Rights Discourse

Coordinator: Reza Banakar

"Terrorist lists" and procedural human rights: is there really a collision between UN law, EU law, and Strasbourg law?

Bill Bowring, Birkbeck College, University of London

Introduction

The designation of a person or an organisation as "terrorist" opens up a chasm in the rule of law, a space defined by the absence of the procedural rights which are not only fundamental human rights in themselves, but crucially provide the best protection against torture and other forms of arbitrary state conduct. This paper engages with a number of issues arising from international and national responses to what is described as the "war on terror", and draws on my own previous work.[1]

This space without rights was prefigured by none other than Carl Schmitt, as I show in my first section. Next, I suggest that the failure of the international community to work out an acceptable definition of "terrorism" is closely linked to the construction of the "terrorist" as an outlaw, a person outside the rule of law. Third, I outline the law of the UN and EU law with regard to the drawing up of "terrorist lists", and follow with the safeguards which the Council of Europe, and these bodies themselves, have endeavoured to put in place. There is case-law of the European Court of Justice and the European Court of Human Rights indicating that a person or group so designated loses these elementary rights, and I conclude this section with the recent decision of the House of Lords in *Al-Jedda*.

Fifth, I describe three case studies of the effect on groups and individuals of placement on "terrorist lists", and the very mixed results of legal action taken on their behalf. Sixth, there have more recently been decisions which appear to show signs of a retreat from this hard line, in particular the astonishing about-turn in relation to the Peoples Mujaheddin of Iran (PMOI). But my conclusion is far from optimistic.

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[1] Bowring, Bill and Korff, Douwe (2003) "Terrorist Designation with Regard to European and International Law: The Case of the PMOI" Joint Opinion at http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf; and Bowring, Bill (2007) "The human rights implications of international listing mechanisms for 'terrorist' organisations" background paper for OSCE/UN Expert Workshop on International Cooperation in Counter-terrorism, 15-17 November 2006 (Final report published February 2007), 75-114, at http://www.statewatch.org/terrorlists/OSCE-UN-feb-2007.pdf

Carl Schmitt, terrorism and the rule of law

I start with one of the later works of Carl Schmitt, his lectures delivered in 1962, and now published as *Theory of the Partisan*.[2] Unlike some of my colleagues, I do not wish to dissociate Schmitt from his role as the "crown jurist of the Third Reich" and his later trajectory until his death in 1985 as an advocate of the New Rights concept of an "integral Europe".[3] His interest to me is as follows. Schmitt distinguishes between the "telluric" partisan, who has a real but not an absolute enemy, for example Joan of Arc[4]; and the communist partisan.

As William Scheuerman points out, Schmitt's *Partisan* "occasionally appears to conflate partisan or guerrilla warfare with terrorism" – when what is needed is to distinguish them.[5] For Scheuerman, guerrilla fighters *refigure* the traditional distinction between combatants and non-combatants, while terrorism simply condones indiscriminate violence against innocent civilians. Thus, he points out that Mao Tse-Tung and Che Guevara sharply criticised terrorism. As he puts it: "In contrast to the potentially democratic or at least populist connotations of guerrilla warfare, terrorists *paternalistically* posit the existence of some (perhaps fictional) political entity which they hope to "awaken" or "unleash" by their acts of violence."[6] He recounts Schmitt's views on the impossibility of codifying the laws of war for irregular fighters, and concludes that "… the Bush administration's legal arguments about the status of accused terrorists mirrors crucial facets of Schmitt's logic."[7]

What Schmitt does, Scheuerman says, is to surrender the rule of law. Scheuerman takes the infamous 13 September 2003 report prepared by Major General Geoffrey Miller on the extension of Guantanamo interrogation techniques to Abu Ghraib.[8] In his view, Miller's justification "…eerily corroborates Schmitt's expectation that the dynamism of modern warfare potentially clashes with *any* attempt to develop a firm legal framework for the rules of war."[9]

In fact, international law recognises the legal right of peoples to self-determination; this applies especially to peoples resisting occupation and tyranny, and was recognised during the period

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[2] Schmitt, Carl (1975; 2007) *Theory of the Partisan. Intermediate Commentary on the Concept of the Political* New York: Telos Press
[3] See Müller, Jan-Werner (2003) *A Dangerous Mind: Carl Schmitt in Post-War European Thought* New Haven: Yale University Press, 207-9; the vision of an 'integral Europe' contains a belief in primordial, integral and homogenous ethnic groups.
[4] Schmitt (2007) 92
[5] Scheuerman, William (2006) "Carl Schmitt and the Road to Abu Ghraib" v.13 n.1 *Constellations* 108-124, 112
[6] Scheuerman (2006) 112
[7] Scheuerman (2006) 118
[8] Danner, Mark (2005) *Torture and Truth: Abu Ghraib and America in Iraq* London: Granta Books
[9] Scheuerman (2006) 121

from the 1960s until the end of the Cold War in the case of the National Liberation Movements. But under the proscription regimes adopted by the EU, UN, USA, UK and other states, armed struggle in self-defence has been criminalised as 'terrorism' and the solidarity of the so-called 'international community' lies increasingly with the oppressor. [10]

What is at stake in this paper is whether the "war on terror" inexorably institutes a norm-free zone; that is, the exclusion of one of the most fundamental human rights (indeed, civil liberties) – the procedural rights of due process.

The absence of a definition of "terrorism"

It cannot be disputed that the international community has failed to draw up an acceptable definition of "terrorism". I strongly suspect that this is because it adds nothing to the identification of a particular action as a serious crime, save to express especially strong condemnation.

Definitions in national legislation are notorious for spreading the net far too wide. John Dugard, the author of a seminal essay on the problems of the definition of terrorism[11], hit the nail on the head in his Rhodes University Centenary Lecture delivered in 2004[12]. He pointed to the two UN Security Council resolutions adopted after 9/11, resolution 1368 (of 12 September 2001) and resolution 1373 (of 28 September 2001). These condemned terrorism in the strongest terms and directed States to act against it, but made no attempt to define it. He continued:

> Terrorism for the Security Council is what obscenity was for the American judge who remarked that he knew obscenity when he saw it! The danger of this approach is that it gives each State a wide discretion to define terrorism for itself, as it sees fit. It encourages States to define terrorism widely, to settle political scores by treating their political opponents as terrorists. It is a licence for oppression.

He went on to draw a chilling parallel with the European Union's response, Council Framework Decision of 13 June 2002, which potentially includes protest action:

> Of course, we in South Africa have experienced this before. Remember the Terrorism Act of 1967 which defined terrorism as any act, committed with the intent to endanger the maintenance of law and order? Such an intention was presumed if the act was likely to encourage hostility between whites and blacks or to embarrass the administration of the affairs of the State!....

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[10] See Bowring, Bill (2008) Chapter 1 "Self-determination – the revolutionary kernel of international law" in *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* Abingdon: Routledge Cavendish, 9-38

[11] Dugard, John (1974) "International terrorism: Problems of Definition" v.50 n.1 *International Affairs* pp.67-81

[12] Text at http://www.ru.ac.za/centenary/lectures/johndugardlecture.doc

Martin Scheinin, the UN's Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, made a similar point in his report for 2005, published in 2006[13]:

> "Of particular concern to the Special Rapporteur's mandate is that repeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights.
>
> Calls by the international community to combat terrorism, without defining the term, can be understood as leaving it to individual States to define what is meant by the term. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term.

He continued by pointing out the risk that the international community's use of the notion of "terrorism", without defining the term, may result in the unintentional international legitimization of conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against "terrorism" however defined.

These authoritative warnings have been heeded – at least in words.

UN and Council of Europe safeguards for due process

Colin Warbrick has urged that:

> "… the insistence on the application and observance of international legal standards on human rights, even if they must be modified in extremis, should be an essential feature of any response to terrorism, even a war against terrorism, which is waged to protect the rule of law." [14]

It can be said that the UN and Council of Europe have sought to encourage such a response. Thus, on 27 April 2006, the United Nations Secretary General launched "Uniting against terrorism: recommendations for a global counter-terrorism strategy"[15]. This included the following:

> 118. Upholding and defending human rights — not only of those suspected of terrorism, but also of those victimized by terrorism and those affected by the consequences of terrorism — is essential to all components of an effective counterterrorism strategy. Only by honouring and strengthening the human rights of all can the international community succeed in its efforts to fight this scourge.

Also in 2006, Bardo Fassbender was commissioned by the United Nations to prepare a study as part of this strategy. He proposed the following:[16]

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[13] Scheinin, Martin (2006) "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism" UN Doc: E/CN.4/2006/98, 28 December 2005

[14] Warbrick, Colin (2004) "The European Response to Terrorism in an Age of Human Rights" v.15 n.5 *European Journal of Human Rights* pp.989-1018, at 989

[15] www.un.org/unitingagainstterrorism/contents.htm

[16] Fassbender, Bardo (2006) "Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter." Report for CAHDI (Committee of Legal Advisers on Public International Law) Doc. CAHDI (2006) 23, 17 August 2006, commissioned by the UN Office of Legal Affairs – Office of the Legal Counsel, 20 March 2006, at www.un.org/law/counsel/Fassbender_study.pdf

> "Every measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve."
>
> (p.8) "12. While the circumstances and modalities of particular sanctions regimes may require certain adjustments or exceptions, the rights of due process, or "fair and clear procedures", to be guaranteed by the Security Council in the case of sanctions imposed on individuals and "entities" under Chapter VII of the UN Charter should include the following elements:
>
> (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."

On 30 November 2005 the European Council adopted the "European Counter-Terrorism Strategy".[17] This sets out the EU's strategic commitment to combat terrorism globally while respecting human rights. The four 'pillars' of the EU's Counter Terrorism Strategy are: "Prevent, Protect, Pursue, Respond." The Strategic Commitment is "To combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice."

Furthermore, these requirements were clearly and expressly reflected in the Council of Europe's 2002 *Guidelines of the Committee of Ministers on Human Rights and the Fight Against Terrorism*[18]. First of all, in line with the remark of the Court that safeguarding national security concerns need not involve a denial of justice, the Committee of Ministers:

> "[recalls] that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;" and
>
> "[reaffirms] states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms [i.e. the ECHR] and the case-law of the European Court of Human Rights"

More specifically, the Guidelines stipulate basic principles:

> **Prohibition of arbitrariness**
>
> All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.
>
> **Lawfulness of anti-terrorist measures**
>
> 1. All measures taken by states to combat terrorism must be lawful.
>
> 2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.
>
> **Right to property**

[17] http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf
[18] Appendix 3 to the Decisions of the Committee of Ministers, adopted at their 804th meeting on 11 July 2002, CM/Del/Dec(2002)804 of 15 July 2002, https://wcm.coe.int/ViewDoc.jsp?id=296009&Lang=en.

> The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.

These principles clearly echo the Convention and the case-law of the ECtHR in relation both to the substantive articles (Arts. 10 and 11 of the Convention and Art. 1 of the First Protocol) and the articles requiring procedural protection (Art. 6 and 13 of the Convention), discussed above.

In particular, they recall the requirements relating to "law" which seek to counter arbitrariness, and those requiring that all restrictions on fundamental rights are "necessary" and "proportionate" to a clearly-defined "legitimate aim". They also expressly affirm that it must be possible to challenge "freezing" before a court.

The UN and the EU have marched in a quite opposite direction.

The powers of the UN Security Council

The events giving rise to the present UN anti-terror mechanisms are well-known. On Aug. 7, 1998, the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were bombed by terrorists, leaving 258 people dead and more than 5,000 injured. In response, the U.S. launched cruise missiles on Aug. 20, 1998, striking a terrorism training complex in Afghanistan and destroying a pharmaceutical manufacturing facility in Khartoum, Sudan, that reportedly produced nerve gas. Both targets were believed to have been financed by wealthy Islamic radical Osama bin Laden, who was allegedly behind the embassy bombings as well as an international terrorism network targeting the United States.[19] Acting under Chapter VII of the UN Charter, which gives it mandatory powers, the Security Council in UNSC Resolution 1267(1999) of 15 October 1999 ordered states to:

> "freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban… as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available… except as may be authorised by the Committee on a case-by-case basis on the ground of humanitarian need."

Within days of "9/11" the UNSC adopted Resolution 1373 (Terrorism) which continues to be the focus of action by governments around the world against Al-Qa'ida financing. This Resolution makes the connection between terrorism and organised crime, drug trafficking, arms trafficking and the illegal movement of weapons of mass destruction.

[19] See http://www.infoplecase.com/spot/newsfacts-sudanstrikes.html

The Security Council has established a "Sanctions Committee" of all its members which has drawn up "terrorist lists" of organisations and individuals who are to be subjected to "asset freezing".

Some scholars have expressed grave reservations as to whether, in adopting such resolutions under Chapter VII, the UN Security Council is engaging in unwarranted legislation. This is particularly the case with 1373. Clémentine Olivier commented:

> Allowing the Security Council to enjoy legislative power and modify States' obligations under international human rights law would not only be legally incorrect; it would also, from a political perspective, be unwise.[20]

In the view of Matthew Happold[21], by laying down a series of general and abstract rules binding on all UN member states, the UNSC in Resolution 1373, purported to legislate.[22] In doing so it acted *ultra vires* the UN Charter. He recognised that Security Council Resolutions are generally seen as being legal, at least prima facie.[23] For him, the real issue was whether the Resolution will serve as a precedent for future Security Council legislation.[24]

He also noted that Resolution 1373 differed from all previous Security Council decisions in Chapter VII, in that "the threat to the peace is identified is not any specific situation but rather a form of behaviour, 'terrorist acts'. Indeed, it is a form of behaviour that the resolution leaves undefined."[25]

EU powers

The EU has in each case acted swiftly to put in place mandatory requirements to enforce the Security Council's measures. Thus, it has adopted "Common Positions" under Article 15 of the Treaty establishing the European Union. If the Common Position calls for Community action implementing some or all of the restrictive measures, the Commission will present a proposal for a Council Regulation to Council in accordance with Articles 60 and 301 of the Treaty establishing the European Community. It should be recalled that it is the member states acting in the Council that are ultimately responsible for deciding who is the included in the EU "terrorist

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[20] Olivier, Clémentine (2004) "Human Rights Law and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373)" v.73 Nordic Journal of International Law pp.399-419, p.419
[21] Happold, Matthew (2003) "Security Council Resolution 1373 and the Constitution of the United Nations" 16 *Leiden Journal of International Law* pp.593-610
[22] See also Szasz, Paul (2002) "The Security Council Starts Legislating" 96 *American Journal of International Law* 901
[23] See *Certain Expenses of the United Nations* (Advisory Opinion), [1962] ICJ Rep. 151, at 168
[24] Happold, ibid, p.609
[25] Happold, ibid, p.598

list", acting under the EU's Common Foreign and Security Policy. This is of course the context of unjust and arbitrary decision-making.

It is no surprise that Al-Qua'ida is on the list, as is the PKK – although the PKK has recently had some considerable success in its legal fight for removal from the list. But a number of individuals also find themselves there.

Three questions arise. How did they get onto the list? What effects will it have on them? And how can they possibly get themselves removed? From the point of view of human rights and fundamental freedoms, the assessment by the international and national authorities of the need for an interference with a property right must be subject to procedural guarantees: there must be an avenue of appeal from the decision of a national authority to interfere with that right. Ben Hayes and Tony Bunyan of "Statewatch" have created a splendid web resource, containing details on all the cases under consideration.[26]

The judges nullify the right to procedural guarantees

There have been a number of judicial decisions which appear to nullify the right to procedural guarantees. The problem is as follows: Article 103 of the Charter provides that obligations under the Charter prevail over obligations under any other international agreement. There is no argument that resolutions and decisions of the Security Council are obligations under the Charter. Does this mean that a Security Council resolution can have the effect of "trumping" treaty obligations under human rights treaties?

In a paper for the *European Society of International Law*[27], Noel Birkhäuser raised the following point:

> "A more central question is whether the right to a fair trial and access to court prevails over Article 103 UNC. Affected individuals who are unable to challenge Security Council action against them, cannot assert the violation of other human rights. It is therefore essential for them to be able to obtain some kind of effective review of their situation. Since the Security Council action excludes all forms of challenging its measures before some form of independent tribunal that satisfies the standards of the ECHR and the ICCPR, 'the very essence of the right of access to court is impaired'. Even though Article 14 of the ICCPR is not included in the list of nonderogable rights of Article 4 paragraph 2 of the ICCPR, its core must remain untouchable even to the Security Council. Judicial guarantees relating to due process can even be counted to the *jus cogens*."

[26] Statewatch *'Terrorist' Lists: Monitoring proscription, designation and asset-freezing* http://www.statewatch.org/terrorlists/terrorlists.html

[27] Birkhäuser, Noah (2005) "Sanctions of the Security Council Against Individuals – Some Human Rights Problems" *European Society of International Law* at http://www.esil-sedi.org/english/pdf/Birkhauser.PDF

This is not the position of the courts. On 21 September 2005 the Court of First Instance of the EU's European Court of Justice decided the first two cases on "acts adopted in the fight against terrorism", *Yusuf* and *Kadi*.[28].

The cases concerned UN resolutions aimed at Al-Quaeda, Taliban etc, under which all member states are called on to freeze funds and other financial resources. The UN Sanctions Committee had the task of identifying the persons concerned and of considering requests for exemption. The judgments established a so-called "rule of paramountcy", derived from Article 103 of the UN Charter:

> "According to international law, the obligations of Member States of the UN under the Charter of the UN prevail over any other obligation, including their obligations under the ECHR and under the EC Treaty. This paramountcy extends to decisions of the Security Council."

The CFI drew a distinction between *jus cogens* rights, for example the right not to be tortured or subjected to inhuman or degrading treatment, and other human rights, for example procedural rights, or other fundamental rights. However they held that it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order.

This rule of paramountcy also, it was held, overrides the whole of the jurisprudence of the European Court of Human Rights on procedural guarantees where property rights are concerned. There is no doubt that "freezing orders" affect the property rights, and thus the civil rights, of the blacklisted organisations or individuals concerned. The Strasbourg cases show clearly that they must be able to challenge such orders in proper courts, in full and fair judicial proceedings in which the relevant matters can be argued in substance. Specifically, the courts must be regular courts, and the judges regular, independent and impartial judges; and the procedure must ensure "equality of arms" to the parties.

Both applicants have appealed to the ECJ. On 13 January 2008 the Advocate General delivered a devastating opinion in *Kadi*.[29] Miguel Poiares Maduro argued that the EU Court of First Instance was wrong to dismiss Kadi's appeal on the grounds that the EU Courts lack jurisdiction over political decisions taken by the EU. On the contrary, he argued, because there is no mechanism for judicial review of the UN decisions, the EU must subject the sanctions regime to proper judicial review. He concluded that the EC Regulations implementing the UN sanctions

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[28] Ahmed *Ali Yusuf and Al Barakaat International Foundation*, and *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (ECJ Court of First Instance, Case T-306/01 and Case T-315/01)

[29] http://www.statewatch.org/news/2008/jan/ecj-kadi-ag-opinion.pdf

regime do infringe Mr. Kadi's right to property and a fair trial/judicial review and should therefore be annulled. He suggests that rather than referring the matter back to the Court of First Instance, the European Court of Justice should give final judgment on these questions. The Opinion will now be considered by the Court of Justice in advance of their ruling.

On 23 January 2008 the Advocate-General delivered a similar Opinion in the *Al Barakaat* appeal, following the same reasoning as *Kadi* . In his view, the Court of First Instance was wrong to dismiss the initial appeal on grounds of limited jurisdiction. Al Barakaat's rights to property and a fair trial/judicial review have been breached. The EC regulations implementing the UN decisions re Al Barakaat should be annulled.[30]

These appeals are still pending.

The case of Al-Jeddah – the English courts confront UN and EU law

Hilal al-Jeddah has British and Iraqi nationality. In 2004 he was in Baghdad in order to obtain British visas for his two wives and to introduce his four British children by a former wife to their Iraqi relatives. The British military forces suspected him of involvement in terrorism (which he denies). On 10 October 2004, he was arrested and taken to a detention centre run by the British Forces in Basra. He has been held in administrative detention without trial for the past three years.[31]

On 29 March 2006[32] the Court of Appeal followed the ECJ in holding that a UN Security Council Resolution, in this case UNSCR 1546 (2004) of 8 June 2004, purporting both to end the occupation and to permit internment, trumped all human rights except *jus cogens*. The Court summarised the effect of the *Yusuf* and *Kadi* cases as follows:

> "… the court held (at paras 213-226) that the obligations of the members of the European Union to enforce sanctions required by a Chapter VII UN Security Council resolution prevailed over fundamental rights as protected by the Community legal order or by the principles of that legal order. The court also held that it had no jurisdiction to inquire into the lawfulness of a Security Council resolution other than to check, indirectly, whether it infringed *ius cogens*, "understood 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… [restricted to] aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination."

Lord Justice Brooke concluded with a chilling Addendum:

> 111 As an addendum to this judgment it is worth noting that in the last great emergency imperilling this nation's legislation was enacted to confer powers of internment similar to those that are in issue in the present case. Section 1 of the Emergency Powers (Defence) Act 1939 created the rule-making power and

[30] *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda)* v *Secretary of State for Defence* http://www.statewatch.org/terrorlists/docs/ECJalbarakaatopinion.pdf
[31] Pannick, David "In Basra as in Basildon – subject to the rule of law" *The Times* 30 October 2007, at http://business.timesonline.co.uk/tol/business/law/columnists/david_pannick/article2763567.ece
[32] C1/2005/2251, [2006] EWCA CIV 327

> Regulation 18B(1) of the Defence (General) Regulations 1939, whose terms are set out in a footnote in *Liversidge v Anderson* [1942] AC 206, 207, created the power of detention. Lord Denning describes in The Family Story (Butterworths, 1981) at pp 129-130 how that power was exercised in practice in 1940 and 1941 when in the persona of Alfred Denning QC he was the legal adviser to the regional commissioner for the North-East Region:
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> > "Most of my work in Leeds was to detain people under Regulation 18B. We detained people, without trial, on suspicion that they were a danger. The military authorities used to receive -- or collect -- information about any person who was suspected: and lay it before me. If it was proper for investigation I used to see the person -- and ask him questions -- so as to judge for myself if the suspicion was justified. He could not be represented by lawyers."
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> 112 The equivalent arrangements, for the purposes of the emergency in Iraq, are described by General Rollo in his witness statement. Apart from the technical matters which the Divisional Court put right there is no challenge to the appropriateness of the procedures adopted for internment in accordance with the Security Council's mandate. The issue is rather that Mr Al-Jedda should be permitted access to a court of law where he could answer a charge against him and test the evidence against him before an independent judicial tribunal. I am satisfied that he has no such entitlement."

On 12 December 2007, the House of Lords unanimously dismissed Al-Jeddah's appeal. There is however a silver lining, and he may win in the end.[33]

As noted by Lord Rodger, the House of Lords 'found itself deep inside the realm of international law'.[34] It was obliged to decide whether or not the procedural right under Article 5 of the ECHR had been displaced by the provisions of the United Nations Charter and associated Security Council Resolutions. Their Lordships were unanimous that the United Nations Charter took priority in this instance. Lord Bingham stated:

> 39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense.

Whilst in agreement, Baroness Hale noted that 'the right is qualified but not displaced … the right is qualified only to the extent required or authorised by the resolution', at para. 126.

However, the House of Lords rejected the UK Government's argument that it bears no legal responsibility for the acts of British soldiers in Iraq. The Government had argued that since the UN had sanctioned the multinational force in Iraq by resolution 1511 (October 2003), any legal responsibility for the acts of British soldiers in Iraq lay with the UN not the UK. By a majority decision the House of Lords (4/1) rejected that argument and held the UK fully to account for all the acts of its troops abroad. The House of Lords also held that the UK could lawfully intern

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[33] http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf

[34] Harrison, James "House of Lords decides on detention without trial by UK forces in Iraq" 13 December 2007, at http://internationallawobserver.eu/2007/12/13/house-of-lords-decides-on-detention-without-trial-by-uk-forces-in-iraq/

suspected terrorists in Iraq on the authority of UN Security Council resolution 1546 (June 2004), but only if they complied with all the other requirements of due process.

A more divisive issue was whether the United Kingdom was responsible for the actions of its troops in Iraq or whether the actions of the multinational force were instead attributable to the United Nations. In this regard, their Lordships paid close attention to the decisions of the European Court of Human Rights in the cases of *Behrami v France and Saramati v France, Germany and Norway* [35], which concerned actions of NATO forces in Kosovo. The Government argued that neither the European Court of Human Rights nor the House of Lords had jurisdiction to review the question of the legality of Mr Al-Jeddah's detention, which was a matter for the UN alone. The Lords rejected that argument, distinguishing the position in Kosovo. It held that the Government's analysis was flawed bearing in mind that the US and the UK had occupied the field from the outset in Iraq with the UN playing a secondary role. Keir Starmer QC said[36]:

> "This is a crucial ruling. The idea that the UN was in control of British troops in Iraq as the Government argued is absurd. The decision to invade was made by the US and the UK, and they set up the administration in Iraq. Had the Government succeeded in its arguments, there would be no accountability for human rights abuses in Iraq. What happened in British detention facilities in Iraq needs to be explained by the troops that were there, not off-loaded to the UN."

Thus whether or not Mr Al-Jedda can continue to be held without trial depends now on a further hearing to take place in the High Court early in 2008. [37] In that hearing lawyers for Mr Al-Jedda will challenge the intelligence that forms the basis of the decision of the UK Government that he continues to pose such a threat to peace and security in Iraq that it is absolutely necessary that he be detained there, rather than brought back to the UK and dealt with here.

The Home Secretary now seeks to revoke his British citizenship, without permitting his solicitors proper time to make representations on his behalf. However on 7 December 2007 Mr Al-Jedda's lawyers made an urgent application for judicial review to challenge this potential decision and the court said that it would be "in each party's interests to allow time for representations".

Lastly, in late August 2007 Mr Al-Jedda's lawyers in a different action obtained an order from the Court of Appeal that Mr Al-Jedda could not be released or transferred from the jurisdiction of the UK Government without proper written notice to his lawyers. This would allow time for

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[35] Application Nos 71412/10 and 78166/01, decision on admissibility of 2 May 2007; see Sari, Auren (2008) "Jurisdiction and International responsibility in Peace Support operations: The *Behrami* and *Saramati* Cases v.8 n.1 *Human Rights Law Review* 151-170

[36] http://www.doughtystreet.co.uk/news/news_detail.cfm?iNewsID=233

[37] http://www.cageprisoners.com/print.php?id=22723

an urgent application to protect him from the risk of torture if he is handed over to the Iraqi authorities, or otherwise released such that there is a significant risk that he will be arrested and handed over to the Iraqi authorities.

Three case studies

1) The case of Professor Sison

This is a particularly striking case of inclusion in the list, and asset-freezing, with respect to an individual. Jose Maria Sison, Founding Chairman of the Communist Party of the Philippines and currently Chief Political Consultant of the National Democratic Front of the Philippines, has since 1987 resided in the Netherlands where he is seeking asylum as a political refugee. He was placed on "terrorist lists" by the USA, by the Netherlands Government, and finally by the European Union.[38] On 12 December 2002, the Council adopted the decision 2002/974/EC repealing the previous decision 2002/848/EC. The new decision mentioned Sison under art. 1, 1.25 and 2.19 in identical terms as the previous decision.

On 6 February 2003 he applied to the CFI for the following remedy:

> "Partial Annulment in regard to the inclusion of Professor Jose Maria Sison of Council Decision of 12 December 2002 (2002/974/EC) implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/848/EC (OJ of the European Communities, n° L 337 of 13/12/2002, p.85 and 86)".[39]

His application listed the following consequences for him of inclusion in the list:

> the loss of free disposition and a total dispossession of all the financial assets of the applicant. He can no longer make the least use of his assets.
>
> excluding him from all bank- and financial services deprives him from the possibility to obtain effective compensation for the violation of his basic human rights by the Marcos-regime as granted to him by a US court as well as from the possibility to benefit from an income from lectures and publishing books and articles and from possible regular employment as a teacher
>
> The freezing of his joint bank account with his wife and the termination of social benefits from the Dutch state agencies deprive him of basic necessities and violate his basic human right to life.

On 11 July 2007 the Court of First Instance decided to annul the EU Council Decision to place Sison on the EU list of 'terrorists' for the purposes of asset-freezing. The Court held (para 226):

> In conclusion, the Court finds that no statement of reasons has been given for the contested decision and that the latter was adopted in the course of a procedure during which the applicant's rights of the defence

[38] See http://www.defendsison.be/index.php?menu=1
[39] The text of his application is to be found at: http://www.defendsison.be/pdf/ApplicationSison.pdf

> were not observed. What is more, the Court is not, even at this stage of the procedure, in a position to undertake the judicial review of the lawfulness of that decision in light of the other pleas in law, grounds of challenge and substantive arguments invoked in support of the application for annulment. [40]

However, the Court also refused his claim for compensation.

The Dutch state moved swiftly following this defeat. On 28 August 2007 Sison was arrested on suspicion of terrorist offences committed in The Netherlands. He was only released on 13 September 2007, after the Dutch court ordered his immediate release saying there was insufficient evidence to hold him on murder charges. The evidence was insufficient to show that Sison "had a conscious and close cooperation with those in the Philippines who carried out the deed."[41] He is now awaiting trial. Finally, on 23 October 2007, in a case brought by the European Parliament, the European Court of Justice finally struck down the European Commission's decision to grant anti-terrorism assistance to the Philippines government.[42]

Dick Marty, the Council of Europe's Rapporteur on UN Security Council and European Union blacklists commented on 12 November 2007 that despite these recent judgments beginning to acknowledge the violations of fundamental fair trial rights in the current de-listing and review procedures, no court has yet addressed the unlawfulness of the underlying UNSC resolutions and EU regulations. As a result, the UNSC and the Council have little impetus to alter their procedures.[43]

2) The SEGI cases

The fundamental right to judicial review, the procedural right referred to above, was considered by both the CFI in 2004[44], and by the European Court of Human Rights in 2002[45], in the *SEGI* case. SEGI was a Basque youth movement, which requested the CFI to award damages for its allegedly illegitimate inclusion in the list annexed to Common Position 2001/931/CFSP, noted above, which implemented UNSC Resolution 1373 (2001).

The Common Position in Article 1 it provided for a definition of the term "terrorist act", applicable across all three pillars. It initiated concrete measures by the Community under the first pillar, such as the freezing of funds (Articles 2,3). Under the third pillar, it called upon

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[40] http://www.statewatch.org/news/2007/jul/eu-ecj-sison-judgment.pdf
[41] http://www.live-pr.com/en/dutch-court-orders-release-of-philippine-r1048144631.htm
[42] http://www.statewatch.org/terrorlists/ECJ-C403-05.pdf
[43] PACE Committee on Legal Affairs and Human Rights, Provisional draft report on UN Security Council and European Union blacklists, at http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=717
[44] T-338/02 *Segi and others v Council*, order of 7 June 2004, [2004] ECR II-01647
[45] *SEGI and others v 15 Member States (SEGI and Gestoras Pro-Amnistia v Germany and others)* App No. 6422/02, decision of inadmissibility of 23 May 2002

Member States to exchange information (Article 4). Its Annex set out a list of persons to whom the measures applied, including SEGI. A footnote to the list specified that SEGI, among others, should be the subject of Article 4 only. Article 4 was addressed to Member States and called upon them to assist each other through police and judicial cooperation. Thus, Articles 2 and 3 did not apply to SEGI, and the Community was not required to freeze its funds.

The Second Chamber of the CFI rejected SEGI's action on competence grounds only, and did not consider the substance of its grievances. In brief, it had no remedy because it had not been made subject to a Community measure, that is, asset freezing. As Christina Eckes comments:

> "SEGI was left without any legal protection… the… case demonstrates forcefully that being listed as someone supporting terrorism will not in itself open the way to the Courts."[46]

She disagrees strongly with the Court's rejection of the argument that the rule of law and fundamental rights, in particular the rights to access to justice enshrined in articles 6 and 13 of the ECHR, require the exercise of judicial control – "even in the absence of a specific competence norm".[47] She points out that "A listing in an anti-terrorist measure constitutes a considerable impairment of the target's right to reputation[48], as well as her property rights."[49]

The European Court of Human Rights also refused to consider the substance of the applications, but dealt with them on the issue of standing. It stated

> Moreover, the applicants have not adduced any evidence to show that any particular measures have been taken against them pursuant to Common Position 2001/931/CFSP. The mere fact that the names of two of the applicants (Segi and Gestoras Pro-Amnistía) appear in the list referred to in that provision as "groups or entities involved in terrorist acts" may be embarrassing, but the link is much too tenuous to justify application of the Convention.[50]

Eckes comments that "the Court's conclusions that the listing "*peut être gênant*" amounts to an ironic comment in the light of its effects on the situation, or even the existence, of the applicants."[51] She concludes:

> "The CFI… did not satisfy the fundamental principles upon which the Union is built and which the Courts have upheld in the past. This is deplorable. It not only infringes fundamental rights in the individual case, but it also harms the objective of promoting fundamental rights as such. Additionally, the doubtful factual basis on which the European blacklists are drawn up and the fact that the ECtHR did not show itself ready to grant protection of last resort, render the situation even more alarming."[52]

In its latest decision, on 27 February 2007, the Grand Chamber of the ECJ dismissed, with costs, the appeal of *SEGI* and the Basque human rights organisation "Gestoras Pro Amnistia" against

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[46] Eckes, Christine (2006) "How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of *Segi*" v.17 n.1 *Kings College Law Journal* pp.144-154
[47] Eckes, ibid, p.148
[48] As in *Bladet Tromso and Stensaas v Norway* Application no. 21980/93, judgment of 20 May 1999
[49] Eckes, ibid, p.149
[50] decision of inadmissibility of 23 May 2002, p.9
[51] Eckes, ibid, p.152
[52] Eckes, ibid, p.154

the dismissal by the CFO of its claim for damages suffered as a result of inclusion in the "terrorist list". Once again the UK intervened, with Spain, on behalf of the Council – the only other EU state to do so.[53]

3) The UK's "financial Guantanamo"

The UK also sought to implement the UN Security Council resolutions 1373/2001 and 1452/2002 through Orders in Council made under the United Nations Act 1946. These were the Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006, designed to strengthen domestic controls on the financing of terrorism and to comply with the British Government's international obligations to enforce UN Resolutions requiring such controls. They were not scrutinised, debated or approved by Parliament.

These orders were challenged by five British citizens who were designated under the Orders, and, as a result, had their assets frozen, were only allowed to access enough money to meet basic expenses, and were compelled to account to a civil servant for every penny they spent. They were subject to unprecedented levels of intrusion and control. They required permission for all economic activity, however modest. The complex regime governed by permissions and licences was not merely harsh but at points absurd. Their solicitors pointed to "the madness of civil servants checking Tesco receipts, a child having to ask for a receipt every time it does a chore by running to the shops for a pint of milk and a neighbour possibly committing a criminal offence by lending a lawnmower."[54]

On 24 April 2008 Mr Justice Collins delivered judgment on their applications. He was clearly concerned at the need to obtain licences for all kinds of activities, and pointed, at para 42, to the fact that those in the Treasury who have to deal with those matters have had to consider whether licences should be granted on more than 50 occasions.

> A specific query arose, and it is a good illustration of the absurdity which can result, in relation to the loan of a car to an applicant to enable him to go to the supermarket to get the family's groceries. After some delay, the Treasury (in my view wrongly) decided that a licence was needed. The car was an economic resource and could be used to obtain or deliver goods or services. This was only resolved by the Treasury after seeking ministerial consideration. Similar concerns have been raised in relation to an Oyster card to enable the applicant to travel and any borrowing of items for any purpose. Since the possible penalty on conviction is severe, the concerns are understandable and the effect on the applicant and his family, whose human rights are also in issue, is serious.

[53] Case C-354/04 P, http://www.statewatch.org/news/2007/mar/ecj-feb.pdf; see http://www.libertysecurity.org/article1386.html
[54] http://www.statewatch.org/terrorlists/docs/A-K-M-Q-G-press-release.pdf

However, following the CFI cases noted above, and *Al-Jeddah*, he made the following finding:

> Governments may have their own reasons to want to ensure that [an applicant] remains on the list and there is no procedure which enables him to know the case he has to meet so that he can make meaningful representations. Nevertheless, that is what the Security Council has approved and the Resolution, which Member States are obliged to put into effect, requires the freezing of the assets of those listed. Article 103 of the Charter makes clear that the obligations under the Charter take precedence over any other international agreements. Thus human rights under the ECHR cannot prevail over the obligations set out in the Resolutions.

He did however quash both Orders on the ground that they had not been considered by Parliament.[55] Nevertheless, although he expressed sympathy for the Advocate General's opinion in the *Yusuf* and *Kadi* and other appeals, he found himself unable to follow that lead. The Government will be able to lay the same or similar measures before Parliament.

The PKK and PMOI

There has recently been another positive – though limited - development. On 12 December 2006 the CFI ruled in favour of an appeal by the People's Mujahedeen of Iran (PMOI) against asset-freezing as a result of their inclusion in the EU "terrorist list".[56] The Court's ruling represented the first successful legal challenge, but left undisturbed the EU legislation on "terrorist lists". The ruling was limited to the decision to freeze the PMOI's assets, rather than the broader issue of its designation as "terrorist". The Court made a further distinction between organisations proscribed by the EU member states, and organisations proscribed the UN Security Council. Further challenges by some of these are on the way.

It is significant that PMOI was originally listed as a terrorist organisation by the UK under the Terrorism Act 2000. Accordingly, the UK supported the European Council in opposing PMOI's appeal. The CFI's judgment contains an extraordinary rebuke to the Council and the UK.

> 170 … it is not possible simply to accept the United Kingdom's position at face value. At the hearing, moreover, the applicant reiterated its position that it did not know which competent authority had adopted the national decision in respect of it, nor on the basis of what material and specific information that decision had been taken.
> 171 Furthermore, at the hearing, **in response to the questions put by the Court, the Council and the United Kingdom were not even able to give a coherent answer to the question of what was the national decision on the basis of which the contested decision was adopted**. According to the Council, it was only the Home Secretary's decision, as confirmed by the POAC (see paragraph 169 above). According to the United Kingdom, the contested decision is based not only on that decision, but also on other national decisions, not otherwise specified, adopted by competent authorities in other Member States. (My emphasis, BB)

In its statement made on the day of the ruling, the Council gave the following rather vague assurance:

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[55] See Ben Hayes "Britain's Financial Guantanamo" at http://www.statewatch.org/news/2008/apr/04financial-guantanamo.htm
[56] Case T-228/02, http://www.statewatch.org/terrorlists/docs/CFI-PMOI-judgment.pdf

> The Council intends to provide a statement of reasons to each person and entity subject to the asset freeze, wherever that is feasible, and to establish a clearer and more transparent procedure for allowing listed persons and entities to request that their case be re-considered.

It remains very unclear how exactly how this promise will be put into effect.

On 4 April 2008 the CFI quashed decisions by the EU Council to include the Kurdish organisations PKK and Kongra Gel on the EU "terrorist list". In Case T-253/04[57] bought on behalf of Kongra Gel and 10 other individuals, the EU court ruled that the organisation was not in a position "to understand, clearly and unequivocally, the reasoning" that led the member states' governments to include them. It reached the same conclusion in Case T-229/02[58], bought by Osman Ocalan on behalf of Kurdistan Workers Party (PKK).

These judgments followed the ruling in favour of Sison in July 2007, and the precedent set in the PMOI ruling in December 2006. [59] In response to the PMOI ruling, the EU "reformed" its procedures for listing and de-listing. Whereas prior to the PMOI judgment no mechanism existed for those proscribed to either receive an explanation for their inclusion or to challenge that explanation, the EU now provides affected parties with a "statement of reasons". In turn, those parties may then write back to the secret EU group responsible for the decision to contest the statement and request de-listing.

In fact, the EU has maintained in the "terrorist list" those groups and individuals who have already successfully challenged their proscription at the EU Courts on the grounds that its "reforms" remedy the fair trial breaches that the Court has identified. This issue will not be resolved until the PMOI's new challenge to the EU's decision to maintain them in the list (case T-157/07[60]) returns to the Court, which may take several years.

However, the UK government suffered a dramatic reversal in the UK courts.

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[57] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=t-253/04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

[58] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=t-229/02&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

[59] In this case the Court found that the EU's proscription regime had denied the PMOI the right to a fair hearing in which it could challenge its designation as "terrorist" in accordance with its fundamental right to a fair trial (see: analysis of PMOI judgment). This paved the way for other proscribed groups and individuals to challenge their inclusion in the list.

[60] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-157/07&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

On 30 November 2007 the UK's Proscribed Organisations Appeal Commission (POAC) ruled that the Home Secretary had acted illegally in refusing to remove the PMOI from its proscribed list of 'terrorist' organisations.[61] The case was brought by more than 30 members of Parliament and the House of Lords. POAC held first, that in concluding that the PMOI was an organisation concerned in terrorism, the Secretary of State had misconstrued the provisions of section 3(5) of the 2000 Act and failed to direct himself properly as to those provisions; secondly that in concluding that the PMOI was an organisation concerned in terrorism, the Secretary of State had failed to have regard to relevant considerations; and thirdly, that the conclusion reached by the Secretary of State that the PMOI was an organisation concerned in terrorism was perverse. As Clare Dyer pointed out in *The Guardian*[62]

> Courts rarely call government decisions perverse, and the panel, chaired by former high court judge Sir Harry Ognall and cleared to see secret material, said: "We recognise that a finding of perversity is uncommon." It added: "We believe, however, that this commission is in the (perhaps unusual) position of having before it all of the material that is relevant to this decision."

On 7 May 2008 the Court of Appeal refused to permit an appeal against the POAC decision, ruling that there were "no valid grounds" to contend that it made legal errors when it ordered the PMOI to be removed from the List.[63]

Conclusion

Professor Christian Tomuschat, one of the leading scholars of human rights, has commented:

> "In the long run, such a denial of legal remedies is untenable. To be sure, no one wishes to protect Al-Qaeda or the Taliban. But the freezing of assets is directed against persons alleged to have close ties to these two organisations. Everyone must be free to show that he/she has been unjustifiably placed under suspicion and that therefore the freezing of his/her assets has no valid foundation." [64]

On 23 January 2008 the Parliamentary Assembly of the Council of Europe (PACE) resolved that the procedures used by the UN Security Council and the EU to blacklist individuals and groups suspected of having connections with terrorism violate basic rights and are "completely arbitrary".[65] It insisted that they must be reviewed "to preserve the credibility of the international fight against terrorism", and added that "Injustice is terrorism's best ally – and we must fight it too". The PACE rapporteur Dick Marty said:

> "Even the members of the committee which decides on blacklisting are not given all the reasons for blacklisting particular persons or groups. Usually, those persons or groups are not told that blacklisting has

[61] http://www.statewatch.org/terrorlists/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf
[62] http://politics.guardian.co.uk/print/0%2C%2C331424166-116499%2C00.html
[63] http://www.bailii.org/ew/cases/EWCA/Civ/2008/443.html
[64] Tomuschat, Christian (2003) *Human Rights: Between Idealism and Realism* (Oxford: OUP), p.90
[65] https://wcd.coe.int/ViewDoc.jsp?id=1237597&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE

> been requested, given a hearing or even, in some cases, informed of the decision – until they try to cross a frontier or use a bank account. There is no provision for independent review of these decisions".

His report[66] pointed out that there are currently some 370 people world-wide whose assets have been frozen, and who cannot travel, because the UN has put them on a blacklist. Some sixty groups and bodies are reportedly on another blacklist kept by the EU. "Mere suspicion" is ground enough for these sanctions. This situation "is deplorable and a violation of human rights and fundamental freedoms". PACE insisted that this kind of procedure is "unworthy" of international institutions like the UN and EU, and undermines the legitimacy of using "targeted sanctions" against terrorists. States required to enforce these sanctions may well violate their obligations under the European Convention on Human Rights.

I have shown in this paper that gross violations of fundamental human rights are the direct consequence of the operation of the “terrorist lists”.

[66] http://www.assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc07/eDOC11454.htm; addendum at http://assembly.coe.int/Mainf.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc07/edoc11454add.htm