reviewing body will have an easier time determining whether those standards have been met in individual situations.

Regardless of which of the other mechanisms might be instituted, the delineation of standards provides benefits. If the devolution model is adopted, the Security Council could provide valuable guidance and increased legitimacy to state-initiated freezes by producing recommended guidelines or binding standards. If no major structural changes were made to the system, standards would still be of enormous benefit to the Security Council because of the increased transparency and legitimacy of the sanctions.

The major objection to the implementation of such standards will be that they could obstruct the need to act quickly to prevent asset transfers to terrorists. If an individual is suspected of preparing to transfer assets to terrorists, then it seems unreasonable to

162. *See supra* notes 29–33 and accompanying text.

prevent the 1267 Committee from adding the person to the list simply because they might lack concrete evidence to meet standards for listing. These cases will likely be rare; by the time a person is suspected of terrorist affiliation, there should be sufficient evidence to warrant placement on the list. It is a crucial issue, however, in the limited circumstances in which it does arise, such as when there might be suspicion that an individual is about to finance an Al-Qaida operation, but there is not sufficient evidence to support such an allegation. Fortunately, this issue is one that can be solved through post-hoc review. In the United States a blocking order can be taken as an interim step pending investigation.[163] Subsequently, the individual can attack the factual support for the order. If the blocking turns out to be invalid, the individual can obtain compensation for any damages under the Tucker Act, 28 U.S.C. § 1491(a).[164] Within the 1267 Committee framework, the Committee could make a decision based on probable cause that the criteria are met. If the evidence turns out to be lacking, then the individual can petition for de-listing through the appropriate review mechanism.

The second way in which the Security Council could strengthen its Al-Qaida sanctioning regime is through the creation of a formal review mechanism. We have previously examined the deficiencies with the current de-listing procedure.[165] Even if individual petitions could be directly filed with the 1267 Committee, as was suggested by one state representative to the United Nations,[166] this alone would not likely meet the European minimum requirements of an impartial or independent review or the U.S. right to judicial review. Such a development would be partially useful, most notably in cases of mistaken identity. The current procedure requires a three-step process of convincing the host state, the designating state, and then the 1267 Committee. Allowing an individual direct appeal to the Committee would expedite the process, and give the individual an opportunity to efficiently provide evidence that a mistake has been made. For those cases in which a mistake is clearly made, this process would prove to be a vast improvement over the current procedure. In situations in which the factual scenario is more complicated, the individual should still have the opportunity for direct review. Direct access to the 1267

163. *See* Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748, 750 (7th Cir. 2002).

164. *Id.* at 754.

165. *See supra* pp. 120–23.

166. *See supra* note 142 and accompanying text.

Committee creates another opportunity for review, but like clearer standards, is insufficient in and of itself.

Thus, if internal procedures are to be relied upon to satisfy the rights of targeted individuals, the Security Council will need to establish an independent review body. This body would be more judicial in nature than the 1267 Committee and would operate alongside, but independent of, that committee. Establishing an independent tribunal to review administrative decisions of international organizations is certainly not without precedent. The United Nations[167] and the International Labour Organization ("ILO")[168] are among the organizations that have established such bodies to consider administrative decisions involving employees of those organizations. Indeed, in *Waite and Kennedy*, the ECHR found that there was no violation of the procedural rights under Article 6(1) of the European Convention because the ESA provided sufficient review through an independent appeals board of the organization.[169] Here the tribunal would be created to hear appeals of decisions taken by the 1267 Committee, and potentially other administrative bodies that have been created under the auspices of Chapter VII action by the Security Council.

The major advantages of such a body would be efficiency, consistency, and certainty. Having a review body at the United Nations level creates one venue where all claims regarding sanctions can be heard. Furthermore, one procedural framework can be developed to adjudicate all claims, ensuring consistency in the standards applied. Third, if properly constituted, it could take care of the need for state review of 1267 Committee decisions.[170] Under the *Waite and Kennedy* standard, the international body will have provided a "reasonable alternative means" of protecting the individual's rights, making state review unnecessary under international human rights

167. The United Nations Administrative Tribunal is an independent organ competent to hear employment contract disputes involving staff members of the U.N. Secretariat. *See* United Nations Administrative Tribunal Statute, adopted by G.A. Res. 351 A (IV) (1949), U.N. Doc. AT/11/Rev.6.

168. The Administrative Tribunal of the ILO hears employment-related complaints from officials of the ILO as well as at least forty other international organizations that recognize its jurisdiction. *See* Statute of the Administrative Tribunal of the International Labour Organization, adopted by the International Labour Conference on Oct. 9, 1946, last amended on June 16, 1998, *at* http://www.ilo.org/public/english/tribunal/stateng.htm.

169. *See supra* note 69 and accompanying text.

170. *See* de Wet and Nollkaemper, *supra* note 4, at 198 ("It could be said that once a proper international mechanism would exist, the legal basis for review by national courts would cease to exist.").

law.[171] Finally, there are institutional advantages to this creation. If the Security Council becomes more legislative in its nature, resulting in additional administrative appendages to implement such legislative activity, then there needs to be some sort of institutional check on the administrative power. Although the Security Council can exercise general oversight, it is incapable of reviewing individual administrative decisions. Thus, if this administrative branch of the Security Council is to grow, the development of some permanent review board is likely in the long-term interest of all who will be affected by such a development.

However, the creation of a U.N.-based review body poses multiple challenges. For one, there is the difficulty of establishing the procedures and standards to be used. Clearly, states will advocate for a number of different positions, with the United States wanting more lenient procedures and standards to protect intelligence information and ensure that there are no false negatives. On the other hand, some European countries will push for more stringent protection of individual rights, ensuring no false positives. At a minimum, for the new review body to solve the aforementioned problems, it would have to adopt procedures that accord with international human rights law. At a maximum, the standards would be based on the most stringent protection afforded by any state. Anything less could raise domestic constitutional difficulties in states affording greater protections. For example, if the standard set for the review body is preponderance of evidence, but a state's constitution is interpreted to require clear and convincing evidence, then the state's implementation of sanctions could very well be subject to judicial review because the review by the U.N. body would not pass constitutional muster. Thus, unless the standard is set at the highest level of state protection, the gains from a U.N. review body may be lessened. Yet reasonable procedures and standards would likely satisfy the majority of states and create pressure on the remaining states to find creative domestic solutions in order to comply with the Security Council mandate.[172]

The problems with creating an international judicial body do not end with the setting of procedures and standards. Another major problem is the hesitancy of states to share intelligence information with international bodies. International bodies contain both allies and enemies, and there is an understandable reluctance to share sensitive information with non-allies. Furthermore, Cameron

171. *See supra* notes 68–69 and accompanying text.

172. *See infra* pp. 537–38.

notes that there is "relatively little experience of international judicial bodies handling intelligence material."[173] Thus, the creation of a tribunal to review decisions of the 1267 Committee is more difficult than replicating those existing international review bodies which do not have to consider matters of national security. When this inexperience is combined with the reluctance of states, particularly the United States, to share intelligence information with anyone, it would seem very difficult to create a body that could adequately address these concerns.[174]

Finally, many states will question whether the expansion of a U.N. bureaucracy is at all wise or desirable. If a judicial body that reviews administrative decisions will help solidify the creation of a permanent administrative arm of the Security Council, many states will view this as a serious encroachment on state "sovereignty." Rather than facilitate such a development, many states would avoid creating a tribunal in favor of either eliminating the sanctions regime at the U.N. level or by allowing state protective mechanisms to operate. The power of the Security Council to legislate, even if limited under Chapter VII to situations in which there is a threat to international peace and security, will inevitably lead to the meddling in the internal affairs of a state, which is an outcome that states want to avoid.

Thus, a judicial body established under Security Council auspices would be of limited use at best. In designing the body, one has to adopt the realist assumption that even if states agreed to its creation, the review body will not have regular access to sensitive materials. Cameron suggests that there are certain categories of cases in which a U.N. review body "clearly seems the best solution . . . ."[175] This U.N. review body could probably make determinations on misidentification, so long as those claims did not involve sensitive material. Factual questions regarding commission of acts will almost inevitably involve sensitive material, so it will be difficult to resolve those questions in the proposed tribunal. Cameron also suggests that the tribunal could hear claims about whether activities actually posed a threat, but then acknowledges that the tribunal

173. Cameron, *supra* note 56, § 10.5.

174. Cameron proposes an arbitral model whereby the designating state could have judges it was comfortable sharing intelligence information with. After discussing the model and its virtues, Cameron concludes by stating, "[I]t is presumably unthinkable for the U[nited] S[tates] to reveal intelligence material to an international arbitral body . . . . If these [U.S.] agencies are worried about revealing information even to their own courts, they will not reveal it to an international body." *Id.*

175. *Id.*

would "never question the Security Council's determination."[176] While there are certain circumstances in which review could take place, they seem to be of limited number and effectiveness. Creating a whole new institution, especially in light of inevitable reluctance among member states, to operate under these limited conditions seems as unreasonable as it does impractical.

C. Strengthening State Mechanisms for Review

Another possibility is for the Security Council to legitimate the role of state mechanisms for review of 1267 Committee decisions. Rather than the current state of affairs, in which the role of review by state and regional bodies occupies a status somewhere between uncertain and illegitimate, under this option the Security Council would explicitly recognize the capacity of state and regional bodies to play a critical role in reviewing sanctioning determinations.

Essentially, this model serves as a hybrid of the previous two models examined. On the one hand, it would maintain elements of centralization. The 1267 Committee would retain responsibility for listing, ideally with more transparent standards than are currently in place. In addition, it would continue to exercise oversight of member state implementation of the sanctions. Finally, this model would place increased responsibility on the Security Council for ensuring the protection of individual rights. A Security Council resolution would not only allow member states to review the sanctioning decisions of the 1267 Committee, but would also identify the procedural protections to be used by member states. These protections would comply with international standards for due process. In other words, listed individuals should have a fair opportunity to contest their listing before an independent tribunal. To ensure consistency, the Security Council should also set out the standards for review. While there will be variance among state practice with regard to standards of review, it seems that the standard should be fairly deferential—somewhat similar to the U.S. standard of judicial review of administrative decisions. Clearer guidelines for listing would likely make this a more acceptable standard from the perspective of states accustomed to more stringent review.

The benefits of centralization have already been rehearsed.[177] Having the Security Council and its committees involved in making

176. *Id.* Cameron himself warns of "purely formal mechanisms of challenge as far as security matters are concerned" when discussing possible state court review. *Id.* § 10.4.

177. *See supra* pp. 106–08.

sanctioning decisions gives the sanctions a legitimacy that is needed for universal implementation. When the Security Council acts under its Chapter VII authority, states understand that they have a legal obligation to comply with the terms of the Security Council resolutions. As we saw in the *Aden* case, states recognize that non-compliance harms their reputation before the international community, even if non-compliance occurs for innocuous reasons.[178] Furthermore, establishing binding processes and standards of review creates uniformity and consistency in the application of sanctions. The legitimacy and coordination benefits that derive from U.N. involvement are crucial to the ultimate success of this sanctioning regime.

Of course, some of the same problems previously seen with centralization remain. Namely, if the Security Council establishes certain procedures and standards, it is impossible to set them in a manner that is acceptable to all member states. In this model, the procedures and standards comply with minimum standards of human rights, but will be insufficiently low compared to the domestic legal standards of some states. This will raise conflicts in those member states that afford greater protection. However, the conflicts between states' domestic law obligations and international law obligations will be fewer and less severe under this system. Currently, states are uncertain if they can provide any review, which raises critical questions among many states that their domestic institutions will have to address. With these new procedures and standards, many states will be able to comply without any conflict of domestic law. Those states with higher levels of protection will still have to balance domestic and international obligations, but the balance may well have shifted in favor of international compliance. At a minimum, if the procedures and standards established by the Security Council are deemed fair and sufficient by most states, there will be increased pressure from the international community for all states to comply with the Security Council resolutions.

This last model also contains elements of decentralized review. While the Security Council lays out the procedures and the standards, member states are obliged to implement both the sanctions and the process of review. Any state (or regional organization body such as the European Union) that implements the sanctions by freezing assets must allow for review under the procedure laid out by the Security Council. This will allow the listed individual to bring a challenge within a legal system that he is familiar with, be-

178. *See supra* notes 136–38 and accompanying text.

cause presumably he will be knowledgeable about the legal system of a state where he holds assets. If the sanctioning state determines after review that there is insufficient evidence, then the specific sanctions will be removed. The actual process of de-listing would occur separately, because domestic bodies lack the authority to order the U.N. to de-list. Modifications to the current de-listing procedure could be made to account for situations in which domestic courts find insufficient evidence to warrant implementing sanctions.[179]

While the sanctioning state's tribunals may be able to adjudicate some of these claims with little trouble, they will lack the information necessary to make informed decisions on the crucial questions of evidence in many cases. Furthermore, as has been previously discussed, the state(s) recommending listing to the 1267 Committee may not be willing to share detailed information with the governments of other states that are implementing the sanctions.[180] When this difficulty arises, a referral mechanism could be created so that the tribunal hearing the case could ask the designating state to review particular questions of fact that require reference to sensitive materials. The state receiving the referral would be bound by the same procedural requirements and standards mandated by the Security Council. Thus, there would need to be an independent court or tribunal available to provide a fair hearing on the questions presented. This body would issue a decision on the specific questions referred, and send the case back to the original court for final adjudication. This would allow for the dual benefits of local adjudication by the state implementing the asset freeze and maintenance of intelligence information by the state designating the individual for sanctioning.

Such a referral mechanism is neither far-fetched nor without precedent. Courts in liberal states are increasingly engaged in a transjudicial dialogue, with even United States judges recognizing that "they may become involved in a sustained dialogue with a foreign court."[181] Furthermore, similar mechanisms have successfully been used. In the United States, if federal courts are presented with a question of state law for which there is no clear controlling precedent, the federal courts may, in many states, certify that ques-

179. For example, if a state determines that an individual was improperly sanctioned, de-listing could be automatic, or at least by a majority vote.

180. *Supra* pp. 528–30.

181. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFFAIRS, Sept./Oct. 1997, at 183, 187.

tion of law to the highest state court.[182] In the E.U., domestic courts may make preliminary references of questions of E.U. law to the European Court of Justice.[183] In both the U.S. and E.U. procedures, the referring court ultimately decides the case. These procedures simply allow for courts that are in the best position to determine specific questions of law to do so without transferring the entire matter into that court's jurisdiction. Of course, the comparison of these procedures to the referral mechanism described here is limited. These references are made within judicial systems that are closely related, whereas references in the sanctions context could be made between courts worldwide. Second, these references concern issues of law, whereas the references made in the sanctions context would be made on issues of fact and evidence. Despite the limited value of the comparison, these examples illustrate the principle that inter-judicial cooperation is sometimes desirable to allow one court with particular knowledge to decide specific questions related to that court's expertise without abdicating the jurisdiction of the court initially presented with the matter.

The referral mechanism proposed does run into serious legal challenges. From the perspective of the state receiving the referral, it is not clear that its courts will have jurisdiction to make such a ruling. For example, in the United States, a federal court established under Article III of the Constitution may not be able to hear such a reference. Federal courts may only hear cases on which they can issue a final judgment that is not subject to revision.[184] Here the court is not asked to make a final judgment, but make a preliminary ruling that would help guide the original tribunal. Thus, U.S. federal courts may lack the jurisdiction to decide evidentiary questions presented by foreign courts.

However, there is an analogous situation in which the federal courts are allowed to hear cases that appear to be non-final. In international extradition cases, federal courts have the jurisdiction to determine whether there is sufficient evidence to warrant the extradition of the individual under the terms of the applicable treaty.[185] However, even if the court finds that there is sufficient evidence to warrant extradition, the Secretary of State has sole discretion to determine whether extradition should be authorized and may review *de novo* the judicial officer's findings of fact and conclu-

182. *See* 32 AM. JUR. 2D *Federal Courts* § 1341 (1995).

183. CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C 325) 127, art. 234 (2002).

184. *See* Hayburn's Case, 2 U.S. 408 (1792).

185. 18 U.S.C. § 3184 (2000).

sions of law.[186] Although this would seem to be a non-final judgment, courts have held that "the judicial officer in an extradition proceeding 'is not exercising 'any part of the judicial power of the United States,'' and instead is acting in 'a non-institutional capacity.'"[187] In extradition matters, judicial officers are not the ultimate decision makers, but are exercising a "special authority" to assist the ultimate decision maker, the Secretary of State, in making the decision.[188] Similarly, in the referral mechanism suggested here, the judicial officers would not be acting as the ultimate decision makers, but instead acting in a special capacity to assist foreign courts in their determination of the propriety of sanctions. Thus, it seems likely that a U.S. court could maintain jurisdiction over such a claim.

Additional legal challenges may exist from the perspective of the referring court. Domestic challenges to the authority of the referring court to delegate factual determinations to a foreign jurisdiction may be made. However, such factual determinations are not binding on the referring court. Like the Secretary of State in extradition matters, the referring court retains sole discretion to make a final determination. For example, if the second court found that there was sufficient evidence, but provided little in the way of explanation, the referring court could still choose to rule that there is insufficient evidence to warrant implementing the asset freeze.[189] When the determination of the second court is considered simply to have probative evidentiary value, the challenges against the legality of such a mechanism seem fairly weak.

The referral mechanism does presume cooperation and a certain amount of trust between the two adjudicative bodies. Perhaps this trust is unrealistic. With both states having a stake in the determination and outcome of the case, however, incentives to cooperate will likely be stronger than if one system were fully responsible for the entire hearing. Because their decisions are not binding, courts hearing classified evidence will have incentives to evaluate the evidence carefully and give the referring court an honest determination of the strength of that evidence. Otherwise, referring

186. United States v. Kin-Hong, 110 F.3d 103, 109 (1st Cir. 1997) (citing 18 U.S.C. § 3184).

187. *Id.* at n.9 (quoting United States v. Howard, 996 F.2d 1320, 1325 (1st Cir. 1993)).

188. United States v. Howard, 996 F.2d, 1320, 1325 (1993).

189. The reverse scenario, in which the referring court maintains the propriety of sanctions despite the second court's finding of insufficient evidence, seems very implausible.

courts will simply disregard the evidentiary courts' findings. The referring court has similar incentives to largely defer to the findings of the evidentiary court, so long as it believes the evidentiary court is acting in good faith. The repeated interaction between judiciaries would also make increased cooperation more likely.

While this hybrid system of centralized Security Council authority and decentralized member state review is by no means without its challenges, it does combine the coordination benefits of having the Security Council active in the sanctioning scheme with the practical benefits of giving member states critical roles within the system. Cooperation is a challenge in all three models studied. Yet the hybrid model maximizes the incentives states have to cooperate while minimizing the reasons for non-participation. Although such a model does not contribute to the building of an international judiciary, it does promote judicial cooperation between the states, which has benefits extending beyond its use in review of sanctioning decisions.[190]

CONCLUSION

Limiting the financial resources of Al-Qaida is an important element in the effort to dismantle the organization and prevent future acts of terrorism. Given the mobility of capital in modern financial systems, this objective cannot be accomplished without the participation of the larger international community. Most members recognize the importance of the goal and are willing to cooperate with international efforts to stop the financing of Al-Qaida specifically, and of terrorism more generally. The Security Council has played a crucial role in mobilizing and coordinating the action of member states around this issue.

Yet the necessity for efficient and widespread cooperation must not override the international community's dedication to human rights and civil liberties. In particular, if the Security Council is allowed to create a bureaucratic structure that has the capacity to take significant action against individuals, and that structure is not accompanied by full concern for the rights of individuals, then perhaps the conservatives in the United States are justified in their concerns about unbridled U.N. power. In creating effective sanctions regimes, the Security Council must be mindful of the human rights considerations that attach to sanctions, whether they are sanctions against a state or an individual. Neglecting such considerations is

190. *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT. L. 503, 524–26 (1995).

not only normatively wrong from a human rights perspective, but will ultimately destroy the legitimacy of such action as states recognize their continuing obligation to recognize human rights.

The challenge then is the same one facing the U.S. domestic legal system post-September 11th, that is, maintaining standards of human rights while effectively combating terrorism. The situation is even more complicated at the international level because different legal systems will have different values and standards of human rights protection. Furthermore, although there is a consensus about the need to take collaborative action, there is deep reluctance of states to fully trust and cooperate with other states and international organizations. Some states may lack the internal political will needed to implement the sanctions. Other states may be hesitant to share intelligence information that justifies sanctions. Ultimately, cooperation is required for both the effective implementation of sanctions and the protection of the due process rights of targeted individuals. Fully inducing such cooperation is a difficult challenge that extends well beyond the confines of an international sanctioning regime.

Having the imprimatur of the Security Council always will be effective in inducing a certain level of cooperation. Yet the lack of procedural protections challenges the legitimacy of Security Council action, thereby reducing incentive for cooperation. Thus, the Security Council's emphasis on the protection of targeted individuals' rights will both increase the legitimacy of Security Council action and induce further cooperation by states. There is also a role for decentralized state action in this scheme. State judicial bodies are likely in the best position to provide for adequate review of sanctioning decisions. Guided by Security Council standards, states can satisfy their international obligations to impose the sanctions while maintaining their commitment to due process by allowing targeted individuals an opportunity to be heard before an impartial body. In many cases, both implementation of sanctions and subsequent review will require cooperation between states. As states participate in these bilateral repeated interactions, they will understand that the effectiveness of the sanctions regime depends on their cooperation. Ultimately, the sanctions regime will be most effective, in both freezing assets and protecting rights, if it consists of a combination of Security Council oversight and member state implementation.