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THE TRANSATLANTIC DIVIDE OVER THE IMPLEMENTATION AND ENFORCEMENT OF SECURITY COUNCIL RESOLUTIONS

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In Of Paradise and Power: America and Europe in the New World Order, Robert Kagan offers the following comparison of the views of Americans and Europeans regarding the role of international law and international institutions:

Americans increasingly tend toward unilateralism in international affairs. They are less inclined to act through international institutions such as the United Nations . . . more skeptical about international law

. . . .

[Europeans] are quicker to appeal to international law, international conventions, and international opinion to adjudicate disputes. . . .

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They often emphasize process over result, believing that ultimately process can become substance.¹

One example of this transatlantic divide is the contrasting means by which American and European governmental institutions implement and enforce targeted sanctions adopted by the United Nations Security Council under Chapter VII of the Charter of the United Nations (Charter). A comparison of the legislation that America and Europe have adopted to implement such targeted sanctions, and of the way that American and European courts address challenges to such sanctions, reveals that in Europe, targeted sanctions mandated under Chapter VII of the Charter are regarded as absolute obligations outside the reach of local legal constraints. In the United States, by contrast, such Chapter VII measures are regarded as mandatory obligations only to the extent that they are consistent with domestic law.

This article explores these divergent approaches to targeted sanctions and explains how, as a consequence, a commonly held belief—that in the “war” on terror, American institutions are more willing to sacrifice human rights than their European counterparts—appears to be turned on its head. In America, courts entertain challenges to targeted sanctions under the Due Process Clause of the United States Constitution.² If the sanctions fail to satisfy the requirements of due process, they will be invalidated in the same manner as a purely domestic measure would be stricken. In Europe, by contrast, the Court of First Instance of the European Communities has refused to entertain challenges, brought under the European Convention on Human Rights (ECHR), to targeted sanctions that were specifically mandated by the Security Council under Chapter VII of the Charter.³ The Court of First Instance has ruled that invalidating such sanctions would constitute an unacceptable violation of Article 25 of the Charter (requiring Member States to “accept and carry out” Chapter VII “decisions”).⁴ Accordingly, for an individual or entity

1. ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 4-5 (2003).

2. See U.S. CONST. amend. V.

3. Case T-306/01, Yusuf v. Council of the Eur. Union, 2005 E.C.R. II-3533.

4. *Id.* para. 239-40; cf. Case T-228/02 Organisation des Modjahedines du peuple d'Iran v. Council of the Eur. Union, 2006 E.C.R. 00 (2006) (“*OMPF*”)

against which the Security Council has mandated that Chapter VII targeted sanctions be applied, greater procedural protections are available if the United States, rather than Europe, is implementing the sanctions.

This article is not intended to definitively resolve why Europe and America have such conflicting approaches to the relationship between local due process guarantees and international legal obligations. Nevertheless, in the conclusion, I suggest that perhaps the cause of these conflicting views lies in the fact that America has adopted a dualist legal system while the European system is more aptly described as monist.⁵ Regardless of the cause for this difference, critics of the American approach may be surprised that it results in relatively greater human rights protections, even in the context of the “war” on terror.

The next part of this article presents a brief history of Security Council-mandated targeted sanctions, and explains the conflict that arises between due process concerns and a State’s obligations under Article 25 of the Charter. Part II sets forth the targeted sanctions regime first established in Resolution 1267 and amended and expanded by subsequent Security Council resolutions. Parts III and IV compare how the courts of the European Union and the United States resolve local due process challenges to sanctions imposed pursuant to such resolutions. Part V considers whether the 1267 sanctions regime can be amended to provide greater due process protections and thus eliminate the dilemma created when Article 25 of the Charter conflicts with local due process guarantees. Finally, Part VI concludes this article by offering a possible explanation for the divergent European and American approaches to this issue.

I. BACKGROUND

Chapter VII of the Charter empowers the Security Council to take measures to maintain or restore international peace and security through a two-tiered structure. First, under Article 41, the Security

(holding that where the Security Council has not mandated the *specific* sanction being challenged, the Court of First Instance has the authority to scrutinize targeted sanctions under the ECHR). See *infra* Part III.C. for a more detailed comparison of the *OMPI* and *Yusuf* decisions.

5. See *infra* Part VI.

Council may take “measures not involving the use of armed force.”⁶ Second, if “the Security Council consider[s] that measures provided for in Article 41 would be inadequate or have proved to be inadequate,” it may take measures involving the use of armed force.⁷ This two-tiered structure reflects one of the principal concerns of the Charter: the avoidance of the “scourge of war” by permitting the use of force only in the most extreme of circumstances.⁸

Article 41 does not enumerate the full panoply of measures that the Security Council may take, short of the use of armed force, to maintain or restore international peace and security. Article 41 does, however, explicitly refer to one of the most common such measures: “complete or partial interruption of economic relations”—i.e. the imposition of sanctions.⁹

The most comprehensive sanctions regime imposed by the Security Council occurred in the 1990s against the Iraqi regime of Saddam Hussein.¹⁰ While this sanctions regime had some success in achieving its stated goals of constraining Iraq’s weapons of mass destruction programs and preventing future acts of aggression against Kuwait,¹¹ it also wrought severe humanitarian consequences on the Iraqi people.¹² To avoid future “negative humanitarian consequences . . . on innocent civilian populations[,]” the Security Council has increasingly turned to targeted sanctions.¹³ Because

6. U.N. Charter art. 41.

7. U.N. Charter art. 42.

8. U.N. Charter pmb.; see THE CHARTER OF THE UNITED NATIONS: A COMMENTARY Vol. I 34-35 (Bruno Simma et al. eds., 2d ed., 2002).

9. U.N. Charter art. 41.

10. The Iraq sanctions regime was initially adopted pursuant to Resolution 661 (1990) and further confirmed by Resolution 687 (1991). S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

11. See S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

12. See Interim Report of the Independent Inquiry Committee into the United Nations Oil-For-Food Programme, at 4 (Feb. 3, 2005); Richard Falk, *Iraq, the United States, and International Law: Beyond the Sanctions*, Aug. 27, 2002, http://www.transnational.org/SAJT/forum/meet/2002/Falk_IraqUSInternatLaw.html (“The imposition and retention of comprehensive sanctions for more than a decade after the devastation of the Gulf War has resulted in hundreds of thousands of civilian casualties, more than a million according to some estimates . . . affecting most acutely, the very young and the poorest sectors of the Iraqi population.”).

13. WATSON INSTITUTE TARGETED SANCTIONS PROJECT, STRENGTHENING

targeted sanctions apply to particular individuals, rather than to entire nations, targeted sanctions are viewed as mechanisms to maintain or restore international peace and security without undermining a national economy or social services system.¹⁴ Thus, the move towards targeted sanctions reflects a second principal concern of the Charter: “solving international problems of an economic, social, cultural, or humanitarian character, and . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”¹⁵

The most extensive targeted sanctions regime that the Security Council has adopted under Chapter VII of the Charter was first established by Resolution 1267 (1999), which imposed sanctions on the Taliban regime in Afghanistan.¹⁶ Resolution 1267 also created a committee to implement and monitor those sanctions (1267 Committee).¹⁷ As is described in more detail below, the targeted

TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 5 (2006), available at http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf [hereinafter WATSON INSTITUTE REPORT]; see U.N.: *Sanctions Rules Must Protect Due Process*, HUMAN RIGHTS WATCH, Mar. 4, 2002, <http://hrw.org/english/docs/2002/03/04/global5839.htm>.

14. See S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (“Reaffirming the necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences on the people of Afghanistan . . .”).

15. U.N. Charter art. 1, para. 3.

16. Bardo Fassbender, *Targeted Sanctions and Due Process* at 4, Mar. 20, 2006 [hereinafter Fassbender Report], available at http://www.un.org/law/counsel/Fassbender_study.pdf; WATSON INSTITUTE REPORT, *supra* note 13, at 25. The targeted sanctions regime established by Resolution 1267 is not the first such regime adopted by the Security Council. Prior Security Council resolutions adopting targeted sanctions include Resolution 841 (1993) (targeting “the Government of Haiti or . . . the de facto authorities in Haiti”), Resolution 1054 (1996) (targeting “members of the Government of Sudan”) and Resolution 1127 (1997) (targeting members of Uniao Nacional para a Independencia Total de Angola).

17. The 1267 Committee consists of all the members of the Security Council. See GUIDELINES OF THE [1267] COMMITTEE FOR THE CONDUCT OF ITS WORK, ¶ 2(a), http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf. The 1267 Committee is responsible for, *inter alia*, maintaining a list of individuals and entities against which targeted sanctions are applied. *Id.* ¶¶ 5, 6. Individuals and entities are added to that list when (a) a Member State of the United Nations proposes that the individual or entity be added to the list; and (b) the 1267 Committee approves that proposal. *Id.* ¶ 6(g). The Committee makes decisions “by consensus of its

sanctions established pursuant to Resolution 1267 have been amended and expanded on various occasions by the Security Council.¹⁸ Pursuant to such amendments and expansions, the targeted sanctions initially limited to the Taliban under Resolution 1267 now apply to “Usama bin Laden and individuals and entities associated with him as designated by the [1267] Committee”¹⁹ These sanctions are widely viewed as a critical instrument in the “war” on terror.²⁰

While targeted sanctions are championed as Chapter VII measures that alleviate the humanitarian burdens associated with more traditional, comprehensive sanctions, targeted sanctions are also criticized insofar as the Security Council, an inherently political body, decides to deprive specific individuals and entities of their rights to liberty and property without the judicial or procedural safeguards guaranteed by international human rights covenants and domestic constitutions (hereinafter referred to as “due process rights”).²¹ Thus, there is some question as to whether the use of targeted sanctions truly achieves the Charter’s desire to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms.”²² Recently, individuals and/or private entities who have suffered deprivations of their liberty interests pursuant to targeted sanctions adopted by the

members.” *Id.* ¶ 4(a).

18. *See infra* Part II.

19. S.C. Res. 1333, ¶ 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000).

20. *See, e.g.*, S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005) (“*Underscoring* the importance of . . . robust implementation of existing [targeted sanctions] measures as a significant preventative measure in combating terrorist activity.”) (emphasis in original); WATSON INSTITUTE REPORT, *supra* note 13, at 5 (“Sanctions to stem the financing of terrorism or to deny safe haven or travel by terrorists have become valuable tools in the global effort to counter terrorism.”).

21. *See, e.g.*, U.S. CONST. amend. XIV; Universal Declaration of Human Rights, G.A. Res. 217A, arts. 8, 10, 11, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 14, ¶ 1, U.N. Doc. A/6316 (Dec. 16, 1966); European Convention on Human Rights art. 6(1), opened for signature Apr. 11, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; *see also* Bill Bowring, *UN, EU and the Court of Appeal all say: No Procedural Human Rights Guarantees for Terrorist Suspects* at 3, <http://www.ejdm.de/BB%20article%20for%20SL%20asset%20freezing%201011.pdf>.

22. U.N. Charter art. 1, para 3. This is particularly worrisome when individuals are targeted as a result of their perceived affiliation with non-state organizations that do not have readily available rosters of members.

Security Council (and implemented by Member States) have argued in the domestic courts of the implementing State that such sanctions violate their due process rights as guaranteed under that State's local law.²³

While to date, "no national or regional court has invalidated measures giving effect to a listing by a UN sanctions committee,"²⁴ such challenges present a dilemma for the reviewing court. If the court exercises jurisdiction to review the sanctions under local due process standards, the court may ultimately invalidate those sanctions. Declaring the sanctions invalid, in turn, not only undermines a key weapon in the "war" on terror,²⁵ but also constitutes a violation of the Member State's obligation under Article 25 of the Charter "to accept and carry out the decisions of the Security Council."²⁶ Alternatively, a court may decline to exercise jurisdiction over the challenges (or a court may feel that it does not have such jurisdiction to begin with), in which case the court would remain passive in the face of possible violations of local due process guarantees. The way that courts resolve this dilemma will have far-reaching consequences on the efficacy of targeted sanctions adopted by the Security Council, on future compliance with Chapter VII resolutions, and on the perception

23. Throughout this article, I refer to the "local" law of Member States of the United Nations. For the purposes of this article, by "local" law, I mean the law that applies in limited jurisdictions. For example, I refer to the federal law of the United States as local law. Moreover, I refer to the law of the European Community as local law. This is to be contrasted with rules of customary international law and *ius cogens*, which arguably do not have jurisdictional limits.

24. WATSON INSTITUTE REPORT, *supra* note 13, at 3.

25. One may question whether targeted sanctions are necessary to combat terrorism. It has been estimated that the events of 9/11—the most prolific terrorist attacks ever—cost only "between \$400,000 and \$500,000 to plan and conduct." THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 169 (2004). The war in Iraq, by contrast, costs the American military an estimated \$10 billion each month. Editorial, *A Visit Worth the Time and Money*, N.Y. TIMES, Feb. 23, 2007, at A20. This article does not take a position on whether targeted sanctions are, in fact, an integral tool in the "war" on terror. It is sufficient to note for the purposes of this article, that such sanctions are perceived to be vital and have been pursued and embraced by the international community (and in particular, the Security Council). See S.C. Res. 1617, *supra* note 20.

26. U.N. Charter art. 25.

that the international community is committed to the protection of individual rights and fundamental freedoms.²⁷

II. THE 1267 SANCTIONS REGIME

On December 8, 1998, the Security Council adopted Resolution 1214, which demanded that the Taliban regime in Afghanistan “stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice”²⁸ The Taliban failed to comply with this demand. In response, the Security Council adopted a series of measures, beginning with Resolution 1267, which accomplished the following: (a) established various sanctions to be applied to persons and entities designated by the 1267 Committee; and (b) mandated that Member States implement those sanctions. The particular resolutions effecting these requirements are discussed below.

A. Resolution 1267 (1999)

On October 15, 1999, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 1267.²⁹ Resolution 1267 demanded that “the Taliban turn over Usama bin Laden without further delay.”³⁰ In order to enforce that demand, Resolution 1267 provided that all States shall (a) restrict the use of aircraft “owned, leased or operated by or on behalf of the Taliban” and (b) “freeze

27. See generally WATSON INSTITUTE REPORT, *supra* note 13, at 3; Peter Guthrie, Note, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 515-16 (2004) (“Lacking effective [due process] mechanisms at the international level, states will be forced to balance the dual mandates of ‘effective fulfillment of obligations under the U.N. Charter and the protection of fundamental legal principles safeguarding individual rights.’”) (quoting Vera Gowlland-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)).

28. S.C. Res. 1214, ¶ 13, U.N. Doc. S/RES/1214 (Dec. 8, 1998).

29. Resolution 1267 “[d]etermin[ed] that the failure of the Taliban authorities to respond to the demands in paragraph 13 of Resolution 1214 (1998) constitutes a threat to international peace and security” S.C. Res. 1267, U.N. doc. S/RES/1267 (Oct. 15, 1999).

30. *Id.* ¶ 2.

funds and other financial resources” owned, controlled, or benefiting the Taliban.³¹ Moreover, Resolution 1267 created the 1267 Committee and directed that Committee to, *inter alia*, identify and designate such “aircraft and funds or other financial resources” to be sanctioned by Member States.³² Thus, Resolution 1267 empowered the 1267 Committee to determine what individuals or entities should be sanctioned, and then required Member States to comply with those determinations and implement the sanctions.

B. Resolutions 1333 (2000) and 1390 (2002)

On December 19, 2000, the Security Council, acting pursuant to Chapter VII of the Charter, adopted Resolution 1333, which reaffirmed and significantly expanded the sanctions contained in Resolution 1267 and, in turn, the powers of the 1267 Committee. With respect to the Taliban regime, Resolution 1333 expanded the 1267 sanctions to include the following provisions:

- prohibiting the transfer of “arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned”³³
- prohibiting the “sale, supply and transfer to the territory of Afghanistan under Taliban control . . . of technical advice, assistance, or training related to military activities”³⁴
- demanding the withdrawal of any agents advising “the Taliban on military or related security matters”³⁵
- requiring the closure of all offices of the Taliban and of Ariana Afghan Airlines in the territory of Member States.³⁶

31. *Id.* ¶ 4.

32. *Id.* ¶ 6(e).

33. S.C. Res. 1333, ¶ 5(a), U.N. Doc. S/RES/1333 (Dec. 19, 2000).

34. *Id.* ¶ 5(b).

35. *Id.* ¶ 5(c).

36. *Id.* ¶ 8(a)-(b).

- prohibiting the “sale, supply or transfer . . . of the chemical acetic anhydride to any person in the territory of Afghanistan under Taliban control”³⁷

Moreover—and more importantly for the purposes of this article—Resolution 1333 mandated that Member States impose sanctions against “Usama bin Laden and individuals and entities associated with him as designated by the [1267] Committee.”³⁸ Specifically, with respect to such designated individuals, Member States were required to “freeze without delay funds and other financial assets . . . and to ensure that neither they nor any other funds or financial resources are made available.”³⁹

To implement and monitor these targeted sanctions against Usama bin Laden and individuals and entities associated with him, Resolution 1333 “*requests* the [1267] Committee to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization.”⁴⁰ Thus, pursuant to Resolution 1333, once the 1267 Committee designated an individual or entity as “associated with” Usama bin Laden, Member States were required to freeze the funds and other financial assets of such individuals or entities.

This scheme was repeated in Resolution 1390 (2002), which expanded the sanctions against “Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them,” as designated by the 1267 Committee “on the basis of relevant information provided by Member States and regional organizations.”⁴¹

C. Security Council “Improvements” to the 1267 Regime

Beginning with Resolution 1455 (2003), the Security Council adopted a series of resolutions under Chapter VII of the Charter to further “improve” the 1267 sanctions regime. These improvements direct Member States to provide a “statement of case” when proposing

37. *Id.* ¶ 10.

38. *Id.* ¶ 8(c).

39. *Id.*

40. *Id.* ¶¶ 8(c), 16(b) (emphasis added).

41. S.C. Res. 1390, ¶¶ 2, 5(a), U.N. Doc. S/RES/1390 (Jan. 28, 2002).

names for inclusion on the sanctions list, establish a mechanism whereby listed individuals and entities may receive notice of their designation, and enable listed individuals and entities to challenge their listing directly to the 1267 Committee.

1. Statement of Case

The importance of providing the 1267 Committee with increased details and information in support of a listing request was first identified by the Security Council in operative paragraph 4 of Resolution 1455, which

stresses to all Member States the importance of submitting to the Committee the names and identifying information, to the extent possible, of and about members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them so that the Committee can consider adding new names and details to its list, unless to do so would compromise investigations or enforcement actions⁴²

Similarly, operative paragraph 17 of Resolution 1526

[c]alls upon all States, when submitting new names to the Committee's list, to include identifying information and background information, to the greatest extent possible, that demonstrates the individual(s)' and/or entity(ies)' association with Usama bin Laden or with members of the Al-Qaida organization and/or the Taliban, in line with the Committee's guidelines.⁴³

While these directives ostensibly provide a more informed basis upon which the 1267 Committee would make designations, these directives are not "decisions" of the Security Council and thus Member States are not required to comply with them under Article 25 of the Charter.⁴⁴ Accordingly, it was not clear that the goals of these

42. S.C. Res. 1455, ¶ 4, U.N. Doc. S/RES/1455 (Jan. 17, 2003).

43. S.C. Res. 1526, ¶17, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

44. Article 25 of the Charter states that "[t]he Members of the United Nations agree to accept and carry out the *decisions* of the Security Council in accordance with the present Charter." U.N. Charter art. 25 (emphasis added). See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY Vol. I 457 (Bruno Simma et al. eds., 2d ed., 2002) ("[I]t is positively clear that decisions taken under Chapter VII

directives would be achieved. This concern was remedied by Resolution 1617, pursuant to which the Security Council

[d]ecide[d] that, when proposing names for the Consolidated List, States shall act in accordance with paragraph 17 of resolution 1526 (2004) and henceforth also shall provide to the Committee a statement of case describing the basis of the proposal; and further encourages States to identify any undertakings and entities owned or controlled, directly or indirectly, by the proposed subject⁴⁵

This requirement was reaffirmed and expanded in Resolution 1735, which

[d]ecide[d] that, when proposing names to the Committee for inclusion on the Consolidated List, States shall act in accordance with paragraph 17 of resolution 1526 (2004) and paragraph 4 of resolution 1617 (2005) and provide a statement of case; the statement of case should provide as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information and (iii) supporting information or documents that can be provided; States should include details of any connection between the proposed designee and any currently listed individual or entity.⁴⁶

Thus, Member States currently must support any designation request with a statement of case, which “should provide as much detail as possible” in support of the listing request.

2. Notice of Designation

Resolution 1735 also establishes a mechanism whereby listed individuals and entities may be notified of their listing and of the information upon which their listing was made. In particular, operative paragraph 10 of Resolution 1735 requires the Secretariat, “within two weeks after a name is added to the Consolidated list,” to notify the Permanent Mission of the Member State of which such

which are not couched in terms of a recommendation . . . [are] binding under Article 25.” (emphasis added).

45. S.C. Res. 1617, ¶ 4, U.N. Doc. S/RES/1617 (July 29, 2005).

46. S.C. Res. 1735, ¶ 5, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

person or entity is a national or is believed to be located.⁴⁷ A Member State receiving such notification is, in turn, “[c]all[ed] upon . . . to take reasonable steps according to their domestic laws and practices to notify or inform the listed individual or entity of the designation”⁴⁸

Moreover, Member States proposing a name for designation are “request[ed] . . . to identify those parts of the statement of case which may be publicly released for the purposes of notifying the listed individual or entity, and those parts which may be released upon request to interested States.”⁴⁹ A Member State notifying or informing a listed individual or entity of its designation is also “call[ed] upon . . . to include with this notification a copy of the publicly releasable portion of the statement of case”⁵⁰

Thus, while Resolution 1735 ostensibly provides that individuals and entities designated under the 1267 sanctions regime will receive notice of their listing and the grounds therefore, such notice is not mandatory, and even when given, may be partial and is always *post hoc*.

3. *The Right of Listed Individuals or Entities to Challenge their Listing*

Finally, Resolution 1730 (2006) requires the 1267 Committee (as well as other United Nations sanctions committees) to adopt certain de-listing procedures, including a procedure whereby listed individuals or entities can directly petition their designation.⁵¹ Listed individuals or entities no longer have to rely on their State of residence or nationality to challenge their listing.⁵²

47. *Id.* ¶ 10.

48. *Id.* ¶ 11.

49. *Id.* ¶ 6.

50. *Id.* ¶ 11.

51. S.C. Res. 1730, ¶ 1, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

52. *See id.* Cf. Case T-306/01, Yusuf v. Council of the Eur. Union, 2005 E.C.R. II-3533 (explaining that the then-governing procedures “set up a mechanism for the re-examination of individual cases, by providing that the persons concerned may address a request to the Sanctions Committee, *through their national authorities*, in order . . . to be removed” from the Consolidated List) (emphasis added).

Thus, together, Resolutions 1267, 1333, 1390, 1455, 1526, 1617, 1730 and 1735 (collectively the “1267 resolutions”) establish a regime whereby (1) a Member State may propose a name to the 1267 Committee, supported by “a statement of case describing the basis of the proposal” and identifying which aspects of the statement of case, if any, can be published;⁵³ (2) the 1267 Committee may designate such a proposed individual or entity to be a target for sanctions; (3) all Member States are obliged under the Charter to implement such sanctions;⁵⁴ (4) listed individuals may or may not receive notice of their listing and the grounds therefore; and (5) if such notice is received, individuals or entities may directly petition the 1267 Committee.⁵⁵

This regime creates the dilemma discussed briefly in Part I of this article: when liberty interests are deprived on the basis of a designation by the 1267 Committee and the targeted individual or entity decides to challenge that deprivation in the courts of the Member State implementing such sanctions, the court must choose one of two options. First, the court may review and possibly invalidate such sanctions, which could undermine the 1267 sanctions regime and violate the Member State’s obligations under Article 25 of the Charter. Or, the court may refuse to hear the challenge, thus possibly denying the petitioner due process rights under local law. The following two sections compare how the courts of the European Communities and the United States resolve this dilemma.

Before discussing such a comparison, one must first understand the differences in the respective legislation adopted to implement the 1267 sanctions regime. As is described in more detail below, the European Communities and the United States have enacted fundamentally different implementing legislation.

53. S.C. Res. 1617, U.N. Doc. S/RES/1617, ¶¶ 4, 6 (July 29, 2005).

54. U.N. Charter art. 25; *see, e.g.*, S.C. Res. 1617, ¶¶ 1, 4 (“States shall take the measures previously imposed” pursuant to the 1267 Committee’s designations); S.C. Res. 1526, ¶ 1 (“States shall implement the measures with respect to listed individuals and entities”).

55. S.C. Res. 1735, ¶¶ 10-11.

III. IMPLEMENTATION OF AND CHALLENGES TO THE 1267
RESOLUTIONS IN EUROPEA. *Implementation of the 1267 Resolutions in Europe*

The Commission of the European Communities (Commission) and the Council of the European Union (Council) have implemented the 1267 resolutions by adopting regulations that *automatically* apply sanctions against any individual or entity designated by the 1267 Committee. After the Security Council adopted Resolution 1333, the Council responded with Regulation 467/2001, which provides, *inter alia*, “[a]ll funds and other financial resources belonging to any natural or legal person, entity or body designated by the . . . [1267 Committee] and listed in Annex I shall be frozen.”⁵⁶ Annex I to Regulation 467/2001, in turn, reflects precisely the designations made by the 1267 Committee.⁵⁷

Similarly, after the Security Council adopted Resolution 1390, the Council responded with Regulation 881/2002, which requires the freezing of assets of any person or entity designated by the 1267 Committee.⁵⁸

This automatic incorporation of designations by the 1267 Committee into European law has been described by the Court of First Instance of the European Communities as follows:

[R]egulation [881/2002] was adopted with a view to implementing in the Community legal order Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) through the automatic transposition of any list of persons or entities drawn up by the Sanctions Committee in accordance with the applicable procedures, *without any autonomous discretion whatsoever being exercised*, as is clearly apparent from both the preamble to the contested regulation and Art. 7(1) thereof.⁵⁹

56. Council Regulation 467/2001, art. 2, 2001 O.J. (L 67) 2 (EC).

57. *Id.* annex 1; Case T-306/01, *Yusuf v. Council of the Eur. Union*, 2005 E.C.R. II-3533.

58. Council Regulation 881/2002, 2002 O.J. (L 67) 10 (EC) (repealing Regulation 467/2001).

59. *Yusuf*, 2005 E.C.R. para. 214 (emphasis added).

Thus, the Council and the Commission require states of the European Community to automatically defer to the discretion of the 1267 Committee in applying targeted sanctions pursuant to the 1267 resolutions.

B. Challenges to the 1267 Resolutions in Europe

In the case of *Yusuf v. European Council*, the Court of First Instance of the European Communities was confronted with a local law challenge to sanctions automatically imposed against European nationals pursuant to designations by the 1267 Committee.⁶⁰ Petitioners, Ahmed Alu Yusuf, a Swede of Somali origin, and Al Barakaat International Foundation, an entity established in Sweden, argued that Regulation 881/2002 should be annulled on three independent grounds: (1) the European Community Treaty (Treaty) did not authorize the Council to promulgate Resolution 881/2002 because that resolution imposes sanctions against nationals of Member States of the European Union; (2) Resolution 881/2002 is unlawful because it targets specific individuals and thus is not a regulation of general application, as required by article 249 of the Treaty; and (3) the sanctions imposed against petitioners under Regulation 881/2002 violate “their right to the use of their property and the right to a fair hearing, as guaranteed by Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”⁶¹ It is the court’s treatment of this last argument (the Fundamental Rights Argument) that is the concern of this article.⁶²

In adjudicating the Fundamental Rights Argument, the court began by questioning whether it had the power to consider that argument. Thus, the court set forth the threshold test for justiciability: the court would only rule on “the plea alleging breach of the applicants’ fundamental rights” if (1) such plea “falls within the scope of its judicial review” and (2) the court would be capable, if such plea were proved, of annulling the relevant regulation.⁶³

60. *Id.* para. 42.

61. *Id.* para. 190.

62. The court rejected petitioner's first two grounds for annulling Regulation 881/2002 upon the finding that the regulation is authorized by and consistent with the Treaty provisions relied upon by petitioners. *Id.* paras. 171, 176, 180, 189.

63. *Id.* para. 226.

1. *Preliminary Observations*

Before applying this threshold test, however, the court offered “preliminary observations” concerning the relationship between international and local legal obligations.⁶⁴ While the court labeled such “observations” as “preliminary,” in fact, these observations sit at the heart of the issue and dictated the court’s ultimate resolution of the Fundamental Rights Argument.

The court began its preliminary observations by noting that under the rule of primacy, embodied in Article 27 of the Vienna Convention on the Law of Treaties, States have an obligation under international law to comply with their treaty obligations, including their obligations under the Charter.⁶⁵ Next, the court noted that under Article 103 of the Charter, a State’s obligation to comply with the Charter also “prevail[s]” over its obligations under “any other international agreement.”⁶⁶ Finally, the court noted that under Article 25 of the Charter, the primacy of Charter obligations over both domestic law and other international treaty obligations applies with equal force to Security Council decisions under Chapter VII of the Charter. Accordingly, the court made the following observations:

Resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are thus binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect.

It also follows from the foregoing that, pursuant both to the rules of general international law and to the specific provisions of the Treaty, *Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations.*⁶⁷

64. *See id.* paras. 226-30.

65. *Id.* para. 232 (“[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

66. *Id.* para. 234.

67. *Id.* para. 239-40 (emphasis added).

As intimated above, the emphasized portion of this quote is the driving force behind the court's resolution of the Fundamental Rights Argument. That argument is predicated on Article 6 of the ECHR (a "provision of Community law"). The *Yusuf* court held that Article 6 must remain "unapplied" where, as here, it could constitute an "impediment to the proper performance of obligations under the Charter" (i.e. compliance with the 1267 resolutions).⁶⁸

2. Adjudication of the Merits

Having established that the members of the European Union are obligated to comply with the 1267 resolutions (irrespective of local law principles to the contrary) the court turned to the first leg of the threshold question identified above: does the petitioners' plea alleging breach of their fundamental rights fall within the scope of the court's judicial review? The court responded to this question with a qualified negative.

The court held that insofar as the Council and the Commission promulgated Regulation 881/2002 pursuant to the 1267 resolutions, with which, as described above, the members of the European Community are bound to comply, Regulation 881/2002 was promulgated "under circumscribed powers, with the result that they had no autonomous discretion . . . they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration."⁶⁹ Thus, the court held that the Fundamental Rights Argument was, in substance, an indirect challenge to the lawfulness of the 1267 resolutions themselves.⁷⁰ The

68. *Id.* para. 240.

69. *Id.* para. 265.

70. *Id.* para. 266; *see also* para. 267:

[I]f the court were to annul the contested regulation, as the applicants claim it should, although that regulation seems to be imposed by international law, on the ground that that act infringes their fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.

Id. para. 267.

court ruled, however, that it did not have the authority to “undertake such indirect review of the lawfulness of [the 1267] resolutions” because under international law, those resolutions are “binding on Member States of the Community [and thus are] mandatory for the court as they are for all the Community institutions.”⁷¹

The court, however, qualified its rejection of the Fundamental Rights Argument with the recognition that, although the court did not have the power to review the 1267 resolutions (and in turn Regulation 881/2002) under the laws of the European Community, the court did have the power to review such directives under *jus cogens*, which the court described as “a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.”⁷² In other words, the court held that, to the extent that Security Council resolutions violate *jus cogens*, the resolutions are themselves unauthorized; and in such circumstances, the Court of First Instance has the jurisdictional authority to declare Security Council resolutions invalid (including resolutions adopted under Chapter VII of the Charter). Pursuant to this holding, the court proceeded to analyze the 1267 resolutions under *jus cogens*. The court held that the requirements of *jus cogens* were satisfied because under the 1267 resolutions and Regulation 881/2002, sanctioned individuals and entities could petition their national authorities to request that the 1267 Committee remove their name from the list of designated targets.⁷³

71. *Id.* at paras. 268-69; *see also* para. 276:

It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.

Id. para. 276.

72. *Id.* para. 277.

73. *Id.* paras. 307, 309, 312. It is worth noting that Resolution 1730 (2006), adopted after the *Yusuf* decision, provides designated individuals and entities with the ability to petition their de-listing directly with the 1267 Committee. S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

C. *Looking Back at the Holding in Yusuf*

To understand the precise holding of the court in *Yusuf*, it is useful to briefly compare that decision to a subsequent decision of the Court of First Instance in *Organisation des Modjahedines du Peuple d'Iran v. Council of the European Union (OMPI)*.⁷⁴ In *OMPI*, the petitioner challenged certain regulations and decisions of the Commission and of the Council, which froze the petitioner's assets. The challenged regulations and decisions were adopted pursuant to Security Council Resolution 1373 (2001), adopted under Chapter VII of the Charter.⁷⁵ Resolution 1373 "[d]ecide[d] that all States shall . . . freeze without delay funds and other financial assets or economic resources" of persons or entities that have committed, attempted to commit, participated in or facilitated terrorist acts.⁷⁶ The petitioner claimed that the freezing of his assets violated, *inter alia*, the ECHR.⁷⁷

Thus, the petition in the *OMPI* case was similar to the petition in the *Yusuf* case. In both cases, the courts confronted challenges to regulations and decisions of the Commission and of the Council, which froze the petitioners' assets; the petitioners alleged, *inter alia*, violations of their rights under the ECHR; and the challenged regulations and decisions were adopted pursuant to decisions of the Security Council under Chapter VII of the Charter. Nevertheless, the holding in *OMPI* was quite different than that in *Yusuf*. The court in *OMPI* held that it did have the authority to review the freezing of the petitioners' assets under, *inter alia*, the ECHR.⁷⁸ Indeed, the *OMPI* court ultimately granted the petition on the ground that the procedural guarantees of the ECHR were violated.⁷⁹

The point of departure of the *Yusuf* and *OMPI* decisions lies in the details of the relevant Security Council resolutions. As the court in *OMPI* explained, the 1267 resolutions required "the freezing of the

74. Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council of the Eur. Union*, 2006 E.C.R. 00 (2006).

75. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

76. *Id.* ¶ 1(c).

77. *See Organisation des Modjahedines*, 2006 E.C.J. para. 61.

78. *See id.* paras. 108, 113, 137.

79. *Id.* paras. 160-74 (annulling the challenged decisions to freeze petitioner's assets on the ground that the procedure pursuant to which the decision was adopted did not adequately observe the petitioner's right to a fair hearing under the ECHR).

funds of the parties concerned, designated by name, without in any way authorising [European] institutions, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations.”⁸⁰ Thus, the mandates of 1267 resolutions and the 1267 Committee were “transposed into the Community legal order, as they were required to [be].”⁸¹

Resolution 1373, by contrast, “d[id] not specify individually the persons, groups and entities who are to be the subjects of those measures.”⁸² Rather, the *OMPI* court noted, under Resolution 1373:

[I]t is for the Member States of the United Nations (UN)—and, in this case, the Community, through which its Member States have decided to act—to identify specifically the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order.⁸³

Thus, measures adopted to implement Resolution 1373 “do not come within the exercise of circumscribed powers and accordingly do not benefit from the primacy effect” provided for in Articles 25 and 103 of the U.N. Charter.⁸⁴ “Since the identification of the persons, groups and entities contemplated in [Resolution 1373], and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community’s own powers, entailing a discretionary appreciation by the Community,” the *OMPI* court concluded, “the Community institutions concerned . . . are in principle bound to observe the right to a fair hearing”;⁸⁵ the rights guaranteed by the ECHR.

In summary, the decisions in *Yusuf* and *OMPI* establish that, in Europe, the obligations of Member States of the United Nations to comply with targeted sanctions specifically mandated by the Security Council under Chapter VII of the Charter are enforced even if such

80. *Id.* para. 100.

81. *Id.*

82. *Id.* para. 101.

83. *Id.* para. 102.

84. *Id.* para. 103.

85. *Id.* para. 107.

compliance is inconsistent with due process rights provided for under local law (the ECHR). This prioritization of the particular mandates of international law over local law is reflected by the legislation adopted in Europe to implement the 1267 resolutions and by the aforementioned decisions of the European Court of First Instance. The following Section will demonstrate that in the United States, by contrast, governmental institutions prioritize local due process rights over obligations imposed by international law, and in particular, the Charter.

IV. IMPLEMENTATION OF AND CHALLENGES TO THE 1267 RESOLUTIONS IN THE UNITED STATES

A. Implementation of the 1267 Resolutions in the United States

Unlike Regulation 881/2002, the legislation enacted by the United States to implement the 1267 resolutions does not automatically adopt designations made by the 1267 Commission. Rather, the implementing legislation in the United States establishes a system whereby the Executive Branch, acting through the Office of Foreign Assets Control (OFAC), an office in the Department of Treasury, is empowered (but not required) to promulgate rules and regulations sanctioning individuals and entities designated by the 1267 Committee. Thus, unlike the case in Europe, the United States exercises “autonomous discretion . . . [to] alter the content of the resolutions at issue.”⁸⁶ The particular statutes, orders, and regulations establishing this discretionary regime are set forth below.

Initially, under section 5 of the United Nations Participation Act of 1945 (the UNPA),

whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which

86. *Cf.* Case T-306/01, *Yusuf v. Council of the Eur. Union*, 2005 E.C.R. II-3533 para. 265 (finding that under the relevant European implementing legislation, the Council and the Commission “had no autonomous discretion . . . [T]hey could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration.”).

he may designate, and under such rules, and regulations as may be prescribed by him, investigate, prohibit or regulate, in whole or in part, economic relations . . . between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof⁸⁷

Acting pursuant to this authority, on September 23, 2001, President Bush issued Executive Order 13,224 (E.O. 13,224) to “establish[] a mechanism to monitor the implementation of UNSCR 1333.”⁸⁸ E.O. 13,224 was explicitly issued “in view of” Security Council Resolutions 1214, 1267, 1333, and 1363.⁸⁹

Under section 7 of E.O. 13,224 the Secretary of the Treasury is authorized to “take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA and UNPA as may be necessary to carry out the purposes of this order[,]” including the authority to “redelegate any of these functions to other officers and agencies of the United States Government.”⁹⁰

Acting pursuant to this authority to redelegate, the Secretary of the Treasury empowered OFAC to promulgate regulations to carry out the purposes of E.O. 13,224.⁹¹ OFAC, in turn, enacted the Global Terrorism Sanctions Regulations, 31 C.F.R. section 594. Under section 594.201(a), “property and interests in property” are blocked if owned by persons (a) who are foreign nationals listed in the Annex to E.O. 13224; (b) who are foreign nationals determined by the Secretary

87. 22 U.S.C. § 287c(a).

88. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). UNSCR refers to the United Nations Security Council Resolution. *Id.*

89. *Id.*; see Letter dated 17 April 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the Chairman of the Committee U.N. Doc. S/AC.37/2003/(1455)/26, (April 2003) at 3 (“Executive Order (E.O.) 13,224 provides the legal authority to ensure that the funds and financial or other economic resources of those individuals and entities listed pursuant to UNSCR 1267, 1333, 1390 and 1455 within the United States or within the possession or control of U.S. persons are frozen without delay. . . . The USG administers sanctions imposed pursuant to E.O. 13,224 through [OFAC].”).

90. Exec. Order No. 13,224, *supra* note 88.

91. 31 C.F.R. § 594.802 (2007) (“Any action that the Secretary of the Treasury is authorized to take pursuant to Executive Order 13224 . . . and any further Executive orders relating to the national emergency declared therein, may be taken by the Director of the Office of Foreign Assets Control”).

of State to have committed, or to pose a significant risk of committing, acts of terrorism; (c) determined by the Secretary of the Treasury “to be owned or controlled by, or to act for or on behalf of, any person whose property or interests in property are blocked” under these regulations; or (d) determined by the Secretary of the Treasury to provide certain support to terrorists or other persons blocked pursuant to these regulations.⁹²

Thus, in the United States, the authority to determine which individuals and entities will be sanctioned as a result of the 1267 resolutions ultimately rests with the Executive Branch of the United States Government, not with the 1267 Committee.⁹³ While the Executive Branch is, of course, free to consider the designations of the 1267 Committee in determining who to sanction (unlike in Europe), the implementing legislation in the United States does not oblige the Executive Branch to adopt such designations.⁹⁴ As a result, when courts in the United States are faced with challenges to sanctions imposed pursuant to E.O. 13,224, they regard such challenges as appeals of autonomous actions of the United States government. Accordingly, courts in the United States readily scrutinize such challenges under local due process standards.

B. Challenges to 1267 Sanctions in the United States

At least five actions have been commenced in United States federal courts by individuals and/or entities challenging OFAC sanctions issued pursuant to E.O. 13,224 (i.e. sanctions that relate back to the 1267 resolutions).⁹⁵ Of these, at least three cases have

92. 31 C.F.R. § 594.201(a) (2007).

93. 31 C.F.R. § 594.201(a).

94. It is worth noting that the practical effect of this difference is unclear. This author has been unable to discover a single case of an individual or entity listed by the 1267 Committee, but not listed by the OFAC regulations.

95. *See* Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34 (D.D.C. 2005); Aaran Money Wire Serv., Inc. v. United States, No. 02-CV-789 (JMR/FLN), 02-CV-790 (MJD-JGL), 2003 U.S. Dist. LEXIS 16190 (D. Minn. Aug. 21, 2003); Global Relief Found., Inc. v. O'Neill, 207 F. Supp. 2d 779 (N.D. Ill. 2002), *aff'd*, 315 F.3d 748 (7th Cir. 2002); Holy Land Found. For Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd* 333 F.3d 156 (D.C. Cir. 2003); Benevolence Int'l Found., Inc. v. Ashcroft, 200 F. Supp. 2d 935 (N.D. Ill. 2002); *see also* Letter dated 2 September 2005 from the Chairman of the Security Council

alleged that the imposition of such sanctions constitutes a deprivation of the petitioners' liberty interests in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution. In each case, the federal courts (including two appellate-level courts) exercised jurisdiction over the challenges and disposed of them on the merits.

In *Global Relief Foundation, Inc. v. O'Neill*,⁹⁶ Global Relief Foundation (Global Relief), a non-profit corporation chartered in Illinois, challenged a blocking order issued by OFAC pursuant to E.O. 13,224, which froze all funds, accounts and business records in which Global Relief had an interest.⁹⁷ Global Relief argued, *inter alia*, that the blocking notice "violat[ed] its right to due process by temporarily blocking Global Relief from its property and business without any judicial oversight."⁹⁸ Specifically, Global Relief argued that it was deprived of its due process rights to notice and an opportunity to be heard pre-deprivation, and to sufficient post-deprivation notice and opportunity to be heard.⁹⁹

As regards pre-deprivation due process rights, the court explained:

The due process clause generally requires the government to afford notice and a meaningful opportunity to be heard before depriving a person of certain property interests. However, when exigent circumstances are present and the government demonstrates a pressing need for prompt action, the Supreme Court has long struck the procedural due process balance so as to dispense with the requirement for a pre-deprivation hearing.¹⁰⁰

The court then held that in the circumstances of the case before it, where "the exigencies of national security and foreign policy

Committee established pursuant to Resolution 1267 (1999) U.N. Doc. S/2005/572 (Sept. 9 2005) at 50-51; Letter dated 17 April 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the Chairman of the Committee U.N. Doc. S/AC.37/2003/(1455)/26 (Apr. 22, 2003) at 4.

96. *Global Relief Foundation, Inc. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002), *aff'd*, 315 F.3d 748 (7th Cir. 2002).

97. *Id.* at 786.

98. *Id.* at 803.

99. *Id.* at 788.

100. *Id.* at 803 (internal citations and quotations marks omitted).

considerations” are at issue and where “[p]re-deprivation notice would, in fact, be antithetical to the objectives of these sanctions programs,” the petitioner was unlikely to succeed in proving its claim that pre-deprivation notice and hearing were required by the Due Process Clause.¹⁰¹

As regards post-deprivation procedures, the court held that OFAC provides “a variety of post-blocking options which satisfied its due process obligations.”¹⁰² Specifically, the court recognized that the OFAC blocking notice informed Global Relief that it had the right to:

[P]resent evidence and/or argument to OFAC if it believed the blocking was made in error, including the right to make submissions by facsimile “to expedite” OFAC’s response. The notice also informed Global Relief of OFAC’s “licensing authority to help ameliorate the effects of the blocking” of Global Relief’s funds and accounts. Through the licensing authority, Global Relief could obtain funds to pay salaries, rent, utility payments, and attorneys fees. The notice also referred Global Relief to relevant agency regulations and provided it with an agency contact and phone number in case any questions arose.¹⁰³

Thus, the court held that the petitioner was unlikely to succeed in proving its claim that the post-deprivation procedures violated the Due Process Clause of the Fifth Amendment. Global Relief appealed this decision and the Court of Appeals for the Seventh Circuit affirmed, adopting precisely the analysis of the lower court.¹⁰⁴

Similarly, in *Holy Land Foundation For Relief & Development v. Ashcroft*,¹⁰⁵ Holy Land Foundation for Relief and Development (“HLF”), a non-profit corporation, asserted a Fifth Amendment challenge to a blocking order issued by OFAC pursuant to E.O.

101. *Id.* at 803-04.

102. *Id.* at 804.

103. *Id.* at 804-05 (noting that despite the availability of these mechanisms, Global Relief did not take advantage of them). It should be noted that these rights were not provided to Global Relief on an *ad hoc* basis, but rather are guaranteed by the OFAC regulations to all sanctioned individuals and entities. *See* 31 C.F.R. § 594.801.

104. *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002).

105. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff’d* 333 F.3d 156 (D.C. Cir. 2003).

13,224, which froze all of HLF's assets.¹⁰⁶ The court rejected this argument on the merits, undertaking a similar analysis to the decisions in *Global Relief Foundation* and holding that plaintiffs had failed to establish a violation of their due process rights.¹⁰⁷ Upon HLF's appeal, the Court of Appeals for the District of Columbia affirmed.¹⁰⁸

Finally, in *Islamic American Relief Agency v. Unidentified FBI Agents*,¹⁰⁹ a United States federal court again rejected a due process challenge to sanctions imposed by OFAC pursuant to E.O. 13,224 on the grounds that plaintiffs had failed to establish that the facts of the case constituted a violation of their due process rights.¹¹⁰

The significance of these decisions for the purposes of this article is that the American courts did not begin with "preliminary observations" concerning the relationship of international law and domestic law because the targeted sanctions were implemented pursuant to federal regulations that do not themselves explicitly rely on the 1267 resolutions, unlike the *Yusuf* decision. Rather, the American courts treated the relevant sanctions as any other Executive Branch action and proceeded to review the merits of the petitioners' due process challenges. Indeed, these decisions did not even recognize that the statutory authority for the OFAC regulations is ultimately traceable to the 1267 resolutions.¹¹¹

Although these decisions found the sanctions to be consistent with due process, they confirm that courts in the United States will strike

106. *Id.* at 62.

107. *Id.* at 76-77.

108. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003).

109. *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C. 2005).

110. *Id.* at 48-50.

111. One may respond that these courts did not address the rule of primacy and Article 25 of the Charter because no party raised that argument. To the extent that this is true, it is, in and of itself, revealing. The United States Government was the defendant in each of these cases. To the extent that Article 25 of the Charter is relevant, it constitutes a defense to the petitioners' challenges. Surely, the government lawyers were aware of the existence of Article 25. The fact that the government did not rely on that defense demonstrates the very point of this article: the United States does not believe that international law obligations are controlling in such circumstances (especially when such obligations may conflict with due process rights under domestic U.S. law).

down such sanctions in the appropriate factual circumstances. That the sanctions relate back to Chapter VII resolutions of the Security Council does not alter this analysis. Put otherwise, these decisions confirm that the United States prioritizes local due process concerns over its obligations under international law. In light of the breadth and open-endedness of the “war” on terror, it may only be a matter of time before a United States court invalidates the application of sanctions called for by the 1267 resolutions, rendering the United States in violation of its obligations under Article 25 of the Charter.

V. CAN THE 1267 SANCTIONS REGIME BE AMENDED TO AVOID THIS DILEMMA?

Much has been written on the need to improve targeted sanctions regimes—including the 1267 regime specifically—in order to better protect due process rights. Indeed, the Security Council has already adopted several such improvements, perhaps as a result of such writings.¹¹² The Office of Legal Affairs of the United Nations even commissioned a study into just this subject. This study, the Fassbender Report, recommends that targeted sanctions regimes be amended to include the following four procedural safeguards:

- (a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;
- (b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;
- (c) the right of such a person or entity of being advised and represented in his or her dealings with the Council;
- (d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.¹¹³

While safeguards (a) and (b) have been, to varying degrees, incorporated into the 1267 sanctions regime, safeguards (c) and (d) have not been explicitly provided for by the Security Council.

Similarly, the Watson Institute for International Studies at Brown University has published a report, the Watson Institute Report,

112. *See supra* Part II.C.

113. Fassbender Report, *supra* note 16, at 28.

containing several further recommendations for improved procedural protections not currently provided for in the 1267 resolutions. The Watson Institute Report recommends, *inter alia*, (a) establishing a biennial review of listings; (b) establishing a mechanism to guarantee the right of effective remedy and redress; and (c) developing a review mechanism under the authority of the Security Council for consideration of delisting requests.¹¹⁴

While the adoption of such recommendations would undoubtedly improve the due process protections within the 1267 sanctions regime, such improvements would only have a limited effect on the fundamental dilemma discussed in this article. Specifically, while improved procedural protections would make it less likely that any local court would ever find that the 1267 procedures violate local due process law, such amendments would not change the fact that courts in the United States (and likely elsewhere) would still scrutinize the imposition of sanctions traceable to Chapter VII decisions. Thus, such improvements would not close the door to the possibility of local courts rendering a Member State in violation of its Article 25 obligations. Nevertheless, they would greatly reduce the likelihood of such a scenario.

VI. CONCLUSION

Comparing how the courts of the European Communities and the United States resolve local law challenges to sanctions mandated by the 1267 resolutions provides a clear example of Kagan's description of the conflicting views of the international legal order held by Europe and America. While this article is not intended to definitively resolve why Europe and America have such conflicting views, by way of conclusion, it is nevertheless worthwhile to suggest that perhaps the underlying difference is the product of the adoption of monist-versus-dualist systems of law.

The monist-dualist distinction has been aptly described by Professor Curtis A. Bradley as follows:

The monist view is that international and domestic law are part of the same legal order, international law is automatically incorporated into each nation's legal system, and international law is supreme

114. WATSON INSTITUTE REPORT, *supra* note 13, at 42-45.

over domestic law. Monism thus requires, among other things, that domestic courts “give effect to international law, notwithstanding inconsistent domestic law, even domestic law of constitutional character.” By contrast, the dualist view is that international and domestic law are distinct, each nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law.¹¹⁵

The American legal system has adopted a dualist approach to international law.¹¹⁶ Thus, decisions of the Security Council under the Charter are incorporated into the American legal system only to the extent American law so provides. Here, the Fifth Amendment of the Constitution does not permit the incorporation of the 1267 resolutions into American law in a manner that violates due process rights. Thus, American courts readily scrutinize the application of targeted sanctions traceable to the 1267 resolutions under the Due Process Clause of the United States Constitution.

In the European legal system, on the other hand, a monist approach to international law has been adopted.¹¹⁷ Thus, the *Yusuf* court held that international law (embodied in Articles 25 and 103 of the Charter, and in the 1267 resolutions), is automatically incorporated into the European legal order, notwithstanding inconsistent provisions in the ECHR.

115. Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999) (quoting LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 64-67 (1995)).

116. Fred L. Morrison, *Characteristics of International Administration in Crisis Areas: A View from the United States of America*, 54 AM. J. COMP. L. 443, 448 (2006) (“The government and courts in the United States, like those in most common law systems, start from a dualist approach to issues of international law.”).

117. See Mattias Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called*, 54 AM. J. COMP. L. 505, 513-14 (2006) (“[T]he ECJ, since the 1960s has consistently held that in case of a conflict between European and national law Member States courts are under an obligation to set aside all national law, even national constitutional law.”). The *Yusuf* decision strongly indicates that European law is not only monist in its relationship to the national law of its Member States, but also in its relationship to international law more generally. See Case T-306/01, *Yusuf v. Council of the Eur. Union*, 2005 E.C.R. II-3533.

Regardless of whether the monist-dualist distinction adequately explains why European and American institutions implement and enforce the 1267 resolutions in fundamentally different ways, this case study is particularly interesting because here, the United States' failure to satisfy its obligations under Article 25 of the Charter results in a greater protection of the "human rights and fundamental freedoms" enshrined in the Charter, even in the context of the "war" on terror.

