

# Blacklisted:

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Blacklisted:  
Targeted  
sanctions,  
preemptive  
security and  
fundamental  
rights

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**BLACKLISTED:**

Targeted sanctions, preemptive security and fundamental rights

by Gavin Sullivan and Ben Hayes

ECCHR

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“Someone must have been telling lies about Josef K., he knew he had done nothing wrong but, one morning, he was arrested.” This is the opening line of Franz Kafka’s famous novel about the Process (1925), somewhat misleadingly translated into English as *The Trial* - misleading because Josef K., like most of those who are blacklisted, never received a trial. It is Kafka who is therefore often used to describe the combination of procedural limbo and interference with ordinary life that faces those who are blacklisted as suspected terrorists.

In my capacity as UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, I have expressed concerns about the use of terrorist lists since the beginning of my mandate in 2005. A thematic report on the impact of counter-terrorism measures on freedom of association and freedom of assembly in 2006 highlighted a number of basic principles and safeguards which would need to be respected and applied in order for the 1267 listing procedures to be brought into line with generally accepted human rights standards, including the principle of legality and legal certainty, the principles of proportionality and necessity, and a number of procedural guarantees for inclusion on the list, including the right to judicial review and the right to a remedy. Unfortunately these principles and safeguards are still not respected today.

Over the years, the Security Council’s 1267 Sanctions Committee, maintaining the consolidated list of Al Qaida and Taliban terrorists, has been responsive to the criticism in the sense that it has been willing to enter into a dialogue with the Special Rapporteur and continuously revised its listing and delisting procedures in order to give them an appearance of due process. Perhaps most remarkably, Resolution 1904 (2009) established the office of an independent delisting Ombudsperson to assist applicants in getting their delisting requests before the Sanctions Committee.

Despite all reforms and dialogue, the fundamental problems with the UN terrorist listing regime persist. All decisions, including those on listing and delisting, are made by the 1267 Sanctions Committee, a political body composed of the diplomatic representatives of the 15 member states of the Security Council. Once a person is listed, this is with indefinite duration and subject only to the delisting power of the same Committee. Perhaps most alarmingly, that decision requires full consensus, i.e., one state with a seat on the Security Council can block it, even without expressing its reasons. The Ombudsperson can independently collect and provide information but can neither decide nor even recommend delisting. Although a summary of the ‘reasons’ for terrorist listing nowadays need to be given to the person concerned, this is something quite different from actual evidence of links to terrorism. In fact, it appears that listing decisions can be made on the basis of assertions by some states that they possess intelligence information, rather than through sharing the evidence with others. Just one look at the composition of the Security Council at any given time will be enough for the observer to realize that the 15 states running the show are not willing to share their intelligence with each other.

Further, there is no judicial review of the listing and delisting decisions by the 1267 committee.

In 2010 I presented to the United Nations General Assembly a new thematic report on the compliance of United Nations itself while countering terrorism. This report takes the view that whatever justification there was in 1999 for targeted sanctions against Taliban leaders as the de facto regime in Afghanistan, the maintenance of a permanent global terrorist list now goes beyond the powers of the Security Council. While international terrorism remains an atrocious crime, it is not generally and on its own a permanent threat to the peace within the meaning of Article 39 of the UN Charter. Therefore it does not justify the exercise by the Security Council of supranational sanctioning powers over individuals and entities. I am glad to see that this ECCHR report endorses this conclusion on the basis of its thorough review of the UN listing system.

This report of the European Center for Constitutional and Human Rights is important because of its comprehensive coverage of the origins and development of the UN and European Union terrorist lists, their impacts, their political significance and the way in which they have been challenged in national and regional courts. Most importantly, it provides a European perspective to an international human rights problem that originates at the UN Headquarters in New York. Its conclusions concerning a reform of the European lists deserve attention by every policy maker. There is a fundamental need for a broader public debate concerning the future of terrorist listings. This report provides an important opening for this discussion.

MARTIN SCHEININ

November 2010

# I

## Introduction

This Report is about one of the most controversial aspects of the so-called ‘War on Terrorism’. Paradoxically, and in contrast to practices like extraordinary rendition, torture, arbitrary detention and extrajudicial killings - which have been widely documented in the media and systematically challenged by NGOs and human rights groups - it also one of the least understood.

At face value, terrorist proscription (the act of designating a group or individual as terrorist, as an associate of known terrorists, or as a financial supporter of terrorism) seems like a reasonable response to the heinous crimes of 9/11 and subsequent terrorist attacks. Ostensibly, these procedures are designed to disrupt the activities of terrorist groups by criminalising their members, cutting off their access to funds and undermining their support.

Appearances can, however, be deceiving. The terrorist proscription regimes enacted by the international community after 9/11, notably by the United Nations (UN) and the European Union (EU), have been seriously undermined by growing doubts about their legality, effectiveness and disproportionate impact on the rights of affected parties. This policy of ‘blacklisting’, as we call it, is in crisis.

In October 2009, concerned at the relative lack of public attention on the issue, the European Center for Constitutional and Human Rights (ECCHR) organised a workshop and conference (*Terrorism Lists, Executive Powers and Human Rights*) at the Université Libre de Bruxelles to discuss the issue. The events brought together a range of jurists, academics, legal and human rights practitioners actively engaged on this issue to identify the fundamental problems and identify ways that strategic litigation could continue to be used to challenge the blacklisting regimes and provide redress to those who are targeted.

This report, which is both an outcome of that conference and a continuation of the critical discussion that it facilitated, is motivated by two interrelated concerns. Primarily, we want to document this crisis by explaining its origin and structure. In short, what began as a series of legal challenges to the legitimacy of the blacklists in European jurisdictions has developed into a full blown political crisis for the United Nations, albeit one that does not receive the attention it deserves. Our second motivation is to highlight the broader impacts of the blacklisting regimes and to articulate some of the ways that these problems might be properly and adequately addressed.



Although the regimes that have been built and the problems that have been created are international in scope, this Report focuses on the implications of blacklisting at the European level, examining the regimes primarily through the lens of fundamental rights. Whilst we suggest that a European response to the issue of blacklisting should be developed, we argue that the problems of the regimes are bigger than the specific laws that implement them and too important to be left to states and policy makers to resolve. The crisis of blacklisting needs to be situated within, and part of, a broader public debate about how the problems of terrorism ought to be dealt with.

The task of examining the blacklisting regimes is straightforward if laborious. In chapter 2 we describe the origins and function of the blacklisting regimes enacted by the UN and EU. Our analysis includes an explanation of the incremental reforms that have been introduced as the crisis of legitimacy has taken hold. In chapter 3 we provide a comprehensive analysis of the structural deficiencies of the blacklisting regimes from a human rights perspective. Chapter 4 provides an overview of twelve of the most important legal challenges to date as we see them. This includes successful and unsuccessful legal cases - there have been many 'pyrrhic victories' for blacklisted individuals as the executive bodies of the UN and EU have sought to maintain control in the face of growing judicial dissent - as well as acts of political resistance. Eleven of the cases analysed in this chapter began in EU member states while one is from Canada, where clear parallels with European demands for the primacy of fundamental rights have emerged.

In chapter 5 we seek to place the blacklists in a broader political and sociological context. While debates about blacklisting are inevitably characterised by legal order and (increasingly) disorder, the wider political significance of these regimes must not be overlooked. The impact of the blacklists extends far beyond individual human rights to fundamental matters of social justice, self-determination, peace-building and conflict resolution. In turn, this calls into question the very role and function of the 'international community'.

If the task of explaining the crisis appears relatively straightforward, finding a way out of it appears gargantuan. In chapter 6 we reassess the responses of the UN and EU to the sustained legal and political challenges documented in the report and evaluate a range of options for reform put forward by eminent jurists and commentators. These approaches have been variously described as too ambitious, too impractical or too radical - positions that sustain the status quo and patently fail to offer a way out of the impasse. In conclusion, we argue that both the UN and EU blacklisting regimes should be abolished and that alternative responses to the issue of terrorist financing need to be discussed, debated and created. This is both a legal and political task and a process we hope this Report can usefully contribute to.



## II. Terrorism Designation: the UN and EU Blacklists

## II Terrorism Designation: the UN and EU Blacklists

In the following sections we outline the key features of the terrorist blacklisting systems enacted by the United Nations and the European Union.

The UN blacklisting regime stems from UN Security Council Resolution 1267, which first created the Al-Qaeda and Taliban list. UN Security Council Resolution 1373, adopted in the aftermath of 11 September 2001, encouraged states to create their own blacklists and enact other counter-terrorism provisions. The EU's terrorist lists stem from the measures it took to transpose Resolution 1373 into EU law.

Within this introductory discussion we also briefly outline the 'due process' reforms that the UN and EU have adopted in response to court rulings and pressure from civil society organisations and concerned member states in order to accurately describe the listing regimes as they exist today.

## 2.1

### UN Sanctions Regimes

The blacklist regime currently implemented by the UN Sanctions Committee (and discussed throughout this Report) emerged from the system of sanctions and trade embargoes developed and deployed by the UN since the mid-1960's to exert economic pressure on 'problem' states - such as South Rhodesia <sup>1</sup>, South Africa <sup>2</sup> and Iraq. <sup>3</sup> However, after the experience of state sanctions being applied against Iraq - which were widely condemned for having a minimal impact against the regime yet a devastating impact upon the wider population they ultimately aimed to support - the UN increasingly turned toward the use of 'targeted' sanctions against specific individuals groups and individuals. Originally, targeted sanctions were aimed at mitigating the broader impact of economic sanctions against civilian populations and were accordingly aimed at the political elites of countries that would have previously been targeted by state sanctions. <sup>4</sup> Today, however, they aim to target and apply coercive pressure to all individuals, groups and supporting networks of those who are perceived by the Sanctions Committee to be contributing to the problem that the sanctions seek to address - which is, in the context of this Report, terrorism.

Targeted sanctions have often been described as 'smart sanctions' <sup>5</sup> or 'sanctions light' as a way of highlighting the advantages of targeting individuals rather than states and populations. However, as detailed throughout this Report, the sanctioning (or 'blacklisting' as we describe it) of terrorist suspects has a comparably devastating (albeit different) impact upon the lives and fundamental rights of the individuals and groups that are targeted. Whilst there is currently a plethora of different terrorist blacklists implemented by public authorities (and private organisations), we focus our analysis below on the two primary UN blacklisting systems - the UNSCR (UN Security Council Resolution) 1267 regime and the UNSCR 1373 regime - and their implementation at the European Union level. Irrespective of the different legal sources of the blacklists, however, it is important to remember that the effects on the lives of blacklisted individuals are largely the same - namely, all their financial assets are frozen, their travel and freedom of movement are severely restricted and their everyday lives (as well as those of their families) are devastated.

Additionally, we maintain that the two primary blacklisting regimes currently in force are both entirely lacking in democratic legitimacy. Actions of the Security Council are not subject to the formal scrutiny of the UN General Assembly, and we are convinced that the absence of democratic oversight of the blacklisting regimes, at both the national and intergovernmental levels, is closely linked to many of the problems identified in this report. This lack of democratic control is particularly striking with respect to the autonomous EU blacklist: the European Parliament has been sidelined, as all key decisions have been taken by the member states acting in the framework of the Council of the EU, with states usually represented by officials exercising delegated powers on their collective behalf. In 2001, following preliminary discussions in the Council, the legislative measures establishing the EU blacklist together with the initial list of banned organisations was simply faxed around the foreign ministries of the then 15 member states on the day after Christmas. The regime became European law on the following day (27 December 2001)

12 under what is called ‘written procedure’ - where the text is taken to be agreed unless one or more member states raise significant objections (a procedure typically reserved for uncontroversial measures).

## 2.2

### The 1267 Sanctions Regime

Following the 1998 Al-Qaida attacks on the US embassies in Kenya and Tanzania, in 1999, the UN Security Council passed Resolution 1267. The ostensible aim of the Resolution - which called upon all states to freeze the funds and other financial resources, either directly belonging to or indirectly benefiting, the Taliban <sup>6</sup> - was to exert pressure on the Afghan regime to extradite Usama bin Laden. To facilitate this process, the Resolution set up a Sanctions Committee, consisting of all members of the Security Council, tasked with drafting and administering a blacklist of individuals and entities ‘associated with’ the Taliban, which were to be targeted. Shortly after UNSCR 1267 was adopted, Resolution 1333 was adopted on 19 December 2000. This extended the blacklist to individuals and entities believed to be associated with Usama bin Laden. <sup>7</sup> Thereafter, on 16 January 2002, Resolution 1390 was introduced which reproduced the Taliban and Al-Qaida lists and introduced an additional travel ban and arms embargo to all listed persons. <sup>8</sup> With Resolution 1390, however, targeted sanctions no longer required any connection with a state or territory - they were instead directed to “any individuals, groups, undertakings and entities” associated with Usama bin Laden, Al-Qaida organization and/or the Taliban <sup>9</sup> - and were to be applied for a potentially unlimited time period. <sup>10</sup> Whilst these three Resolutions (1267, 1333 and 1390) each have slightly different emphases, for the purposes of this Report we refer them together as part of the 1267 (Al-Qaida and Taliban) blacklisting regime.

The 1267 regime therefore established a blacklisting system of ‘global reach’, <sup>11</sup> targeting individuals persons, without any defined limitations on those who can be declared targets, and empowering states to restrict the human rights of those targeted in an unprecedented form. <sup>12</sup> The 1267 regime leaves no discretion for Member States regarding implementation. Instead, they are strictly obliged to freeze the assets of all individuals and groups included in the list <sup>13</sup> and independently “bring proceedings” and “impose appropriate penalties” against those who are blacklisted and within their jurisdiction. <sup>14</sup> Significantly, within three years - from the introduction of Resolution 1267 to the adoption of Resolution 1390 - the UN blacklisting system developed from a system which targeted the political elites of ‘problem states’ to one aimed at ill-defined ‘terrorist networks’.

The first ‘consolidated list’ of persons and entities to be subjected to the freezing of funds was published by the Sanctions Committee on 8 March 2001, designating 162 individuals and seven entities. The blacklist grew rapidly, however, and by 30 July 2010 it included the names of 443 terrorist suspects (including 311 associated with Al-Qaida and 132 associ-

ated with the Taliban). <sup>15</sup> The majority of those designated were listed at the initiative of the US as suspected financial supporters of Al-Qaida in the period immediately following the attacks of 11 September 2001. At that time, there was “such [a] ... global outpouring of sympathy for the US” that there very little scrutiny of the designations. <sup>16</sup>

The criteria for being listed in the 1267 regime remain extremely broad. Being ‘associated with’ extends to include:

participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, or in support of;  
supplying, selling or transferring arms and related material to;  
recruiting for; or

otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof. <sup>17</sup>

The 1267 blacklisting procedure itself is remarkably opaque. Any state can nominate an individual or group for inclusion on the list, with each member of the Security Council retaining the right to object within five working days. <sup>18</sup> The role played by the UN Sanctions Committee in this listing process is wholly administrative. Rather than taking informed decisions, the Committee routinely adopts the particular listing decisions of individual states with little or no discussion and then vests these decisions with universal validity for all UN Member States to apply. <sup>19</sup> Whilst some listings are based on publicly available information (such as media reports), many others are based upon secret intelligence material that neither blacklisted individuals nor the Courts ultimately charged with the task of reviewing the national implementation of the lists will ever have access to. <sup>20</sup> Originally, the listing was not even communicated to the affected persons, <sup>21</sup> who had in any event no right to submit any information about their listing to the Sanctions Committee. Furthermore, there was no mechanism available to remove someone from the list once designated. At that time (although the same could arguably be said for today) the UN Sanctions Committee acted under a veritable “aura of infallibility”. <sup>22</sup> Whilst the situation has purportedly improved with the introduction of procedural reforms, as discussed in more detail below <sup>23</sup> and noted by the UK Court of Appeal in the recent *Ahmed and others* judgment, the UN 1267 blacklisting procedure still does not even “begin to achieve fairness for the person who is listed.” <sup>24</sup>

## The 1373 Sanctions Regime

In the wake of the attacks of 11 September 2001, the UN Security Council supplemented the 1267 regime by adopting Resolution 1373 <sup>25</sup> - which set up a parallel blacklisting system requiring states to criminalise the support of terrorism by freezing the assets of those “who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts” and the entities controlled by them. <sup>26</sup> Unlike Resolution 1267, which targets specific individual terrorist suspects at the UN level, Resolution 1373 does not specify the persons or entities that should be listed. Instead, it gives states the discretion to blacklist all those deemed necessary to “prevent and suppress the financing of terrorist acts”. <sup>27</sup> As discussed later in this Report, it is this decentralised aspect of the regime - which effectively enables states to interpret the Resolution unilaterally and identify terrorist suspects in light of their own national interests - that has led commentators to describe Resolution 1373 as “the most sweeping sanctioning measures ever adopted by the Security Council.” <sup>28</sup>

Unlike Resolution 1267, individuals and groups need not be ‘associated with’ Al-Qaida or the Taliban in order to be placed on the 1373 list. Instead, the identification of terrorist suspects to be blacklisted takes place at a national or regional level. Accordingly, those who are blacklisted under Resolution 1373 have the formal opportunity to challenge the allegation that they have supported terrorism through judicial review (typically, at the national and/or European level). <sup>29</sup> Part 3 of this Report analyses the limitations of these formal rights.

## 2.4

### The UN Blacklists: Procedural Reform

Criticism of the UN blacklists from human rights organisations quickly developed in the face of legal challenges, as well as concerns raised by parliamentarians and several authoritative studies into the operation of the lists. <sup>30</sup>

At the outset, judicial safeguards were entirely absent from the UN blacklisting system. As noted above, the sanctions regime failed to provide any mechanisms (a) for groups and individuals to be informed of their inclusion on the list; (b) for them to know or have access to the allegations against them; or (c) for them to challenge their inclusion on the list, either to the 1267 Committee or to any other independent court or tribunal. The only way for an individual or entity to be removed from the list at that time was to petition the government of their country of residence or citizenship to make representations to the Security Council. It was then left to the discretion of the 1267 Committee - and in particular the state responsible for the original listing - to accept or deny the request.



By the end of 2004 Kofi Annan, Secretary-General of the UN, had added his voice to the criticisms, suggesting that “the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions”.<sup>31</sup>

The following year, the UN General Assembly called on the Security Council “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions”.<sup>32</sup> Modest reforms followed in 2005 and 2006 before several damning legal judgments ushered in more substantive reforms in 2008 and 2009. The most important procedural reforms were introduced by the following Security Council Resolutions:

S/RES/1617 (of 29 July 2005). This Resolution introduced a requirement for UN Member States to provide the 1267 Sanctions Committee with a ‘statement of case’ when submitting names for inclusion on the list.<sup>33</sup> It also required states to provide written notice to affected parties of the measures imposed against them and of the applicable procedures for delisting.<sup>34</sup> However, this requirement was not mandatory and only applied where, and to the extent, it was possible.<sup>35</sup>

S/RES/1730 (of 19 December 2006). This Resolution established a ‘Focal Point’ within the UN Security Council Secretariat to receive delisting requests from anyone affected by UN sanctions. Affected parties could submit requests for delisting to the Focal Point which would then simply log the request, inform them about applicable procedures for delisting, forward the requests to the designating states and states of citizenship and residence for their consideration, and inform them of the Sanctions Committee’s final decision. The Focal Point aimed at improving the accessibility of the Sanctions Committee and purported to provide some kind of legal remedy for those that were blacklisted. In reality, however, the Focal Point was little more than a ‘mailbox’ - that is, an administrative body that received and forwarded individual delisting requests to the Sanctions Committee, without any authority to review or otherwise be involved in the decision-making process as to whether someone should remain on the blacklist.<sup>36</sup> The Focal Point was scrapped in 2009 by Resolution 1904.

S/RES/1735 (of 22 December 2006). Along with Resolution 1730, this Resolution introduced changes aimed at improving individual participation and the influence of requesting states in the delisting process. It called upon states to “take reasonable steps ... to notify or inform the listed individual or entity of the designation” and to include “a copy of the publicly releasable portion of the statement of case” along with their notification.<sup>37</sup> This Resolution also sought to introduce formal delisting criteria that the 1267 Committee “may consider” when determining whether to remove names from the Consolidated List - including whether the person or group (1) has been listed through mistaken identity; (2) is deceased; or (3) no longer meets the criteria for listing set out in earlier resolutions, including by taking into account whether they have severed all ties with Al-Qaida, the Taliban or Usama bin Laden.<sup>38</sup>

S/RES/1822 (of 30 June 2008). This Resolution contained further procedural improvements, requiring inter alia, the Sanctions Committee to provide a “narrative summary of reasons for listing” available on the Security Council website.<sup>39</sup> The Resolution also reduced the time frame for the Secretariat to notify Member States after a name is added to the list from two weeks to one and demanded that states receiving notification take all possible steps to notify the listed individuals or entities in a timely manner.<sup>40</sup> Resolution 1822 also responded directly to the problem of the ‘toxic designations’ - that is, those listings that were provided to the UN Sanctions Committee by the US State Department in the immediate aftermath of the 11 September 2001 attacks, which have been recognised as containing numerous erroneous or ill-founded listings - by demanding a full review of all names on the 1267 list within two years (by 30 June 2010) and an ongoing annual review thereafter.<sup>41</sup> This review commenced in late 2008 and was finalised on 30 July 2010, with the Sanctions Committee removing 45 names [including 10 individuals formerly associated with the Taliban, and 14 individuals (and 21 entities) formerly associated with Al-Qaida].

S/RES/1904 (of 17 December 2009). As discussed in part 6 of this Report, Resolution 1904 has been hailed by some as a triumph of progressive reform in Security Council delisting procedures. It created an Ombudsperson’s Office, staffed by an ‘eminent person’ with substantive legal and human rights expertise, in order to “lay out for the Committee the principal arguments concerning the delisting request” of those seeking removal from the 1267 list.<sup>42</sup> Crucially, however, the decision as to whether someone should be removed from the list is still taken by the Sanctions Committee alone - that is, by the Security Council - without any substantive input or involvement by the Ombudsperson.<sup>43</sup> Furthermore, Member States are still able to withhold any information that they wish to keep confidential during the information exchange process. On 7 June 2010 the UN Secretary-General appointed Judge Kimberly Prost - a former judge of the International Criminal Tribunal for the former Yugoslavia - to serve as Ombudsperson for the initial 18-month term.<sup>44</sup>

We critically evaluate the major problems and failings of these reforms in more detail below in Part 6 of this Report. At this point it is sufficient to note that the reforms fall far short of meeting accepted standards of due process as set out in relevant human rights instruments and providing blacklisted individuals and groups with the right to an effective means of challenging their designation. As discussed later, we believe the reforms do little to address the fundamental problems of legitimacy that are at the core of the UN blacklisting system.

## 2.5

### The EU Terrorist Lists

There are essentially two different types of European sanctions, implementing the two different UN blacklisting regimes (1267 and 1373) outlined above. Both types of sanctions are introduced following the procedure that was outlined in Article 301 of the EC Treaty whereby (a) the EU Council takes a decision to adopt sanctions in a ‘common position’ on matters of concern under the Common Foreign and Security Policy (CFSP); and (b) the decisions under the CFSP (as well as the assets freezes and travel bans) are then implemented by Community (EC) Regulations which have direct effect (or are directly applicable) in EU Member States.

First, UN Resolutions 1267, 1333 and 1390 and their consolidated lists of terrorist suspects are directly implemented (and exactly copied) into the European legal order by way of Common Position 2002/402/CFSP and EC Regulation 881/2002. Amendments to the 1267 list are not automatically incorporated into European law. However, to date the European Commission has precisely copied and implemented each single amendment that has been made to the 1267 list at the UN level, without considering whether the names have been included justifiably. <sup>45</sup>

Second, UN Resolution 1373 - under which the EU prepares and implements its own, autonomous lists of terrorist suspects - is given effect in the European legal order through Common Position 2001/931/CFSP and EC Regulation 2580/2001. The autonomous European blacklist is directed at “persons, groups and entities involved in terrorist acts” and currently extends to include revolutionary groups or those engaged in armed struggle such as Hamas, ETA, the PKK and the LTTE. <sup>46</sup> Common Position 2001/931/CFSP requires Member States to prevent „the public“ from offering „any form of support, active or passive“ to anyone included on the EU blacklist. <sup>47</sup> In practice, this has meant that all Member States have introduced their own national criminal regimes for the breach of EU blacklisting provisions. Although the decisions to designate a group or individual as terrorist on the autonomous EU list are formally taken at ministerial level by the EU Council, an ad hoc ‘clearing house’ was created by the EU to evaluate proposals from the member states as to who should be included. The composition, mandate and proceedings of this ‘clearing house’, however, have been kept completely secret.

Under both types of sanctions and UN resolutions, blacklisted individuals and groups have (since late 2008) had the right to challenge the legality of Community sanctions and restrictive measures before the European Court of Justice (ECJ). <sup>48</sup>

## The EU Lists:

### Procedural Reforms

Like the UN, the EU had originally made no provision for notification of the affected parties or introduced procedures for them to be removed from the autonomous list. However, in June 2007 following a number of legal challenges before the European courts and widespread criticism of European blacklisting procedures by human rights organisations and other NGOs, the EU introduced procedural reforms <sup>49</sup> similar to (but in some cases, going further than) the reforms introduced at the UN level, the most important of which are as follows:

A formal EU sanctions committee: In June 2007 an EU ‘Working Party on the Implementation of Common Position 2001/931/CFSP’ was established, replacing the ‘clearing house’ that had been previously used to evaluate potential nominations for the autonomous EU blacklist. The functions of the Working Party include (1) examining and evaluating information used to list and delist individuals and groups; (2) assessing whether that information meets the relevant criteria; (3) preparing regular reviews of the EU blacklist; and (4) making recommendations for listings and delisting. <sup>50</sup> The Working Party takes proposals for blacklisting from both EU member states and non-EU states (such as the US). It also works with representatives of EUROPOL who provide “background information” for listing and delisting requests. All of the Working Party’s meetings are held in a ‘secure environment’ where the date, agenda, organisational details and all of the proceedings are kept completely secret.

Statement of reasons: Following the decision of the European Court of First Instance (CFI) on 12 December 2006 in the *PMOI* case (discussed below at part 4.1), the EU announced it would provide a ‘statement of reasons’ to all those included in the autonomous EU blacklists. This change was then included as part of the same reform package that introduced the Working Party discussed above. <sup>51</sup> This statement should be “sufficiently detailed to allow those listed to understand the reasons for their listing and to allow the Community Courts to exercise their power of review where a formal challenge is brought”. <sup>52</sup> The Statement was to make clear how the listing criteria set out in Common Position 2001/931/CFSP had been met - that is, specify how the blacklisted individual or group had been involved in terrorist acts.

Notification: As an additional part of the 2007 reform package, the EU Council agreed to notify each person or group designated on the autonomous EU list after the listing decision is taken “wherever this is practicably possible”. The notification letter is to include, inter alia, a description of the restrictive measures that have been adopted; the Council’s “statement of reasons”; details about the possibility of appealing against the blacklisting decision to the CFI; and a request for consent to allow public access to the statement (in order to comply with data protection provisions). <sup>53</sup>

Review procedure: Under the 2007 reforms, the Council are obliged to review and update the EU blacklist every six months in order to determine whether the grounds for blacklisting are still valid. In undertaking this review, the Council are required to “take into account all relevant considerations, including the person’s [or] group’s ... past record of involvement in terrorist acts, the current status of the group or entity and the perceived future intentions of the person [or] group.”<sup>54</sup>

‘Focal Point’ for delisting applications: Those included in the autonomous EU blacklist can now submit a request to the Council at any time asking for their designation to be reconsidered. Upon receipt, the Council are to forward the request to the Working Party. Delegates are given 15 days to consider the application before the Working Party is required to make a recommendation to COREPER (the permanent representatives of the Member States) as to whether the listing should be removed or maintained. Despite subsequent changes,<sup>55</sup> at the time this delisting reform was introduced in 2007 it was limited to those who were designated on the autonomous EU list.

In April 2009, in addition to the reforms discussed above, and in direct response to the challenges presented by the ECJ’s 2008 decision in the case of *Kadi*,<sup>56</sup> the European Commission proposed amendments to Regulation (EC) No. 881/2002.<sup>57</sup> In turn, this proposal led to the introduction of Regulation (EU) No. 1286/2009 which introduced procedural and due process reforms to the implementation of the UN 1267 blacklist regime in the EU.<sup>58</sup> The key provisions of this recent reform package include:

New listing procedure: As we will discuss below, after the *Kadi* case European institutions could no longer simply automatically implement the UN 1267 blacklists. Instead, they now have to consider whether the European implementation of the list is compatible with fundamental rights. In order to facilitate this shift from ‘automatic compliance’ to ‘controlled compliance’, Regulation 1286/2009 amends the blacklisting procedure in the following manner. After the European Commission are notified of a new 1267 listing and have been sent the corresponding ‘statement of reasons’ by the UN Sanctions Committee, they will immediately freeze the assets of the person or group concerned. At the same time, however, the Commission are to send the statement to the listed person “without delay” and invite them to express their views on the listing decision. Crucially, before taking the European decision to implement the UN listing decision, the Commission are now required to take into account the views of the blacklisted person or group, as well as the opinion of an advisory committee of experts from the Member States, before taking the final decision to designate them on the European list.<sup>59</sup>

New listing/review procedure for those blacklisted before the *Kadi* decision:

Whilst the listing procedure outlined above is to apply to all new blacklisting decisions, similar due process reforms were also introduced for the benefit of those who were already on the EU blacklist implementing Resolution 1267 before the *Kadi* judgment was delivered in September 2008.<sup>60</sup> For those already on the list at that

time, a request can be made to the European Commission for a statement of reasons to be provided. Upon receipt, the Commission will forward this request to the UN Sanctions Committee. Once the statement has been provided by the Sanctions Committee, the Commission will invite the blacklisted person or group to submit representations (following the procedure outlined above) before taking their final decision as to whether they should remain on the EU list.

Finally, on 1 December 2009 the Lisbon Treaty entered into force, introducing substantial changes to the functioning of the European Union. <sup>61</sup> Whilst the details and full implications of this development for fundamental rights protection are beyond the scope of this Report, the key points to note in relation to blacklisting are as follows:

The new Treaty on the Functioning of the European Union (TFEU) includes an express provision empowering the EU to take restrictive measures against “natural or legal persons and groups or non-State entities”. <sup>62</sup> Previously, EU sanctions were implemented pursuant to Article 301 of the EC Treaty. Whilst it was generally accepted that Article 301 empowered the EC to adopt sanctions against states, it did not (on a literal reading) extend to cover sanctions against private individuals, leaving the legal basis for EU blacklisting somewhat contentious. <sup>63</sup> This reform explicitly seeks to address this issue.

The Lisbon Treaty also contains a specific provision empowering the European Parliament and EU Council to combat terrorism by defining “a framework for administrative measures with regard to capital movements, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities”. <sup>64</sup> The aim of this reform was to introduce the level of parliamentary involvement (and therefore introduce greater democratic legitimacy) to the EU blacklisting process.

Finally, the Lisbon Treaty includes an express provision stating that the ECJ has jurisdiction to review “the legality of decisions providing for restrictive measures against natural or legal persons” adopted on the basis of the EU’s common and foreign security policy. <sup>65</sup> Previously, individuals blacklisted by the EU could only legally challenge the Community Regulations (which, for example, froze their assets), not the CFSP instrument (or Common Position) under which they were listed. In the *Segi* case (discussed below at section 4.4 of this Report), the applicants were blacklisted under a CFSP common position only. As a result, there was no Community Regulation for them to challenge, leaving them in a “judicial vacuum” at the European level. <sup>66</sup> Among other things, this new provision of the Lisbon Treaty seeks to address this problem by enabling designated individuals to bring judicial review challenges against CFSP instruments (and blacklists) in the European courts.

The impact and potential of the recent changes introduced through the Treaty of European Union will be explored in more detail in Part 6 of this Report.



- 1 Sanctions were applied by the UN from the period 1965 - 1979
- 2 See, for example, S/RES/418 and 421 (1977), applied until 1994. All of the Resolutions cited in this section of the Report are available at: <http://www.un.org/sc/committees/1267/resolutions.shtml> [date accessed: 28. Oct 2010]
- 3 See, for example, S/RES/661 (1990), which has (but for the arms embargo provisions) been repealed by S/RES/1483 (2003)
- 4 Eckes, C. (2009) *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* OUP: Oxford [at p.16]
- 5 See, for example, Cortright, G. and Lopez, G. (2002) *Smart Sanctions: Targeting Economic Statecraft* Rowman and Littlefield: Lanham; United Nations Sanctions Secretariat, Department of Political Affairs *Smart Sanctions, the Next Step: Arms Embargoes and Travel Sanctions. The Experience of the United Nations in Administering Arms Embargoes and Travel Sanctions* (1999). Available at: [www.un.org/Docs/sc/committees/sanctions/background.doc](http://www.un.org/Docs/sc/committees/sanctions/background.doc) [date accessed 26. Oct 2010]
- 6 S/RES/1267 [at para. 4]
- 7 S/RES/1333
- 8 S/RES/1390
- 9 Ibid [at para. 2]
- 10 Whilst there is a review mechanism set up pursuant to para. 3 of UNSCR 1390, the default position is one of indefinite retention of the listing.
- 11 Dewulf, S. and Pacquée, D. (2006) 'Protecting Human Rights in the War on Terror: Challenging the Sanctions Regime Originating from Res 1267 (1999)' in *Netherlands Quarterly of Human Rights*, no. 24:4 [at p. 609]
- 12 Eckes, C. *Supra* note 4 [at pp. 26 and 41]
- 13 See S/RES/1267 [at paras. 2, 4 and 7], S/RES/1333 [at paras. 4, 5 and 8(c)], S/RES/1390 [at paras. 1-2]
- 14 S/RES/1267 [at para. 8]
- 15 United Nations Security Council. Press Release No SC/9999, "Security Council Al-Qaida and Taliban Sanctions Committee Concludes Review of Its Consolidated List, Pursuant to Resolution 1822 (2008)" (2. Aug 2010) Available at: [www.un.org/News/Press/docs/2010/sc9999.doc.htm](http://www.un.org/News/Press/docs/2010/sc9999.doc.htm) [date accessed: 26. Oct 2010]
- 16 Biersteker, T. and Eckert, S. Watson Institute. *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"* (October 2009). Available at: [www.watsoninstitute.org/pub/2009\\_10\\_targeted\\_sanctions.pdf](http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf) [date accessed: 26. Oct 2010]
- 17 S/RES/1617 [at para. 2]
- 18 Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities *Guidelines of the Committee for the Conduct of its Work* (adopted 7. Nov 2002, amended 10. April 2003, 21 December 2005, 29 November 2006 and 12 February 2007). Available at: [http://www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf) [date accessed: 26. Oct 2010]
- 19 Eckes, C. *Supra* note 4 [at p.41]
- 20 Cameron, I. Report to the Council of Europe. *The European Convention on Human Rights: Due Process and United Nations Security Council Counter-Terrorism Sanctions*. (6 February 2006). Available at: [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/public\\_international\\_law/Texts\\_&\\_Documents/Docs%202006/31.%20Cameron%20Report%2006.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_&_Documents/Docs%202006/31.%20Cameron%20Report%2006.pdf) [date accessed: 02. Nov 2010]
- 21 Cameron, I. (2004) 'European Union Anti-Terrorist Blacklisting' in *Human Rights Law Review*, (2003) 3 (2): 225 - 256 (at p.229)
- 22 Eckes, C *Supra* note 4 [at p. 31]
- 23 Specifically, at parts 2.4 and 6 of this Report.
- 24 A, K, M, Q, G v *HM Treasury* (2008) EWCA Civ 1187 [at para. 114]
- 25 S/RES/1373
- 26 Ibid [at para. 1(c)]
- 27 Ibid [at para. 1(a)]
- 28 Eckes, C. *Supra* note 4 [at p. 38]. On the issue of the Security Council as world-legislator, see Szasz, P. (2002) 'Notes and Comments: The Security Council Starts Legislating' in *American Journal of International Law* no.96 [at p.901]; Olivier, C. (2004) 'Human Rights Law and the International Fight against Terrorism: Could Security Council Regulations Impact on States' Obligations under International Human Right Law?' *Nordic Journal of International Law* No. 73:4 [at pp.399 - 419].
- 29 See, for example, the PMOI and Sison cases discussed at parts. 4.1 and 4.2 of this Report respectively.
- 30 See, for example, Fassbender, B. *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* (20 March 2006). Available at: [http://untreaty.un.org/ola/media/info\\_from\\_lc/fassbender\\_study.pdf](http://untreaty.un.org/ola/media/info_from_lc/fassbender_study.pdf) [date accessed: 28. Oct 2010]; Biersteker, T. and Eckert, S. The Watson Institute., *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (30 March 2006). Available at: [http://www.watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf) [date accessed: 28. Oct 2010]; Biersteker, T. and Eckert, S. (*Supra* note 16); Cameron, I. (*Supra* note 20).
- 31 Report of the High-Level Panel on Threats, Challenges, and Change. *A More Secure World, Our Shared Responsibility*. UN Doc. 1/59/656 (2. December 2004) [at para. 153]. Available at: <http://www.un.org/secureworld/report.pdf> [date accessed: 26. Oct 2010]
- 32 A/RES/60/1, 2005 *World Summit Outcome*. [at para. 109]. Available at: <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf> [date accessed: 28. Oct 2010]
- 33 S/RES/1617 [at paras. 4 - 6]
- 34 Ibid [at para.5]
- 35 Ibid
- 36 Feinäugle, Clemens A. (1 November 2008) 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' in *German Law Journal*, no 11(9) [at p.1530]. Available at: [http://www.germanlawjournal.com/pdf/Vol09No11/PDF\\_Vol\\_09\\_No\\_11\\_1513-1538\\_Articles\\_Feinaeugle.pdf](http://www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_1513-1538_Articles_Feinaeugle.pdf) [date accessed: 26. Oct 2010]; Eckes, C. (*Supra* note 4 [at p. 32])
- 37 S/RES/1735 [at para. 11]
- 38 Ibid [at para. 14]
- 39 S/RES/1822 [at para. 13]
- 40 Ibid [at para. 15]
- 41 Ibid [at paras. 25 - 26]
- 42 S/RES/1904 [at para. 20]
- 43 Ibid [at para. 7]
- 44 See <http://www.un.org/en/sc/ombudsperson/index.shtml> [date accessed: 26. Oct 2010] and, for a biography of Ms Prost, see: <http://www.un.org/en/sc/ombudsperson/bio.shtml> [date accessed 26. Oct 2010]
- 45 See Case T-306/01 R, *Aden and Others v Council and Commission* [2002] ECR II-2387 [at para. 70]
- 46 That is, *Euskadi Ta Askatasuna* (ETA or Basque Fatherland and Liberty); *Partiya Karkerên Kurdistan* (PKK or Kurdistan Workers Party) and *Liberation Tigers of Tamil Eelam* (LTTE).
- 47 Common Position 2001/931/CFSP [Article 4]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF> [date accessed 04. Nov 2010]
- 48 Following from Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, 3 September 2008; discussed in more detail below at part 4.8 of this Report. In order for this right to have any real substance, however, Courts (and listed individuals) must have access to the information relied upon by states in alleging that those on the blacklist are terrorists.
- 49 Council Document 10826/1/07 [at p.4]. Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/st10826-re01en07.pdf> [date accessed: 26. Oct 2010]
- 50 bid
- 51 bid, Annex II
- 52 Ibid [at para. 17]
- 53 Ibid [at paras. 20 - 21]
- 54 Ibid [at paras 22 - 28]
- 55 Discussed below at note 59
- 56 Discussed below at part 4.8 of this Report
- 57 EC Regulation 2009/0055(CNS). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0187:FIN:EN:PDF> [date accessed 26.Oct 2010]
- 58 EC Regulation 1286/2009. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:346:0042:0046:EN:PDF> [date accessed: 07. Nov 2010]
- 59 Ibid [at Article 9]
- 60 Ibid
- 61 Consolidated version of the Treaty on the Functioning of the European Union (TFEU). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF> [date accessed: 26 October 2010]
- 62 Ibid, Article 215(2)
- 63 See, for example, Nettesheim, M. (2007) 'UN Sanctions Against Individuals: A challenge to the Architecture of European Union Governance' in *Common Market Law Review* no. 44 [at p.567]; Tridimas, T. and Gutierrez-Fons. Queen Mary School of Law Legal Studies Research Paper No. 11/2009. 'EU Law, International Law and Economic Sanctions Against Terrorism: the Judiciary in Distress'. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1271302](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1271302) [date accessed: 07 Nov 2010]
- 64 TFEU *Supra* note 61 [Article 75]
- 65 Ibid, Article 275
- 66 Eckes, C. *Supra* note 4 [at p.328]







### III. Blacklisting and Human Rights

### III

# Blacklisting and Human Rights

In the following section we outline the key fundamental human rights provisions that are engaged and often violated by the terrorism blacklisting regimes. Most of the key international reports to date on the issue of targeted sanctions have restricted their analyses to the framework of human rights violation and protection. Despite the somewhat legalistic approach adopted in the following section, and notwithstanding the severity of the various ways that the lists breach human rights, we believe that confining our critical analyses of the blacklists to fundamental rights concerns is ultimately unduly restrictive. One cannot properly understand the ways that the lists violate due process rights, for example, without linking it to the specific post 9/11 program of the UN Sanctions Committee and its key actors (such as the USA) to create new forms of international quasi-legislative power in counter-terrorism matters that are explicitly beyond the scope of effective judicial review. Similarly, the routine failure of state bodies to provide blacklisted individuals with access to all of the relevant material underpinning their designation as terrorist suspects (and, therefore, with the possibility of an effective remedy) cannot be understood in isolation from the broader shift by liberal states toward ‘risk profiling’ and ‘preemptive security’ and the increased participation of intelligence services in counter-terrorism policing and policy. Accordingly, we suggest that the human rights impacts of the lists (as discussed in this part of the Report) are best linked with, and situated within the context of, the broader political impacts of the lists (as discussed in Part 5 of this Report).

## 3.1

### Right to a Fair Trial

The right to a fair trial is a fundamentally important part of an individual's right to defence. It must be guaranteed "even in the absence of any rules" in "all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person". <sup>1</sup> This right is especially important in the context of blacklisting regimes as its respect is a pre-requisite for enabling targeted individuals to contest the violation of their other human rights.

At a minimum, the right to a fair trial extends to include the following, interconnected, components <sup>2</sup> :

The right of a person or group against whom restrictive measures have been taken to be informed about those measures and to know the case against them as soon as possible (that is, *the right to be informed*)

The right of a person or group to be heard (via written submissions) by the relevant decision-making body within a reasonable time (that is, *the right to be heard*)

The right of a blacklisted person or group to an effective review mechanism by which they can challenge their designation before an independent and impartial tribunal (that is, *the right to judicial review and an effective remedy*)

At an international level, fair trial rights are explicitly guaranteed by a number of legally binding instruments. Article 10 of the 1948 *Universal Declaration of Human Rights* (UDHR), which is accepted to reflect general international law binding all UN member states, declares that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. <sup>3</sup>

Similarly, Article 14(1) of the 1966 *International Covenant on Civil and Political Rights* (ICCPR), which is a treaty binding the states which have ratified it, provides, inter alia, that:

... in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. <sup>4</sup>

At the European level, it is the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereafter, the ECHR) that is the primary legal instrument for the protection of fair trial rights. Article 6(1) of the ECHR, for example, provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. <sup>5</sup>

There has been considerable academic commentary and legal debate about the legitimate scope of Article 6, predominantly focusing on whether blacklisting and imposition of targeted sanctions can properly be qualified either civil or criminal in nature (and thus, within the scope of Article 6) or, as maintained by blacklisting authorities, 6 they are merely administrative, preventative measures (and thus, beyond the scope of Article 6 altogether). In practice, the European Courts have generally taken a broad and pragmatic approach to this issue, determining the applicability of Article 6 by assessing the fairness of proceedings in the round rather than rigidly applying particular procedural rules. In short, it is the gravity of the consequences of a public decision (such as the decision to designate, impose a travel ban or freeze one's assets) that is key. 7 If the decision interferes with and determines one's civil law rights - as both blacklisting (with its adverse impact on an individual's reputation) and asset freezing (which interferes with the individual right to property) clearly do - then the provisions of Article 6 will apply. 8

### 3.1.1

#### The Right to be Heard

The right to be heard requires designating authorities to notify blacklisted individuals of the evidence against them and to provide them with an opportunity to make their views known. 9 Both the UN Security Council (pursuant to the UN Charter and general principles of international law protecting individual due process rights) and European authorities (under the ECHR and the EU Charter) are obliged to guarantee and protect this fundamental right.

Ordinarily, the right to be heard must be realised "where the actual decision is taken" so as to enable the affected party the best opportunity to actually influence the decision-making process. 10 Given the specifically preventative aims of blacklisting, however, European courts have held that the obligation to provide targeted persons with notification of the case against them and with the opportunity to be heard is only triggered *after* the decision to blacklist individuals and freeze their assets has been taken. 11 To do otherwise and oblige states to notify individuals *before* they are listed would, it is argued, undermine the entire rationale and effectiveness of the blacklisting regime itself. However, the decision to designate and the grounds for the listing must (at least at the European level) be communicated to affected individuals and groups *as soon as possible* after the decision to blacklist and freeze funds has been taken.

Designated individuals and groups are therefore denied the opportunity to be heard prior to actually being blacklisted. Furthermore, despite the introduction of procedural reforms at the UN level, those blacklisted still do not have the right to make *direct* representations to the UN Sanctions Committee to effectively challenge the

original blacklisting decision that affects them. As a result, the right to be notified of the evidence and provided with a statement of reasons underpinning the listing decision is *crucially* important because it is the only safeguard that enables those who are blacklisted to challenge the lawfulness of their designation before the Courts - that is, by providing individuals with sufficient information to determine whether the blacklisting is justified and/or ought to be challenged and the Courts with the necessary information to review the lawfulness of the decision. <sup>12</sup>

### 3.1.2

## The Right to be Informed

Enabling designated individuals and groups to access the relevant, incriminating information underpinning their blacklisting is an essential element in the protection of fair trial rights. To put it simply: those who are blacklisted cannot oppose the allegations against them if they are prevented from knowing what the allegations actually are. <sup>13</sup>

Originally, the UN only included the names and aliases of blacklisted individuals in the Consolidated List published on the internet. With the procedural reforms introduced through Resolution 1822 (2008) and Resolution 1904 (2009), however, the Sanctions Committee were obliged to make a “narrative summary of reasons” accessible for those who are blacklisted. According to the Sanctions Committee, these summaries are based on:

information available to the designating State(s) and/or members of the Committee at the time of the listing, including the statement of case, coversheet or any other official information provided to the Committee, or any relevant information available publicly from official sources, or any other information provided by the designating State(s) or Committee members. <sup>14</sup>

However, whilst the listings are often nominally based on public sources, confidential material (such as Embassy reports) or secret intelligence material usually lie behind the formal source as the basis for blacklisting. <sup>15</sup> There are three crucially important consequences that flow from this reliance on secret material. First, blacklisted terror suspects are routinely denied access to the relevant, inculpatory ‘evidence’ relied upon by the designating state to justify the listing on the basis of national security considerations. <sup>16</sup> This practice *prima facie* breaches the individual right of access to information. <sup>17</sup> Second, the UN Sanctions Committee rarely, if ever, actually evaluates the ‘evidence’ that a person or group is engaged in activities involving a threat to international peace and security before deciding to place them on the blacklist. According to Dick Marty, the Council of Europe’s Parliamentary Assembly rapporteur on this issue, the UN blacklisting procedure takes place in the following manner: “A country proposes that a person be added, often without giving any detailed reasons, even to the other members of the Sanctions Committee, and

the Committee agrees without hearing or even notifying the person concerned”. <sup>18</sup> That is, the ordinary practice of the Sanctions Committee is simply to ‘rubber-stamp’ blacklisting nominations made by member states and duplicate individual states’ own blacklists (especially, the US anti-terrorist blacklists) without any proper consideration of the relevant material. <sup>19</sup> Third, as outlined above, so little information is being provided to blacklisted individuals and groups that Courts have been unable to judicially review the merits of listing decisions. <sup>20</sup>

At the European level, a statement of reasons ought to be provided to those who are blacklisted indicating, in a clear and concise manner, “the actual and specific reasons” for listing. <sup>21</sup> It must be “sufficiently detailed to allow those listed to understand the reasons for their listing and to allow Community Courts to exercise their power of review”. <sup>22</sup> In practice, however, limitations on disclosure are routinely made on the grounds of public security and the statement of reasons provided is so unduly brief and general that it prevents blacklisted individuals from meaningfully challenging their designation. European courts have yet to adequately resolve the issue of what types of evidence or reasons can legitimately be withheld from blacklisted individuals or groups without violating the right to be informed. <sup>23</sup> We will discuss the broader policy implications of this gap and possible reforms that might ameliorate the problem later in this Report. <sup>24</sup> For now, we simply note that blacklisting regimes routinely breach the right of individuals and entities to access information used against them, with the further effect of undermining their rights to judicial review and an effective remedy.



## 3.2

### The Right to Judicial Review / the Right to an Effective Remedy

The right to judicial review and an effective remedy are - as demonstrated in the case law outlined in the following chapter - the procedural rights that are perhaps the most routinely violated by the practice of blacklisting.

Internationally, these rights are guaranteed by both the UDHR and the ICCPR. Under Article 8 of the UDHR, for example:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law.

Article 2(3) of the ICCPR similarly provides that:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Whilst Article 8 of the UDHR requires a review by a competent national *tribunal* (and thus, a judicial body), Article 2(3) of the ICCPR sets a lower standard by referring to “competent judicial, administrative or legislative authorities”, which has been interpreted by the UN Human Rights Committee in the following terms:

Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. [...] The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy. <sup>25</sup>

At the European level, the right to judicial review is protected by Article 6 of the ECHR (as a component of the right to a fair trial), whilst the right to an effective remedy is protected by Article 13 which provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity.

Although these two aspects of the European right to judicial protection overlap, there are important differences between them, akin to those outlined above between Article 8 of the UDHR and Article 2(3) of the ICCPR. In particular, whilst the right to judicial review (under Article 6) is a freestanding right entitling individuals to a review before a *judicial* authority, the right to an effective remedy (under Article 13) is only engaged when another right of the Convention has been breached and can be satisfied by non-judicial, administrative bodies (such as an Ombudsperson). As blacklisting engages and interferes with civil rights, the primary remedy for blacklisted individuals and groups is the right to judicial review contained within Article 6. However, should a Court find that Article 6 was not applicable in a given blacklisting case, then the right to an effective remedy under Article 13 would provide alternative, subsidiary protection. <sup>26</sup>

For a remedy or review mechanism (whether legal or administrative) to be compliant with international human rights standards, it must be firstly be effective. Effectiveness is generally measured by reference to the powers and procedural guarantees of the reviewing institution involved, <sup>27</sup> taking into account, *inter alia*, the following relevant criteria:

Accessibility of the procedure;

Speed and efficiency of consideration by the reviewing body;

Power of the reviewing body to request interim measures of protection and/or grant appropriate relief;

Due process concerns (does each party have a fair opportunity to put forward case and permit full consideration of disputed issues of fact and law so that credible and persuasive decisions result?);

Quality of decision-making (does the decision of the reviewing body clearly indicate the reasoning on which any finding is based, and indicate the appropriate remedy?);

Compliance with the decision; and

Follow-up (does the reviewing body have effective procedures to monitor whether its decision has been carried out?). <sup>28</sup>

Furthermore, for a remedy to be lawful then the reviewing body or mechanism must also be both *independent* and *impartial* taking into account, *inter alia*, the following criteria:

the manner of appointment of the tribunal's members;

their terms of office;

the existence of guarantees against outside pressure; and whether the tribunal presents an appearance of independence.

At the UN level it is clear that the Sanctions Committee lacks the requisite degree of independence and impartiality to meet minimum international human rights standards. The fundamental problem has been succinctly described by Justice Zinn, the Canadian Federal Court judge in the *Abdelrazik* case discussed later in part 4.12 of this Report:

There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness ... It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge. <sup>29</sup>

The institution that first adopts the blacklisting measures - that is, either the UN Sanctions Committee (in the case of the 1267 regime) or the EU Council (in the case of the autonomous EU regime) - cannot pretend to offer an 'independent' review of those same measures. Neither body therefore falls within the meaning of 'independent and impartial tribunal' contained in Article 6 of the European Convention. <sup>30</sup> An increasing number of European blacklisting cases have accordingly arrived at the same conclusion: namely that "re-examination [at the UN level] does not offer the guarantees of judicial protection". <sup>31</sup> Similarly, under Article 13, the reviewing authority must be clearly "identified and composed of members who are impartial and who enjoy safeguards of independence". <sup>32</sup> Thus, for the same reasons as outlined above, a delisting request brought to the same authority that took the listing decision cannot constitute an "effective remedy" within the scope of Article 13. Whilst a right of review formally exists for blacklisted individuals and groups at the national and EU level, this right is often bereft of any substance because both individuals and Courts lack access to the relevant information.

In practice, therefore, there is a close interconnection between the right to be heard, the right to be informed and the right to an effective legal remedy. European Courts have, for example, held that the failure to inform blacklisted individuals and groups of the evidence adduced against them necessarily prevents them from defending their rights through judicial review - that is, the violation of the rights to be heard and the right to an effective remedy are inseparable in practice and that a breach of one follows from a breach of the other. <sup>33</sup> At the same time, commentators have noted that "more than anything else, the real stumbling block" to the provision of a substantive right to judicial review of blacklisting at the UN level "is the substantive review of intelligence information by an independent and impartial organ" <sup>34</sup> - a crucial problem that is discussed in more detail within the final part of this Report.

According to relevant European case law, an 'effective remedy' means a remedy that is as effective as *can be* having regard to the circumstances. <sup>35</sup> Given the national security implications of targeted sanctions, therefore, states enjoy a certain margin of appreciation in interpreting their Article 13 obligations. However, states do not have an unlimited scope to limit the effectiveness of a remedy or the right to judicial review on the grounds of national

security. The ‘effective as it can be’ principle actually emerged from European cases challenging the legality of state surveillance measures <sup>36</sup> where it was argued by Governments (and accepted by the Courts) that the measures could only work effectively (and thus, national security could only be protected) if they remained secret from the individuals that were targeted. In relation to other measures motivated by national security considerations (such as deportation and blacklisting), however, the Courts have held that “reconciling the interest of preserving sensitive information with the individual’s right to an effective remedy is obviously less difficult”. <sup>37</sup> *Al-Nashif v Bulgaria*, for example, involved an individual who had been detained and deported on the grounds of national security without being able to access or challenge the grounds of his detention. In that case, the European Court of Human Rights (ECtHR) held that:

Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive’s assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual’s right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual’s rights must be examined. <sup>38</sup>

European Courts have therefore tried to resolve the incompatibility between blacklisting procedures and the right to judicial review by trying to ‘strike an appropriate balance’ between international security and fundamental rights. <sup>39</sup> On the one hand, this has meant that the Courts have refrained from actually reviewing the *substance* of the blacklisting decision and have instead tended to defer to the European Council’s assessment of the facts and thus confine their review to *procedural* issues. On the other hand, the Courts have been quite robust in asserting that the Courts themselves must be properly placed in a position to assess the lawfulness of blacklisting decisions, and have unequivocally confirmed that states cannot base blacklisting and asset-freezing decisions on confidential material that they are unwilling to share with the Courts in the name of national security. <sup>40</sup>

The core issue nevertheless remains unresolved, to the detriment of those who are directly targeted by the blacklisting regimes. We will discuss the possibilities for reform later in the Report. For now, in summary, we simply note that “the procedural and substantive standards applied by the UN Security Council and the Council of the EU, despite some recent improvements, in no way fulfil the minimum standards ... and violate the fundamental principles of human rights and the rule of law”. <sup>41</sup>

### 3.3

## The Right to Property

Asset-freezing measures directly interfere with the property rights of those who are blacklisted. Those who are subjected to asset freezing are indefinitely prevented from using, receiving or accessing any form of property, funds or economic resources unless expressly permitted and licensed to do so by the state. This is undoubtedly one of the most draconian impacts of blacklisting regimes. When combined with the fact that there is no right of judicial review available where an individual can argue that the deprivation is unlawful, <sup>42</sup> the consequences of indefinite asset-freezing are indeed dire. <sup>43</sup>

The individual right to property (and protection against its arbitrary deprivation) is a peremptory norm of international law, <sup>44</sup> and a right acknowledged within both the European legal order <sup>45</sup> and the national legal systems of all European member states. At the European level this right is protected by Article 1, Protocol 1 of the ECHR which provides that:

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. <sup>46</sup>

There are, therefore, *three* interrelated legal principles covered under this Article:

(1) the principle of peaceful enjoyment of property (*first sentence, first paragraph*);

(2) the rule that deprivation of possessions cannot be arbitrary and must be subject to specified conditions (*second sentence, first paragraph*); and

(3) the right of the State to control the use of property, subject to specified conditions (*second paragraph*).

For the right to be violated there therefore needs to be either a ‘deprivation of possessions’ or a ‘control of use of property’. Both are considered determinations of civil rights within the Article 6 of the ECHR. This is particularly important given the ECtHR’s questionable reasoning in the *Segi* case that blacklisting alone does not violate one’s human rights and that it only with the freezing of one’s assets that fundamental rights are engaged. <sup>47</sup>

The duration of the asset freeze is important in this regard. Even if it is not considered a deprivation from the outset, the longer a freeze is maintained the more likely it is that a Court will view the measure as a deprivation of property within the scope of Article 1 of Protocol 1. <sup>48</sup> There is, as discussed in part 2.2 of this Report, no time limit on the duration of blacklisting under UN Security Council Resolution 1390. Given the indefinite nature of the designation, therefore, a decision to freeze one’s assets can (and probably will be) of unlimited duration, <sup>49</sup> thus leading to a violation of this fundamental right.

States can interfere with individual property rights so long as they act in accordance with the ‘general’ or ‘public’ interest. In assessing compliance with this test, the ECtHR tries to strike a fair balance between the public interest of the community and the fundamental rights of the individual, including an assessment of whether the individual has had to bear a ‘disproportionate burden’. <sup>50</sup> Therefore, in order to meet the ‘general interest’ test, states must show a relationship of *proportionality* between the means employed to interfere with the right to property and the aim pursued by such interference. <sup>51</sup>

According to ECHR case law, the necessary elements of the proportionality test in such cases include:

- (1) Whether the measure pursues a *legitimate aim* or *objective*
- (2) Whether the means employed are appropriate or suitable
- (3) Whether the means employed are *necessary* to achieve the aim

Firstly, therefore, the proportionality assessment requires a general evaluation of the overall policy objective of the measure - that is, in the context of UN blacklisting, the maintenance of international peace and security - and a determination as to whether that objective is a legitimate aim. If the threat to international peace and security is simply balanced in the *abstract* against the infringement of the civil right to property that asset freezing entails, then “the scales can invariably be assumed to come down on the side of maintaining international peace and security”. <sup>52</sup> However, the subsequent elements of suitability and necessity contained within the proportionality test actually require a secondary and more *specific* evaluation of “how much of a contribution a particular restriction can make towards securing a given objective”. <sup>53</sup> In effect, this requires an examination of:

whether the *specific measures* directed against the *specific individuals* are necessary in the circumstances to advance international peace and security, and if so, whether the gain to international peace and security by freezing *these particular persons’ assets* is proportionate to the infringement of their property rights. [emphasis added] <sup>54</sup>

The principle of necessity additionally requires an assessment of whether the measure in question (in this case, the freezing of an individual’s assets) is capable of achieving the goal (in this case, the maintenance of international peace and security through the disruption of terrorist financing). We argue that it is highly questionable whether blacklisting and asset-freezing actually have *any* significant effects for the disruption of terrorist financing. <sup>55</sup> The UN Sanctions Committee has stated that asset freezing has only had a “limited impact” in the international fight against terrorism, <sup>56</sup> whilst the 1267 Monitoring Team stated that there is “difficulty in quantifying its effect” and that the value of targeted sanctions in combating terrorism is largely “symbolic”. <sup>57</sup> We discuss the overall ineffectiveness of targeted sanctions and the broader political implications of this deficiency later in this Report. For now, we simply note that it renders the proportionality of state interference with property rights through asset-freezing legally suspect.



- 1 Case T-260/94, *Air Inter v Commission* [1997] ECR II-997 [at para. 59].
- 2 The European Court of Justice has, for example, repeatedly observed that the right to be heard, the right to be informed/obligation to state reasons and the right to effective judicial protection are inseparably interconnected in practice. See, for example, Case T-47/03, *Jose Maria Sison v Council and Commission* [2007] ECR II-73 [at para. 137]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0047:EN:HTML> [date accessed: 02. Nov 2010]; Case T-284/08, *People's Mojahedin Organisation of Iran v Council* (PMOI III) [December 2008] [at para. 75]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008A0284:EN:HTML> [date accessed: 27. Oct 2010]
- 3 Available at: <http://www.un.org/en/documents/udhr/index.shtml> [date accessed: 27. Oct 2010]
- 4 Available at: <http://www2.ohchr.org/english/law/ccpr.htm> [date accessed: 27. Oct 2010]
- 5 See also Article 47 of the EU Charter that also protects "the right to an effective remedy and to a fair trial". Available at: [www.eucharter.org](http://www.eucharter.org) [date accessed: 28. Oct 2010]. As this provision is based on Articles 13 and 6 of the European Convention respectively, however, we have not separately analysed the rights of the EU Charter in this Report.
- 6 See, for example, Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and associated individuals and entities, *Guidelines of the Committee for the Conduct of its Work*, 22 July 2010, which states [at Article 6(c)] that "A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature". Available at: [http://www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf) [date accessed: 27. Oct 2010]. See also 1526 Analytical Support and Sanctions Monitoring Team, Third Report (9. September 2005). UN Doc. S/2005/572 [at para. 41]: "the sanctions do not impose criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures such as the freezing of assets, prohibiting international travel and precluding arms sales". Available at: <http://www.un.org/arabic/sc/ctc/pdf/sanctionsR.pdf> [date accessed: 27. Oct 2010]. For a recent ECJ affirmation of the precautionary, non-punitive and administrative nature of asset freezing, see Joined Cases T-37/07 and T-323/07, *Mohamed El Morabit v Council of the European Union*, [2. September 2009] [at paras. 40-52] Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007A0037:EN:NOT> [date accessed: 27. Oct 2010]
- 7 This pragmatic approach mirrors the position of the UK Courts on this issue, initially adopted in relation to control-orders. See, for example, the judgment of Lord Bingham in *Opinions of the Lords of Appeal for Judgment in the Cause, Secretary of State for the Home Department v. MB and Secretary of State for the Home Department v AF* UKHL 46, Session 2006-2007. Available at: <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/ldj071031/home-1.htm> [date accessed: 31. October 2010] [at para. 17]: ...
- In this country also judges have regarded the classification of proceedings as criminal or civil as less important than the question of what protections are required for a fair trial (*International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, paras 33, 148) and have held that the gravity and complexity of the charges and of the defence will impact on what fairness requires (*R v Securities and Futures Authority Ltd, Ex p Fleurose* [2001] EWCA Civ 2015, [2002] IRLR 297, para 14).
- 8 See, for example, Leach, P. (2005) *Taking a Case to the European Court of Human Rights*. (2nd ed.) OUP: Oxford, who succinctly notes [at p. 244] that:  
For Article 6 to apply in civil cases there are three requirements:  
(a) that there is a civil right or obligation in issue; and  
(b) that there is a dispute in relation to a civil right; and  
(c) that there is a determination of such dispute.
- 9 Cortright, D. and de Wet, E. Sanctions and Security Research Program. *Human Rights Standards for Targeted Sanctions* (January 2010) [at p.5]. Available at: [www.fourthfreedom.org/pdf/10\\_01\\_HR\\_STANDARDS\\_FINAL\\_WEB.pdf](http://www.fourthfreedom.org/pdf/10_01_HR_STANDARDS_FINAL_WEB.pdf) [date accessed: 27. Oct 2010]. See also, Fassbender, B. *Targeted Sanctions and Due Process* (20 March 2006) [at paras. 1.17 and 12]. Available at: [untreaty.un.org/olamedia/info\\_from\\_lc/Fassbender\\_study.pdf](http://untreaty.un.org/olamedia/info_from_lc/Fassbender_study.pdf) [date accessed: 27. Oct 2010]. Case T-346/94, *France Aviation v Commission* [1995] ECR II-2841. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994A0346:EN:HTML> [date accessed: 02. Nov 2010] [at paras. 26 - 38]
- 10 See, for example, the ECJ's reasoning in Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] ECR I-6351 (hereafter, the *Kadi* case, at para 339). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> [date accessed: 04. Nov 2010]; Case T-228/02, *People's Mojahedin Organisation of Iran v Council* [2006] ECR II-4665 [PMOI I case, at para.128] discussed in more detail at parts. 4.8 and 4.1 of this Report respectively. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0228:EN:HTML> [date accessed: 04. Nov 2010].
- 11 *Ibid.* PMOI I case [at paras. 138 - 140]
- 12 *Ibid.* PMOI I case [at paras. 138 - 140]
- 13 See, for example, the *Sison* case [supra note 2, at para. 137] where the ECJ held that "the parties concerned can make genuine use of their right to judicial remedy only if they have precise knowledge of and the reasons for the act in question".
- 14 See [www.un.org/sc/committees/1267/narrative.shtml](http://www.un.org/sc/committees/1267/narrative.shtml) [date accessed: 27. Oct 2010]
- 15 Cameron, I. (2003) "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights" in *Nordic Journal of International Law* no.72:2 [at p.165] and Cameron, I. Report prepared for the Council of Europe. *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions* (6 February 2006) [at p.5]. Available at: [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/public\\_international\\_law/Texts\\_& Documents/Docs%202006/31.%20Cameron%20Report%2006.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_& Documents/Docs%202006/31.%20Cameron%20Report%2006.pdf) [date accessed: 27. Oct 2010]
- 16 *Ibid.*
- 17 Eckes, C. (2009) *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*. OUP: Oxford [at p. 320]
- 18 Marty, D. Committee on Legal Affairs and Human Rights, Parliamentary Assembly. AS/Jur 9. *UN Security Council black lists: Introductory Memorandum* (2007). Available at: <http://assembly.coe.int/Documents/WorkingDocs/doc07/edoc11454add.htm> [date accessed: 27. Oct 2010]
- 19 *Ibid.*
- 20 See, for example, the *PMOI* case [supra note 11, at paras. 162 - 165] and *Kadi* case [supra note 11, at paras. 348 - 351] 21 *PMOI* case [supra note 11, at para. 9]
- 22 Council Doc. 10826/07 [Annex II] Available at: <http://register.consilium.europa.eu/pdf/en/07/st10/st1010826-re01.en07.pdf> [date accessed: 2. Nov 2010] [at paras. 17 - 19].
- 23 Cortright, D. and de Wet, E [supra note 9, at p.6]
- 24 For example, the introduction of in-camera proceedings or the use of special advocate procedures (similar to those used in control-order proceedings in the UK).
- 25 Human Rights Committee. CCPR. *General Comment No. 31 (80) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* UN Doc CCPR/C/21/Rev.1/Add.13. (26. May 2004) [at para. 15] Available at: <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument> [date accessed: 2. Nov 2010]
- 26 See, for example, Cameron, (supra note 15 [at p.19]).
- 27 *Klass and others v Germany* [1979-80] 2 EHRR 214 [at para. 67]. Available at: [http://www.hrcr.org/safrika/limitations/klass\\_germany.html](http://www.hrcr.org/safrika/limitations/klass_germany.html) [date accessed: 03. Nov 2010]
- 28 Fassbender, B. (supra note 9 [at p.31, para. 12.10]). For further discussion of the relevant criteria and substantive content of the ECHR Article 13 right, see Leach, P. (supra note 8 [pp. 341 - 346]).
- 29 *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 (4 June 2009) [at para. 51]. Available at: <http://decisions.fct-cf.gc.ca/en/2009/2009fc580/2009fc580.html> [date accessed: 27. Oct 2010]
- 30 Eckes, C. (supra note 17 [at p. 178])
- 31 the *Kadi* case (supra note 11 [at para. 322])
- 32 Committee of Ministers of the Council of Europe. *Recommendation R (98) 13 of The Committee of Ministers to Member States on the Right of Rejected Asylum Seekers to an Effective Remedy Against Decisions on Expulsion in the Context of Article 3 of the European Convention on Human Rights* (18 September 1998). Available at: [http://www.en.refugeelawreader.org/index.php?option=com\\_docman&task=cat\\_view&gid=52&Itemid=](http://www.en.refugeelawreader.org/index.php?option=com_docman&task=cat_view&gid=52&Itemid=) [date accessed: 28. Oct 2010]
- 33 See, for example, the *Kadi* case (supra note 11 [at paras. 336 - 337 and 349]) and Cases T-135/06 to T-138/06 *Al-Bashir Mohammed Al-Faqih, Sanabel Relief Agency Ltd, Ghunia Abdrabbah and Taher Nasuf v Council of the European Union*, (29 September 2010) [at para. 35]
- 34 Van den Herik (2007) 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' in *Leiden Journal of International Law*, no 20 [at p.798]
- 35 *Supra* note 26 [at para. 69]
- 36 See, in particular, the *Klass* case (supra note 27) and *Leander v Sweden*, [1987] 9 EHRR 433
- 37 *Al-Nashif v Bulgaria* [2003] 36 EHRR 37
- 38 *Ibid.*
- 39 See, for example the *PMOI* case (supra note 11 [at paras. 154-155]) where the ECJ held that:  
the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based... In the present case, that review is all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial ... the Community Courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is



secret or confidential.

40 See, *inter alia*, the *PMOI III* case (*supra* note 2 [at para. 73])

41 Parliamentary Assembly of the Council of Europe. Resolution 1597 (2008) [at para. 6]. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1597.htm> [date accessed: 27. Oct 2010]

42 See, for example, the *Kadi* case (*supra* note 11 [at paras. 369 - 372])

43 As described by Lord Phillips in the recent UK case of *Ahmed and others v HM Treasury*, (2010) UKSC 2 [at para. 137]. (Available at: [http://www.supremecourt.gov.uk/docs/uksc\\_2009\\_0016\\_judgment.pdf](http://www.supremecourt.gov.uk/docs/uksc_2009_0016_judgment.pdf) [date accessed: 02. Nov 2010]) Discussed in more detail in part.4.10 of this Report.

44 See, for example, Biersteker, T. and Eckert, S. Watson Institute. *Strengthening Targeted Sanctions Through Fair and Clear Procedures: White Paper prepared by the Watson Institute Targeted Sanctions Project Brown University* (30. March 2006) [at pp. 21 - 23] who argue that the ICJ implicitly recognised the right to property as a *jus cogens* norm in the 3. February 2006 case of *Armed Activities on the Territory of the Congo* (The DRC v Rwanda).. ICJ Reports 2006. Watson Report available at: [www.watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf) [date accessed: 27. Oct 2010]. ICJ reports available at: <http://www.icj-cij.org> [date accessed: 27. Oct 2010]

45 See, for example, Case 44/79, *Hauer* [1979] ECR 3727, *Sporrong and Lonnroth v Sweden*. [1983] 5 EHRR 35 and the *Kadi* case (*supra* note 11)

46 Available at: <http://conventions.coe.int/treaty/en/Treaties/html/009.htm> [date accessed: 27. Oct 2010]

47 See, in particular, *Segi and Others v. all 15 Member States* [2002] ECHR [Application No. 6422/02, 23 May 2002] (the *Segi* case), discussed in more detail in part. 4.4 of this Report.

48 *Sporrong* case (*supra* note 45) and *Eckes* (*supra* note 17 [at p.167])

49 Cameron, I. (*supra* note 15, (2006) [at p.16])

50 *Chassagnou and others v France*. [2000] 29 EHRR 615 [at para. 85]

51 Leach, P. (*supra* note 8 [at p. 358])

52 *Supra* note 15 [at p.190]

53 Eckes, C. *Supra* note 17 [at p. 411]

54 Cameron, I. (2006) *Supra* note 15 [at p.18]

55 *Ibid*

56 UN Doc. S/2004/1039 [at para. 24] Available at: [www.afghanconflictmonitor.org/S20041039.pdf](http://www.afghanconflictmonitor.org/S20041039.pdf) [date accessed: 27. Oct 2010]

57 UN Doc. S/2005/572 [at para. 38]. Available at: [www.un.org/Docs/journal/asp/ws.asp?m=S/2005/572](http://www.un.org/Docs/journal/asp/ws.asp?m=S/2005/572) [date accessed: 27. Oct 2010]



#### IV. Challenging the Lists

## IV. Challenging the Lists

In the following section of the report, we select some of the key legal cases that have challenged various aspects of the blacklisting regime. In the previous section, emphasis was placed on cases involving blacklisting under UNSCR 1267, <sup>1</sup> the European measures that implementing those UN sanctions, <sup>2</sup> and the autonomous European sanctions adopted pursuant to UNSCR 1373. <sup>3</sup> Some of these cases have been included because of the important legal principles they helped to establish or the clarification they have provided of fundamental issues such as due process and defence rights. <sup>4</sup> Other cases are less important from a strictly ‘legal’ point of view, but have nevertheless been included because of the ways they highlight some of the broader political impacts of the blacklisting regime <sup>5</sup> or have helped to build political resistance <sup>6</sup> and led to reform of listing procedures at the national level. <sup>7</sup> Our selection is by no means comprehensive. It is, however, intended to be indicative of the key issues that are at stake and to show how legal challenges (and the political campaigns surrounding them) have been the primary means of bringing about the reform of blacklisting regimes, albeit, in an ad hoc and haltingly incremental manner, and opening spaces for challenging their legitimacy.

## 4.1. Terrorism

### Designation and Due Process: the PMOI

On 17 June 2002 the *People's Mujahadeen Of Iran* (PMOI) - an active opposition movement in Iran which (until 2000) used armed action against military targets in Iran as part of its resistance strategy - was placed on the EU terrorist list set up under UNSCR 1373. <sup>8</sup> The PMOI filed an appeal on 26 July 2002 with the EU Court of First Instance (CFI) <sup>9</sup> and, on 12 December 2006, the CFI finally ruled that PMOI's inclusion on the list was unlawful, largely because the EU Council had failed to provide the organisation with any information concerning its decision to add them to the 'terrorist list'. <sup>10</sup>

In arriving at their decision, the CFI clearly distinguished between the two different UN sanctions regimes set up under UNSCR 1267 and 1373 respectively. For designations made under the 1267 regime, the Court held that they were not competent to undertake any substantive review. In contrast, under Resolution 1373 it is the EU Member States themselves who decide on who is to be targeted and the procedures of listing that are to be followed. Accordingly, the CFI held that the Member States - and in this case, the European Community - have to act in compliance with "the rules in their own legal order". <sup>11</sup> At a minimum, this means that the Council are obliged to state reasons (that is, provide a 'statement of reasons') for its action <sup>12</sup> and notify the listed parties of their designation - either at the time of the listing or as soon as possible after funds have been frozen the first time. <sup>13</sup> The statement is especially important for those who had not been informed prior to sanctions being imposed, as it is those reasons alone which form the basis for effective judicial review. <sup>14</sup> If the Council believes that there is new evidence justifying the maintenance of individuals or entities on the list, then the parties have the right to be notified and heard before any further decision is taken. <sup>15</sup> Finally, the Court stressed that states cannot simply justify listing on the basis of confidential information or classified intelligence material, thus avoiding judicial scrutiny. Instead, the Council's decisions must be open for judicial review. <sup>16</sup> Taking these procedural rights into account, the Court annulled PMOI's designation on the grounds that:

the contested decision does not contain a sufficient statement of reasons and ... it was adopted in the course of a procedure during which the applicant's right to a fair hearing was not observed. Furthermore, the Court is not, even at this stage of the procedure, in a position to review the lawfulness of that decision. <sup>17</sup>

This initial PMOI challenge to the terror lists was significant for a number of reasons. Most significantly, it was the first successful legal challenge against terrorist blacklisting at the EU Courts. Furthermore, this challenge led the EU Council to reform its procedures to ensure that a 'statement of reasons' was provided to all those included on the list. <sup>18</sup>

The requirement to provide a statement of reasons, however, was a procedural, rather than substantive, victory for PMOI. Shortly after the CFI's decision and on the basis of the

procedural reforms that were subsequently introduced, the EU Council provided PMOI with a statement of reasons and - relying this time on information provided to them by the Home Secretary of the UK - the Council took a fresh decision on 28 June 2007 <sup>19</sup> to maintain PMOI on the EU blacklist. On 16 July 2007, <sup>20</sup> therefore, PMOI filed a further challenge with the CFI challenging their revised listing. <sup>21</sup>

Whilst that EU challenge was pending before the CFI, PMOI successfully challenged their proscription as a ‘terrorist organisation’ in the UK under the provisions of the *Terrorism Act* 2000. The key issue in this case was whether the PMOI could justifiably be held to be “concerned with terrorism” given that they had abandoned military activity since August 2001. In arriving at their decision, the Proscribed Organisations Appeal Commission (POAC) held that:

the only belief that a reasonable decision maker could have honestly entertained, whether as at September 2006 or thereafter, is that the PMOI no longer satisfies any of the criteria necessary for the maintenance of their proscription. In other words, on the material before us, the PMOI is not and, at September 2006, was not concerned in terrorism. <sup>22</sup>

In a scathing judgment delivered on 30 November 2007, POAC concluded that the decision of the UK government to maintain PMOI’s as a terrorist organization could “properly [be] characterised as perverse”, <sup>23</sup> ordered that government delist PMOI forthwith and dismissed all requests by the UK government to appeal. Finally, on 24 June 2008, PMOI was removed from the UK list of terrorist organisations. <sup>24</sup>

Despite this successful challenge, the European Council again decided to maintain PMOI on the EU blacklist when it was reviewed on 20 December 2007. The Council argued that the fact that the UK Home Secretary had sought to appeal POAC’s decision was a sufficient basis to keep PMOI blacklisted. <sup>25</sup> PMOI promptly challenged this decision at a European level and the case was joined with their earlier challenge against their 2007 listing.

On 23 October 2008 the CFI delivered its judgment on the two joined PMOI cases. Whilst the Court held that the 2007 decision to list PMOI was lawful (as the Council had properly complied with the obligation to state reasons <sup>26</sup>), it annulled the later 2008 Council decision to list the PMOI as unlawful. <sup>27</sup> The Court held that the Council had failed properly to take into account the effect of the POAC decision delisting PMOI as a terrorist organisation in the UK in the statement of reasons that had been issued <sup>28</sup> - indeed, the mere fact that the UK Home Secretary had sought to file an appeal against the POAC decision was an insufficient reason for maintaining the listing. <sup>29</sup>

Despite having twice successfully challenged their listing at an EU level and once at the UK level, PMOI were again placed on the EU blacklist (this time at the request of France) on 15 July 2008. <sup>30</sup> This decision was again promptly challenged by PMOI and its consideration was expedited by the CFI who annulled the listing on 4 December 2008 - less than two months after their decision annulling the earlier Council measures. In this case, the CFI held that the Council had breached PMOI’s rights to defence <sup>31</sup> by failing to inform them of new evidence they had purportedly obtained from France to justify the new

listing. <sup>32</sup> Whilst this alone was sufficient to annul the Council's decision, the Court went further and specified some of the additional obligations that the Council owed to listed persons or entities to ensure that they have the possibility of an effective judicial remedy.

First, the Council needed to explain why alleged acts by individual members ascribed to a particular group justified the listing of the whole organisation. <sup>33</sup> Second, a decision by the Council to list an individual or organization must be based on "serious and credible evidence", and in this case the Council's reasoning failed to meet that threshold. <sup>34</sup> Here the CFI found that it was unable properly to review the legality of the listing because it was based on secret information that was kept confidential by the French authorities. <sup>35</sup> Consequently, the Court held that:

the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision. <sup>36</sup>

By failing to disclose such material to the Court, the Council's decision to list PMOI was in clear breach of the fundamental right to effective judicial protection. <sup>37</sup> Consequently, the decision was annulled and, on 26 January 2009, PMOI were officially and finally removed from EU terrorist list. <sup>38</sup>

Among other reasons, the PMOI cases have been crucially important in resolving key due process and jurisdictional issues associated with the EU terror list regime. Apart from being the first case where an EU Court actually annulled a listing decision by the European Council, the 2006 PMOI decision established a clear requirement for a statement of reasons to be provided to listed parties. In the PMOI judgments which followed, the CFI went some way towards defining and specifying what this obligations entails - including by specifying, in the December 2008 decision, that an EU listing decision cannot be based on secret information which cannot be placed before a Court for judicial scrutiny and review. Although these decisions have helped introduce due process reforms into the European blacklisting process, this is not a decisive victory. It is clear that such reforms are still wholly inadequate in ensuring that the rights of those blacklisted are properly protected. <sup>39</sup>

## Unfounded Allegations: the *Sison* Cases

In August 2002 Professor Jose Maria Sison - a Filipino refugee who had been living in the Netherlands since 1987- first realised that he had been blacklisted and had his assets frozen when his bank refused to allow payments to his dentist and local supermarket. After making further enquiries, Mr Sison discovered that the US government had designated him on their own internal blacklist <sup>40</sup> on 12 August 2002, the Dutch government had added him to their “assets freezing list” <sup>41</sup> on 13 August 2002 and the EU had designated him and frozen his assets on 28 October 2002. <sup>42</sup> As with other blacklisted individuals, he was deprived of all income (including his social security benefits of €201.50/month), ordered to leave his social housing apartment and stripped of his health insurance benefits.

Mr Sison had been the Chairman of the Central Committee of the Communist Party of the Philippines (hereafter, the CPP) from 26 December 1968 to 10 November 1977, when he was arrested by the Marcos dictatorship and imprisoned for almost nine years. <sup>43</sup> He left the Philippines in 1986 to undertake a global university lecture tour and applied for asylum in the Netherlands in 1988. His asylum application, however, was rejected three times by the Dutch government on the grounds that he was (allegedly) the head of the CPP and therefore also directed their military wing (the New Peoples Army or NPA) which had been responsible for a number of terrorist attacks in the Philippines. Whilst the first two refusals of his asylum application were annulled in separate judgments of the Dutch Raad van State in 1992 and 1995 respectively, the third rejection was upheld in 1997 by the District Court of the Hague (the Rechtbank). Since 1990 Mr Sison had been the chief political consultant of the National Democratic Front of the Philippines in their peace negotiations with the Filipino government and a signatory witness in all the major bilateral agreements made between the opposing parties since 1992.

Mr Sison made three sets of challenges against the various measures and sanctions introduced against him at the European level. First, throughout 2002 and 2003, Mr Sison made a series of formal requests to access the documents relied upon by the European Council to include and maintain him on the blacklist. After the EC refused to provide Mr Sison with even partial access to these documents, he brought three separate legal challenges. <sup>44</sup> These challenges - which were subsequently joined into a single application - were dismissed as unfounded by the Second Chamber of the CFI of 26 April 2005. <sup>45</sup> Mr Sison appealed the decision, but this appeal was similarly dismissed by the First Chamber of the CFI on 1 February 2007. <sup>46</sup>

Second, Mr Sison applied to the CFI on 6 February 2003 to challenge the decision to include him on the European blacklist, arguing inter alia that the EC had failed to provide him with a ‘statement of reasons’ explaining why he had been blacklisted, that he was not in charge of the NPA as alleged and that his listing breached Articles 6, 7 10 and 11 of the European Convention. <sup>47</sup> Unlike his earlier access-based cases, however, this challenge was ultimately successful. In their decision of 11 July 2007, the Second Chamber of the



CFI held that right to effective judicial protection meant that blacklisted individuals have the right to challenge decisions freezing their funds by bringing an action before the CFI. Crucially, the Court held that:

judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying that decision and to the evidence and information on which that assessment is based... The Court must also be satisfied that the rights of defence have been observed and that the requirement of a statement of reasons has been complied with and also, where applicable, that the overriding considerations ... relied upon by the Council in order to escape those obligations are justified... In the present case, that review is all the more imperative because it constitutes the only procedural safeguard capable of ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. <sup>48</sup>

In this case, the Council had failed to provide Mr Sison (and the Court) either with a statement of reasons as to why he was blacklisted nor any opportunity to respond to the allegations. As a result, the Court concluded that:

The applicant has not only been unable to effectively make his views known to the Council but also, given the lack of any statement ... of the actual and specific grounds justifying those decisions, has not been placed in a position to make good use of his right to action before the Court... <sup>49</sup>

[Furthermore] the Court considers that it is not in a position to carry out adequately its review of the lawfulness of the decision originally challenged or, in consequence, that of the contested decision, in light of the other pleas. <sup>50</sup>

The Council therefore acted unlawfully by breaching Mr Sison's rights to defence and effective judicial protection. Accordingly, the decision to blacklist him was annulled by the Court.

Third, and despite this legal victory for Mr Sison, the EU Council adopted new legislation in June 2007 maintaining Mr Sison on the blacklist and continuing to freeze his funds. <sup>51</sup> This time, however, Mr Sison was provided with a statement of reasons alleging *inter alia* that he was the leader of the CPP and NPA and provided with one month to provide comments or observations to the Council as to why he should not be listed. To freeze funds under the European listing regime, a competent national authority ought to have taken a decision to instigate investigations or prosecution for terrorist activity. In justifying their June 2007 listing decision, therefore, the Council claimed that the earlier Dutch asylum appeal decisions of Raad van State (1992 and 1995) and the Rechtbank (1997) comprised such decisions.

On 10 September 2007 a further legal challenge was filed with the CFI seeking to annul the June 2007 decision and on 30 September 2009 the Court finally delivered their judgment. In short, the Court found that a decision to 'instigat[e] ... investigations or prosecut[e]' must primarily aim at the imposition of preventative or punitive measures in relation to that person's involvement in terrorism. <sup>52</sup> In this case, however, the decisions of the Raad van State and Rechtbank (relied upon by the Council to blacklist Mr Sison) were solely concerned with the legality of the Dutch government's decision to refuse Mr

48 Sison's asylum application. <sup>53</sup> As such, they could not serve as a valid basis for freezing Mr Sison's funds. Accordingly, the Court annulled the June 2007 blacklisting decision, finding that Mr Sison had never been investigated, prosecuted or convicted for any specific act of terrorism. <sup>54</sup> Finally, on 11 December 2009 - after more than seven years of continuous legal challenge - the CFI (which by now had been renamed the General Court) removed Mr Sison from the EU terror blacklist and unfroze his assets.

### 4.3.

#### Appeals Denied: the *PKK* Cases

The PKK (the *Partiya Karkerên Kurdistan* or *Kurdistan Workers' Party*) have, since at least 1978, been involved in a struggle against the Turkish state for self-determination of the Kurdish people and democratic autonomy, using both political and military means to achieve their aims. Whilst the EU excluded the PKK from the first round of terrorist designation following the events of 11 September 2001 they were subsequently listed in 2002. <sup>55</sup> At the time they were designated the PKK had observed a four-year ceasefire during which time no acts of violence against the Turkish state had occurred. Indeed, prior to their designation the PKK had announced their own formal dissolution and the creation of a new organisation (KADEK, renamed in 2003 as KONGRA-GEL) specifically aiming at fostering a democratic settlement to the issue of Kurdish self-determination.

Both the initial 2002 Council decision to blacklist the PKK <sup>56</sup> and the subsequent listing decisions which followed <sup>57</sup> were promptly and jointly challenged in the CFI by both the 'Kurdistan National Congress' (KNK) - an umbrella group of 30 Kurdish organisations which included the PKK <sup>58</sup> - and Osman Öcalan - the younger brother of Abdullah Öcalan, founder of the PKK, who has been imprisoned by Turkey since 1999. However, on 15 February 2005 the CFI dismissed both applications as inadmissible on procedural grounds - that is, Osman Öcalan could not readily prove that he validly represented the PKK, which the CFI understood was dissolved. <sup>59</sup> Similarly, the Court found that the KNK could not validly represent the PKK, given that the latter group was not a member of the former network anymore. <sup>60</sup>

Both parties then filed an appeal against the CFI's dismissal of their cases with the European Court of Justice (ECJ). On 18 January 2007 the ECJ declared that certain aspects of Osman Öcalan's appeal were admissible whilst others were inadmissible. Specifically, the Court held that Osman Öcalan was legitimately able to act on behalf of the PKK in this case and that the PKK must have the possibility to dispute the Council's blacklisting decision. <sup>61</sup> In stressing the importance of judicial protection in general, the ECJ stated:

It is particularly important for that judicial protection to be effective because the restrictive measures ... have serious consequences. Not only are all financial transactions and financial services thereby prevented in the case of a person, group or entity covered by the regulation, but also their reputation and political activity are damaged by the fact that they are classified as terrorists.

... [A] person, group or entity can be included in the disputed list only if there is certain reliable information, and the persons, groups or entities covered must be precisely identified. In addition, it is made clear that the name of the persons, groups or entities can be kept on the list only if the Council reviews their situation periodically. All these matters must be open to judicial review.

That is, the procedural rights of defence, the obligation to state reasons and the right to effective judicial protection are, according to the ECJ, inseparably interconnected in the context of terrorism blacklists. <sup>62</sup> Furthermore, whilst both Öcalan's challenge against the May 2002 PKK listing decision was dismissed for being out of time and the KNK's appeal was dismissed as unfounded, <sup>63</sup> the Court referred the challenge against the Council's June 2002 PKK listing decision back to the CFI for proper consideration. <sup>64</sup>

On 3 April 2008 the CFI finally annulled the Council's June 2002 blacklisting decision of the PKK. <sup>65</sup> In an earlier decision regarding the PMOI, <sup>66</sup> the CFI had held there was a clear obligation upon the Council to provide listed persons or groups with a 'statement of reasons' as to why they had been blacklisted. In this PKK case the Court held that the Council had failed to make such a statement available "as soon as reasonably possible" after the ruling in PMOI. <sup>67</sup> As the Council had failed to provide any reasoning for the listing, the Court held that:

... the applicant was not placed in a position in which it is able to understand, clearly and unequivocally, the reasoning by which the Council considered that the conditions laid down in Article 1(4) of Common Position 2001/931 and in Article 2(3) of the contested regulation had been satisfied in the circumstances of the case. <sup>68</sup>

On 3 April 2008 the Court finally annulled both the Council's 2002 decision to blacklist the PKK <sup>69</sup> and their 2004 decision to blacklist KONGRA-GEL. <sup>70</sup> This victory was, however, pyrrhic because the Court also found that the more recent Council decisions blacklisting both organisations properly complied with the obligation to provide a statement of reasons. Consequently, the PKK, KADEK and KONGRA-GEL all currently remain on the EU blacklist. <sup>71</sup>

## No Judicial Review

### Possible?

### The Basque Cases

*Segi* (meaning ‘continue’) are a Basque youth movement that aim for Basque self-determination and the preservation of Basque identity, culture and language in Spain and France. The group claims to use democratic channels to ensure respect for collective and individual rights and favours a negotiated solution to the Basque conflict. <sup>72</sup>

On 27 December 2001 the EU Council moved to designate *Segi* (and four of its members) as a terrorist group on the autonomous EU blacklist implementing UN Security Council Resolution 1373 <sup>73</sup> on the basis that they were part of the armed Basque nationalist and blacklisted organisation, ETA. Shortly after they were listed, in February 2002 *Segi* filed an application with the ECtHR alleging a violation of their convention rights - namely, the right to a fair trial (Art. 6), rights to freedom of expression (Art. 10) and assembly (Art.11) and the right to an effective remedy (Art. 13).

On 23 May 2002 the Court dismissed the application as inadmissible. Whilst the Common Position that blacklisted *Segi* extended to both the European Community (Articles 2 & 3, in relation to the freezing of assets) and the individual Member States (Article 4, in relation to establishing police and judicial co-operation in criminal affairs), *Segi* were only listed under Article 4. This meant that whilst *Segi* and the other designated individuals had been included on the EU list, they had not been subjected to Community asset freezes. Consequently, the Court held that applicants were not ‘victims’ within the meaning of Article 34 of the European Convention, stating:

(t)he mere fact that the names of two of the applicants ... 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. <sup>74</sup>

According to the Court’s reasoning, the relevant Common Positions <sup>75</sup> that listed *Segi* (and four of its members) were not *in themselves* capable of violating the Convention rights of the individuals concerned because they required further implementation. That is, if asset freezes were later implemented or the applicants became ‘directly affected’ in some other way by the blacklisting then they would be entitled to challenge the implementing measures in either national or EU courts. <sup>76</sup> Designation on the EU blacklist, however, has *criminal implications* for the individuals concerned. <sup>77</sup> Blacklisted individuals are also *negatively stigmatised* by being publicly identified as terror suspects and potential targets for Community asset freezing measures. In equating blacklisting with mere ‘embarrassment’, the Court clearly failed to understand special characteristics of individual sanctions and the wider repercussions for those who are targeted.

On 13 November 2002, after the dismissal of the ECtHR case, *Segi* began a further legal challenge against their blacklisting in the CFI, arguing that the listing breached their

fundamental rights (including the presumption of innocence, the right to a fair trial and the right to an effective remedy) and that they were accordingly entitled to compensation for damages. <sup>78</sup>

In their decision of 7 June 2004, however, the CFI dismissed the application as inadmissible on technical grounds. As discussed above, *Segi* had been listed under Art. 4 of Common Position 2001/931/CFSP, which addresses Member States (rather the European Community) and calls upon them to assist each other to combat terrorism through police and judicial cooperation. In the three pillar-system of the EU, justice and home affairs measures (such as police cooperation between states) were of the Third Pillar, whilst economic matters (such as asset freezes) were considered to be of the First Pillar. Whilst the CFI was generally competent to hear disputes arising First Pillar measures, they were extremely limited in their ability to hear disputes arising from Third Pillar measures. Consequently, the CFI held that they were manifestly incompetent to decide on a claim for damages arising from a Third Pillar measure - that is, Art. 4 of Common Position 2001/931/CFSP. Whilst the Court explicitly acknowledged the severe consequences of their reasoning - that is, that *Segi* were without any effective remedy for challenging their listing under European law - and that this created an unacceptable gap in the EU's system of judicial protection of fundamental rights, it held that there was nothing it could do rectify the situation. <sup>79</sup>

*Segi* promptly filed an appeal against the CFI's decision with the European Court of Justice (ECJ). <sup>80</sup> While the ECJ's eventual decision of 27 February 2007 served to introduce significant changes to the legal structure of the relevant EU Common Positions engaged in the case, it dismissed *Segi*'s appeal on the grounds that the Court had no jurisdiction to hear claims for damages arising from Third Pillar measures. <sup>81</sup> On the issue of judicial review, the ECJ took a different approach than the CFI. Whilst acknowledging that Union law or other Third Pillar measures did not usually impact directly upon the rights of individuals and that it was ordinarily the responsibility of national courts to deal with disputes arising from the implementation of Common Positions or other EU measures, <sup>82</sup> the ECJ also held that:

The right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of *all measures* adopted by the Council, whatever their nature or form, *which are intended to have legal effects in relation to third parties* [emphasis added].

Judicial review of EU measures that directly impact upon the rights of individuals - such as EU blacklists that designate individuals as being involved in terrorism - was therefore a necessary requirement of the rule of law. <sup>83</sup> Given the availability of this right to request a preliminary ruling via national courts, the ECJ held that the contested Common Position did not leave *Segi* without an effective remedy and therefore rejected their argument that the blacklisting breached their fundamental rights.

Too Flawed for  
German law:  
the *DHKP-C* Case

The DHKP-C (*Devrimci Halk Kurtulus Partisi-Cephesi* or *Revolutionary People's Liberation Party*) are a Turkish revolutionary Marxist-Leninist party with an anti-US and anti-NATO position. On 2 May 2002 DHKP-C were designated on the autonomous EU blacklist set up pursuant to UN Security Council Resolution 1373. <sup>84</sup> However, it was not until 28 June 2007 - with Council Decision (2007/445/EC) - that the DHKP-C were provided with a statement of reasons as to why they been put on the list. On 6 October 2009 German prosecutors brought charges against two individuals who were allegedly high-ranking members of the DHKP-C in Germany. Prosecutors alleged that both men were responsible for collecting money, selling propaganda material, participating in ideological training, organizing the acquisition of false documentation and the transportation of weapons and explosives to fighting units of the party. <sup>85</sup> Subsequently, on 9 December 2009, similar charges were brought against another high-ranking DHKP-C member who had allegedly led the DHKP-C in Germany and Europe since 2007. <sup>86</sup>

On 6 October 2009 all three were charged with being members of a foreign terrorist organization and financially supporting a terrorist organization, contrary to §34 Abs. 4 AWG (*Außenwirtschaftsgesetz*), which effectively incorporates the EU blacklisting regime <sup>87</sup> implementing UN Security Council Resolution 1373 into German criminal law.

The defendants argued, however, that most of the charges relate to work they had undertaken in legal cultural clubs and in solidarity with political prisoners and the inhumane conditions that they face in Turkish prisons. Furthermore, they criticised their prosecution on political grounds arguing *inter alia* that the EU blacklist is being used to criminalise their party and diminish its political force whilst denying them the right to an effective judicial remedy. <sup>88</sup>

On 21 December 2009, prior to the commencement of the first instance criminal trial, the *Oberlandesgericht* (OLG) in Düsseldorf, Germany requested a preliminary ruling of the European Court of Justice (ECJ). Specifically, the OLG asked the ECJ to determine, in light of earlier decisions taken by the CFI, whether the decision to designate the DHKP-C on the European blacklist was in accordance with EU law - that is, whether "basic procedural guarantees were infringed in [the] listing". <sup>89</sup> Significantly, the OLG asked these preliminary questions on their own initiative in order to ensure compliance with fundamental rights, without the DHKP-C having commenced their own independent legal challenge against the blacklisting.

Finally, on 29 June 2010, the ECJ delivered their ruling on the correct interpretation of EU law in this matter. <sup>90</sup> The Court held that all of the EU Council decisions pertaining to the blacklisting of the DHKP-C prior to 29 June 2007 were invalid. This was because they had not been accompanied by a statement of reasons explaining the actual reasons why

the blacklisting of the DHKP-C was considered to be justified. The consequences of this error were twofold: first, it effectively denied the defendants the opportunity to verify whether the inclusion of the DHKP-C on the blacklist (prior to 29 June 2007) was well founded; and second, it prevented the Courts from undertaking an adequate and effective review of the legality of DHKP-C's listing. Accordingly, the ECJ directed the German court to refrain from applying all Council decisions concerning the DHKP-C adopted prior to June 2007 and declared that such council decisions cannot form the basis of any criminal proceedings against the alleged party members in relation to the period prior to 29 June 2007.

The DHKP-C case is significant in a number of regards. First, it demonstrates the practical application of the principle established in the *Segi* case, whereby national Courts seek to provide individuals with an effective remedy by requesting the ECJ to provide a preliminary ruling on points of law. Second, it highlights the importance that the Courts are seeking to give to due process requirements, by stipulating - following earlier European jurisprudence that has developed out of the *PMOI* and *Sison* cases - that a statement of reasons must be provided to those blacklisted to enable the protection of their fundamental rights. Finally, the case potentially has broader relevance for the means by which other Member States (in addition to Germany) implement the autonomous European blacklist pursuant to Common Position 2001/931/CFSP and Council Decision 2580/2001. Prior to this decision, German authorities had chosen to automatically criminalise each breach of the Council Decision. However, the ECJ decision clearly problematises this blanket approach to the issue, which *prima facie* conflicts with the constitutional requirement for strict and detailed determination of crimes under German law. Consequently, it is likely that this case may yet proceed to the highest German court and provoke the first Supreme Court decision on the implementation of EU blacklists in Germany.

#### 4.6.

### Criminalising Public

#### Support for Proscribed Organisations: the *Fighters + Lovers* Case

In 2006 a group of seven Danish activists called *Fighters + Lovers* (F+L) printed and distributed t-shirts displaying the symbols of the Popular Front for the Liberation of Palestine (PFLP) and the Revolutionary Armed Forces of Colombia (FARC). Revenues from the sale of the t-shirts - amounting to 24.982 DKK or approximately €3350 - was to be sent by F+L to a radio station run by FARC and a printing press run by the PFLP, <sup>91</sup> despite the fact that both organisations were on the autonomous EU blacklist implementing UN Security Council Resolution 1373. It was the view of F+L that both groups were engaged in legitimate struggles against oppressive regimes and that others should not be criminalised for expressing their solidarity with them.

Under s. 114 of the Danish Penal Code - which is the key Danish legal provision that

defines the scope of terrorism and implements the EU blacklist - it is a criminal offence to provide material support to terrorist organisations. Accordingly, in February 2006 Danish police raised the business operated by *F+L*, confiscated the remaining t-shirts, closed down their website and froze the company's bank account, preventing the funds from being transferred. <sup>92</sup> Furthermore, seven members of *F+L* were arrested and charged with "sponsoring terrorism" - an offence punishable by a prison term of up to ten years under the Danish Penal Code. <sup>93</sup>

On 15 March 2007 the *F+L* trial began in the district court of Copenhagen. Danish law explicitly recognised the right to self-determination and legitimate resistance against oppressive regimes under international law. As such, much of the first instance trial involved a substantive consideration of whether FARC and PFLP were to be considered under Danish law as 'terrorist' organisations or groups engaged in legitimate resistance. To that end, a number of expert witnesses on terrorism and the political conflict in Israel-Palestine and Colombia were called to provide evidence and assist the Court in arriving at their decision.

Finally, in December 2007, the Court delivered their judgment acquitting the defendants. Crucially, the Court held that it could not be shown that either FARC or PFLP constituted 'terrorist organisations' under Danish law. Indeed, the mere fact of being listed on the EU blacklist was held to be insufficient in determining whether a group was 'terrorist' or not. <sup>94</sup> Given the potential ramifications of the first instance decision, the Danish authorities promptly filed an appeal at the Østre Landsret (or Eastern High Court) in Copenhagen. On appeal, the Court found that both the PLFP and FARC actually served illegitimate aims and were 'terrorist organisations' within the scope of Danish law. As such, the first instance decision was overturned, the funds were finally seized and the *F+L* activists were sentenced to jail terms of between two and six months for provision of material support to a terrorist organisation. <sup>95</sup> On appeal, on 25 March 2009, the Danish Supreme Court confirmed that FARC and PFLP were properly to be considered terrorist organisations rather than groups engaged in legitimate resistance and therefore maintained the convictions for the *F+L* activists. However, the Court acknowledged that the relevant provisions of the Danish anti-terrorism legislation were 'unclear' and suspended the sentences accordingly. <sup>96</sup>

In a parallel case later in 2009, Danish prosecutors initiated criminal proceedings against Patrick MacManus, spokesperson for *Rebellion* - a Danish activist group formed in 2004 with the explicit aim of challenging the draconian nature of recent anti-terrorism legislation and defending the right of liberation movements to armed struggle when other means have been exhausted. <sup>97</sup> After a criminal investigation lasting several months, the prosecutors conceded that they had no clear evidence that MacManus had transferred funds to 'terrorist organisations'. Instead, they relied on excerpts from wiretapped telephone conversations and confiscated emails indicating that he supported liberation struggles against Israel and Columbia and, by his own admission, had donated 20 kroner (approximately € 2.50) to FARC and/or PFLP at a *Rebellion* party in August 2004. <sup>98</sup> MacManus argued that there was insufficient evidence to demonstrate that either FARC or the PFLP were



‘terrorist organisations’ under international law or that he had actually provided material support in this case. In their decision of 15 March 2010, however, the Copenhagen City Court found MacManus guilty and provided a six-month suspended sentence, relying upon the earlier 2009 Supreme Court decision in the *F+L* case to demonstrate that both FARC and PFLP were to be properly considered ‘terrorist organisations’ for the purposes of Danish law. <sup>99</sup>

Although neither the *F+L* or the *Rebellion* case succeeded in legally challenging the implementation of the EU blacklisting regime in Denmark, the cases do highlight the problems and difficulties that arise from labeling certain liberation groups as ‘terrorist’ in the absence of an unambiguous definition of ‘terrorism’ at the international level. As discussed later in this Report, <sup>100</sup> this uncertainty concerning the definition of terrorism runs to the core of the blacklisting regimes and has been exacerbated (rather than resolved) through the sweeping sanctioning powers introduced by UN Security Council Resolution 1373 and its associated European implementation. In Denmark, this ambiguity was particularly amplified throughout the *F+L* and *Rebellion* cases by the ongoing political support provided to the defendants by the *Horeserød-Stutthof Association* - an organisation that originated out of the Danish resistance movement in the Second World War, during a time when the resistance fighters were defined as ‘terrorists’ by the occupation forces and their allies. <sup>101</sup> Indeed, in 2006 - as an act of defiance aimed at highlighting the hypocrisy of the Danish government’s position - the *Horeserød-Stutthof Association* openly transferred funds to FARC and informed the Danish Ministry of Justice that they had done so. <sup>102</sup> Despite this historical legacy, the commitment in Danish law to the legality of legitimate resistance to oppressive regimes and the widespread public discussion on this issue which these cases stimulated in Denmark, the Danish state - who had reportedly been subjected to strong political pressure from the Colombian Uribe government to stop *F+L* <sup>103</sup> - persisted and succeeded in securing prosecutions in this case.

#### 4.7.

### Blacklisting and the ICCPR: the *Sayadi* & *Vinck* Case

Nabil Sayadi and his spouse, Patricia Vinck, are Belgian nationals who co-founded a charitable organisation called *Fondation Secours Mondial* (FSM) in 1994. FSM was reportedly set up as the European branch of the American association *Global Relief Fund* (GRF), which had been designated on the US and UN lists since 22 October 2002 as an organisation allegedly connected to Al Qaida. Accordingly, on 3 September 2002 Belgian prosecutors commenced a criminal investigation into Sayadi and Vinck for potential terrorist association. On the basis of this investigation (in which charges were not brought), and at the request of the Belgian authorities, Sayadi and Vinck were placed on the UN 1267 blacklist on 22 January 2003 <sup>104</sup> and the EU blacklist on 27 January 2003. <sup>105</sup> Crucially, as is the case

with other blacklisted individuals, neither Sayadi nor Vinck were given access to the ‘relevant information’ that purportedly justified their listing.

In 2003 numerous requests were filed to the Belgian, European and UN authorities requesting delisting. However, the Belgian authorities simply stated that they were bound by their obligation to give primacy to international law and the European authorities similarly argued that they had no authority to remove names from a list drawn up by the UN Sanctions Committee. <sup>106</sup>

Neither Sayadi nor Vinck had been made the subject of a criminal indictment - either at the time of the listing or anytime thereafter. Accordingly, on 3 February 2004 they commenced a legal action in the Belgian Court of First Instance to force the Belgian state to file a delisting request. This application was successful and on 11 February 2005 the Court ordered the Belgian state to “urgently initiate a de-listing procedure with the United Nations Sanctions Committee and to provide the petitioners with proof thereof, under penalty of a daily fine of €250 for delay in performance”. <sup>107</sup> In order to duly comply with this order the Belgian state promptly filed a delisting request with the UN Sanctions Committee on 4 March 2005. However, the request was blocked by several members of the Sanctions Committee who wanted further details about the order of the Belgian Court of First Instance that had dismissed the criminal case. <sup>108</sup> After providing the further details, an additional delisting request was filed by the Belgian authorities on 4 April 2006 that pointed out the complete lack of evidence that might justify their blacklisting. Notwithstanding the urgency of these two requests, as of March 2006 Sayadi and Vinck both remained on the lists.

Having exhausted all other options, on 14 March 2006 a complaint was lodged with the UN Human Rights Committee - the supervisory body of the ICCPR - arguing that by nominating the Sayadi and Vinck for designation on the UN list without providing them with any ‘relevant information’ as to why they were listed, Belgium had violated key provisions of the ICCPR pertaining to the right to a fair trial and effective remedy (Articles 2 and 14) as well as the right to free movement (Article 12). <sup>109</sup>

In response, Belgium argued that the complaint was inadmissible before the HRC because an application for delisting was still pending before the UN Security Council Sanctions Committee. Secondly, Belgium argued that blacklisting individuals could not violate the presumption of innocence and the right of access to justice and a fair trial because it was an administrative measure (rather than criminal sanction). <sup>110</sup> Finally, Belgium argued that they had simply acted as required by United Nations rules in requesting Sayadi and Vinck be placed on the blacklist and that they had since taken all appropriate measures within their powers to have them delisted and their fundamental rights respected. <sup>111</sup>

On 29 December 2008 the HRC published their views, concluding that Belgium had indeed violated Sayadi and Vinck’s freedom of movement under Article 12 of the ICCPR as well as unlawfully interfered with their rights to privacy and home, and attacked their reputation, in violation of Article 17 of the ICCPR. <sup>112</sup> At the same time, the Committee

held that Article 14 (and the right to an effective remedy) was not engaged in this case because the blacklisting did not constitute a ‘criminal charge’. <sup>113</sup> On the issue of jurisdiction, the Committee stated:

While the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism, the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party. <sup>114</sup>

Furthermore, the Committee dismissed Belgium’s arguments that they had done all they could to secure delisting and found that “even though the state party is not competent to remove the authors names from the United Nations and European lists, it is responsible for the presence of the authors’ names on those lists”. <sup>115</sup> Finally, the Committee ordered that Belgium made an appropriate remedy available and take steps to ensure that no similar violations would arise in the future. <sup>116</sup> Finally, on 20 July 2009 - after enduring more than six years of blacklisting, asset freezing and associated restrictions - Sayadi and Vinck were removed from the UN 1267 blacklist. <sup>117</sup>

This case was significant because it effectively constituted a *de facto* form of judicial review of the UN 1267 blacklisting scheme. It firmly established that the listing regime interferes with individuals’ civil and political rights and that HRC is competent to hear and resolve complaints arising from blacklisting cases. Furthermore, it strengthened the requirement of states to ensure that fundamental rights are prioritised and protected from the outset of the blacklisting procedure - that is, states that nominate individuals for inclusion on the lists cannot then simply absolve themselves of responsibility on the basis of the supremacy of international law. Moreover, the HRC decision was widely received as an authoritative and damning commentary on the inadequacy and illegitimacy of the UN blacklisting regime. <sup>118</sup>

#### 4.8.

### Fundamental Rights and European Judicial Review: the *Kadi and Al Barakaat* Cases

On 3 September 2008, in one of the most legally far-reaching judicial decisions on the legality of the blacklisting regimes, the Grand Chamber of the European Court of Justice annulled the Council Regulation freezing the assets of Yassin Abdullah Kadi and the Al Barakaat International Foundation of Sweden, part of the ‘Hawala’ banking system used by the Somali Diaspora to transfer funds internationally. <sup>119</sup> Kadi and Al Barakaat had first been placed on the US blacklist - that is, the U.S. Treasury Department’s Office of Foreign Asset Control (OFAC) list - on 12 October 2001 as ‘specially designated global terrorists’. Shortly after, on 19 October 2001 they were designated by the 1267 Committee of the United Nations Security Council for being ‘associated with Usama bin Laden,

Al-Qaeda or the Taleban'. Consequently, on 18 December 2001, Kadi and Al Barakaat filed legal challenges with the European Court of First Instance (CFI) arguing that the implementing EC Regulation <sup>120</sup> which implemented the UN 1267 blacklist into European law ought to be annulled because it infringed their fundamental rights - namely, the right to be heard, the right to respect for property and the right to effective judicial review. <sup>121</sup>

On 21 September 2005, however, the CFI rejected their challenge, stating that they had no jurisdiction to review the lawfulness of the decision in question. <sup>122</sup> The disputed Regulation simply served to implement and effect UN Security Council Resolution 1267. Accordingly, the CFI held that the Council and Commission had acted under "circumscribed powers, with the result that they had no autonomous discretion" in this matter. <sup>123</sup> The Court *did* acknowledge that the EU courts were empowered to indirectly check the lawfulness of UN Security Council Resolutions to determine compliance with peremptory norms of public international law (*jus cogens*) <sup>124</sup> which bind all subjects of international law (including the various bodies of the UN) <sup>125</sup> without the possibility of derogation. <sup>126</sup> However, the CFI held that there was no *jus cogens* violation in this case and subsequently went on to dismiss the action in its entirety. <sup>127</sup>

Kadi and Al Barakaat promptly filed an appeal with the ECJ on 17 November 2005 arguing *inter alia* that (1) the Council did not have the authority to introduce Regulations that violate economic relations with individuals that are not connected to the government of a third country; (2) the CFI had erred in its finding that EU institutions were bound, by their international law obligations, to simply implement the decisions of the Security Council without providing individuals who wished to contest Security Council decisions with an opportunity for redress. <sup>128</sup>

On 18 January 2008, the Advocate-General of the ECJ, Miguel Poiares Maduro, presented his opinion to the Court. <sup>129</sup> He advised the ECJ to reverse the CFI ruling and to annul the Council's Regulation insofar as it concerned Kadi and Al Barakaat because it contradicted the EU's founding principle of respect for fundamental rights. Specifically, the Advocate-General held that the CFI had erred in finding that the EU courts had only limited jurisdiction to review the contested regulation. Instead he stated that it is "the Community Courts that determine the effect of international obligations within the Community legal order by reference to conditions set by Community law" - that is, that international law can only take effect under the conditions compliant with the constitutional principles of the European Community, such as respect for fundamental rights and the rule of law. As such, it was the view of the Advocate-General that the EU courts have jurisdiction to review whether the contested regulation complies with fundamental rights, irrespective of the legal source of the measure. <sup>130</sup> Moreover, the Advocate-General concluded that the Regulation breached Kadi and Al Barakaat's right to property, their right to be heard and their right to effective judicial review:

[H]ad there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. <sup>131</sup>

In the absence of any such mechanism, however, the Advocate-General held that EU institutions were competent to judicially review the implementation of UN resolutions within the European legal order. <sup>132</sup>

On 3 September 2008 the ECJ delivered their final judgment. <sup>133</sup> Following the approach taken by the Advocate General, they set aside the earlier ruling of the CFI and annulled Council Regulation 881/2002. In a remarkable judgment, which has subsequently opened up fertile grounds for challenging the legitimacy of the blacklisting regimes, the ECJ held that European institutions are necessarily bound by fundamental rights when implementing targeted sanctions. As a result, they must ensure that blacklisted individuals have both the right to be informed of the reasons for their listing and the right to contest those reasons before an independent body. The ECJ held, therefore, that the CFI had erred in law in ruling that the Community courts had, in principle, no jurisdiction to review the internal lawfulness of the contested regulation. Instead, the Court held that EU Courts must ensure the full review of the lawfulness of all Community acts - including Regulations which are designed to give effect to Security Council Resolutions - to ensure compliance with fundamental rights. <sup>134</sup> On the question of fundamental rights in this case, the Court unequivocally ruled that “the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected”. <sup>135</sup> Crucially, the Court also held that the complete failure of the EC Regulation incorporating UN Security Council Resolution 1267 to include any procedure for “communicating the evidence justifying the inclusion of the names of the persons concerned” in the list constituted a breach of fundamental rights. <sup>136</sup>

Shortly after the ECJ judgment, however, the European Commission “communicated the narrative summaries of reasons provided by the UN Al-Qaida and Taliban Sanctions Committee, to Mr Kadi and to Al Barakaat International Foundation and [gave] them the opportunity to comment on these grounds in order to make their point of view known”. <sup>137</sup> According to the Commission, the provision of such a statement (and an opportunity to respond) was sufficient to ensure the protection of the fundamental rights of blacklisted individuals. On 28 November 2008, after having provided Kadi and Al Barakaat with their ‘statement of reasons’, the Commission renewed their listing on the EU blacklist. <sup>138</sup>

A further legal application action was filed with the General Court (formerly, the CFI) on 30 January 2009 against the renewed listing. <sup>139</sup> Whilst the Al Barakaat Foundation was finally delisted by the UN Security Council and withdrew its EU action for annulment, Mr Kadi remained blacklisted and persisted with his challenge before the General Court. <sup>140</sup>

Finally, on 30 September 2010 the Court delivered their decision, finding that the regulation adopted on 28 November 2008 maintaining the freeze of Mr Kadi’s assets was unlawful and should therefore be annulled. <sup>141</sup> Significantly, the Court held that the review of the legality of blacklisting and asset-freezing decisions had to be a ‘full review’ that extended to the “the substantive assessments of the Sanctions Committee itself and the evidence underlying them” - that is, “that it had to be possible to apply that review to the lawfulness of the grounds on which the contested Community measure was founded”. <sup>142</sup>

Accordingly, the Court found that the review undertaken by the Commission in this case was patently inadequate and that:

The applicant's rights of defence [were] observed only in the most formal and superficial sense, as the Commission in actual fact considered itself strictly bound by the Sanctions Committee's findings and therefore at no time envisaged calling those findings into question in the light of the applicant's observations. <sup>143</sup>

The Court found that the Commission failed to take proper account of Mr Kadi's comments and observations as to why he should not be listed, meaning that "he was not in a position to make his point known to advantage". <sup>144</sup> Furthermore, the Commission failed to grant Mr Kadi "even the most minimal access to the evidence against him ... despite his express request", thus failing to strike an appropriate balance between Mr Kadi's interests and the need to protect the confidential nature of the information in question. <sup>145</sup> Accordingly, given the limited information available to him and the imprecise (and therefore, insufficient) information contained in the summary of reasons, the Court concluded that Mr Kadi was not placed in a position where he could "launch an effective challenge to the allegations against him" through exercising his rights to judicial review.

Mr Kadi has also filed a legal action in the US against Office of Foreign Assets Control (OFAC) challenging his blacklisting as a 'Specially Designated Global Terrorist' on the OFAC list and arguing *inter alia* that "the designation is not supported by the administrative record, and that the designation and review process violated his First, Fourth, and Fifth Amendment rights, the *International Emergency Economic Powers Act* (IEEPA) and the *Administrative Procedure Act* (APA)". <sup>146</sup> At the time of preparing this Report, this case was still pending before the Columbia District Court.

The *Kadi* case, as the September 2008 ECJ decision has come to be known, has had a remarkable impact in challenging the legitimacy of the UN and EU blacklisting regimes. First, the decision placed respect for human rights at the very core of the European legal order by confirming that obligations imposed by international agreements could not prejudice the constitutional principles of the European Community - including the respect for fundamental rights. <sup>147</sup> As such, compliance with human rights is a condition for the lawfulness of Community acts and measures incompatible with human rights are not acceptable in the Community. European institutions must therefore ensure that targeted individuals have the right to be informed of the reasons for their listing and the right to contest their designation before an independent body. Second, by highlighting the structural flaws and procedural inequities of the UN blacklisting system whilst effectively opening a space for the *de facto* review of the implementation of UN measures at the European level, the decision challenges the very legitimacy of the UN sanctioning regime itself. Whilst the Court were careful not to disturb the supremacy of the UN Charter in international law, <sup>148</sup> they did strengthen the European constitutional order in a way that makes it harder for the UN Security Council to violate fundamental rights. As such, the *Kadi* case demonstrated a type of 'bottom-up' process in which a regional court has exerted pressure on the UN Security Council to change its policy towards fundamental

rights. <sup>149</sup> The precise implications of this challenge are yet to be determined. However, some commentators have noted that “The growing negative reaction to targeted sanctions for counter terrorism purposes” catalysed through cases such as Kadi “risks the further erosion of the credibility and future utility of the instrument of *multilateral sanctions in general*” [emphasis added]. <sup>150</sup> It was the *Kadi* case more than any other, and the challenge to the legitimacy of UN sanctions regime that it posed, that led to the introduction of Security Council Resolution 1904 and the new round UN reforms discussed in more detail later in this Report.

Furthermore, the September 2010 decision of the General Court is similarly significant in two keys respects. First, it firmly upheld and reaffirmed the far-reaching conclusions of the ECJ in their 2008 decision concerning the fundamental importance of the right to judicial review, rejecting the Commission’s attempts to minimise the impact and veracity of the ECJ’s findings by concluding that:

if the intensity and extent of judicial review were limited in the way advocated by the Commission and the intervening governments ... and by the Council ... there would be no effective judicial review of the kind required by the Court of Justice in Kadi but rather a simulacrum thereof. <sup>151</sup>

Second, the decision confirmed the patent inadequacies of the procedural reforms that have been introduced at both the UN and EU level to try and resolve the fundamental problems associated with blacklisting and the rights of defence. Whilst we discuss these problems in more detail in part 6 of this Report, for now we simply note that the decision (if confirmed by the ECJ) will undoubtedly result in further reforms being introduced to try and amend this fundamental lacuna.

## 4.9

### Blacklisted in New York, Cleared in Switzerland: the *Nada* Case

On 9 October 2001, shortly after the 9/11 attacks in New York, Youssef Nada and businesses deemed related to him were placed on the 1267 UN blacklist by the US on suspicion of being associated with Al Qaida and involved in funding their terror-network. <sup>152</sup> Mr Nada, who was born in Egypt but is an Italian national, is resident in Campione - a 1.6 km<sup>2</sup> Italian tax enclave within, and surrounded by, the Swiss canton of Ticino. He had previously made his fortune supplying cement to Libya and Saudi Arabia and at the time of his listing he was the head of *Al Taqwa Islamic Investment Group*, which US officials believed had handled funds for associates of Usama bin Laden. However, as a blacklisted individual subject to an assets freeze and travel ban, Mr Nada could not leave the tiny enclave of Campione because Switzerland was legally obliged to deny him entrance. This effectively placed him under house arrest.

On 22 September 2005, therefore, Mr Nada applied to the Swiss *Bundesrat* to have his name deleted from the domestic Swiss law implementing the 1267 resolution, arguing that as Swiss officials had stayed their criminal investigations into possible terrorist associations, there were no grounds for retaining his name on the blacklist and continuing with the sanctions. <sup>153</sup>

However, following the approach taken by the CFI in the *Kadi* case, on 14 November 2007 the Swiss Supreme Court (*Schweizer Bundesgericht*) delivered its decision, declaring that it was strictly bound to afford primacy to international law and adhere to Security Council Resolutions and that they therefore had no jurisdiction to review whether the national measure implementing the 1267 blacklist was in accordance with the law. <sup>154</sup> According to the Court, the UN 1267 Sanctions regime did not leave any margin of discretion to Member States in relation to the blacklisting of designated individuals. Within this context, the removal of Mr Nada's name from the Swiss list would place Switzerland in breach of its obligations under the UN Charter - specifically, Article 103 which consolidates the primacy of international law by stating that the obligations of Member States under the UN Charter override their obligations under any other treaty. <sup>155</sup> The Court held that they were only competent to determine whether the disputed measure was in breach of *jus cogens* - that is, in compliance with the peremptory norms of international law. However, as *jus cogens* norms did not extend to include the protection of procedural rights such as the right to a fair trial, the Swiss Court did not find any violation in this case. <sup>156</sup> Accordingly, the Court rejected Mr Nada's application and declined to remove his name from the Swiss blacklist.

In arriving at their decision, however, the Swiss Supreme Court clearly criticised the inequities of the blacklisting regime for its lack of protection of fundamental rights. The Court firstly decided that Mr Nada's application was admissible because the national law freezing his assets directly affected his fundamental rights. <sup>157</sup> Furthermore, the Court held that because of the duration of the asset freeze (five years at the time of the decision) the listing measure engaged Article 6(1) of the European Convention (the right to fair trial). Whilst it held that effective judicial protection for UN blacklisting measures could only offered at the UN level, the Court went on to conclude that the UN existing delisting procedures did not comply with the minimum due process requirements specified by Articles 6 and 13 of the European Convention and related provisions of the ICCPR. <sup>158</sup> Despite these violations of fundamental rights, 'political control' over individual sanctions originating at the UN level was effectively deemed by the Swiss Court to be the only 'realistic solution' as anything else would place Switzerland in breach of its UN Charter obligations. <sup>159</sup> Whilst the legal challenge itself was unsuccessful, the *Nada* decision was therefore a clear call for political reform of the UN blacklisting system.

In response to this call, in March 2010 the Swiss Parliament introduced significant political reforms that changed the way UN 1267 sanctions are to be implemented at the national level. <sup>160</sup> Crucially, the reforms allow the Swiss authorities to opt-out of implementing international sanctions in relation to individuals who either (1) have been listed for more than three years without a criminal trial; (2) have been unable to appeal against their



listing to an impartial authority; (3) have not been subjected to any criminal charge (or have not been issued a new charge since their initial listing).<sup>161</sup> This type of ‘bottom-up’ political reform procedure builds upon the criticism of the system developed through cases such as *Kadi* and points towards a new way of tackling the systemic violation of fundamental rights at the core of the UN blacklisting regime. Considered in isolation, such national measures may be of limited effectiveness - even if, for example, blacklisted individuals are removed from particular national lists they would in any event remain on the UN 1267 list and other UN Member States would be bound to adopt sanctions against them. <sup>162</sup> Were other states to adopt similar procedural reforms, however, the cumulative effectiveness of such measures might be otherwise. <sup>163</sup>

On 23 September 2009, almost eight years after he was first blacklisted, Youssef Nada was finally removed from the UN 1267 list. <sup>164</sup> On 10 March 2010 the last of the companies deemed associated with him were similarly delisted. <sup>165</sup> In a public statement on the issue, the US Treasury simply declared that the US supports “the removal of those individuals who are no longer appropriate for listing pursuant to that specific regime”. <sup>166</sup> No other reasons were provided. At the time of writing this Report, Mr Nada still had a case pending before the ECtHR alleging a breach of his right to a fair trial under Art. 6(1) of the European Convention. <sup>167</sup>

#### 4.10

### Unconstitutional Sanctions: the Case of *A, K, M, Q* and *G v HM Treasury*

On 27 January 2010 the UK Supreme Court (formerly, the House of Lords) delivered its leading judgment on the lawfulness of the national implementation of the UN blacklisting regime in the case of *A, K, M, Q and G v HM Treasury* [the *Ahmed and others* case]. <sup>168</sup>

In September 2005 Hani El Sayed Sabaei Youssef (known in the judgment as Hay) was informed by the UK Foreign and Commonwealth Office (FCO) that he had been added to the UN 1267 blacklist and, as a result, that his funds, assets and economic resources were frozen in the UK under the *Al-Qaida and Taliban (United Nations Measures) Order 2006* (SI 2006/2952, hereafter the AQA). In December 2006 Mohammed al-Ghabra (known as G in the judgment) was notified by the UK Treasury that a direction had been made against him under Article 4 of the *Terrorism (United Nations Measures) Order 2006* (SI 2006/2657, hereafter the TO) on the basis that the Treasury had ‘reasonable grounds’ for believing that he was, or might be, involved in the commission of acts of terrorism. A few days later, the FCO informed him that he had been designated on the UN 1267 list (at the request of the UK government) and that he was now subjected to an assets-freeze under the AQA. On 2 August 2007 Mohamed Jabar Ahmed, Mohamed Azmir Khan and Michael Marteen (known in the judgment as A, K and M) also received written notification from the UK Treasury that they had been designated in the UK as suspected terrorists

under Article 4 of the TO. Whilst they has not been designated on the UN 1267 list, A, K and M were nonetheless subjected to the assets freeze in the UK under the TO - which had rather been introduced to give domestic effect to UN Security Council Resolution 1373. <sup>169</sup> At the time of their listing, none of the applicants in this case had ever been investigated or charged in relation to any terrorism-related offences. The applicants had all filed various legal challenges against their blacklisting by the UK authorities. However, their cases were combined into the one appeal for the consideration of the Supreme Court.

The key legal issue in the appeal concerned the lawfulness of the TO and the AQO. The AQO simply served to transpose the UN 1267 blacklist into UK law - if a person is included on the UN blacklist, the AQO automatically subjected them to an assets freeze in the UK. Whilst the TO was somewhat autonomous from the 1267 list, its provisions actually went further by allowing an individual's assets to be frozen on the basis of 'reasonable suspicion'. Both the TO and the AQO were introduced by the Treasury pursuant to s.1(1) of the UN Nations Act 1946 (hereafter, 'the UN Act') which authorised the making of Orders that were 'necessary and expedient' to give effect to Resolutions of the UN Security Council. The primary issue before the Court, therefore, was whether the TO and AQO were indeed 'necessary and expedient' given (1) the gravity of the interference with fundamental rights associated with asset freezing; (2) the fact that the TO allowed for asset freezing on grounds of 'reasonable suspicion'; and (3) the fact the AQO deprived those designated on the UN 1267 list with any right of access to a court. <sup>170</sup>

In their decision <sup>171</sup> the Supreme Court unanimously held that the TO was *ultra vires* (or beyond the scope) of s.1(1) of the UN Act. The majority of the Court also held that the AQO was *ultra vires*, but for different reasons. Accordingly, both the TO and AQO and the directions made by the Treasury against A, K, M, Q and G were quashed by the Court.

In arriving at their decision, the Court held that Orders made under s.1(1) of the UN Act would only be legitimate if the interference with fundamental rights was no greater than that which the UN Security Council Resolution requires. <sup>172</sup> Resolution 1373, which the TO sought to give effect to, was not framed in terms of 'reasonable suspicion' but rather referred to people "who commit, or attempt to commit acts of terrorism". Thus, the TO clearly went beyond what was required by Resolution 1373. Taking into account the severity with which the TO interferes with individual fundamental rights - it "strike[s] at the heart of the individual's basic right to live his own life as he chooses" and effectively renders "designated persons ... prisoners of the state" <sup>173</sup> - and the fact that Parliament had not in any way authorised such restrictions, the Court found that the TO exceeded (or was *ultra vires*) the power granted to the Treasury under s.1(1) of the UN Act.

There were two primary arguments advanced as to why the AQO was *ultra vires* the UN Act. First, it was contended that the AQO was an unlawful interference with G's rights under Articles 6 and 8 of the European Convention and Article 1 of Protocol 1 because it failed to provide him with any meaningful access to a Court capable of providing an effective remedy. <sup>174</sup> In considering this ground of challenge, the Court reviewed the efficacy of the UN procedural reforms introduced by Security Council Resolutions 1730

and 1904 and found that “while these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy”. <sup>175</sup> Nevertheless, the Court ultimately rejected this human rights argument on the basis of the primacy of international law, refusing to reconsider their approach to this issue in light of the ECJ’s decision in *Kadi* and stating that: “Convention rights fall into a category of obligations under an international agreement over which obligations under the [UN] Charter must prevail”. <sup>176</sup> Second, it was argued that the AQO was *ultra vires* because there was no effective judicial remedy against a listing by the 1267 Sanctions Committee. <sup>177</sup> There were two related aspects to this argument. First, that the 1267 Committee procedures failed to provide any effective remedy for blacklisted individuals to challenge their listing and second, that the means used to implement the AQO into UK law (that is, the UN Act) bypassed all parliamentary scrutiny. Considered together, the Court held that “the *regime* to which [G and Hay have] been subjected to has deprived [them] of access to an effective remedy”[emphasis added]. <sup>178</sup>

The quashing of the AQO was suspended for one month to allow the Treasury time to consider what steps they should take and (according to the Government) to ensure that frozen assets could not be used for the purposes of terrorism in the interim. <sup>179</sup> The day following judgment the Treasury made a further application asking that the order be suspended for a period of eight weeks (in relation to the TO) and six weeks (in relation to the AQO) so that new legislation could be introduced. On 4 February 2010, however, the majority of the Supreme Court dismissed the government’s application in the strongest terms, stating: “this Court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment”. <sup>180</sup>

The criticisms of the UN blacklisting regime delivered in the *Ahmed and others* case, as it has come to be known, resonate and overlap with the approach taken by the ECJ in the *Kadi* decision. <sup>181</sup> Both cases held that the UN listing system patently failed to provide any effective remedy by which blacklisted individuals could challenge their listing. Whilst *Kadi* played a constitutive role in the introduction of new UN procedural reforms aimed at ensuring compliance with due process requirements (Resolution 1904), the *Ahmed and others* case confirmed that the reforms are inadequate and go no way towards actually protecting fundamental rights and remedying the core deficiencies of the system. Even though the Supreme Court ultimately limited itself to a particular interpretation of national law that enabled the provision of a remedy to blacklisted individuals, the decision comprised an important challenge to the capacity of the Security Council to designate itself a law-making body through the adoption of Resolutions. <sup>182</sup> The particular facts of Mohammed al-Ghabra’s case (G) are worth recalling in this regard. He was first informed by the UK Treasury that his funds were to be frozen and a few days later told that the reason why was that he had been included on the 1267 list, which UK authorities were bound to implement. What he was *not told* at that time was that it was the UK authorities themselves that had nominated him for inclusion on the 1267 list. <sup>183</sup> Thus, instead of freezing G’s assets directly under national law (by making a decision which would have been liable to judicial review), the UK government froze G’s assets indirectly, using the mechanism of the UN Sanctions Committee (through a procedure outside the

66 scope of judicial review). G's experience highlights the ways that the Security Council has been transparently and strategically used as "a venue through which to wash national executive decisions which would otherwise be subject to judicial control of their vulnerability to court supervision in the interests of the individual". <sup>184</sup>

4.11.

### Material Support and the Gendered Impact of Blacklisting: the Case of *M and Others*

The ECJ recently delivered a further important critique of the UK's implementation of the UN blacklisting system in the case of *M and Others v HM Treasury*. <sup>185</sup> The case was brought by several spouses of individuals listed on the UN blacklist issued pursuant to Security Council Resolution 1390 and the EU blacklist annexed to EC Regulation (No. 881/2002), which implements the UN list into the EU. Under Paragraph 2 of Resolution 1390, states are required to:

Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, or by their nationals or by persons within their territory.

The UK government had interpreted this 'indirect support' provision in the strictest manner by introducing Regulations <sup>186</sup> that required (according to the Treasury) the welfare benefits (including income support, disability living allowance, child benefit, housing benefit and council tax benefit) of the spouses of those listed be paid into separate bank accounts, with the funds to be released only after the spouse had successfully applied for a license from the government. The government's rationale for licensing (and thus, directly controlling the remaining income of blacklisted families) was summarised by the Court as follows:

Because the sums in question may be used to cover the basic needs of the households to which designated persons belong, such as the buying of food for a communal meal, they are, in the Treasury's opinion, made indirectly available for the benefit of those persons within the meaning of that provision. <sup>187</sup>

Furthermore, under the terms of the license, <sup>188</sup> the government would only release limited amounts of the spouses welfare benefits to them and their family, calculated to be the minimum amount required for basic subsistence for all family members, minus the designated individual - that is, £10.00 per member of the household. The spouse was then required to provide the government with "a monthly account detailing all her expenditure in the previous month, enclosing receipts for the goods purchased and a copy of her monthly bank statement. Those receipts may be checked by the Treasury in order to ascertain that the purchases do not exceed basic expenses". <sup>189</sup>

'M', a spouse of one of the blacklisted individuals, had five children and her family were entirely dependent on welfare benefits amounting to approximately £350 per week. Similarly, the families of the other applicants in the case were dependent on weekly benefits of approximately £540 and £310 respectively. <sup>190</sup> The spouses together commenced legal challenges against the restrictive measures applied by the UK Treasury in 2005. After being unsuccessful both in the Administrative Court <sup>191</sup> and the Court of Appeal, <sup>192</sup> the spouses then took the matter to the House of Lords (now, the UK Supreme Court). <sup>193</sup> The House of Lords, however, referred the matter in turn to the ECJ to determine the discrete issue of whether financial support provisions outlined in the European blacklisting regime extend to include the social security benefits of the spouse of a designated person "on the ground only that the spouse lives with the designated person and will or may use some of the money to pay for goods and services which the latter will consume or from which he will benefit" - that is, whether the benefits were caught by the blacklisting regime and thus whether the Treasury's licensing system was actually necessary. <sup>194</sup>

The ECJ adopted a purposive interpretation of the listing regime and rejected the UK government's arguments in their entirety, finding that the essential purpose of the asset freeze was to combat international terrorism and cut off terrorists from financial resources that would be used for terrorist activities. <sup>195</sup> With this essential purpose in mind, the Court held that the asset freeze only applied to "those assets that can be turned into funds, goods or services capable of being used to support terrorist activities". <sup>196</sup> In this case, the Court unequivocally held that the UK Government's approach was incorrect as there "was no danger whatsoever that the funds in question might be diverted in order to support terrorist activities". <sup>197</sup> The case was then sent back to the UK Supreme Court for a final ruling.

Whilst the case turned on a discrete and specific point of law, it highlights the ways that blacklisting severely interferes with the lives of spouses and other family members of those who are designated. It remains to be seen whether improvements will be introduced in light of this decision. However, the fact remains that the preferred approach of states to date (including the UK government) has been to use the 'indirect support' provisions of the blacklisting regime to criminalise the most basic of activities (such as sharing of food and other material resources) between the family members of those affected - that is, activities which women are often responsible for undertaking and so disproportionately targeted by the provisions.

### Prisons without Walls and Political Resistance: the *Abdelrazik* Case

Abousfian Abdelrazik was jailed in Sudan in 1989 after the successful military coup of Omar Al-Bashir. He managed to flee to Canada in 1990, where he was granted refugee status and, subsequently, Canadian citizenship. <sup>198</sup> In March 2003, after some of his acquaintances had been charged or convicted for participating in terrorist attacks, Mr Abdelrazik returned to Sudan in order to visit his mother and escape harassment by the Canadian Security Intelligence Service (the CSIS) in the wake of the 11 September 2001 attacks. <sup>199</sup> Upon return, however, he was promptly arrested and detained for two periods of eleven and nine months without charge, during which time he was questioned by the CSIS and tortured by Sudanese authorities. <sup>200</sup>

On 31 July 2006 Mr Abdelrazik was placed on the UN 1267 terrorist list at the request of the US government who alleged that he was a senior Al Qaida official with personal connections to Osama Bin Laden, had trained in a terrorist camp in Afghanistan and fought with Islamic militants in Chechnya. As with other on the 1267 list, he was subjected to a total asset freeze and travel ban. Mr Abdelrazik sought to have himself removed from the list, but the 1267 Committee denied his request without giving reasons on 21 December 2007. <sup>201</sup> Finally, in late 2007, he was released from Sudanese imprisonment and cleared of all charges by both Sudanese authorities and Canadian police and intelligence agencies.

When he attempted to fly home to Canada, however, he was prevented from leaving. Canadian authorities refused to issue him with the emergency travel documents necessary to leave Sudan on the basis that he had been designated on a US no-fly list as result of his 1267 blacklisting. After repeated visits from Canadian officials failed to facilitate his repatriation, in April 2008 Mr Abdelrazik successfully obtained media coverage of his plight and was consequently granted temporary refuge at the Canadian embassy in Khartoum. After the media were alerted to the fact that Mr Abdelrazik was sleeping on mattress in the embassy lobby, he was subsequently provided with a bed for the remainder of the 14 months it was to take for him to return home. Despite having offered him temporary refuge, however, the Canadian authorities were persistent in their resistance to having Mr Abdelrazik return to Canada. When a airline agreed to transport him back to Canada, for example, the Canadian authorities demanded that he possessed a fully paid ticket before they would proceed to issue him with the necessary travel documents. In March 2009, in an act of defiance against both the 'material support' provisions of the UN blacklisting regime and the obstinance of the Canadian government's position, more than 100 Canadians donated funds to allow for a return flight to be purchased. Yet despite the fact that the ticket had been paid for and his return flight confirmed, on 3 April 2009 - less than two hours before the flight was scheduled to depart - the Canadian authorities again refused to issue the necessary travel documents. <sup>202</sup> Finally, on 27 June 2009, Mr Abdelrazik was able to fly back to Canada. Upon return, Mr Abdelrazik filed a case with the Canadian Federal Court alleging *inter*

*alia* that his constitutional right to enter Canada (and, therefore, his rights under the Canadian Charter of Rights and Freedoms) had been violated. <sup>203</sup> In reply, the Canadian Government argued that it was not Canada, but rather the 1267 Sanctions Committee, that impeded Mr Abdelrazik's return as it was they who had blacklisted him and consequently made him subject to a global travel ban and asset freeze. <sup>204</sup>

On 4 June 2009 Justice Zinn of the Canadian Federal Court delivered his decision, finding that Canada had indeed violated Mr Abdelrazik's rights under the Canadian Charter and that he was entitled to an effective remedy for the breach - namely, that the Canadian authorities must provide an emergency passport and airfare to Mr Abdelrazik <sup>205</sup> as well as an escort to ensure his unimpeded return. <sup>206</sup> In arriving at this decision, Zinn J. also noted and openly criticised the core failings of the 1267 regime - that is, that (1) there are no direct hearings, even in limited form; (2) there is no independence and impartiality in the consideration of petitions; (3) there are no reasons provided, even in narrative form, for some of the individuals listed despite the requirements of Security Council Resolution 1822; and finally (4) that the delisting process requires the petitioner to prove a negative (that she is not associated with Al-Qaida), something which Zinn J. considered was as achievable as proving that 'fairies and goblins do not exist'. <sup>207</sup> In a commonly cited section of the judgment, Zinn J. actually described the 1267 blacklisting regime - and the treatment of Mr Abdelrazik by the authorities - as *Kafkaesque*:

It is a fundamental principle of Canadian and international justice that the accused does not have the burden of proving his innocence, the accuser has the burden of proving guilt. In light of these shortcomings, it is disingenuous of the respondents to submit, as they did, that if he is wrongly listed the remedy is for Mr. Abdelrazik to apply to the 1267 Committee for de-listing and not to engage this Court. The 1267 Committee regime is, as I observed at the hearing, a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime. <sup>208</sup>

Despite having never being charged with an offence, and being formally cleared of any wrongdoing by the Sudanese and Canadian authorities in 2007, Mr Abdelrazik still remains on the 1267 list and subjected to the associated asset freeze, travel ban, and national security restrictions which prohibit anyone providing him with food, clothing, money or any other 'material support'. In response, there has been a well-organised political campaign by a number of Canadian groups and organisations to challenge the implementation of the 1267 blacklist in relation to Mr Abdelrazik. On 28 April 2010, for example, a 'sanctions busting telethon' was organised where people were invited to donate money to Mr Abdelrazik (under risk of prosecution) to show their opposition to his blacklisting and the 'arbitrary sanctions regime' set up under Resolution 1267. <sup>209</sup> Furthermore, in May 2010 a number of Canadian Labour Federations and Trade Unions - including the Canadian Labour Congress, Canadian Union of Postal Workers, the Canadian section of the International Machinists and the Windsor Labour Council - all announced that they would be hiring Mr Abdelrazik for periods of between one day and one week each in clear defiance of the 'material support' provisions that flow from the 1267 Resolution. <sup>210</sup>

At the same time, on 7 June 2010 Mr Abdelrazik commenced a new legal application with the Canadian Federal Court seeking to indirectly challenge the lawfulness of the UN 1267

70 regime under Canadian law. <sup>211</sup> UN Resolution 1267 and other associated Resolutions (including 1333 and 1390) are implemented into Canadian law via Regulations (known collectively as the *United Nations Al-Qaida and Taliban Regulations*) <sup>212</sup> issued by the Canadian executive pursuant to an Order in Council. In a challenge broadly resembling the approach taken in the UK *Ahmed and others* case, Mr Abdelrazik argues that the implementing Regulations are unlawful because:

they are *ultra vires* s.2 of the *United Nations Act* 1985, which allows the Canadian government to make regulations to give domestic effect to UN Security Council Resolutions; they violate freedom of association as protected by section 2(d) of the Canadian Charter of Rights and Freedoms;

they violate the rights to liberty and security of the person under section 7 of the Canadian Charter of Rights and Freedoms in a manner that does not accord with the principles of fundamental justice; and

they violate sections 1(a) and 2(e) of the Canadian Bill of Rights - namely, the right to enjoyment of property and not to be deprived thereof except in accordance with due process of law. <sup>213</sup>

At the time of preparing this report, this legal challenge was still pending. However, should the well-organised Canadian solidarity campaign continue, it is possible that its aims - namely, the removal of the domestic sanctions against Mr Abdelrazik and the Canadian government's active support for his removal from the UN 1267 list - may be met in advance of the next Federal Court decision. <sup>214</sup>





- 1 Also including cases under the subsequent UN Security Council Resolutions 1333 and 1390.
- 2 Principally, pursuant to EC Regulation 881/2002
- 3 Under Common Position 2001/931/CFSP (Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF> [date accessed 02. Nov 2010]) and EC Regulation 2580/2001 (Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF> [date accessed 02. Nov 2010])
- 4 Such as the *Kadi* and *Ahmed and others* cases discussed at parts 4.8 and 4.10 respectively.
- 5 See, for example, the *PMOI* (part 4.1), *PKK* (part.4.2) and *M and Others* case (part 4.11)
- 6 See, for example, the *F+L* case (part 4.6) and the *Abdelrazik* case (part. 4.12)
- 7 See, for example, the *Nada* case (part 4.9)
- 8 Council Decision 2002/334/EC. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:116:0033:0034:EN:PDF> [date accessed 02. Nov 2010]
- 9 Action brought on 26 July 2002 by the People's Mojahedin Organisation of Iran (PMOI) against the Council of the European Union, [O.J. C 247/20 (2002)].
- 10 Case T-228/02, *People's Mojahedin Organisation of Iran v Council* [2006] ECR II-4665 [PMOI I]. However, the CFI also clearly stated that they did not have jurisdiction over the terror lists of the European Union under the Common Foreign and Security Policy (Second pillar), thus this Council decision was not reviewed [at paras. 38ff]. Available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0228:EN:HTML> [date accessed: 04. Nov 2010]. See also: Eckes, C. (2009) EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions OUP: Oxford [at p.307]
- 11 *PMOI I* (*Supra* note 10), [at paras. 99 - 102]
- 12 *Ibid* [at para. 109]
- 13 The court accounts for the fact that an effective assets-freeze might be dependent on a "surprise effect" [*Ibid*, at paras. 128 and 137]. Furthermore, a hearing is not necessarily required after an initial listing as the concerned have the possibility to immediately appeal to the CFI (*Ibid* [at para. 130])
- 14 *Supra* note 4 [at para. 140]
- 15 *Ibid* [at paras. 125 and 137]
- 16 *Ibid* [at paras. 156 - 159]
- 17 *Ibid* [at para. 172]. The CFI had asked the Council and the United Kingdom to clarify which national decision the listing was based on. However, the Court noted [at para. 171] that they 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. According to the United Kingdom, the contested decision was based not only on that decision, but also on other national decisions, not otherwise specified, adopted by 'competent authorities' in other Member States. In other words, the Council and the UK clearly contradicted each other as to what 'authority' had actually taken the blacklisting decision.
- 18 Eckes, C. (*Supra* note 10) [at p. 306ff]
- 19 Council Decision 2007/445/EC. Available at: [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_169/l\\_16920070629en00580062.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_169/l_16920070629en00580062.pdf) [date accessed 02. Nov 2010]
- 20 Case T-256/07, *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3019 [PMOI II] Available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007A0256:EN:HTML> [date accessed: 04. Nov 2010]
- 21 *Ibid*
- 22 Lord Alton of Liverpool & Others. *In the matter of The People's Mojahadeen Organisation of Iran v Secretary of State for the Home Department*, Proscribed Organisations Appeal Commission, Appeal No: PC/02/2006. Available at: <http://www.siac.tribunals.gov.uk/poac/Documents/outcomes/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf> [date accessed: 29. Oct 2010] [at p. 139]
- 23 *Ibid* [at p. 144]
- 24 Court of First Instance of the European Communities. Press Release No 79/08 'Judgment of the Court of First Instance in Case T-256/07, People's Mojahedin Organization of Iran v Council' (23. October 2008). Available at: <http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080079en.pdf> [date accessed: 29. Oct 2010]
- 25 *PMOI II* (*Supra* note 20) [at para. 28].
- 26 *Ibid* [at para. 100]
- 27 *Ibid* [at paras. 177 - 178]
- 28 *Ibid* [at para. 179 - 180]
- 29 *Ibid* [at para. 183]
- 30 Council Decision 2008/583/EC. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:188:0021:0025:EN:PDF> [date accessed: 2 Nov 2010]
- 31 Case T-284/08, *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3487 [PMOI III]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008A0284:EN:HTML> [date accessed: 04. Nov 2010]
- 32 *Ibid* [at paras. 41, 47]
- 33 *Ibid* [at paras. 61-67]
- 34 Common Position 2001/931/CFSP, Art. 1 (4) (*Supra* note 3); *Ibid* [at para. 68]
- 35 *PMOI III* case [*Ibid*, at para. 76]: The circumstances of the present case are especially troubling as the Council does not explain "why the production of the relevant information or material in the file to the Court would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not" [at para. 72]
- 36 *Ibid* [at para. 73]
- 37 *Ibid* [at para. 78]
- 38 Council Decision 2009/62/EC. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:023:0025:0029:EN:PDF> [date accessed 02. Nov 2010]; Common Position 2009/67/CFSP. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:023:0037:0042:EN:PDF> [date accessed 02. Nov 2010]; France has nonetheless filed an appeal against the CFI's decision of December 2008. At the time of preparing this Report, that case - Case C-27/09 P, O.J. C 82/26 - is currently pending with the Court.
- 39 Eckes, C. (*Supra* note 10) [at p. 324]
- 40 Comprehensive List of identified terrorists and groups under Executive Order 13224 issued by the Office of the Coordinator of the Counterterrorism, October 23, 2002. Available at: <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf> [date accessed: 28. Oct 2010]
- 41 *Sanctieregeling terrorisme* 2002, III, 13 August 2002, Staatscourant (at 153).
- 42 Council Decision 2002/848/EC
- 43 For background information on this case, see: [http://www.kalayaancentre.net/content/kc\\_camps/joma\\_conf\\_articles.html](http://www.kalayaancentre.net/content/kc_camps/joma_conf_articles.html) [date accessed: 29. Oct 2010] and Fermon, Jan. Beys, Mathieu et. al., 'The Case of Prof. Jose Maria Sison: Labelling dissent as "Terrorism" by the EU' from *Contribution to the Congress of the International Association of Democratic Lawyers Paris*. June 7 - 11, 2005. Available at: [http://www.nlginternational.org/report/THE\\_CASE\\_OF\\_PROF\\_JOSE\\_MARIA\\_SISON\\_LABELING\\_DISSENT\\_AS\\_TERRORISM\\_BY\\_THE\\_EU\\_by\\_Progress\\_Lawyers\\_Network.pdf](http://www.nlginternational.org/report/THE_CASE_OF_PROF_JOSE_MARIA_SISON_LABELING_DISSENT_AS_TERRORISM_BY_THE_EU_by_Progress_Lawyers_Network.pdf) [date accessed: 03. Nov 2010]
- 44 Joined Cases T-110/03, T-150/03 and T-405/03, *Jose Maria Sison v Council* [2005] ECR II-1429. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0110:EN:HTML> [date accessed: 02. Nov 2010]
- 45 *Ibid*
- 46 Case C-266/05 P, *Jose Maria Sison v Council* [2007] ECR I-01233. Available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0266:EN:HTML> [date accessed: 02. Nov 2010]
- 47 Case T-47/03, *Sison v Council* [2007] ECR II-73. Available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0047:EN:HTML> [date accessed: 02. Nov 2010]
- 48 *Ibid* [at paras. 201-202]
- 49 *Ibid* [at para. 219]
- 50 *Ibid* [at para. 225]
- 51 Council Decision 2007/445/EC. (*Supra* note 19) [at p. 58]
- 52 Court of First Instance of the European Communities. Press Release No 80/09: 'The Court of First Instance Annuls The Council Acts Freezing Jose Maria Sison's Funds' (30 September 2009). Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-09/cp090080en.pdf> [date accessed: 02. Nov 2010]
- 53 *Ibid*
- 54 *Ibid*
- 55 Council Decision 2002/334/EC (*Supra* note 8)
- 56 *Ibid*.
- 57 Council Decision 2002/460/EC. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:160:0026:0027:EN:PDF> [date accessed: 29. Oct 2010]
- 58 Case T-206/02, *KNK v. Council of the European Union*, [2005] ECR II-523 Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002B0206:EN:HTML> [date accessed: 3. Nov 2010]
- 59 Case T-229/02, *PKK and KNK v Council of the European Union* [2005] [at para. 37ff]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002B0229:EN:HTML> [date accessed: 3. Nov 2010]
- 60 Case T-206/02, *KNK v. Council of the European Union* (*Supra* note 58) [at para 32ff]; *Ibid* [at para. 49ff].
- 61 Case C-229/05 P, *Öcalan and Vanly v Council of the European Union*, [2007] ECR I-439, [at paras. 107-122]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0229:EN:HTML> [date accessed: 3. Nov 2010]
- 62 Eckes, C. (*Supra* note 10) [at p. 308]
- 63 Case C-229/05 P, *Öcalan and Vanly v Council of the European Union* (*Supra* note 61) [at para. 87]. The ECJ also dismissed *KNK's* argument that their Convention rights were infringed by the listing.
- 64 *Ibid* [at paras. 93-104]
- 65 Case T-229/02, *PKK and KNK v Council* [2005] ECR II-539. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002B0229:EN:HTML> [date accessed: 02. Nov 2010]
- 66 *PMOI I* (*Supra* note 10) [at para. 109]
- 67 Case T-229/02, *PKK and KNK v Council* (*Supra* note 65) [at paras. 66 and 68]
- 68 *Ibid* [at para. 69]
- 69 Council Decision 2002/460/EC. (*Supra* note 57)
- 70 Council Decision 2004/306/EC. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:099:0028:0029:EN:PDF> [date accessed: 29. Oct 2010] See also: Case T-253/04, *KONGRA-*

*GEL and others v Council*. [2008] ECR II-46. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0253:EN:HTML> [date accessed: 03. Nov 2010]

71 'EU Court Annuls PKK Terror Ruling'. *BBC News* (07. April 2008) Available at: <http://news.bbc.co.uk/2/hi/europe/7328238.stm> [date accessed: 29. Oct 2010]. See also the most recent EU blacklist Regulation (EC) No. 1285-2009. Available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:346:0039:0041:EN:PDF> [date accessed: 03. Nov 2010]. Furthermore, a recent decision by the US Supreme Court considered the question as to what type (if any) of support could lawfully be provided to designated "terrorist groups" such as the PKK and LTTE under US law, see: <http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf> [date accessed: 03. Nov 2010]

72 *Segi and Others v. all 15 Member States* [2002] ECHR [Application No. 6422/02, 23 May 2002]

73 Annex to Common Position 2001/931/CFSP. (*Supra* note 3)

74 *Segi and Others v. all 15 Member States*. (*Supra* note 72) [at p.9]

75 Common Position 2001/930/CFSP (Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0090:0092:EN:PDF>[date accessed 02. Nov 2010]) and Common Position 2001/931/CFSP (*Supra* note 3)

76 *Segi and Others v. all 15 Member States* (*Supra* note 72) [at p.10]

77 Those designated on the autonomous EU list, for example, have allegedly 'attempted, participated in or facilitated the commission of a terrorist act' which is 'necessarily a criminal offence under national law' [see Articles 1(3) and 1(4) of Common Position 2001/931/CFSP (*Supra* note 3)]. Thus, as Eckes points out "even though their conduct does not necessarily meet the conditions of a criminal offence, they are involved in the commission of a crime"(*Supra* note 10) [at p. 164].

78 Case T-338/02, *Segi and Others v Council*. [2004] ECR II-1647. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002B0338:EN:HTML> [date accessed: 04. Nov 2010]

79 *Ibid* [at para. 38]

80 The appeal was filed on 17 August 2004.

81 As discussed, the contested measure came from the third pillar founded in section VI of the Treaty on European Union (TEU). Art. 35 TEU sets the competences of the ECJ in the pillar of Police and Judicial Co-operation in Criminal Matters. These did not extend to include jurisdiction over action for damages. See Case C-355/04 P *Segi and Others v Council* [2007] ECR I-1657 [at paras. 45 - 46]. Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0355:EN:HTML> [date accessed: 05. Nov 2010]

82 *Ibid* [at para. 56]

83 Eckes, C. (*Supra* note 10) [at p. 333]

84 Common Position 2001/931/CFSP and EC Regulation 2580/2001 (*Supra* note 3)

85 Der Generalbundesanwalt beim Bundesgerichtshof (German Federal Prosecutor General). Press Release No 21/2009. 'Anklage gegen zwei mutmaßliche Mitglieder der ausländischen terroristischen Vereinigung Revolutionäre Volksbefreiungspartei-front (DHKP-C)' (19. October 2010). Available at: <http://www.generalbundesanwalt.de/de/showpress.php?themenid=11&newsid=344> [date accessed: 04. Nov 2010]

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87 *Supra* note 85

88 Neues Konstrukt auf Grundlage des Außenwirtschaftsgesetzes (AWG) und der EU-Terrorliste bedeutet weiteren Schritt zum Feindstrafrecht -Prozessbeginn am 11. März vor dem OLG Düsseldorf. Available at: <http://www.no129.info/duesseldorf3/pm-1103.pdf> [date accessed: 02. Nov 2010]

89 2010/C 148/18, Reference for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 29 December 2009 - Generalbundesanwalt beim Bundesgerichtshof v E and F.

90 Case C-550/09, *E and F* [2010] ECR 00000 Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0550:EN:HTML> [date accessed 05. Nov 2010]

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106 Human Rights Committee (HRC). Communication No. 1472/2006. *Nabil Sayadi and Patricia Vinck v. Belgium* (29 December 2008) [at para. 2.4]. Available at: <http://www.statewatch.org/terrorlists/docs/Vinck%20-%20Sayadi%20%28English%29.pdf> [date accessed 02, Nov 2010]

107 *Ibid* [at para. 2.5]

108 *Ibid* [at para. 2.5 and 4.3]

109 *Ibid* [at paras. 3.1 - 3.13]

110 *Ibid* [at para. 4.6]

111 *Ibid* [at para. 4.12]

112 *Ibid* [at para. 11]

113 *Ibid* [at para. 10.11]

114 *Ibid* [at para. 7.2]

115 *Ibid* [at para. 10.13]

116 *Ibid* [at para. 12]

117 United Nations Security Council. Press Release No SC/9711, 'Security Council Al-Qaida and Taliban Sanctions Committee Removes Names of Two Individuals from its Consolidated List' (21 July 2009). Available at: <http://www.un.org/News/Press/docs/2009/sc9711.doc.htm> [date accessed: 02. Nov 2010]

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119 Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] ECR I-6351 (hereafter, the *Kadi* case). Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> [date accessed: 04. Nov 2010]

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123 *Kadi*, [2005] ECR. II-3649 [at para. 214]; *Yusuf & Al Barakaat*, [2005] ECR. II-3533 [at para. 265]

124 *Ibid* (*Kadi* [at para. 226] and *Yusuf & Al Barakaat* [at para. 277])

125 Vienna Convention on the Law of Treaties Art. 53 (May 23 1969) 1155 U.N.T.S. 331

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- 128 Danosh, Shelly (*Supra* note 121)
- 129 Court of Justice, Luxembourg. Press Release No CJ/E/08/2. 'Advocate General's Opinion in Case C-402/05' (16 January 2008). Available at: <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05> [date accessed: 02, Nov 2010]
- 130 *Ibid* [at para. 54]
- 131 *Ibid*
- 132 *Ibid* [at para. 55]
- 133 Kelly, H. and Fischer, A. (*Supra* note 118)
- 134 *Ibid* [at para. 330]
- 135 *Ibid* [at para. 334]
- 136 *Ibid* [at paras. 345 - 349]
- 137 EC Regulation 1190/2008 amending, for the 101st time, EC Regulation 881/2002 [at para. 3]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:322:0025:0026:EN:PDF> [date accessed: 02 Nov 2010]
- 138 *Ibid* [at para. 7]
- 139 Cases T-45/09, *Al Barakaat Foundation v Commission* [2009] and Case T-85/09, *Kadi v Commission* [2010] ECR I-00000 Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009A0085:EN:HTML> [date accessed: 6. Nov 2010]
- 140 Committee of Legal Advisers on Public International Law (CAHDI) 'UN Sanctions and Respect for Human Rights'. March 2010
- 141 *Supra* note 139
- 142 *Ibid* [at paras. 129 -133]
- 143 *Ibid* [at para. 171]
- 144 *Ibid* [at para. 172]
- 145 *Ibid* [at para. 173]
- 146 Complaint filed 16 January 2009 See: [http://www.nefafoundation.org/miscellaneous/FeaturedDocs/Kadi\\_v\\_Paulson\\_complaint.pdf](http://www.nefafoundation.org/miscellaneous/FeaturedDocs/Kadi_v_Paulson_complaint.pdf) [date accessed 02. Nov 2010]
- 147 Pursuant to Article 6(1) of the EU Treaty
- 148 The only reference the Court made to the primacy of international law was one of tacit approval: "any judgment given by the Community judicature deciding that a Community measure intended to give effect to a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law". *Kadi* case [at para. 4]
- 149 Posch, A (*Supra* note 127)
- 150 Biersteker, T. and Eckert, S. The Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"* (October 2009). [at p.11]. Available at: [www.watsoninstitute.org/pub/2009\\_10\\_targeted\\_sanctions.pdf](http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf) [date accessed: 26. Oct 2010]
- 151 *Supra* note 139 [at para. 123]
- 152 Beside Youssef Nada himself, the entities 'Bank Al Taqwa Limited', 'Nada Management Organization SA', 'Waldenberg AG' and 'Youssef M. Nada & Co. Gesellschaft M.B.H' were also listed on 9 November 2001. Additionally, 'Ba Taqwa for Commerce and Real Estate Company Limited' and 'Nada International Anstalt' were listed on 3 September 2002. See: <http://www.un.org/sc/committees/1267/NSQI05301E.shtml> [date accessed 02. Nov 2010]. For background on the allegations, see Dorsey, James. M. 'Delisting of Islamist financier raises questions about US and UN terrorism lists' *Deutsche Welle* (16. April 2010). Available at: <http://www.dw-world.de/dw/article/0,,5474116,00.html> [date accessed: 02 Nov 2010]
- 153 Swiss Supreme Court (Schweizer Bundesgericht), *Youssef Mustapha Nada v SECO*, Staatssekretariat für Wirtschaft, 14 November 2007, 1A.45/2007/daa
- 154 *Ibid* [at paras. 8.1 - 8.2]
- 155 *Ibid*
- 156 *Ibid*, [at para. 7]
- 157 *Ibid* [at para. 2.1]
- 158 *Ibid* [at para. 8.3]
- 159 Eckes, C. (*Supra* note 10) [at p. 406]
- 160 See Dorsey, James. M. (*Supra* note 152)
- 161 [http://www.parlament.ch/afs/data/f/bericht/2009/f\\_bericht\\_n\\_k4\\_0\\_20093719\\_0\\_20100301.htm](http://www.parlament.ch/afs/data/f/bericht/2009/f_bericht_n_k4_0_20093719_0_20100301.htm) [date accessed: 06 November 2010]
- 162 This point was also made by the Swiss Supreme Court in the *Nada* judgment (*Supra* note 153) [at para. 8.2]
- 163 Cf. with Eckes, C. (*Supra* note 10) [at p. 406] however, who argues that "for several reasons 'political control' will not be enough to reach a reasonable level of compliance with human rights as quickly as possible".
- 164 United Nations Security Council. Press Release No SC/9744, 'Security Council Al-Qaida and Taliban Sanctions Committee Approves deletion of one name from its Consolidated List' (23 September 2009). Available at: <http://www.un.org/News/Press/docs/2009/sc9744.doc.htm> (date accessed: 29. Oct 2010)
- 165 United Nations Security Council. Press Release No SC/9877, 'Security Council Al-Qaida and Taliban Sanctions Committee Removes Names of Three Entities from Consolidated List' (11 March 2010). Available at: <http://www.un.org/News/Press/docs/2010/sc9877.doc.htm> [date accessed: 29. Oct 2010]. On 22 October 2009 the Sanctions Committee had removed 'Bank Al Taqwa Limited' and 'Nada Management Organization SA' from the blacklist [See: United Nations Security Council. Press Release No SC/9773, 'Security Council Al-Qaida and Taliban Sanctions Committee Removes Names of Four Entities from Consolidated List' (27. October 2009). Available at: <http://www.un.org/News/Press/docs/2009/sc9773.doc.htm> [date accessed: 29. Oct 2010]]; and on 1 March 2010 'Ba Taqwa for Commerce and Real Estate Company Limited' and 'Nada International Anstalt' were also removed (United Nations Security Council. Press Release No SC/9872, 'Security Council Al-Qaida and Taliban Sanctions Committee Removes Names of Two Entities from Consolidated List' (22. October 2009) Available at: <http://www.un.org/News/Press/docs/2010/sc9872.doc.htm> [date accessed: 29. Oct 2010].
- 166 Dorsey, James (*Supra* note 152).
- 167 Tenth report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1822 (2008) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2009/502, [at p.32] Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/542/20/PDF/N0954220.pdf?OpenElement>, [date accessed: 6 November 2010].
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- 169 *Ibid* [at para. 55]
- 170 Press Summary, A, K, M, Q and G v *HM Treasury*. Supreme Court of the United Kingdom. Available at: [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2009\\_0016\\_PressSummary.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0016_PressSummary.pdf) [date accessed: 6 November 2010]
- 171 *Supra* note 168
- 172 *Ibid* [at para. 47]
- 173 *Ibid* [at para. 60]
- 174 *Ibid* [at para. 66]
- 175 *Ibid* [at para. 78]
- 176 *Ibid* [at para. 74]
- 177 *Ibid* [at para. 65]
- 178 *Ibid* [at paras. 81 - 82]
- 179 *Ibid* [at para. 84]
- 180 *Supra* note 168
- 181 Guild, E. CEPS: Liberty and Security in Europe. *EU Counter-Terrorism Action: A Fault line between law and politics?* (2010). Available at: [www.ceps.eu/ceps/download/3266](http://www.ceps.eu/ceps/download/3266) [date accessed 03. Nov 2010]
- 182 *Ibid* [at p.9]
- 183 *Supra* note 168 [at para. 33]
- 184 Guild, E. (*Supra* note 181) [at p. 7]
- 185 Case C 340/08, *M (FC) And Others v Her Majesty's Treasury* [2010] ECR I-00000. Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008C0340:EN:HTML> [date accessed: 04. Nov 2010]
- 186 *Al-Qa'eda and Taliban (United Nations Measures) Order 2002* (SI No. 2952). Available at: <http://www.opsi.gov.uk/si/si2006/20062952.htm> [date accessed: 03. Nov 2010]
- 187 *Supra* note 185 [at para. 25]
- 188 *Supra* note 186 [at section 7]
- 189 Case C 340/08, *M (FC) And Others v Her Majesty's Treasury* (*Supra* note 185) [at para. 30]
- 190 Casciani, Dominic 'Terror suspects' spouses win UK benefits challenge' *BBC News* (29. April 2010). Available at: [http://news.bbc.co.uk/2/hi/uk\\_news/8651066.stm](http://news.bbc.co.uk/2/hi/uk_news/8651066.stm) [date accessed: 29. Oct 2010].
- 191 *M & Ors v Her Majesty's Treasury & Ors* [2006] EWHC 2328 (Admin) Available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2006/2328.html> [date accessed 08. Nov 2010]
- 192 *M & Ors, R (on the application of) v Revenue & Customs Secretary of State for Work & Pensions Manchester City Council, Birmingham City Council and London Borough of Hammersmith and Fulham* [2007] EWCA Civ 173. Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2007/173.html> [date accessed 08. Nov 2010]
- 193 *M, R (on the application of) v Her Majesty's Treasury* [2008] UKHL 26 Available at: <http://www.bailii.org/uk/cases/UKHL/2008/26.html> [date accessed 08. Nov 2010]
- 194 *Ibid* [at para. 32]
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- 196 *Ibid* [at para. 56]
- 197 *Ibid* [at para. 58]
- 198 Tzanakopoulos, A. 'An Effective Remedy for Josef K: Canadian Judge 'Defies' Security Council Sanctions through Interpretation' EJIL Talk (19 June 2009). Available at: <http://www.ejiltalk.org/an-effective-remedy-for-josef-k-canadian-judge-defies-security-council-sanctions-through-interpretation/> [date accessed: 03. Nov 2010]
- 199 T-727-08, *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 [at paras. 9 - 12]. Available at: <http://reports.fja-cmf.gc.ca/eng/2009/2009fc580/2009fc580.pdf> [date accessed: 04. Nov 2010]
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- 201 *Ibid* [at paras 27-29]
- 202 *Ibid* [at paras 31 - 40]
- 203 *Ibid* [at para. 42]
- 204 *Ibid* [at paras. 44 and 147]. See also: Tzanakopoulos, A. (*Supra* note 198).
- 205 T-727-08, *Abdelrazik v. Canada (Minister of Foreign Affairs)*, (*Supra* note 199) [at paras 156 - 57]

206 Ibid [at para. 166]  
207 Ibid [at paras. 51 - 53]  
208 Ibid [at para. 53]  
209 See: 'Abousfian Abdelrazik: Project Fly Home' People's Commission Network. Available at: <http://www.peoplescommission.org/en/abdelrazik/past.php> [date accessed: 07. Nov 2010]  
210 See Ibid. Available at: <http://www.peoplescommission.org/en/abdelrazik/> [date accessed: 07. Nov 2010] and People's Commission Network. Press Release. 'Canadian Labour Congress challenges Security Council „terrorist“ list' (18. May 2010) Available at: <http://www.peoplescommission.org/files/abousfianMedia/20100518PressReleaseEn.pdf> [date accessed: 07. Nov 2010]  
211 See BC Civil Liberties Association. Press Release (07. June 2010) Available at: [www.bccla.org/pressreleases/10Abdelrazik.pdf](http://www.bccla.org/pressreleases/10Abdelrazik.pdf) [date accessed 07. Nov 2010]  
212 1.SOR/99-444, United Nations Al-Qaida and Taliban Regulations. Available at: <http://www.canlii.org/en/ca/laws/regu/sor-99-444/latest/sor-99-444.html> [date accessed 03. 2.Nov 2010]  
213 1.'Challenging the UN Security Council'. *BCCLA National Security Blog* (07. June 2010) Available at: <http://nationalecurity.bccla.org/2010/06/07/challenging-the-un-security-council/> [date accessed 03. Nov 2010]  
214 The issues associated with this case, including the lawfulness of blacklisting in Canada and the basis for the current constitutional challenge, has recently been explored in depth in a comprehensive new public report prepared by Carmen K. Cheung for the British Columbia Civil Liberties Association (BCCLA) entitled: "*The UN Security Council's 1267 Regime and the Rule of Law in Canada*". Available at: <http://www.bccla.org/othercontent/1267.pdf> [date accessed: 03. Nov 2010].



## V. Broader Impacts of the Lists

## V. Broader Impacts of the Lists

In this chapter we broaden our focus from the legal impact and effect of the terrorist listing regimes to examine the wider implications of blacklisting policies.

We discuss the way in which the lists have effectively expanded the power of the executive branches of government and transformed the UN Security Council into a more executive body in its own right. By legitimising preemptive (or ‘pre-crime’) action on the basis of blacklisting while at the same time outsourcing the definition of terrorism, the UN has ushered in a system that allows repressive governments to criminalise political opponents by branding them ‘terrorists’. Doing this using ‘administrative’ rather than criminal law has simultaneously weakened judicial and democratic control of the executive.

Blacklisting has had a tremendously negative impact on attempts to resolve long-standing conflicts and complex struggles for self-determination, often undermining the very right to self-determination itself. International development organisations have had to adjust to a new regime of due diligence obligations at home while simultaneously finding their work in conflict zones and fragile states paralysed by the blacklisting of groups and individuals in the communities in which they operate.

In Europe and North America diaspora communities have come under particular scrutiny because of their association with terrorist organisations. Kurds, Palestinians, Tamils, Kashmiris, Baluchis and other minority communities have all felt the effect of suspicion and stigmatisa-



tion. We also discuss the gendered impacts of the terrorism lists and the way in which women have often borne the brunt of asset-freezing, reporting obligations and other control mechanisms.

Finally, we argue that the adoption of terrorist lists by the UN and EU is part of a dangerous precedent that legitimises the principle of black-listing and encourages its use in other security frameworks, with worrying long-term implications for civil liberties.

## 5.1.

### Externalisation and Expansion of Executive Power

The terrorist listing regimes set up under Resolutions 1267, 1373 and the relevant EU provisions that implement them have created structural mechanisms for the production of both increasing executive (and effectively unaccountable) power over individuals and novel means of circumventing domestic fundamental rights protection mechanisms.

Those who are blacklisted under the 1267 regime, for example, still remain trapped in a Kafkaesque situation without the capacity to effectively challenge their listing at the UN level or to exercise their rights of defence at a European level. EU institutions still do not exercise any discretion with respect to the UN listing mechanisms - the UN Sanctions Committee simply determines who is to be targeted, on the basis of recommendation made by a Member State, and the EU then faithfully reproduces the UN list into its own legal order. The individuals who are targeted and the European institutions that implement the UN lists are denied access to the relevant information used to support the terrorist allegation. Blacklisted individuals are denied the ability to effectively test the legality of the UN listing in a court. EU Courts have no sphere of influence over the UN Sanctions Committee and the specific listing decisions it takes. Furthermore, even after the recent introduction of procedural reforms there is still no effective remedy available for individuals to challenge their listing at the UN level. An individual can still only be removed from the list ultimately if either the designating state or their national government makes a recommendation for delisting to the Sanctions Committee. <sup>1</sup>

As a result of litigation brought by targeted individuals, EU courts have gone some way toward attempting to rectify this situation. Both the CFI and ECJ have repeatedly ruled that individuals are being denied their right of action before a Court because they do not possess the information necessary to exercise their rights of defence and that Courts themselves were ‘not in a position to carry out adequately its review of the lawfulness of [a] decision’. <sup>2</sup> The ECJ went even further in the *Kadi* case by establishing that European sanctions that give effect to UN terror lists must be judicially reviewable at the European level and that states cannot simply hide behind the supremacy of international law in order to deny fundamental rights protections to individuals. <sup>3</sup> However, despite this legal victory, the procedural reforms which followed and the current attempts at reform the core problem still remains: no adequate and effective remedy for individuals exist at the UN level and European institutions still continue to reproduce the UN lists without having access to the relevant information on which the listing is based and in circumstances that breach individuals’ fundamental rights.

*Kadi* and *al Barakaat*, for example, were first listed as terrorist suspects by the UN Sanctions Committee in the immediate aftermath of the 11 September 2001 attacks. Consequently, the EC adopted a regulation freezing all of their assets within the EU. <sup>4</sup> Whilst they first challenged this listing in December 2001, it was not until seven years later (that is, on 3 September 2008) that the ECJ finally annulled the measures and held that their listing breached their fundamental rights. <sup>5</sup> Despite this important victory, however, their assets remained frozen <sup>6</sup> because the EC simply continued to copy the blacklist produced by the UN Sanctions Committee, responding to the ECJ’s ruling by stating:

[we have] communicated the narrative summaries of reasons provided by the UN Al-Qaida and the Taliban Sanctions Committee, to Mr Kadi and to Al Barakaat International Foundation and given them the opportunity to comment on these grounds in order to make their point of view known. <sup>7</sup>

A similarly draconian and combative approach has been followed with respect to the implementation of autonomous European sanctions. The history of the PMOI’s designation, as discussed in part 4.1 of this Report, clearly illustrates these problems. There the EC Council repeatedly listed PMOI as a terrorist organisation, for example, despite having their designations annulled three times by the CFI as well as being overturned in UK courts and tribunals. PMOI were first listed on the European list of terrorist organisations on 2 May 2002 at the request of the UK Home Secretary. <sup>8</sup> This listing was successfully challenged before the CFI on 12 December 2006, <sup>9</sup> who held, *inter alia*, that the listing was in breach of the rights of defence. The Council then adopted a further decision <sup>10</sup> to list PMOI as a terrorist organisation, again at the request of the UK Home Secretary. Shortly after, however, the UK Proscribed Organisation Appeals Commission (POAC) held that it would be ‘perverse’ to maintain the PMOI designation and ordered the UK government to delist them as a terrorist organisation. Despite this ruling, the Council quickly adopted a new decision on 15 July 2008 still listing PMOI as a terrorist organisation, albeit this time at the request of the French (rather than UK) government. However, on 23 October 2008, the CFI again annulled this second Council designation of PMOI, on the grounds that there was no remaining decision to keep

PMOI on the blacklist and, on 4 December 2008, annulled a third Council designation of PMOI stating clearly that:

The Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judiciary whose task is to review the lawfulness of that decision.

It was not until 26 January 2009 that PMOI were finally removed from the EU list of terrorist suspects. However, the core problem remains - those who are blacklisted under the autonomous European sanctions are still without their necessary due process rights and the Council continues to conceal relevant information from the EU courts rendering them unable to provide an effective remedy to those targeted.

The blacklisting history of these two groups succinctly demonstrates how the listing regimes have been used in practice by states and European institutions to repeatedly deny or bypass fundamental rights protections. <sup>11</sup> In both cases, it took around seven years of proactive litigation in order to be delisted, whilst some still remain on the list with their assets frozen despite having their designation annulled in Court. <sup>12</sup> Despite repeated successful challenges against terrorist designation (sometimes by the same claimants) as well as the ECJ confirming that all Community sanctions must be subject to full judicial review irrespective of whether they are implementing UN or EU lists, European institutions continue to blacklist individuals and groups without even accessing or evaluating the information underpinning the terrorist designations and in circumstances that breach fundamental rights. Despite the blacklisting regimes being in place for at least twelve years, and scores of legal challenges that have successfully annulled designations on procedural grounds, EU courts have yet to review the substance or well-foundedness of a single decision to list and sanction someone as a terrorist. <sup>13</sup> Instead, as was the case with Mr Kadi and al Barakaat, they are simply referred to the UN level and given the indirect opportunity to 'make their point of view known' to the Sanctions Committee which designated them.

In sum, the gap or legal lacuna opened up by the blacklisting regimes has been productive - generating new means of aggregating and externalising forms of unaccountable executive power and new methods of circumventing fundamental rights protections in the name of combating terrorism. These issues have not been, and arguably cannot be, resolved in manner that is consistent with fundamental rights - they go to the very legal core of the blacklisting regimes.

## Proliferating Pre-Crime: Administrative Measures, Criminal Effects

As outlined above, the terror listing regimes enacted by the UN and EU circumvent the ‘normal’ criminal procedure by placing the power to designate an individual or group as ‘terrorist’ in the hands of the executive and then preventing national courts from exercising judicial review of those designations. This effect is not simply an unforeseen by-product of the blacklisting regimes, but rather its *raison d’être*.

In the aftermath of the 11 September 2001 attacks, preemptive security strategies and techniques have been prioritised as the most effective means of fighting the ‘war on terrorism’. As McCulloch and Pickering have observed:

Preventing harm through pre-empting threats is the foremost rationale for counter-terrorism measures implemented post 9/11... Strategies aimed at preventing harmful acts and pre-empting the threat of terrorism through disruption, restriction and incapacitation include compulsory questioning, extended detention without charge, control orders that restrict movement and association, criminalizing membership of organizations deemed or judged to be terrorist organizations, criminalization of association and engagement with groups deemed to be terrorist organizations, freezing of assets and the criminalization of a wide range of conduct, not necessarily linked to any violent act, but deemed nevertheless to be terrorist-related. <sup>14</sup>

It is within this anticipatory, ‘pre-crime’ context that the ‘war on terrorist financing’ and its impact on fundamental rights can best be situated. Blacklisting and preventative asset freezing is perceived by governments and policy makers as a cutting-edge method of tracing, intervening and disabling terrorist networks at an early stage. <sup>15</sup> At the same time, however, the former US Treasury Secretary Paul O’Neill has described the rapid development of blacklisting and asset freezing in the post 9/11 context in the following terms:

[We] moved on ... setting up a new legal structure to freeze assets on the basis of evidence that might not stand up in court ... Because the funds would be frozen, not seized, the threshold of evidence could be lower and the net wider. Yet ‘freeze’ is something of a legal misnomer – funds of Communist Cuba have been frozen in various US banks for forty years [emphasis added]. <sup>16</sup>

The asset-freezing measures facilitated by the UN and EU blacklisting regimes, therefore, have been prioritised, promoted and developed precisely because they enable preventative, extra-legal security intervention by states on the basis of evidence that is not designed to hold up in court. <sup>17</sup> This is extremely problematic - not only from a legal and fundamental rights perspective, but from the perspective of democratic control.

The primary legal justification offered by states (and Courts) for this extra-legal procedure, which is *prima facie* at odds with due process rights, is that blacklisting and asset-freezing are “mere[ly] administrative measures and not ... any form of penalty or confiscation ... capable of extending ... the protection of Article 6 ECHR”. <sup>18</sup> In their

2005 judgment in the *Kadi* case, for example, the CFI held that: “the freezing of funds is a precautionary measure which, unlike confiscation, does not effect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof”.<sup>19</sup> Furthermore, the CFI in that decision (since overturned by the Grand Chamber of the ECJ) stressed the *temporality* of the asset freeze as determinative. According to the CFI in that case (and the majority of states more generally) blacklisting and asset freezes are “temporary”, precautionary instruments that are administrative in scope, rather than more permanent, punitive measures akin to a criminal charge and its correlated property confiscation.

Given the fact that many of those on the blacklists have already been subject to asset freezes for periods of between seven - nine years,<sup>20</sup> and that there is still no effective way for individuals to challenge their blacklisting at the UN level, the idea that blacklisting and asset-freezing is *temporary* in nature is clearly difficult to sustain. The longer that states leave individuals on the blacklist and continue to freeze their assets without effective redress, the more clearly these ostensibly temporary measures takes on the form of semi-permanent states of exception.<sup>21</sup>

A full analysis of the debate around the legal nature of targeted sanctions (administrative v. criminal) is beyond the scope of this Report.<sup>22</sup> Suffice to say, however, that despite the UN and EU’s insistence that the listing frameworks are purely administrative in nature, the consequences of the sanctions attached to the listing are clearly *punitive* in effect. Indeed some officials - including the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in his 2008 report to the UN General Assembly - have argued that “because of the indefinite freezing of the assets of those listed, the listing amounted to a criminal charge owing to the severity of the sanction”.

Another key issue with respect to the executive and administrative nature of blacklisting is democratic accountability. As discussed in part 2 of this Report, the operative principle of current blacklisting regimes is that individual states decide who should be listed and then the ‘international community’ simply enforces those that are designated on the basis of a shared to commitment to combat international terrorism. Whilst there may be a modicum of democratic control at the national level over the proscription of groups as terrorist organisations,<sup>23</sup> there is no control whatsoever over the administrative decision (taken by the executive) to designate an individual for the purposes of imposing financial sanctions.

Moreover, the open-ended nature of the majority of designations and the barriers to meaningful judicial review have served to transform those decisions into a quasi-criminal judgments. To be deemed an associate of Al-Qaida and placed on an international terrorism list is just about as harsh a judgment as one could be subjected to. As Eckes argues, with respect to autonomous European listings:

Those listed have attempted, participated in or facilitated the commission of a terrorist act [which is] necessarily a criminal offence under national law. Hence, even though their conduct does not necessarily meet the conditions of a criminal offence, they are involved in

the commission of a crime. Moreover, the terms ‘terrorist’ and ‘terrorism’ entail an additional negative stigma that goes beyond a common criminal conviction... Furthermore, the consequences of a listing are akin to a criminal conviction, which is publicly known but not immediately followed by a punishment... In sum, it is submitted that the identification of an individual on a European list has *criminal implications*.<sup>24</sup>

That this quasi-criminal sanction could be reached on the basis of nothing more than an assessment of preliminary police investigations or intelligence material by a civil servant is arguably an affront to the principles of natural justice.

### 5.3.

## Transforming the UN Security Council

Blacklisting has also functioned as an effective vehicle for radically transforming the role of the UN Security Council into a global legislative body, bypassing the traditional process of international law making by treaty.

With the adoption of Resolution 1267, the Security Council began the process of transforming a sanctions regime that had originally been designed to target states, rather than individuals and the networks that support them. Resolution 1267 first came into force on 15 October 1999 calling upon all states to freeze the funds and other financial resources belonging to the Taliban and Al-Qaida. A series of further resolutions followed - including Resolution 1333 which empowered the Sanctions Committee to set up a list of individuals and entities associated with Usama bin Laden and Resolution 1390 (adopted shortly after the attacks of 11 September 2001) which renewed the Taliban and Al-Qaida lists and extended travel and arms embargo sanctions to all those blacklisted. Within months following the attacks of 11 September 2001, therefore, a blacklisting regime had been built which had had total global reach and was unlimited in both geographic scope and the potential number of individuals it could target. Rather than targeting senior officials of targeted regimes and their immediate family members (as had been the case with earlier UN sanctions), sanctions under Resolutions 1267, 1333 and 1390 blacklists directly targeted individuals and groups who were deemed by Sanctions Committee to be ‘associated with’ Al-Qaida and Usama bin Laden. What had started, therefore, as sanctioning system against states (Afghanistan) was effectively transformed by the UN Security Council - first, by breaking with the requirement that there be a connection with a specific territory or state<sup>25</sup> and then by generalising the measures into an open-ended ‘smart sanctions’ regime aimed at the potentially unlimited number of individual nodes within globally distributed terrorist *networks*, thus affecting fundamental rights in a more profoundly draconian way than had been possible previously.<sup>26</sup>

If Resolution 1267 facilitated the creation of new legal mechanisms for the UN Security Council to directly interfere with the fundamental rights of individuals, it was Resolution 1373 that most effectively served to transform and expand the powers of the Security Council itself. In 1999, the International Convention for the Suppression of the Financing

of Terrorism was finalised <sup>27</sup>, which urged all states to criminalise the financing of terrorist activities. As a multilateral treaty the Convention was not binding and, at the time that Resolution 1373 came into effect in 2001, it had attracted only four ratifications and forty-six signatures - certainly not enough ratifications for it to enter into force. With Resolution 1373, however, the Security Council effectively made the obligations of the Convention mandatory and binding on all states, obliging them to take actions (such as criminalising the financing of terrorist acts) that they previously had to agree to in the Convention in order to be bound. <sup>28</sup> With Resolution 1373, therefore, the UN Security Council quietly assumed, without any public debate, unprecedented world-legislative powers, expanding its powers through the creation of a new general form of binding rules. <sup>29</sup> Thus, as Krisch comments in his analysis of the Resolution 1373:

In this case the fight against terrorism will have led to a change in international relations that is of fundamental importance not only in symbolic but potentially also in practical terms: the establishment of an international legislator in matters of peace and security.

[It] has resulted in the transformation of collective security into a mechanism of legislation, administration and regulation which bears many structural similarities to a world government [and the] affirmation of central public power against the elusive, dispersed, transboundary threat of terrorism... [that is], the strengthening of territorial states and of a global quasi-government.

Of course, the creation of this “global quasi-government” needs to also be understood as a mechanism for expanding the power of the UN Security Council’s most important, powerful and influential member - the United States. The US have aggressively and strategically pursued a policy of “instrumental multilateralism” in the years following 11 September 2001 within an international field characterised by Condoleeza Rice in the following terms:

An earthquake of the magnitude of 9/11 can shift the tectonic plates of international politics ... [T]his is a period not just of grave danger, but of enormous opportunity ... America and our allies must move decisively to take advantage of these new opportunities. <sup>30</sup>

It would be a mistake to understand the emergence of, and problems presented by, this new form of supranational power simply as a renewed vehicle of US imperialism. Nevertheless, it is within this context - where the threat of terrorism is used *productively* to generate new forms of supranational executive power - that the proliferation of blacklist-ing regimes and the rapid and unspoken transformation of the UN Security Council into global legislator can best be understood.

## Outsourcing the Definition of ‘Terrorism’, Undermining the Right to Self-Determination

Despite their ostensible aim of combating terrorism, the blacklists operate within a complex international legal field where there is no clear or agreed definition of what actually constitutes ‘terrorism’ itself. As we explain below, this absence of a legal definition has had a significant legal and political influence on the development and impact of the listing regimes.

According to the UN Special Rapporteur on Terrorism and Human Rights, more than 109 different definitions of terrorism have been put forward for international agreement between 1936 and 1981, yet none have been universally accepted.<sup>31</sup> As a result of this failure, at least twelve international conventions have emerged since 1963 that seek to avoid this issue by instead focusing on ‘acts’ of terror. Recent UN attempts to revisit this problem - for example, in the report of the High-Level Panel on Threats, Challenges and Change entitled ‘*A More Secure World: Our Shared Responsibility*’<sup>32</sup> - have similarly defined terrorism largely by reference to terrorist ‘acts’ as contained in the earlier anti-terrorism conventions, reproducing rather than resolving this fundamental tension.<sup>33</sup>

There are two key reasons why a definition of ‘terrorism’ has not been internationally agreed upon. First, there has been widespread conflict about the appropriate status of state-sponsored terrorism - that is, the state deployment of their armed forces against civilian populations. Second, and more important in the context of the terror lists, is the widespread international disagreement over the appropriate status of the right to self-determination under international law and the various national liberation movements and political struggles which rely upon this right in their resistance.

This inability to agree on a clear definition of terrorism has persisted even after the events of 11 September 2001 and creates a fault line underpinning the core legal framework of the blacklisting regime set up under Resolution 1373, the “most sweeping sanctioning measure ever adopted by the Security Council”.<sup>34</sup> Resolution 1373 compels states to “prevent and suppress the financing of terrorist acts”<sup>35</sup> despite the fact that there is no uniform definition of ‘terrorism’ in existence at an international level nor any definition of either ‘terrorism’ or terrorist ‘acts’ contained in the Resolution itself.

Crucially, this makes Resolution 1373, and the ‘terrorism’ it aims to combat, open to unilateral interpretation by states in light of their own national interests.<sup>36</sup> Or, put differently, Resolution 1373 “has effectively outsourced the definition of terrorism to member states to define ‘terrorism’ domestically without limitation”.<sup>37</sup> The implications of this outsourcing have been profound. Most significantly, it has allowed states *inter alia* to designate (and therefore, criminalise) resistance movements on the basis of geo-political, foreign policy or state diplomatic interests. As Mark Muller QC puts it:



nation states have traded resistance movements like carbon emissions in the Quetta Agreement. Too often they have found themselves on the lists not because of a judicial or forensic exercise and not because of any universally applied objective criteria about what constitutes a public threat, but because of geo-political horse trading. <sup>38</sup>

As a result, groups which may have been lawfully engaged in armed conflict against oppressive states and legitimately struggling for their right to self-determination - as expressly provided under common Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) <sup>39</sup> - have been criminalised through terrorist proscription and designation regimes.

Two examples clearly highlight this process - the proscription and designation of both the PMOI and PKK as terrorist organisations. As discussed earlier in this Report, the PMOI - who describe themselves as the largest and most active opposition movement in Iran - used armed action against military targets in Iran until 2000 as part of their resistance against the Iranian state. As such, its members have been disproportionately subjected to gross human rights violations by the Iranian regime - it has been estimated, for example, that up to 120,000 PMOI members and supporters have been executed over the past two decades. <sup>40</sup> The US were the first to designate PMOI as a terrorist organisation in 1997 in response to direct pressure from Tehran. According to one senior official in the Clinton administration, PMOI's designation was intended as "a good will gesture" <sup>41</sup> toward Iran and a means of "opening up a dialogue with the Iranian government" <sup>42</sup> at a time when the US were seeking to court the newly elected moderate President Khatami. The EU, similarly under direct pressure from Tehran, who had set the terrorist designation of PMOI as a precondition for negotiations over EU access to Iranian nuclear facilities, followed suit shortly after and designated PMOI as a terrorist organisation on 17 June 2002. <sup>43</sup>

The PKK have, since at least 1978, been involved in a struggle against the Turkish state for self-determination of the Kurdish people and for 'democratic autonomy' within the Turkish state. Whilst they were excluded from the first round of terrorist designations following 11 September 2001, they were subsequently listed in 2002. <sup>44</sup> At the time they were listed, however, the PKK had observed a four-year cease-fire during which time no acts of violence against the Turkish state had occurred. In fact, prior to their designation the PKK had even announced their own formal dissolution and the creation of a new organisation (KADEK) specifically aiming at fostering a democratic settlement to the issue of Kurdish self-determination. However, despite their observation of the ceasefire and genuine attempts to peacefully resolve their conflict with Turkey, the Council of the EU exercised its discretion in 2004 to blacklist the PKK, Kadek and Kongra-Gel without any explanation in a process "that had more to do with international politics and the need to appease Turkey than with the strict application of law". <sup>45</sup> Despite having their terrorist designation annulled as unlawful by the European Court of First Instance (CFI) in April 2008 <sup>46</sup>, the PKK were promptly placed back, and currently remain, upon the EU blacklist by the Council. <sup>47</sup>

Blacklists can and have therefore been used as political tools by nation states in attempts to criminalise and delegitimise popular resistance movements. <sup>48</sup> By outsourcing the definition of terrorism, the blacklists give nation states enormous power to unilaterally attach the

label of ‘terrorist’ to individuals or organisations they are politically opposed to and financially cripple them. <sup>49</sup> They have functioned as crucially significant legal vehicles for actively de-legitimising any form of armed conflict as terrorism. In this way, the lists function not simply as legal tools for combating terrorism, but also as ideological and political tools for undermining the right to popular resistance and self-determination.

## 5.5.

### Broadening the Scope of Terrorism: Criminalisation by Association

The impact of blacklisting extends far beyond the actual names of designated groups and individuals. It is not an exaggeration to suggest that the proscription of groups engaged in struggles for self-determination has had the effect of transforming Diaspora communities associated with those struggles into ‘suspect communities’. <sup>50</sup>

Whereas Muslim communities in Europe and North America have borne the brunt of suspicion and stigmatisation engendered by the ‘war on terror’, a slightly more nuanced (if no less disingenuous) process of criminalisation has occurred as a result of the international proscription of groups like the ‘Tamil Tigers’, PKK and Hamas. Although none of these organisations are known to present a tangible threat outside of the disputed territories in which they operate, the EU’s decision to ban them has had the effect casting Tamils, Kurds and Palestinians who are legally resident in Europe as suspected members or supporters of terrorist organisations. There is of course a fundamental difference between sympathising with a cause or the plight of a people (which all international solidarity movements do) and encouraging or engaging in violent acts on behalf of that cause, but it is a difference that has been wholly undermined by Europe’s over-broad counter-terrorism laws.

United Nations Security Council Resolutions and European Union counter-terrorism laws *oblige* states to prevent “public support” for terrorist organisations - an obligation that many states have interpreted very broadly indeed. In the UK for example, preposterous as it may seem, simply displaying the logo of a proscribed terrorist organisation is punishable by a custodial sentence of up to seven years in prison. <sup>51</sup> Organising a meeting with a member of a proscribed organisation could result in a sentence of up to ten years. <sup>52</sup>

While these provisions have clearly been ignored in respect to European governments’ secret talks and covert meetings with Hamas, <sup>53</sup> proscription regimes have been used as a pre-text for banning public demonstrations, police raids on activists and restrictions on the activities of solidarity organisations. It is difficult to avoid the conclusion that the desired effect of such actions is to create a chilling effect in respect to international solidarity with liberation struggles, again largely in order to appease foreign governments. International terror lists have also had a strong impact on charitable giving and international money transfers more generally. The Financial Action Task Force [FATF, estab-

lished by the G7 in 1989 to combat international money laundering and headquartered at (though independent of) the Organisation for Economic Cooperation and Development (OECD)] has strongly promoted the thesis that terrorist organisations use laundered money for their activities, and that charities are a potential conduit for terrorist organisations. <sup>54</sup>

On 11 October 2002 the FATF published ‘International Best Practices on Combating the Abuse of the Non-Profit Sector’. <sup>55</sup> These guidelines bore strong similarities to the ‘Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. - Based Charities’, issued by the US Treasury in November 2002. <sup>56</sup> Two weeks later, the FATF issued nine *Special Recommendations on Terrorist Financing*, supplementing the 40 Recommendations on Money Laundering it had elaborated in accordance with its initial G7 mandate. <sup>57</sup> The new recommendations included:

Special recommendation VIII: Non-profit organisations.

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

by terrorist organisations posing as legitimate entities;

to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and

to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations. <sup>58</sup>

The FATF recommendations have been endorsed and adopted, either in whole or in part, by more than 180 jurisdictions as well as the United Nations, the IMF, the World Bank and the European Union. <sup>59</sup>

The implementation of FATF guidance has impacted strongly upon on charitable giving, particularly in the USA. According to a study by the ACLU [*Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the War on Terrorism Financing*], these laws “are seriously undermining American Muslims’ protected constitutional liberties and violating their fundamental human rights to freedom of religion, freedom of association, and freedom from discrimination”. <sup>60</sup> The report further suggests:

The government’s actions have created a climate of fear that chills American Muslims’ free and full exercise of their religion through charitable giving, or Zakat, one of the “five pillars” of Islam and a religious obligation for all observant Muslims.

Blacklisting and financial sanctions rules have also impacted severely on the work of international development organisations. On the one hand they have had to adjust to the due diligence obligations imposed by EU law, on the other they have found their work in conflict zones and fragile states paralysed by the blacklisting of groups and individuals with whom had previously been in contact (for example as part of conflict resolution or peace-building activities). European development organisations and grant-making foundations consistently opposed EU rules on increased financial transparency of non-profit organisations in representations to the European Commission. <sup>62</sup>

More broadly, the legacy of EU measures designed to combat terror financing is the wholesale surveillance of the financial system by law enforcement agencies looking for suspicious financial transactions. In addition to the domestic disclosure regime, the EU has granted the USA direct access to the databases of SWIFT (the interbank transfer organisation) based in Brussels. Consequently, anyone sending money to conflict zones or regions of interest to the international law enforcement community will have their right to privacy in financial proceedings arbitrarily overridden and their transactions recorded.

## 5.6.

### Impact on Conflict

#### Resolution and Peace Processes

The terrorist designation of groups can also adversely affect global conflict resolution efforts in significant ways. First, designation can act to prevent states from even undertaking negotiations with key non-state actors involved in conflicts. In 2006, for example, the Norwegian government - a key figure in a number of significant international peace negotiations, including those between the Sri Lankan state and the LTTE (Liberation Tigers of Tamil Eelam) - decided to withdraw all support from EU terror list regime implementing Resolution 1373. A formal statement released by the Norwegian Royal Ministry of Foreign Affairs explained that:

The reason for this decision is that a continued alignment with the EU list could cause difficulties for Norway in its role as neutral facilitator in certain peace processes. Norway's role could become difficult if one of the parties involved was included on the EU list, and the opportunities for contact were thus restricted.

The Norwegian Foreign Minister, Jonas Gahr Støre, explained the decision in the following terms:

Norway is making an important contribution to international peace and security through its involvement in peace processes. These efforts have won the recognition of the international community, including the EU and the US ... The government wants to intensify these efforts and we must therefore avoid a situation that makes it more difficult for us to have contact with any of the parties to a conflict.

Similarly, in January 2009, a diplomatic delegation from the EU (including the French, Czech and Swedish foreign ministers as well the EU's chief diplomat, Javier Solana) visited the Middle East in an attempt to negotiate a ceasefire between Israel and the Gaza Strip. Hamas, which governs the Gaza Strip, has had both its political and military divisions designated by the EU since at least 2002, despite objections at that time from both France and Germany that such designation would hamper peace efforts in the region. As anticipated, due to their designation the 2009 EU mission refrained from visiting the Gaza or otherwise meeting with Hamas, instead holding talks with the Palestinian Authority at Ramallah in the West Bank. When asked why they had not met with one of the key protagonists of the conflict they were seeking to resolve during a

self-stated peace mission, the spokesperson for the European Delegation simply confirmed:

There is a list that is decided by the Council [EU member states] and ... this is our guideline ... Hamas is on this list of terrorist organisations and this is the policy we are applying because it has been decided unanimously by the European Union. <sup>63</sup>

Second, the process of designating a group as a terrorist organisation itself can further undermine peace efforts by antagonising negotiating parties and/or providing them with rhetorical legitimacy to resort to the use of force. It is generally accepted that the EU's decision to designate the LTTE as a terrorist organisation, for example, has played a clear and tangible role in undermining the Sri Lankan peace process facilitated by the Norwegian government. In May 2006, the Norwegian Special Envoy for the Peace Process in Sri Lanka, Jon Hanssen-Bauer had arranged for both Sri Lankan and LTTE representatives to attend peace negotiations in Oslo the following month to discuss the safety of international truce monitors in the north-east of the country. However, the EU were actively considering whether to designate the LTTE at that time and the LTTE leadership had warned that should designation take place they would reconsider the cease fire agreement that was in place. <sup>64</sup> On 29 May 2006 the EU added the LTTE to their blacklist <sup>65</sup>, despite observing that "the upsurge in violence is not caused by the LTTE alone", noting with concern "the growing number of reports of extrajudicial killings" and strongly urging "the Sri Lankan authorities to curb violence in Government controlled areas". <sup>66</sup> Following the group's listing, the LTTE demanded the departure of the international monitors (from Denmark, Finland and Sweden) who had been monitoring the ceasefire agreement of 2002, stating that "European Union ban on the LTTE has seriously disturbed" the neutrality of these countries, and they would therefore have to be replaced. <sup>67</sup> In addition to disrupting the peace process, observers argued that the EU listing itself effectively gave "carte blanche" for the Sri Lankan government to seek a military solution to the conflict. <sup>68</sup>

Terror lists "communicate societies disfavour on the most profound scale" <sup>69</sup> towards the individuals and groups who become entangled in them, with those targeted (and their supporters) being criminalised, diplomatically isolated and financially sanctioned. In the context of complex global conflicts between state and non-state actors, this official legitimising/delegitimising function can have a critical effect in antagonising key protagonists and facilitating the use of force - thus exacerbating the conflicts themselves and undermining attempts to resolve them.

## Terror Lists and Gender

Whilst it is well known that blacklists directly affect targeted individuals in draconian ways, there has been very little discussion of the broader, gendered impacts of the lists. Blacklists do not just affect the individuals that they target, but also - as pointed out in a recent report presented to the UN General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism - “sanction regimes ... also have both direct and indirect impacts on the human rights of third parties, particularly female family members”.<sup>70</sup> The spouses or other female family members of those listed often have their bank accounts directly and separately monitored by states to prevent them from providing any financial support to their listed partners. By targeting activities which women are often responsible for undertaking, it is women who are disproportionately targeted by the blacklisting regimes.<sup>71</sup> Indirectly, the partners of those listed invariably experience increased economic hardship, acute mental distress and, in some cases, because of the immense burden of the sanctions on all family members, separation.<sup>72</sup>

The burden that such restrictive measures place on spouses and other family members can be immense. As Lord Brown has noted in the recent UK Supreme Court case of *Ahmed and others*:

The draconian nature of the regime imposed under these asset-freezing orders can hardly be over stated. Construe and apply them how one will - and to my mind they should have been construed and applied more benevolently than they appear to have been - they are scarcely less restrictive of the day to day life of those designated (*and in some cases their families*) than are control orders. In certain respects, indeed, they could be thought even more paralyzing [emphasis added].<sup>73</sup>

In a similar tone, Lord Hope observed that:

The overall result is very burdensome on all the members of the designated person’s family. The impact on normal family life is remorseless and it can be devastating ... The restrictions strike at the very heart of the individual’s basic right to live his own life as he chooses ... It is no exaggeration to say ... that designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources *and the effect on both them and their families can be devastating* [emphasis added].<sup>74</sup>

Two of the claimants in the *Ahmed and others* case discussed above actually experienced mental health problems and marriage break-ups as a direct result of the severe strain placed on them and their spouses by the blacklisting regime.<sup>75</sup> Such severe effects are corroborated by Victoria Brittain’s research into the social and psychological impacts of restrictive measures (such as control orders, blacklisting and asset-freezing) on the households, family members and children of those in the UK who are targeted by these measures. Specifically, Brittain concludes that:

The lasting impact of British policy and the actions of the myopic officials who have administered the collective punishment of these families, is incalculable. No outsider can convey the depths of grief, the sheer fear of the unknown, the sleepless nights of wives left to manage households and children in a hostile society where they had no resource to turn to, and often little English. The terrors they had fled came back to haunt them, their health broke down. Britain, which had been the place of safety their husbands chose for them, became a place of mental torture. And for the men, trust disappeared. They were consumed with guilt at the misjudgment of the country that they had made and the strain on their families who paid for it daily. None of them would say, like Mrs El Banna, ‘I must forget, I must forgive.’ Quite simply, their lives have been ruined by Britain.

The recent decision of the ECJ in the matter of *M and Others v HM Treasury* <sup>76</sup> - discussed above at part 4.11 of this Report - highlights some of the ways that blacklists directly impact on family life and gender. In that case, the asset-freezing regime severely interfered with and disrupted the lives of spouses and other family members of blacklisted individuals - who are not themselves suspected of any terrorism offences - by criminalising the most basic of activities (such as sharing of food and other material resources) between family members. Specific humanitarian exemptions do exist, with the nominal aim of ameliorating such effects. <sup>77</sup> However, we note that this criminalisation of social reproduction has actually been an explicit goal of blacklisting from the outset. As (former) US Treasury Secretary John Snow stated: “A terrorist organization like Al Qaeda needs to be able to raise, move and store money in order to recruit, train and pay operatives, *support their families*, purchase false documents and detonators, as well as to plan and carry out attacks” [emphasis added]. <sup>78</sup>

Whilst the indirect, familial and gendered impacts of blacklisting have been acknowledged in a number of cases, these effects raise a number of important legal issues that have yet to be properly litigated before the courts. It is now generally accepted, for example, that blacklisting and asset-freezing interfere with the right to privacy and family life of both designated persons and their families. <sup>79</sup> Any interference with Article 8 of the European Convention must be proportionate and limited to what is strictly necessary. We suggest that blacklisting measures which aim to directly target one individual (the alleged terror suspect) but indirectly interfere the rights of others (their spouses and children) may actually be disproportionate and unlawful. <sup>80</sup> The right to protection from unlawful interference with the family and privacy is also explicitly guaranteed under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). <sup>81</sup> This requires states, *inter alia*, to issue legislation specifying in precise detail the circumstances in which interferences can be lawful. <sup>82</sup> By indirectly and disproportionately targeting spouses without proper legal foundation, blacklisting and asset-freezing - as pointed out by the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism - undermines women’s enjoyment of their civil and political rights. <sup>83</sup>

It is important to note that States have positive obligations to take steps to avoid gender inequality and discrimination. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for example, obliges states to eliminate discrimination against women by (1) “ensur[ing] that there is no direct or indirect discrimination against women in their laws” and protecting women from discrimination in both the

public and private spheres (2) “improv[ing] the de facto position of women through concrete and effective policies and programmes” and (3) addressing prevailing gender relations and the persistence of gender-based stereotypes that affect women”.<sup>84</sup> If, as we argue, blacklisting engages and unlawfully interferes with women’s civil and political rights then such measures may conflict with states positive obligations to counter gender discrimination under CEDAW as outlined above. Whilst this overlap has certainly been formally acknowledged,<sup>85</sup> there has been very little research undertaken to date on the complex relationships between gender discrimination and restrictive counter-terrorism measures and/or specific assessments of the gendered impacts of the listing regimes, let alone strategic litigation taken forward to test the legality of such measures in these terms. We argue that there is a critical need to need to engage with these issues and to develop further critiques the blacklists from gendered perspectives.

## 5.8.

### Extending the Policy of Designation: the Generalisation of Blacklists into Everyday Life

The blacklisting of groups and individuals by governments is neither limited to terrorism nor unique to the contemporary ‘war on terror’. Whereas historically their use has been overtly political - the virulent anti-communism of the Cold War, the banning of nationalist political parties, or the blacklisting of trade unionists, for example - a much broader strategy of targeting and prohibiting groups and individuals on the basis of a perceived threat or arbitrary categorisation is now emerging. That is to say, the blacklist regimes analysed throughout this Report are part of a broader geopolitical shift towards *risk profiling* and *preemptive security*.

Underpinned by the technological revolution - which allows information to be compiled, stored and shared among state agents and private sector organisations in ‘real-time’ (both within countries and across borders) - blacklists play an increasingly central role in a host of policing functions, from immigration and border control to policing and criminal justice. The increasing privatisation of these functions has encouraged private actors within the security-industrial complex to carve out a ‘clearing house’ role; one that is based on the consolidation, interrogation and implementation of sanctions against listed individuals and organisations.

While the “reorientation of policing towards ‘risk policing’ and the ‘responsibilisation’ of the private sector to perform crime control functions have been major features of new thinking in criminology and criminal justice for over a decade”,<sup>86</sup> civil liberties and human rights advocates have been surprisingly slow to engage with these new trends.

As noted above, in addition to the consolidated ‘terrorism lists’ that have been drawn-up by UN and the EU, many nation-states operate a plethora of domestic blacklists tailored to



their intelligence interests and foreign policy concerns. These lists, which sometimes feed into the UN and EU lists, are much broader than the ‘official’ blacklists developed by the ‘international community’. The national lists also feed into other international lists that risk profile, designate and target suspected individuals and groups. In 2008, for example, Interpol’s list of ‘terrorism suspects’ contained 8,479 people - 20 times the number on the official consolidated lists. <sup>87</sup>

In the UK, the secret intelligence services (including MI5 and MI6), National Criminal Intelligence Service, the Home Office and the Foreign Office (among others) feed the names of individuals deemed a threat to national security or otherwise worthy of scrutiny into a new ‘e-borders’ system, against which all entrants to the country (including citizens and EU nationals) are checked. This system utilises a ‘traffic light’ principle under which *all travelers* are effectively ‘risk-profiled’, with a green light for those travelers deemed to pose no threat, an orange light for those to be subject to discreet or specific checks, and a red light for wanted individuals. It is not known how many people fall into these last two categories - people subject to specific checks are unlikely to be informed of the basis for such a decision - nor are there any meaningful mechanisms for them to challenge their inclusion.

The European Union is currently developing its own ‘e-borders’ system, anchored in the Schengen Information System (SIS). The SIS connects police forces, border guards, immigration agencies and judicial authorities across the EU by effectively allowing them to check people against a series of blacklists to which they all contribute. Specifically, the SIS legislation includes provisions for EU-wide lists of ‘aliens’ (non-EU citizens) banned from EU territory on grounds of immigration or national security (so-called ‘Article 96’ alerts) and people to be subject to ‘discrete surveillance’ or ‘specific checks’ (‘Article 99’ alerts), as well as people wanted by police or judicial authorities for arrest or extradition (European Arrest Warrants are issued through the SIS) and missing persons.

According to the most recent figures released by the European Union, the SIS currently contains over 736,000 ‘Article 95’ alerts, many of them failed asylum applicants, and over 32,000 ‘Article 99’ surveillance alerts. <sup>88</sup> Because EU states enjoy wide discretion over the addition of names and aliases (of which there are over 290,000) to the SIS, arbitrary national decisions can be readily transformed into coercive EU-wide orders. They enjoy similar discretion over when to release information to individuals about their inclusion in the SIS, raising many of the same kind of due process problems that have arisen in respect to the consolidated terrorism lists.

The absolute numbers in the SIS dwarf even the multifarious blacklists currently maintained by the USA. In addition to the various US terrorism lists - which include the ‘Foreign Terrorist Organisations List’, <sup>89</sup> the ‘Terrorist Exclusion List’, <sup>90</sup> the list of persons designated for asset-freezing under Executive Order 13224, <sup>91</sup> and a State Department list of (foreign) ‘State Sponsors of Terrorism’ - the US also maintains separate lists of alleged organised criminals and drug traffickers (some recently re-classified as ‘narco-terrorists’). There are so many US blacklists and watchlists that the ACLU has cited the difficulty in even ascertaining a list of the lists. <sup>92</sup>

Of all the US blacklists, the ‘no-fly’ list has achieved the same kind of notoriety for its ‘Kafkaesque’ operation as the UN’s 1267 terrorism list. The ‘no-fly’ list is in fact a subset of a consolidated ‘watchlist’ maintained by the US authorities that is drawn from a multitude of law enforcement sources. According to a recent investigation by the New York Times, <sup>93</sup> the ‘consolidated list’ now contains the names of more than 400,000 people (of which around 97 percent are foreigners), including approximately 6,000 on the ‘no-fly’ list and 20,000 on a ‘selectee list’, from which individuals are singled out for scrutiny when crossing the US border (the equivalent of an ‘Article 99’ surveillance alert in the SIS or a an ‘orange light’ in the UK ‘e-borders’ system). The ACLU currently represents seven people on the ‘no-fly’ list who have brought a lawsuit against the US Department of Homeland Security and the Transport Security Administration, including two ACLU employees. <sup>94</sup>

Problems in respect to the lack of procedural safeguards and accountability mechanisms *vis-à-vis* blacklists are magnified by the involvement of the private sector. States supply a growing number of private businesses with lists of names against which to check customers or applicants in order to enforce their financial sanctions and in accordance with the due diligence obligations described above. Whereas the terrorist exclusion lists are referred to as ‘no-fly’, the financial sanctions lists have been termed ‘no-buy’.

According to a 2007 report by the *Lawyers’ Committee for Civil Rights* <sup>95</sup> in the US, the Office of Foreign Assets Control (OFAC) supplies a list of suspected terrorists, drug traffickers, and other ‘specially designated nationals’ (a list that runs to over 250 pages long and includes more than 6,000 names) to financial institutions, mortgage companies, car dealerships, health insurers, landlords and employers. As the report explains:

Many Americans who are not on the list face stigma as well as delayed or denied consumer transactions solely because their names are similar to others who are designated. The government has encouraged a wide range of private businesses to screen against the list, resulting in difficulties for ordinary people even where there is no discernible relationship to national security. Moreover, there are few safeguards - such as training requirements for businesses, complaint mechanisms for individuals, or other avenues for redress - to protect against such arbitrary screening. <sup>96</sup>

As long as financial institutions face punitive sanctions for providing services to official-designated individuals and entities, they will continue to engage in concerted efforts to ensure they do not fall foul of financial sanctions laws. The complex national and international regulatory framework to which they are now subject has encouraged private institutions to turn to third-party agencies that provide dedicated vetting services in order to comply with various international blacklisting provisions. In Europe, for example, companies such as *World-Check* offer “risk intelligence” in order to reduce “customer exposure to potential threats posed by the organisations and people they do business with”. <sup>97</sup> The organisation claims to have a client base of “over 4,500 organisations”, with a “renewal rate in excess of 97%”. Infosphere AB is another European “Commercial Intelligence and Knowledge Strategy consultancy” providing similar services. <sup>98</sup> Crucially these companies do not just provide vetting services against those on official blacklists, they also claim to

collect data on other individuals and entities deemed “worthy of enhanced scrutiny”. The potential dangers of such private intelligence bodies are well known. As Statewatch has observed:

In Britain in the 1980s, the Economic League drew up its own ‘blacklists’ and acted as a rightwing employment vetting agency. The League, which was acknowledged to have close links with the security services, had accumulated files on at least 30,000 people, files it shared with more than 2,000 company subscribers, in return for annual revenues of over £1 million. The files it held contained details of political and trade union activists, Labour Party MPs and individuals who, for instance, had written to their local papers protesting at government policy. The League always maintained that ‘innocent’ people had nothing to fear as they only kept files on “known members of extreme organisations”. Critical investigative reporting coupled with a campaign against the organisation saw it disband in 1993 (though its Directors reportedly set-up a new company offering the same service on the basis of the same files the following year). An enterprise considered illegitimate in the early 1990s has now been supplanted by an entire industry. <sup>99</sup>

Although the links are rarely acknowledged, the growth of these types of private blacklisting entities and open source intelligence (OSINT) agencies are inextricably connected to the expansion of the formal international blacklisting regimes discussed throughout this report. They present new and additional problems extending beyond the realm of formal state regulation into the emergent sphere of the public-private management of (in)security.

- 1 S/Res/1730, 19 December 2006
- 2 Case T-47/03 *Sison v Council and Commission*
- 3 See Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat*, 3 September 2008. Significantly, the ECJ did not specify how to deal with the arguably more fundamental problem that the listing itself takes place at the UN level, beyond the sphere of influence of European institutions.
- 4 EC Regulation 467/2001 of 6 March 2001 (OJ 2001 L 67/1), amended by Commission Regulation 21999/2001 of 12 November 2001 of 12 November 2001 (OJ 2001 L 295/16) and repealed by EC Regulation 881/2002 of 27 May 2002 (OJ 2002 L 139/9).
- 5 *Supra* note 3
- 6 At the time of writing, however, al Barakaat had been recently delisted at the UN level as a result of a review undertaken pursuant to Resolution 1822. For Kadi, see Case T-85/09 *Kadi v Commission* and part 4.8 of this Report.
- 7 Commission Regulation (EC) No 1190/2008 of 28 November 2008. Preamble, (at para. 3)
- 8 Council Decision 2002/334 of 2 May 2002 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2001/927/EC, OJ 2002 L 116/33-4
- 9 Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council and UK* [2006] ECR II-4665
- 10 On 28 June 2007
- 11 Although, as we have discussed in Part 4 of the Report, the same denial can be observed in a whole range other designation cases.
- 12 For example, Mr Kadi. See *supra* note 6 and Part 4.8 of the Report
- 13 Eckes, C. (2009) *EU Counter-Terrorist Policies and Fundamental Rights: The case of Individual Sanctions* OUP: Oxford (at p. 10)
- 14 McCulloch, J. and Pickering, S. 'Pre-crime and counter-terrorism: imagining future crime in the 'war on terror'' in *British Journal of Criminology*. 2009 49(5): 628-645 (at p.629 & 631).
- 15 De Goede, M. 'The Politics of Preemption and the War on Terror in Europe' in *European Journal of International Relations* (2008) 14: 161 - 185 (at p. 166)
- 16 Cited in Suskind, R. (2004) *The Price of Loyalty*. New York: Simon & Schuster (at p. 192)
- 17 *Supra* note 16 (at p. 173).
- 18 Argument of the Council in Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-52 (at paras. 149 and 167) *Ibid* (at para. 299)
- 19 *Ibid* (at para. 299)
- 20 Keeping in mind that the majority of those on the UN 1267 list were designated shortly after the 11 September 2001 attacks.
- 21 Cf. Agamben, G. (2005) *State of Exception* (trans. Attel, K.) University of Chicago Press: London
- 22 For a more detailed discussion of the issues, see Cameron, I. 'The ECHR, Due Process and UN Security Council Counter-Terrorism Sanctions'. Report to the Council of Europe. 6 February 2006. Available at: <http://www.coe.int>. Legally, the distinction between administrative measures and criminal charges is important because the types of the procedural safeguards that apply changes depending on how blacklisting and asset freezing are classified. The presumption of innocence, for example, only applies to criminal proceedings (not civil proceedings). Furthermore, in the *Kadi* case, the CFI held that: "[When] what is at issue is a temporary precautionary measure ... [the CFI] considers that observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them." (at para. 320).
- 23 See Cameron (*ibid*, at p.8)
- 24 *Supra* note 13 (at pp. 164 - 165).
- 25 By S/RES/1390
- 26 That is, compared with the earlier UN sanctions targeting states such as Angola, Haiti and Sierra Leone.
- 27 UN Doc A/RES/54/109 of 9 December 1999.
- 28 See, in particular, Krisch, N. 'The Rise and Fall of Collective Security: Terrorism, US Hegemony and the plight of the Security Council' in Walter, C., Voneky, S., Roben, V. and Schorkopf, F. (eds) 2003. *Terrorism as a Challenge for National and International Law: Security versus Liberty?* Springer: Berlin (at p.6); Eckes *supra* note 13.
- 29 *Ibid* (at pp. 41 - 42)
- 30 Remarks at Johns Hopkins University on 29 April 2002. Available at: <http://www.whitehouse.gov/news/releases/2002/04/20020429-9.html> 31 Working paper K Koufa 26 June 1997
- 32 UN doc A/59/565, 2 December 2004, available at <http://www.un.org/secureworld/>
- 33 For a good discussion of the ways international conventions have failed to define terrorism but instead focus on terrorist acts, see Sorel, Jean-Marc. 'Some questions About the Definition of Terrorism and the Fight Against Its Financing' in *European Journal of International Law* (2003) 14(2), 365-378. For a good discussion of the relationship between international law and international liberation struggles, see: Faundez, Julio (1989) "International Law and Wars of National Liberation: Use of Force and Intervention" v.1 *African Journal of International and Comparative Law* (at pp.85-98).
- 34 Eckes, C. (*Supra* note 13) [at p.38]
- 35 S/RES/1373 [at para. 1(a)].
- 36 *Ibid*, (at p.38)
- 37 Muller QC, Mark. 'Terrorism, Proscription and the Right to Resist in the Age of Conflict' in *Denning Law Journal* 2008 (20): 111 - 131 (at p. 115).
- 38 Available at: <http://iranjustice.org/content/view/23/1> See also, Cameron, I. 'European Union Anti-Terrorist Blacklisting' in *Human Rights Law Review* 2003 (3): 225 - 256 (at 236): "Despite the supposedly objective criteria, the decision to blacklist obviously leaves considerable space for political considerations, such as political pressure from friendly states, such as Turkey, to blacklist an organisation".
- 39 Common Article 1(1) of the ICCPR and ICESCR expressly states: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". This principle recognises the fundamental principle that people exercising their right to self-determination have, in the last resort, a license to engage in armed conflict against an oppressor state. In this way, armed resistance by national liberation movements is generally held to be in compliance with international law. See, for example, Cassese, A. (1998) *Self-determination of Peoples: A Legal Reappraisal* CUP: Cambridge (at p.200) and Faundez (*Supra* note 39)
- 40 See [http://www.david-kilgour.com/2008/Nov\\_24\\_2008\\_06.php](http://www.david-kilgour.com/2008/Nov_24_2008_06.php)
- 41 Norman Kempster, 'US Designates 30 Groups as Terrorists' in *The Los Angeles Times*. 9 October 1997.
- 42 Martin Indyk, US Assistant Secretary of State for Near Eastern Affairs, interview with *Newsweek Magazine*, 26 September 2002.
- 43 See Council Decision (2002/460/EC) of 17 June 2002.
- 44 Council Decision 2002/334/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2001/927/EC
- 45 *Supra* note 7 (at 127)
- 46 *PKK v Council* (Case T-229/02) 3 April 2008
- 47 Council Decision 2008/583/EC
- 48 On the status of Hezbollah and Lebanon' s refusal to freeze the organisation' s assets because of their view that it is a legitimate resistance group, see Hardister, A. 'Can we Buy Peace on Earth? The Price of Freezing Terrorist Assets in a Post-September 11 World' in *North Carolina Journal of International Law and Commercial Regulation* (2003) 28: 605 - 661. For a brief account of the 'embarrassment' experienced by the US administration in having (until recently) maintained travel restrictions on Nelson Mandela and other ANC leaders following their designation as a terrorist organisation by the South African apartheid regime, see: <http://news.bbc.co.uk/2/hi/africa/7340248.stm>
- 49 McCulloch, J. and Pickering, S. 'Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neoliberalism' in *British Journal of Criminology* (2005) 45: 470 - 486 (at 476).
- 50 The political work undertaken by CAMPACC (Campaign Against Criminalising Communities) is particularly instructive on this issue. See, for example, the CAMPACC Briefing Paper Series - available at [www.camppacc.org.uk](http://www.camppacc.org.uk) - for a clear explanation as to how four different diaspora communities in the UK (Tamils, Kurds, Baluch and Basque) have been rendered suspect through blacklisting.
- 51 s.13 *Terrorism Act* 2000
- 52 s.12, *Terrorism Act* 2000
- 53 See, for example: <http://www.independent.co.uk/news/world/politics/europe-opens-covert-talks-with-8216blacklisted8217-hamas-1625948.html>
- 54 See, for example: <http://www.statewatch.org/analyses/no-92-briefing-eu-financial-transparency-charities.pdf>.
- 55 Available at: [http://www.icnl.org/KNOWLEDGE/IJNL/vol5iss1/cr\\_1.htm](http://www.icnl.org/KNOWLEDGE/IJNL/vol5iss1/cr_1.htm)
- 56 Available at: <http://www.ustreas.gov/press/releases/docs/tocc.pdf>. The guidelines were updated in 2006 - see: <http://www.ustreas.gov/press/releases/hp122.htm>.
- 57 Available at: [http://www.fatfgafi.org/document/9/0,3343,en\\_32250379\\_32236920\\_34032073\\_1\\_1\\_1\\_1,00.html](http://www.fatfgafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html)
- 58 (at para. 8)
- 59 S/RES/1617, for example, "strongly urges all Member States to implement the comprehensive international standards embodied in the FATF Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing". See: <http://www.state.gov/s/ct/rls/other/un/65909.htm>
- 60 Available at: <http://www.aclu.org/human-rights/report-blocking-faith-freezing-charity>
- 61 *Ibid* (at p.7)
- 62 See, for example: <http://www.efc.be/EUAdvocacy/EU%20Communiqu%20%20Briefings/befc0977.pdf>
- 63 See Phillips, L. 'Terror lists complicates EU diplomacy in Middle East' in *EU Observer* 5 January 2009. Available at: <http://euobserver.com/9/27347>
- 64 'Norway talks 'depend upon' EU ban' 28 May 2006. Available at: [http://www.bbc.co.uk/sinhala/news/story/2006/05/060528\\_ltte\\_norway.shtml](http://www.bbc.co.uk/sinhala/news/story/2006/05/060528_ltte_norway.shtml)
- 65 Council Decision 2006/379/EC of 29 May 2006 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 2005/930/EC (OJ L 144, 31.5.2006).
- 66 Declaration by the EU Presidency on the proscription of LTTE (9962/06, 31.5.06). At: [http://www.consilium.europa.eu/uedocs/cms\\_Data/](http://www.consilium.europa.eu/uedocs/cms_Data/)

docs/pressdata/.../89790.pdf

67 Government of Norway, Royal Ministry of Foreign Affairs, 'Replacement of SLMM Monitors from EU Countries', Press Release no. 85/06, 22 June 2006. Available at: <http://www.regjeringen.no/en/dep/ud/press/News/2006/Replacement-of-SLMM-monitors-from-EU-countries.html?id=419966>

68 See, for example, Florquin, N. and Decrey Warner, E. 'Engaging non-state armed groups or listing terrorists? Implications for the arms control community' in Disarmament Forum (2008) 1. Available at: [www.unidir.org/pdf/articles/pdf-art2708.pdf](http://www.unidir.org/pdf/articles/pdf-art2708.pdf)

69 *Supra* note 7 (at p. 129)

70 UN Doc A/64/211 (3 August 2009, at p.16). Available at: [www.unhcr.org/refworld/pdfid/4aae4eea0.pdf](http://www.unhcr.org/refworld/pdfid/4aae4eea0.pdf)

In this Report we follow the Special Rapporteur's approach where gender encompasses the social constructions that underlie how women's and men's roles, functions and responsibilities (including in relation to sexual orientations and gender identity are defined and understood. Gendered impacts therefore extend to include the impacts upon women, men and persons of diverse sexual orientation and gender identities. As gender is informed by, and intersects with, roles, functions and responsibilities as both perceived and practiced, it is a social and shifting construct rather than a static identity. It is from this starting point that we are able to best understand the complex and inter-related gender-based human rights violations that are in regard of international human rights law - including CEDAW, ICCPR, ICESCR, discrimination on the basis of gender, sex, sexual orientation and gender-identity. See also UN Doc A/64/211 (cited above, esp. at paras. 20, 52); the UN High Commissioner for Refugees Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR//GIP/02/01 (at p. 2); ICESCR, Articles 2 and 3; Committee on Economic, Social and Cultural Rights, General Comment No. 20. UN Doc. E/C.12/GC/20 (at para. 32) and the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

71 According to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (*ibid.*, at para. 41) there are other rights of women which may be breached by listing regimes:

As with other counter-terrorism measures that impact third parties (e.g., disappearances), women in these families often bear the weight of these stresses, jeopardizing numerous economic, social and cultural rights protected by the International Covenant on Economic, Social and Cultural Rights, including protection and assistance accorded to the family and to children and young persons (art. 10); the right to an adequate standard of living, including adequate food and housing (art. 11); the right to health (art. 12); and the right to education (arts. 13 and 14). Such measures also undermine the enjoyment of women's various civil and political rights guaranteed by the International Covenant on Civil and Political Rights, such as the protection against arbitrary or unlawful interference with the family and privacy (art. 17) and protection of the family (art. 23).

72 *Ibid.*

73 *HM Treasury (Respondents) v Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2 & 5. [*Ahmed and others* (at para. 192)].

Available at: [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2009\\_0016\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0016_Judgment.pdf) [date accessed: 02. Nov 2010]

74 *Ibid.* (at paras. 38 and 60)

75 *Ibid.* (at para. 31). For an in-depth discussion of the impacts of blacklisting on the families of those targeted, see: Brittain, V. (2009) 'Besieged in Britain' in *Race and Class* 50: 1 - 29 (cited below at p. 27)

76 Case number C 340/08

77 Blacklisting regimes (and associated legislation that criminalises terrorist financing) also impacts on gender by operating to restrict donations to non-government organisations (including women's rights organisations) promoting gender equality. As Martin Scheinin has noted (*supra* note 70, at para. 42):

The small-scale and grassroots nature of such organizations means that they present a greater "risk" to foreign donors who are increasingly choosing to fund a limited number of centralized, large-scale organizations for fear of having their charitable donations stigmatized as financing of, or material support to, terrorism. At the same time, as divergent voices within their communities, it is precisely this foreign funding on which women's rights organizations may be particularly dependent to achieve their objectives .

According to Scheinin, humanitarian exemptions to blacklisting ought to be extended to protect such gender equality work from restrictions. See also Centre for Human Rights and Global Justice. *The United States and Gender, National Security, and Counter-Terrorism Concept Note*. Available at: [www.chrgj.org/projects/docs/ConceptNote.pdf](http://www.chrgj.org/projects/docs/ConceptNote.pdf)

78 Snow, J. 'Financial Intelligence' in Washington Post. 14 April 2006

79 See, for example, Joint Committee on Human Rights Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report) 22 October 2010 (at pp.9 and 33 - 39). Available at: <http://www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/41/4102.htm>

80 See, for example, the opinion of the House of Lords Appellate Committee in the matter of *M v HM Treasury and two other actions* [2008] UKHL 26 who note (at para. 15) that the government's suggested interpretation of the contested asset-freezing regulation "produces a disproportionate and oppressive result" with respect to the spouses of listed persons and "seem[s] an extraordinary invasion of the privacy of someone who is not a listed person".

81 Article 17 of the ICCPR expressly states:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.  
2. Everyone has the right to the protection of the law against such interference or attacks"

82 *CCPR General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence and Protection of Honour and Reputation*. Adopted at the Thirty-second Session of the Human Rights Committee on 8 April 1988. (at para. 8). Available at: <http://www.unhcr.org/refworld/docid/453883f922.html>

83 *Supra* note 70 (at para. 41)

84 *General Recommendation No. 25 on Article 4 Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* (at paras. 6 - 7). Available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>

85 *Supra* note 70. see also: <http://www.chrgj.org/projects/gct.html>

86 Levi, M. "Combating the Financing of Terrorism: A History and Assessment of the Control of 'Threat Finance'" in *British Journal of Criminology*. 2010. 50(4): 650-669 (at p.615)

87 See, for example, <http://www.interpol.int/public/FusionTaskForce/default.asp>

88 'Schengen information system database statistics dd.

01/01/2010', EU doc. 6162/10, 5 February 2010, Available at: <http://www.statewatch.org/news/2010/feb/eu-council-sis-stats-6162-10.pdf>

89 See: <http://www.state.gov/s/ct/rls/other/des/123085.htm>

90 See: <http://www.state.gov/s/ct/rls/other/des/123086.htm>

91 See: <http://www.state.gov/s/ct/rls/other/des/122570.htm>

92 Jaffer, J. 'Challenging executive powers & national security laws in the USA' Conference Presentation at *Terrorism Lists, Executive Powers and Human Rights* (Organised by ECCHR). Brussels. 20 October 2009. See: [http://www.ecchr.de/id-2009.309.html?file=files/Dokumente/Conference agenda.pdf](http://www.ecchr.de/id-2009.309.html?file=files/Dokumente/Conference%20agenda.pdf)

93 McIntire, M. 'Ensnared by Error on Growing U.S. Watch List'. *New York Times*. 6 April 2010. Available at: <http://www.nytimes.com/2010/04/07/us/07watch.html>

94 See: <http://www.aclu.org/national-security/aclu-challenges-government-no-fly-list>

95 LCCR. (March 2007) *The OFAC List: How a Treasury Department Terrorist Watchlist Ensnarers Everyday Consumers*. Available at: [http://www.lccr.com/03\\_2007\\_OFAC\\_Report.pdf](http://www.lccr.com/03_2007_OFAC_Report.pdf)

96 *Ibid.* (at p.1)

97 See: <http://www.world-check.com/>

98 See: <http://www.infosphere.se/>

99 Hayes, B. 'Spying in a see-through World: the 'Open Source' intelligence industry' in *Statewatch Bulletin* January-March 2010. 20(1). See: <http://www.statewatch.org/contents/ swbul20n1.html>



## VI. Reforming the Lists: too Little, too Late

## VI

# Reforming the Lists: too Little, too Late

In the following sections we re-visit the substantive criticisms levelled at the UN and EU terrorist blacklisting regimes.

We argue that the cumulative impact of the legal and political challenges that have beset the UN's 1267 regime now represent a full-blown crisis of legitimacy. The trajectory of national and EU case law on the 1267 regime will only exacerbate this crisis. It is also clear that the procedural reforms adopted to date fall far short of what is needed to bring the regime back within the rule of law. An evaluation of the options for further UN-led reform suggests that this crisis is now intractable. The UN is left with the only real option of either introducing judicial review of Security Council blacklisting decisions at the UN level or empowering national courts to hear cases brought by affected parties and decide on the validity of those decisions. For various political reasons, neither option is really viable for the UN's power brokers in New York. Given that further inaction represents an unacceptable and sustained assault on the very human rights the UN was established to protect, we argue that the only credible option on the UN's table is to abolish the 1267 regime in its entirety. If alternative global arrangements to prevent the alleged financing of terrorism are necessary then these should be introduced through international conventions that pay due regard to both national sovereignty and international human rights norms.

It is this perspective that shapes our critique of the EU's autonomous terrorist list. While the EU's legal order and court system ensures a



relatively higher standard of ‘due process’ than the UN, the EU’s blacklisting regime also falls far short of any reasoned interpretation of the substantive obligations on the Union to introduce a much fairer system - one that respects both fundamental rights and the Treaty principles of proportionality, democratic control and subsidiarity. Again while we do not go as far to outline an alternative system for countering the funding or support for terrorist groups we remain convinced of the fundamental flaws in the existing regime and the pressing need for wholesale reform.

## 6.1

### A Crisis of Legitimacy

The cumulative impact of the legal challenges and political problems and conflicts discussed throughout this Report is that the UN blacklisting regime is experiencing a crisis of legitimacy.

The *Kadi* case has undoubtedly been a particularly important catalyst in this process. More than any other legal decision on the issue, it opened a juridical space of conflict between the UN and EU and - whilst being careful not to appear that it was doing so - effectively undermined the primacy of the international legal order by establishing an indirect right of review of UN Security Council decisions at the European level. <sup>1</sup> In this way, the decision served to deliver an ultimatum to the Security Council: either they were to amend their blacklisting procedures to ensure compliance with fundamental rights (by, for example, providing means of effective judicial protection and sufficient information to enable blacklisted individuals to exercise their rights of review) or have the implementation of their blacklists declared unlawful.

Other decisions and political processes have also played an important determinative role in precipitating this crisis. Despite its focus on the national legislation implementing the 1267 regime, for example, the January 2010 decision of the UK Supreme Court in the *Ahmed and others* case constituted a serious and authoritative form of indirect judicial criticism of the UN blacklisting system. Resonating with the ECJ’s reasoning in the *Kadi* case, the Court found that the lack of an effective remedy for individuals blacklisted by the UN served to vitiate the blacklisting system and render the UK’s implementing legislation unlawful. <sup>2</sup> The Court also observed that Resolution 1373 more closely resembled a Convention than a Resolution because of the way that the Security Council had taken aspects of the *International Convention for the Suppression of the Financing of Terrorism* (1999) - to which accession was optional and which had only been ratified by a small

number of states in 2001 - and had adopted them as part of a binding Resolution. <sup>3</sup>

Although it is not explicitly stated, the implications of this conclusion are clear. In adopting Resolution 1373 and forcing all UN member states to be automatically bound to legal obligations that had formerly been optional and discretionary, the UN Security Council have acted to indirectly subvert the accepted international law making process by assuming the role of global legislator. <sup>4</sup> As a result of the Supreme Court's decision in the *Ahmed and others* case, new asset-freezing legislation is in the process of being introduced in the UK. <sup>5</sup>

In Switzerland, legislative reforms have been introduced that empower the Swiss Federal Council to refrain from implementing the UN 1267 blacklist in certain circumstances - including, *inter alia*, where blacklisted individuals and groups have not been afforded access to an independent mechanism of review and/or where they have been listed for more than three years without being brought before the Court. Upon approval of the proposal in March 2010, the Swiss Parliament publicly stated that:

The Federal Council "should make clear that it is not possible for a democratic country based on the rule of law that sanctions imposed by the Sanctions Committee, without any due process guarantee, result in the suspension, for years and without any democratic legitimacy, the most basic human rights that are proclaimed and propagated by the United Nations. <sup>6</sup>

These reforms are also clearly significant. They effectively enable Switzerland to opt-out of implementing the 1267 regime in spite of their persistent international obligations as a UN Member State. If other states were to follow suit with the introduction of similar opt-out reforms, then both the authority of the UN Sanctions Committee and its practice of targeted sanctioning could be effectively undermined. <sup>7</sup>

In the fertile space opened up by these challenges and criticisms both the public acceptability of blacklisting and the legitimacy of the UN Sanctions Committee itself has begun to diminish. Shortly after the ECJ's *Kadi* decision in 2008 the UN Analytical Support and Sanctions Implementation Monitoring Team stated that despite the introduction of procedural reforms "criticisms of the regime and legal challenges to its implementation persist" and that "*such challenges have the potential to undermine the authority of the Security Council to impose sanctions*" [emphasis added]. <sup>8</sup> At the same time, independent commentators in this area, such as the highly influential Watson Institute, observed that:

There is a real, and growing, political problem associated with ... not only ... the instrument of targeted sanctions, but increasingly of actions taken under Chapter VII by the UN Security Council itself.

...

The consequences of not having thought through the targeting of sanctions against individuals are beginning to return to challenge the very legitimacy of the targeted sanctions instrument.

...

The growing negative reaction to targeted sanctions for counter terrorism purposes ... risks the further erosion of the credibility and future utility of the instrument of multilateral sanctions in general. <sup>9</sup>

Drawing upon this widespread and sustained body of judicial and public criticism, Martin Scheinin - the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism - has recently filed a formal report with the UN General Assembly concluding that the blacklisting regimes established under Resolutions 1267 and 1373 are *ultra vires* - that is, the implementation of targeted sanctions upon individuals and entities by the Security Council actually goes beyond the legal powers conferred upon them by Chapter VII of the UN Charter. <sup>10</sup> This criticism is both scathing and profound. It cuts to the very core of the system's legitimacy (or lack thereof) and - as discussed in more detail later in this section of the Report - potentially has far-reaching consequences for the future of the blacklisting regimes.

## 6.2

### Fundamental Flaws of the Blacklisting System

Within this context of heightened public criticism, sustained judicial opposition and dwindling political and legal legitimacy we suggest that the fundamental, structural flaws and inequities of blacklisting are being rendered increasingly visible.

Although the legal and political problems associated with blacklisting are manifold, there are three key problems that are, in our view, determinative of the issue.

First, there is the lack of due process and systemic violation of fair trial rights for those blacklisted at the UN level. The inability of the UN to provide some type of mechanism for the effective exercise of the right to judicial review is - as is being increasingly confirmed by the judicial and political developments outlined above - being recognised as ultimately fatal to the legitimacy of the blacklisting regime.

Second, there is the issue of disclosure. Providing access to information is absolutely essential to enabling blacklisted individuals and groups to be properly informed and exercise their rights of review - as the CFI confirmed in the *Sison* case, "the parties ... can make genuine use of their right to a judicial remedy only if they have a precise knowledge of the content of and the reasons for the act in question." <sup>11</sup> Similarly, other commentators have noted that "it appears impossible to implement the UN lists of terror suspects in compliance with general principles of EU law unless [those blacklisted] have access to the relevant information that substantiates the terrorist allegation". <sup>12</sup> This requirement of disclosure, however, is directly at odds with the interests of states and their security services - whose powers have grown immeasurably in the years following 11 September 2001 and who are ordinarily unwilling to share intelligence gathered from their own agencies with states or other actors (including the Courts).

Third, there is the overly broad scope of blacklisting measures and lack of a clear definition of 'terrorism' at the international level that necessarily leads to arbitrariness. Whilst a

106 definition of ‘terrorist acts’ exists at the European level to inform the autonomous EU blacklisting procedure, at the UN level the criteria is unduly broad and requires only that an individual or group be “associated with” Al-Qaida or the Taliban. Under the current UN blacklisting framework, for example, there is neither a clear definition of ‘terrorism’ nor clarity as to the link that states must demonstrate between an individual (or group) and the ‘terrorist acts’ they are purportedly connected to. Intent is simply not required to justify restrictive measures. ‘Guilt by association’ and ‘categorical suspicion’ - even when proven by a Court to be entirely unfounded - remain the operative principles of the UN and EU blacklisting regimes. <sup>13</sup>

In spite of their nominal differences, these three fundamental problems are closely inter-related. They each go to the very core of terrorist blacklisting as an administrative technique of preemptive security.

As we discussed in part 5.2 of this Report, blacklisting regimes were explicitly set up as vehicles for supplanting criminal justice systems (with their due process protections and well established evidentiary requirements) in matters of national security by empowering states to introduce punitive measures against terror suspects on the basis of classified material that would be otherwise inadmissible in Court. As such, blacklisting is one part of a broader set of governance techniques and measures (including administrative detention without trial, control orders and preventative immigration measures) that are rapidly facilitating the parallel development of a state security apparatus operating on the lower standard of ‘risk’ rather than the more onerous standard of ‘proof’. <sup>14</sup> Moreover, it has been the rapid expansion of the powers and capabilities of intelligence services since 11 September 2001, as well as the increased international flow of information between them, which has provided the material foundation for the rise of preemptive security. <sup>15</sup> We argue that it is because these problems run to the very core of blacklisting as a preemptive security project that they have proven so intractably difficult for states to resolve within a liberal due process framework. It is accordingly against these fundamental, constituent problems that the attempts to reform blacklisting regimes that have taken place to date need to be assessed.

### 6.3

## Critically Evaluating the UN and EU Reforms

We have already mentioned the key reforms introduced to both the UN and EU blacklisting regimes in an attempt to try and improve their procedures and ensure compliance with fundamental rights. In this section, we argue that these reforms go no real way toward remedying the fundamental, underlying problems of terrorist blacklisting as discussed throughout this Report.

### 6.3.1

## UN Reforms in Perspective

The ‘Focal Point’ set up under Resolution 1730 was introduced in reaction to widespread criticism of the existing blacklisting system. <sup>16</sup> It was a first step towards allowing blacklisted individuals to directly petition the UN for delisting, as prior to that time they were entirely reliant upon the state of their country of residence or nationality to access the UN system on their behalf. Yet in reality, the Focal Point was little more than a mailbox - performing the wholly administrative function of simply receiving and forwarding applications to the Sanctions Committee who continued to maintain untrammelled executive authority to decide who ought to be placed on or removed from the 1267 blacklist. Whilst the reform gestured toward improving the *accessibility* of the UN blacklisting procedure, it did nothing to actually address the fundamental problems of the regime by creating an *effective remedy* or *right of review* for those affected.

Resolution 1735 (2006) was similarly celebrated as an important reform because it established a minimal requirement of *notification* for blacklisted individuals and an obligation that they be provided with a copy of the ‘statement of case’ that underpinned the blacklisting decision. In reality, however, the information contained in the ‘statement of case’ is entirely limited to material deemed to be publicly releasable. As such, the reform goes no way toward providing blacklisted individuals with access to the confidential or classified information that will ordinarily form the basis for their designation. It therefore fails to provide blacklisted individuals with sufficient information to properly exercise their rights of defence. <sup>17</sup> Furthermore, the information contained in the statements is often misleading if not, in some cases, inaccurate. ECCHR presently represents, for example, a number of individuals placed on the 1267 blacklist between 2003 and 2005 on the basis of allegations that they were part of a criminal front organisation for an Al-Qaida cell purportedly operating in Italy. After being subjected to a series of high-profile criminal prosecutions, the Italian courts ultimately found no evidence linking our clients to any terrorist network and therefore acquitted them of all terrorist charges. Nevertheless, they remain on the 1267 list on the basis (according to their near-identical respective statements of case) that they have been part of an Al-Qaida terrorist cell operating in Italy. Suspicion, even when proven by the Courts to be entirely unfounded, apparently remains enough to justify their blacklisting. We are currently seeking their delisting at both the UN and EU levels.

Resolution 1822 (2008) was similarly heralded as demonstrating that the 1267 Sanctions Committee “has made considerable progress” and “taken significant steps” towards establishing fair and clear blacklisting procedures. <sup>18</sup> This reform required the Sanctions Committee, *inter alia*, to make a narrative summary of reasons for listing available on the Security Council website, review all names on the Consolidated List before 30 June 2010 and thereafter to review each entry every three years to determine whether blacklisted individuals and entities fall within the

108 relevant listing criteria. As we outlined earlier, the UN Sanctions Committee justifies asset-freezing on the grounds that it is a temporary preventative measure. In reality, however, the freezing of assets of those on the list is ongoing for many years and resembles a *de facto* appropriation of property akin to permanent criminal confiscation. Resolution 1822 tries to address the indefinite duration of asset-freezing by introducing a blacklisting review procedure. However, “by operating on the basis of consensus and ... the no objection principle” - that is, where consensus is required by all members of the Sanctions Committee before any delisting decision can actually be made - “the process tends to be biased against making changes to the list”.<sup>19</sup> Furthermore, after a process that took more than two years, only 45 names individuals or entities were removed from a list consisting of 488 names at the commencement of the review. Given the continued relative success with which blacklisted individuals have been able to challenge aspects of their designation before the European Courts, and the ongoing failure to provide those targeted with any kind of effective remedy to challenge their designation at the UN level, it is difficult to accept that this proportion of designated individuals have been properly and legitimately blacklisted by the UN Sanctions Committee.

More than any of the other reforms, however, it has been Resolution 1904 (2009) which has attracted the most attention and sought to go the furthest towards rectifying the systemic defects of the UN blacklisting regime. In short, this Resolution scrapped the Focal Point and replaced it with an independent Ombudsperson to “lay out for the Committee the principal arguments concerning the delisting request[s]” of those seeking removal from the 1267 list<sup>20</sup> and to otherwise aid in increasing the general flow of information between blacklisted individuals and the Sanctions Committee.

Notwithstanding the incremental procedural benefits and appearance of increased transparency that the Ombudsperson has brought to the regime, Resolution 1904 - like the other UN procedural reforms before it - still fails to address the fundamental problems running to the core of the blacklisting system: including the lack of judicial review and effective remedy for those on the blacklist and the non-disclosure of the confidential or classified information underpinning the listing decision. On the day that the Resolution was adopted, Amnesty International issued a public statement rightly criticising the reforms for “fall[ing] far short of an independent and effective review mechanism mandated to examine delisting requests and to provide relief, namely lifting of the measures imposed, to those unfairly listed”.<sup>21</sup> Since then other observers, such as Cortright and de Wet, have evaluated Resolution 1904 along similar lines:

The introduction of the Ombudsperson does not amount to the introduction of independent and impartial review. The Ombudsperson has no direct decision-making authority on delisting requests, as his/her formal role is limited to the gathering and presenting of information. The delisting decisions are still taken confidentially and by consensus by the sanctions committee. The new procedures are an improvement ... [but they] do not satisfy the international legal standard guaranteeing the accused the right to fair hearing, which includes the right to be heard, the right to impartial and independent judicial review and the right to a remedy.<sup>22</sup>

The same conclusion has been forcefully and most recently made by Martin Scheinin - the UN Special Rapporteur on the promotion and protection of human rights and funda-

mental freedoms while countering terrorism - who concluded his analysis of Resolution 1904 for the UN General Assembly in the following terms:

The revised procedures for de-listing do not meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law. Under resolution 1904 (2009), the Ombudsperson does not have the decision-making power to overturn the listing decision of the Committee. The Ombudsperson is not even mandated to make recommendations to the Committee, and de-listing decisions are still taken confidentially and by consensus of a political body ... as opposed to being the result of judicial or quasi-judicial examination of evidence. Further, access to information by the Ombudsperson continues to depend on the willingness of States to disclose information, as States may choose to withhold information in order to safeguard their security or other interests. The system continues to lack transparency since there is no obligation for the Committee to publish in full the Ombudsperson's report or to fully disclose information to the petitioner. Without decision-making powers, the Ombudsperson cannot be regarded as a tribunal within the meaning of article 14 of the International Covenant on Civil and Political Rights. <sup>23</sup>

Criticisms of the Ombudsperson set up under Resolution 1904 have not been confined to legal commentators. <sup>24</sup> European Courts have also resoundingly confirmed the inadequacies of the measures. In the *Ahmed and others* case discussed at part 4.10 of this Report, for example, Lord Hope of the UK Supreme Court (formerly House of Lords) expressly considered the relevance of the Ombudsperson before concluding that “while these improvements are to be welcomed, the fact remains that there was not when the designations were made, *and still is not*, any effective judicial remedy” [emphasis added]. <sup>25</sup> Moreover, in their recent September 2010 decision in the *Kadi* case the General Court (formerly CFI) evaluated whether UN delisting procedures post-Resolution 1904 still violated the right to effective judicial protection, finding that:

128. The considerations ... set out by the Court of Justice ... [in] *Kadi*, in particular with regard to the focal point, remain fundamentally valid today, even if account is taken of the ‘Office of the Ombudsperson’, the creation of which was decided in principle by Resolution 1904 (2009) and which has very recently been set up. In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee’s list requires consensus within the committee. Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee’s list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee’s list). For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.

129. [T]he review carried out by the Community judicature of Community measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them [emphasis added]. <sup>26</sup>

Whilst it remains to be seen just how robust the new Ombudsperson will actually be in practice, it is already clear from an analysis of the formal powers prescribed to her under

Resolution 1904 that the reform measure is patently inadequate to meet the core problems of the blacklisting regimes. As detailed in the following section, we argue that more far-reaching and radical reforms are necessary if the crisis currently facing the UN blacklisting regime is to be averted and the problems are to be seriously and properly addressed.

### 6.3.2

#### EU Reforms in Perspective

Whilst numerous reforms have been introduced to European blacklisting procedures, largely in response to successful litigation by designated individuals and groups before the European courts, it is Regulation 1286/2009 that most readily seeks to fill the gap opened by the ECJ in their 2008 *Kadi* decision and widened by the Treaty of Lisbon entering into force on 1 December 2009. <sup>27</sup>

As discussed in part 2.6 of this Report, through this measure European authorities have sought to minimally comply with the terms of the *Kadi* decision by shifting from a position of ‘automatic compliance’ (where listing decisions of the Sanctions Committee were automatically implemented into the European legal order without any exercise of discretion by European decision-makers) to one of ‘controlled compliance’ (where the European Commission are to explicitly take the views of blacklisted individuals and groups into consideration before exercising their own discretion as to whether they should be designated on the European lists).

The adequacy of this ‘minimal requirement’ approach, however, has since been tested (and comprehensively rejected) by the European Courts. In the most recent *Kadi* decision of 30 September 2010 <sup>28</sup> the General Court evaluated the legality of Regulation 1190/2008 (of 28 November 2008). Like Regulation 1286/2009, Regulation 1190/2008 is based on the assumption that by providing a blacklisted individual or group with the summary of reasons underpinning their listing, inviting them to provide comments and then taking those comments into consideration before taking a final decision on whether they ought be listed (i.e., the controlled compliance procedure), European authorities are acting within the terms of the ECJ’s 2008 *Kadi* judgment. Thus, whilst in this case the General Court were only specifically concerned with the legality of Regulation 1190/2008, their conclusions can also be implicitly read as applying to Regulation 1286/2009.

In a scathing judgment, the General Court found that under the provisions of Regulation 1190/2008, Mr Kadi’s “rights of defence have been ‘observed’ only in the most formal and superficial sense”. <sup>29</sup> First, because the Commission considered themselves strictly bound to adhere to the findings of the Sanctions Committee and “at no time envisaged calling those findings into question in the light of the applicant’s observations”. <sup>30</sup> Second, and in spite of their statements to the contrary, the Commis-



sion “failed to take due account of the applicant’s observations and as a result he was not in a position to make his point of view known to advantage”. <sup>31</sup> Third, “the procedure followed by the Commission ... did not grant him even the most minimal access to the evidence against him”. <sup>32</sup> As a result, the Court held that the contested Regulation - and the minimal controlled compliance approach that it embodied - was in violation of Mr Kadi’s right to defence and right to effective judicial review. <sup>33</sup>

This decision of the General Court also serves to clearly confirm the inadequacy of the European reform measures that have been introduced to date. The failure to provide for the disclosure of key material underpinning listing decision is arguably the fatal flaw: it directly violates the rights of defence of those on the blacklist and therefore makes it impossible for them to properly exercise their rights of review before the European courts.

The right to judicial review, upheld in the 2008 *Kadi* decision, was effectively endorsed by the 27 EU Member States on 1 December 2009 when the Lisbon Treaty entered into force. With the adoption of Article 275, para. 2 of the Treaty on the Functioning of the European Union (TFEU) the ECJ were expressly given the competence to review “the legality of decisions providing for restrictive measures ... adopted by the Council”. However, it remained to be seen how substantive and broad that right would be interpreted to be by the Courts. The 2010 *Kadi* decision confirms two crucially important aspects about the nature and scope of this right. First, that it must extend to include a review of the substantive assessments of the UN Sanctions Committee and the evidence underlying their listing decisions. Second, moreover, that unless proper disclosure is provided (which, under the current blacklisting procedure, it is not) then any right of judicial review against restrictive measures will necessarily be ineffective. Therefore, if the Lisbon Treaty confirms the central importance of the right of judicial review in the European legal order, the 2010 *Kadi* decision serves to confirm that this right largely remains without substance. The reforms that have been introduced to date go no way toward addressing the fundamental flaws of the blacklisting regimes. Something more far-reaching is still yet required.

## Ways Out and Forward

There is therefore an emerging consensus that something urgently needs to be done about terrorist blacklisting that goes beyond mere procedural tinkering. According to the Watson Institute's most recent evaluation:

Incremental or marginal improvements of committee procedures alone, however, will not address effectively the larger political problem or regain control of the debate over fair and clear procedures. Bold, proactive measures to address the fundamental issue of effective remedy are needed. <sup>34</sup>

Much has already been written about the different types of legislative and policy changes that could be introduced to remedy the worst excesses of the blacklisting system. <sup>35</sup> Having excluded the introduction of further reforms to existing Sanctions Committee procedures, we maintain that there are three primary ways out of this impasse:

### 6.4.1

#### Independent Judicial Review

##### Mechanism at the UN Level

Many of the worst aspects of the blacklisting regimes could foreseeably be addressed through the creation of an independent UN review mechanism that is both accessible to blacklisted individuals and groups and competent to review the listing decisions taken by the Sanctions Committee. In order to comply with accepted international human rights law standards, such a review body would need to have actual *judicial* oversight of the Sanctions Committee and be empowered to take decisions which are binding upon them. An advisory body - as the critical reception of the Ombudsperson set up under Resolution 1904 is demonstrating - will simply be insufficient to meet the required standards. Furthermore, any judicial review mechanism at the UN level would need to be both *public* and *transparent*, with processes in place to ensure that blacklisted individuals and groups (as well the review body itself) has access to the relevant material.

To many commentators, this type of substantive UN reform represents the best means of resolving the blacklisting dilemma. According to Professor Iain Cameron, for example:

[F]or all the actors involved - the ECJ, the ECtHR, the European members of the Security Council and the Security Council itself - it would ... be greatly preferable if the necessary equivalent standards [of human rights protection] were put in place at the UN level. <sup>36</sup>

In their 2009 review of the blacklisting regime, which predated Resolution 1904 and the establishment of the Ombudsperson as an advisory post, Biersteker and Eckert (for the Watson Institute) argued that:

Establishing a review mechanism at the UN level represents the best prospect of effectively addressing the legal and political challenges to targeted sanctions. Creative thinking on a full range of issues - procedural, legal and political - is called for to meet contemporary challenges of global governance in this issue domain. It is time to move beyond traditional arguments about Security Council prerogatives. <sup>37</sup>

Similarly, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has recently argued that:

[I]ntroducing a mechanism of independent review at the United Nations level, as a last phase in the Security Council's decision-making about the listing ... composed of security classified experts serving in their independent capacity ... would be likely to be recognised by national courts, the EU court and regional human rights courts as sufficient analogous protection of due process, so that courts would exercise deference in respect of the outcome. <sup>38</sup>

The *authority* to create such a special review body - as the experience of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) demonstrates - would certainly exist. <sup>39</sup> However, the *advisability* of creating such a body is another question altogether. <sup>40</sup> The creation of such a review mechanism would seem a logical development to follow from the new quasi-legislative and executive powers that the Security Council has assumed for itself under Resolutions 1267 and 1373. As we argued in part.5.3 of this Report, the listing regimes introduced through these Resolutions have served as vehicles for the transformation of the Security Council into a new type of global quasi-legislative body capable of taking executive decisions that directly impact on the lives of individuals. If each blacklisting decision taken by the Sanctions Committee constitutes an exercise of public authority against the targeted individual, then from a human rights or public law perspective an effective remedy *must* be made available to those targeted enabling them to challenge that decision. <sup>41</sup> However, whilst an international review mechanism could undoubtedly go some way toward addressing the systemic human rights violations associated with the UN blacklisting regime, it will not necessarily address the broader political impacts of blacklisting discussed in detail throughout part 5 - including, most obviously, the very creation of new forms supranational UN legislative power in this area. To properly address the legal and political problems of blacklisting we argue that more radical reforms will be necessary.

## National Implementation and Review of UN Blacklists

Another suggested means of reforming blacklisting is to rely on national authorities to directly implement the UN lists and provide a right of review for those who are blacklisted to challenge their designation at the national level. According to Eckes, for example, UN blacklists confront the EU:

[W]ith an irresolvable dilemma that supports the conclusion that terrorist suspects should only be identified in a legal framework that complies with the rule of law and meets a certain standard of legal protection.

...

International cooperation must remain rooted in national constitutional systems, at least in a world without a universal constitution. Anything else would place international cooperation in a constitutional ‘vacuum’ outside of the domestic legal framework and with no forum able to hold political actors to account *ex post* for their actions. <sup>42</sup>

Others commentators (including EU and UN officials) have voiced similar criticisms, strongly supporting national initiatives such as those taken by Switzerland and suggesting that other national authorities should follow suit to guarantee the protection of fundamental rights rather than to wait for action to be taken at the UN level. Dick Marty, the Council of Europe Rapporteur for the Committee on Legal Affairs and Human Rights, for example, “encourage[d] all ECHR states parties to follow Switzerland’s lead in fulfilling their human rights obligations” notwithstanding the fact that “Switzerland’s practices might contravene UNSC resolutions”. <sup>43</sup> According to Marty, “the violations [associated with blacklisting] can most readily be addressed through states’ improvement of their internal targeted sanctioning (implementation) procedures”. <sup>44</sup> Similarly, after noting that “the right to contest inclusion” was non-existent at the international level, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has held that “if there is no proper or adequate international review available, national review procedures - *even for international lists* - are necessary” [emphasis added]. <sup>45</sup>

The fact that such strong criticisms - which effectively call on national authorities to defy the primacy (and thus, the authority) asserted by the Security Council in this area - are being recommended by such respected human rights officials is indicative of both the severity of the crisis that the blacklisting regimes are currently facing and the increasing importance of national solutions. Biersteker and Eckert outline three particular ways that national initiatives that could be introduced to improve the blacklisting system:

(1) *Defer to national measures* to ensure that listings meet domestic legal standards of each member state (e.g., conduct a national-level review before submitting/approving names for potential UN listing, allowing judicial review of classified information).

...

(2) *Conduct a retrospective hearing at the national level* in [the] state proposing the listing within a reasonable period of time, with a statement of case made available to designated individual and designee given opportunity to respond ... A decision by national courts of the designating states that proposal to list was unjustified would be binding on sanctions committee, or result in immediate 1822 review.

...

(3) *Rely on national or regional-level designations in lieu of UN listings*. Abolish the 1267 Committee and list, utilizing instead UNSCR 1373 as the legal basis for making terrorist designations at the national/regional levels. <sup>46</sup>

Providing a right of review at the national level either *before* or *shortly after* a listing is provided to the UN (that is, the first two options outlined above) would undoubtedly be a very useful developments for improving the blacklisting procedure. Most national criminal justice systems already have mechanisms in place for dealing with the issue of classified information (including, in the case of the United Kingdom, the use of security-vetted advocates) that could go some way toward dealing with the crucial issue of disclosure. Similarly, national criminal justice systems would ordinarily be in a better position to meet the requisite and accepted due process standards. However, in order for such a measure to provide any real benefit, any decision taken by national courts that a listing was unjustified would necessarily have to lead to the removal of the name from the UN blacklist as well. In the absence of an agreed judicial standard between the Security Council and national authorities as to both the requisite standard of proof and criteria for listing and an internationally agreed and sufficiently clear definition of what constitutes ‘terrorism’ and/or ‘terrorist acts’, such a reform would be unable to properly address the problems that we have discussed. Other practical and procedural difficulties could also make such a reform insurmountably difficult and undesirable to implement. As Cameron points out:

There are unfortunately many historical (and regrettably, some present day) examples in Europe and elsewhere of purely formal mechanisms of challenge so far as security matters are concerned. For example, a court’s jurisdiction may be limited by standing requirements, or it may only be able to review the legality of the measure and not its merits. Or the judges may have no expertise in security matters, or they may be unable in practice to look at all the intelligence material in question. Or there may be a tradition that the judicial branch defers to the executive in matters of foreign policy and/or national security. In such cases, a right of appeal, or review, can be useless. It can worse than useless, as it gives the impression of just procedures without the reality. <sup>47</sup>

Similarly, in evaluating their proposals Biersteker and Eckert go on to point out that:

[R]elying on national measures at the listing stage would provide a basis for fair hearing and effective remedy, but assume that fair judicial hearings could be conducted similarly across widely varying national jurisdictions and in highly charged political contexts (such as those immediately following a major act of terrorism). <sup>48</sup>

The experience of the European Arrest Warrant (EAW) is an interesting example to consider within this context. The EAW is predicated on an EU policy of mutual cooperation and recognition in criminal justice matters. In the absence of standard

minimum procedural safeguards or common standards on legal aid, bail and pre-trial detention, however, the EAW has resulted in gross injustices and the extradition of suspects within and across the EU in circumstances that amount to an abuse of process or are otherwise contrary to the rule of law. <sup>49</sup> Reliance upon national review measures, in the absence of common procedural and fair trial standards, will be insufficient for properly reforming the UN blacklisting regime.

Furthermore, after considering at length the procedures by which individuals who are specially designated on the US OFAC list can seek to challenge US blacklisting decisions before the US courts, Cameron has concluded that “there is, at the present time, no evidence to suggest that a genuine right of appeal exists for foreigners who lack a sufficient connection with the US”. <sup>50</sup> Without other broader reforms being introduced in parallel, therefore, increasing reliance on national review measures alone will have little material benefit for the vast majority of individuals already on the 1267 blacklist - that is, non-US citizens who were designated at the request of the US in the immediate aftermath of the 11 September 2001 attacks.

We believe that any reform of the blacklists at the national level that leaves the mechanism of UN targeted sanctions, the authority and legitimacy of the UN Security Council to globally legislate in this area and the overtly broad scope of the UN regime intact, will be insufficient to address the fundamental problems of blacklisting that we have described throughout this Report. For the reasons outlined in the following section, we therefore believe that the third option for change - that is, the repeal of Resolution 1267 and the abolition of the 1267 blacklist and Sanctions Committee - is a step in the right direction, capable of grappling with the more fundamental problems of blacklisting whilst opening the legal and political space necessary to come to a better solution.

### 6.4.3

#### Abolition of UN

#### Blacklisting Regimes

There is one option for change that has received relatively little attention and yet is perhaps the most obvious answer to the problem: abolish the UN blacklisting regimes and replace them with another solution altogether.

There are two particular variants of this reform that have been proposed. The first, as outlined above, recommends the abolition of Resolution 1267, its Sanctions Committee and the 1267 blacklist alongside the preservation of Resolution 1373 to provide the legal foundation for terrorist blacklisting at the national level. <sup>51</sup> The second, perhaps more radical, proposal recommends the abolition of both Resolutions 1267 and 1373, instead relying on the *International Convention for the Suppression of the Financing of Terrorism* (1999) or other new mechanisms to provide the legal foundation for blacklisting and the freezing of assets at the national level. <sup>52</sup>

Whilst such far-reaching changes to the blacklisting system might of previously seemed beyond the realm of possibilities, the fact that they are being formally recommended and considered at the international level provides strong support as to their viability in the current environment. In his latest (and final) report to the UN General Assembly the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for example, recommended that:

The Security Council should seize the opportunity of the approaching tenth anniversary of its resolution 1373 (2001) to replace resolutions 1373 (2001), 1624 (2005) and 1267 (1999) (as amended) with a single resolution not adopted under Chapter VII of the Charter of the United Nations in order to systematize the States' counter-terrorism measures and reporting duties of States under one framework. This proposal is motivated by the assessment of the Special Rapporteur that Chapter VII does not provide the proper legal basis for maintaining the current framework of mandatory and permanent Security Council resolutions of a quasi-legislative or quasi-judicial nature. <sup>53</sup>

This recommendation for abolishing the blacklisting regimes is based on the following specific grounds. First, the sanctions regimes set up under Resolutions 1267 and 1373 are arguably unlawful (or *ultra vires*). They bestow judicial or quasi-judicial powers upon the Security Council to make lasting and legal determinations against individuals in circumstances where they are only empowered (under Articles 39 and 41, Chapter VII of the UN Charter) to make preliminary determinations “deemed indispensable to countering a specific concrete situation that is posing a threat to international peace and security”. <sup>54</sup> Furthermore, in specific relation to Resolution 1373:

The inherent limits to the powers of the Security Council under Chapter VII are more pressing in the light of the persistent problem of the lack of a universal, comprehensive and precise definition of ‘terrorism’. The Special Rapporteur considers it problematic for binding permanent measures to be imposed by the Council on all Member States on the basis of hypothetical future acts falling under such a controversial and internationally undefined notion of terrorism.

...

[Therefore] whatever justification the Security Council may have had in September 2001 for the adoption of resolution 1373 (2001) its continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. <sup>55</sup>

Second, the blacklisting regimes are actually *ineffective* in meeting their ostensible aim of promoting international peace and security through the blocking of terrorist financing. <sup>56</sup> Furthermore, an alternative acceptable legal foundation for blacklisting already exists outside Chapter VII of the UN Charter - the *International Convention for the Suppression of the Financing of Terrorism* (1999). Whilst only four states had ratified the Convention in 2001, there are currently 173 state parties to the Treaty, thus rendering the Convention “a proper legal basis for States” obligations in this field”, <sup>57</sup> that operates without the creation of new quasi-legislative powers in the Security Council.

Finally, despite the fact that Article 24(2) of the UN Charter [in conjunction with Article 1(3)] demands that the Security Council acts in a manner that promotes and respects human rights when discharging its duties, <sup>58</sup> the blacklisting regimes continue to systemically and seriously undermine fundamental rights. Given the patent inadequacies of the procedural reforms that have been initiated to date, the Special Rapporteur concludes that the blacklisting regimes “continue to fall short of the fundamental principles of the right to a fair trial as reflected in international human rights treaties and customary international law”. <sup>59</sup>

After having reviewed the other possible options for change, we agree with the Special Rapporteur’s recommendations and support the call for the UN blacklisting regimes as they currently exist to be abolished. The fundamental premise underpinning his recommendation, along with other proposals to repeal the blacklisting regimes, is that the UN Security Council does not or should not have the power to unilaterally legislate and introduce restrictive measures against individual terror suspects. We believe that this is the key strength of this reform initiative and is precisely the type of “bold, proactive measure” <sup>60</sup> necessary to begin the process of actually addressing the core problems of the blacklists. That is, by politicising the emergence and transformation of the UN Security Council as a quasi-legislative body in this area, founded on a permanent state of exception <sup>61</sup> and the exercise of global power against individuals, these proposals highlight (and, therefore, open to challenge) the legitimacy of the new type of emergent supranational juridical authority that we believe terrorism blacklisting both reflects and constitutes. <sup>62</sup>

It would be a mistake, however, to underestimate the gravity of this problem, to limit our thinking to juridical solutions (thus failing to grasp the constitutive relationship between legal transformations and changes in the material production of global sovereignty) and to assume that a return to the protection purportedly offered by national justice systems will be sufficiently able to deal with the complexity of the issue. Nevertheless, as we have discussed, there are clear advantages to increasing reliance on national measures in certain areas. Notwithstanding their limitations, domestic courts are ordinarily better equipped to provide and protect due process requirements for individuals, deal with the crucial issue of classified information (through the use of special security-vetted procedures or otherwise) <sup>63</sup> and therefore put terrorist suspects in a position to contest their listing or the allegations against them through exercising their rights of review.

If the current UN blacklisting regimes are abolished (as we have suggested) the UN could still have an important advisory or standard-setting role to play in this area - that is, either by providing information collection, expertise and/or listing assistance to national authorities as required <sup>64</sup> or identifying the relevant listing criteria and then leaving it up to national authorities to draw up and implement their own blacklists as needed. <sup>65</sup> The issue of standard setting and relevant criteria is indeed crucially important. The unduly broad scope of blacklisting provisions and the lack of a clear definition on the criteria of ‘terrorism’ and ‘terrorist acts’ are fundamental problems that have provided



the foundation for some of the worst excesses of the blacklisting regimes. Accordingly, following the approach of the Special Rapporteur, we argue that in order for the principle of legality and legal certainty to be provided for in counter-terrorist measures of this nature:

All international and national executive bodies in charge of including groups or entities on lists should be bound by a clear and precise definition of what constitutes terrorist acts and terrorist groups and entities... At the national level, a definition of terrorism should include three cumulative elements - the aim, the purpose and the means... In addition, the need for precision and clarity in the definition also extends to the definition of the link between the group or entity and the terrorist act. In the absence of a definition, words or expressions that leave much leeway for interpretation, such as “supports”, “involved in” or “is associated with”, may be used to list groups or entities improperly. This is particularly problematic in the light of the absence of a universal definition of terrorism. It is the definition set forth by the States, if any, that will apply. This is not satisfactory in that neither the groups/entities themselves nor the States are able to determine with certainty which groups/entities should be subject to inclusion on terrorist lists, which may lead to the arbitrary inclusion of groups/entities on terrorist lists. <sup>66</sup>

Additionally, we argue that the definition of ‘terrorism’ and ‘terrorist act’ operative within any reform measure that is adopted needs to be explicitly amended to expressly exclude armed conflict from its scope. As we discussed in part 5.4 of this Report, one of the key impacts of the blacklisting regime has been to criminalise groups (and their supporters) who are lawfully engaged in armed conflict against oppressive states and/or legitimately struggling for their right to self-determination as expressly provided under common Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). <sup>67</sup> One of the primary standard-setting or advisory initiatives that the UN could and should perform, therefore, is to properly deal with this fundamental issue that they effectively outsourced through the hasty adoption of Resolution 1373. Whilst such a process would undoubtedly be politically complex and fraught with difficulties, it is nonetheless a prerequisite for preventing states from using blacklists as ideological and political tools (as they have done) for undermining the right to popular resistance and self-determination and criminalising those who support such struggles.

## Next Steps for the EU

The abolition of UN Resolutions 1267 and 1373 necessarily opens a space for the European blacklisting regimes to be similarly subjected to review and overhaul.

The abolition of Resolution 1267 at the UN level would clearly render the European implementation of this regime (through Common Position 2002/402/CFSP and EC Regulation 881/2002) without proper legal foundation or purpose.

The repeal of Resolution 1373 would undoubtedly have a similarly dramatic effect on the autonomous European blacklists. As discussed in part 2 of this Report, it was Resolution 1373 which first created the legal obligation for member states to introduce measures to combat, criminalise and freeze funds ‘associated with’ the financing of terrorism. The autonomous European blacklisting scheme was therefore expressly created by the EU Council (through Common Position 2001/931/CFSP and EC Regulation 2580/2001) in order to give effect to the requirements of Resolution 1373. <sup>68</sup> If that Resolution were to be abolished at the UN level (as we propose), then there would, strictly speaking, be no *international* legal obligation placed upon states to fight the financing of terrorism through the creation of their own blacklisting and asset-freezing regimes - that is, the abolition of the Resolution will create a much-needed opportunity for the European blacklists to be reviewed and reformed. <sup>69</sup>

The autonomous European blacklisting procedure is certainly better (from a due process perspective) than the UN blacklisting process and the implementation of UN lists at the EU level. Those listed at the EU level, for example, are to be provided with a statement of reasons that should be “sufficiently detailed to allow those listed to understand the reasons for their listing and to allow the Community Courts to exercise their power of review”. <sup>70</sup> Additionally, those first blacklisted at the European level are to be notified of the listing and told that they have the possibility to challenge the listing decision before the General Court. <sup>71</sup> The procedures of the Council Working Party (CP 931 WP) - which effectively operates as a European Sanctions Committee, making the relevant recommendations for listing and delisting - are now publicly available. These guidelines specify that the Working Party is to check, *inter alia*, that proposals for listing “compl[y] with the fundamental principles and the rule of law”. <sup>72</sup>

In practice, however, the autonomous European blacklisting regime remains flawed and continues to violate fundamental rights, “damag[ing] basically and essentially the EU’s legitimacy as a political entity”. <sup>73</sup> As demonstrated in the *PMOI* and *Sison* cases, for example, both applicants and the EU Courts are still refused access to the key information substantiating the listing decision - rendering blacklisted individuals and groups unable to exercise their rights of defence and the Courts unable “to carry out adequately its review of the lawfulness of the decision”. <sup>74</sup> This refusal to disclose ‘sensitive’ information is still arguably the key obstacle in the provision of effective judicial protection within the European blacklisting regime. <sup>75</sup>

It is beyond the scope of this Report to outline in detail the various (and already well-documented) <sup>76</sup> options for reforming the autonomous European listing procedure. However, we argue that there is a clear need for a broader public debate concerning the future of the European blacklists and ways that persistent violations of human rights and other problems discussed throughout this report might be properly addressed. The 2006 *Ottawa Principles on Anti-Terrorism and Human Rights* are instructive as guidelines in this context. On the issue of national and regional blacklists, they state the following:

Principle 5.4: National and regional security lists

5.4.1 States should not create security lists except where there is a pressing and substantial security reason for doing so. Moreover, security lists should only include the names of persons or groups that present a real, substantial and established danger to the national security of the state or the international or regional collectivity creating the list. States must not adopt listings, made by other countries or entities, that do not meet this test, or use security lists for reasons not related to national security.

5.4.2 States should avoid using the terms “terrorist” or “terrorism” as a criterion for listing because of the definitional problems associated with the terms, but if they do, those terms must be precisely and narrowly defined by law ... so that they do not capture legitimate political activity, expression, association or insurgency.

5.4.3 The precise national security criteria for listing, and the consequences of listing, must be clearly prescribed by law and not subject to discretion.

5.4.4 The standard of proof for making a listing should be clear and convincing proof and, where criminalization is a consequence, the criminal standard of proof - beyond a reasonable doubt - should apply.

5.4.5 States must ensure that no evidence which may have been obtained through torture may be used to support a listing.

5.4.6 Due to the serious consequences of listing an individual or group, including infringements of constitutional and international human rights, affected parties must be afforded, at a minimum: a right to reasonable notice of the intent to list; a right to know the allegations and evidence offered in support of the listing; and a right to respond, including the right to call evidence and witnesses. Parties should also be afforded a right to a de novo appeal before an impartial judicial body with power to grant relief.

5.4.7 Each listing by a state should be reviewed on a yearly basis. States should also provide a mechanism by which individuals and groups may periodically seek delisting and call new evidence in support of their case. There should be automatic delisting after a reasonable period of time, subject to renewal through the same processes used in the initial listing.

5.4.8 The criteria states adopt for listing groups must also take into account the scope and degree of activity within the group which threatens national security. Where only certain individuals within a group are engaged in violent activity targeting civilians, the individuals and not the group should be listed.

5.4.9 If the legislative branch of government is called upon to ratify a state’s listings, that ratification must take place on a case by case basis.

On such issues of legal necessity, clarity of purpose and definition, reviewability and proportionality the EU blacklisting regime still falls far short of these standards. If the European lists are to continue, therefore, we maintain that they need to be brought within

the scope of ordinary and existing criminal law measures, where decisions to designate are based on proof, evidence and criminal conviction for terrorism offences rather than secret intelligence or other sensitive information that is neither disclosed to those blacklisted or the EU Courts. Those who have neither been convicted nor are awaiting trial for terrorism offences should not be placed on the blacklist.<sup>77</sup> Similarly, for those already on the blacklist who have neither been convicted nor are awaiting trial, steps should be taken to unfreeze their funds and remove them from the list as is already provided under the applicable EC Regulations.<sup>78</sup> Those who remain on the list should not stay there unless it can be demonstrated that they present “a real, substantial and established danger”.<sup>79</sup> Such a requirement is a logical corollary of the principle of proportionality, in that “the longer the freezing continues the stronger must be the evidence supporting the freezing decision”.<sup>80</sup> The principle of necessity further requires a clear relationship between the interference with individual rights and the pursuance of a legitimate aim. In the context of European blacklisting, therefore, the EU Courts have held that individuals and groups can stay blacklisted so long as it is considered necessary to prevent their funds from being made available for terrorist activities.<sup>81</sup> Mechanisms (such as a *de minimus* rule) therefore need to be introduced in order to assess the objective contribution that blacklisted individuals and groups are capable of actually making to terrorist activities. Where funds are below a certain amount, then the person or group should be removed from the list. Furthermore, as with the UN lists, we argue that the applicable EU definition of ‘terrorism’ and ‘terrorist act’ contained in Common Position 2001/931/CFSP and the European Council Framework Decision on Combating Terrorism needs to be amended to exclude legitimate armed conflict from its scope so as to prevent the criminalisation of groups (and their supporters) who are lawfully engaged in armed struggle against oppressive states and/or seeking to assert their right to self-determination.<sup>82</sup>

With the adoption of the Lisbon Treaty, Article 215 and 75 of the TFEU anticipates the European Parliament playing a much more prominent role in shaping the framework for European blacklisting. Yet, to date, little has been done by the Parliament to address the core problems of the lists. We suggest that this deficit needs to be urgently remedied and that Parliament must take responsibility in playing a lead role in engaging with these issues.

However, in our view what is at stake in this process is too important to be left to policy makers, EU institutions or the closed networks of counter-terrorism experts and security professionals that increasingly define the European security agenda to resolve on their own terms.<sup>83</sup> Similarly, whilst legal challenges and the EU Courts have been integral in bringing the fundamental problems of blacklisting to the fore, they are ill equipped resolve the wider core issues that these problems present.

Within an extraordinary short space of time, blacklisting, asset-freezing and the preemptive war on terrorist financing have become central planks of European counter-terrorism policy. We have, throughout this report, sought to highlight the fundamental problems that this has created and questioned the value, efficacy and

desirability of the blacklisting regimes themselves from a range of different perspectives.

If, as we argue, the ongoing existence of the blacklists is to be critically engaged with and questioned, then the fundamental assumptions of threat and security underpinning the EU preemptive security agenda rapidly constructed (largely behind closed doors) in the years since 2001 also need to be revisited and challenged.

The constitution of the preemptive security field within which the EU blacklists operate is not limited to the decision-makers who create these restrictive measures and the specific individuals and groups who are targeted. Rather, these measures (and the values of threat and security they embody and put into effect) involve all of us at a more fundamental level. The debate about the future of the blacklists ought therefore extend to include a different set of security questions than those ordinarily articulated in conventional discussions on ‘security and liberty’ and the problems of fundamental rights. According to Dillon, such a parallel debate might begin:

[N]ot by asking what is dangerous? But by asking what does a representation of danger make of ‘us’ and those who are not ‘us ... Not by asking what are we endangered by? But by asking how does a representation of danger make ‘us’ what we are? ... And finally, not by asking how to secure security? But, by enquiring about what is lost and forgotten, and who or what pays the inevitable price, for the way that ‘we’ are thus habited in fear? <sup>84</sup>

Such questions run to the very core of what kind of political community we want to be part of and the values that should compose it. Whether liberal values (of due process, proportionality and the rule of law) and litigation strategies are ultimately adequate to the task of understanding and providing effective purchase against the specifically illiberal regimes of blacklisting remains an open, contestable question. <sup>85</sup> We hope that this report goes some way toward opening up the necessary terrain for such processes to take hold and develop.

- 1 Specifically, the General Court held [at para. 129] that “the review carried out by the Community judicature of Community measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them.” *Case T-85/09. Kadi v Commission* [2010] ECR 00000. Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009A0085:EN:HTML> [date accessed 10. Nov 2010]
- 2 *Al-Qaeda and Taleban (United Nations Measures) Order* (SI 2006 No 2952). Available at: <http://www.legislation.gov.uk/ukSI/2006/2952/contents/made> [date accessed 10. Nov 2010]
- 3 *Ahmed and others v HM Treasury* [2010] UKSC 2. Lord Rodgers, with Baroness Hale agreeing [at para. 161]. Available at: [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2009\\_0016\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0016_Judgment.pdf) [date accessed 10. Nov 2010]
- 4 Guild, E. CEPS: Liberty and Security in Europe. *EU Counter-Terrorism Action: A Fault line between law and politics?* (2010) [at p.9] Available at: [www.ceps.eu/ceps/download/3266](http://www.ceps.eu/ceps/download/3266) [date accessed 03. Nov 2010]
- 5 *Terrorist Asset Freezing Bill*. For current status on the Bill's introduction (expected before 31 December 2010) see <http://services.parliament.uk/bills/2010-11/terroristassetfreezingtchl.html> [date accessed 10. Nov 2010]
- 6 See, for example, Vermeulen, Mathias ‘Swiss parliament want opt-out of 1267 sanctions regime’ *The Lift* (18 March 2010). Available at: <http://legalift.wordpress.com/2010/03/18/swiss-parliament-wants-opt-out-of-1267-sanctions-regime/> [date accessed 10. Nov 2010]
- 7 Keller, H. and Fischer, A. (2009) “The UN Anti-Terror Sanctions Regime under Pressure” in *Human Rights Law Review* no 9(2): 257-266 [at p.266]
- 8 Established pursuant to Resolution 1526 and extended by Resolution 1822. See UN Doc. S/2009/502 (2 October 2009). Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20S%202009%20502.pdf> [date accessed 10. Nov 2010]
- 9 Biersteker, T. and Eckert, S. Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report”* (October 2009) [at pp. 4, 10 & 11]. Available at: [www.watsoninstitute.org/pub/2009\\_10\\_targeted\\_sanctions.pdf](http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf) [date accessed 26. Oct 2010]
- 10 Scheinin, M. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. (6 August 2010). UN Doc. A/65/258. [at paras. 39 and 57] Available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/65/258](http://www.un.org/ga/search/view_doc.asp?symbol=A/65/258) [date accessed 10. Nov 2010]
- 11 *Case T-47/03, Sison v Council* [2007] ECR II-73 [at para. 137]. Available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0047:EN:HTML> [date accessed 02. Nov 2010]
- 12 Eckes, C. (2009). *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*. Oxford: OUP [at p.394]. Also [at p.419]: “This leads to the conclusion that European institutions cannot lawfully give effect to UN terrorist lists. They do not possess the relevant information and the listings are not subject to review at the UN level”
- 13 *Ibid* [at p.390]. See also *Supra* note 10 [at p.15, para. 32]. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/477/03/PDF/N0647703.pdf?OpenElement>
- 14 See, for example, International Commission of Jurists (ICJ), *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009) [at pp. 91 - 122]. Available at: <http://www.icj.org/IMG/EJP-Report.pdf> [date accessed 10. Nov 2010]
- 15 *Ibid* [at p.91]
- 16 Eckes, C. (*Supra* note 12) [at p. 32]
- 17 *Ibid* [at p.395]
- 18 See, for example, Biersteker, T. and Eckert, S. (*Supra* note 9) [at p. 21]
- 19 *Ibid* [at p.22]
- 20 S/RES/1904 [at para. 20]
- 21 Amnesty International Public Statement. AI Index: IOR 41/032/2009 (17 December 2009). Available at: <http://www.amnesty.org/es/library/asset/IOR41/032/2009/es/6c5e2899-f36d-459a-8bc5-3e9bb27fb5f8/ior410322009en.pdf> [date accessed 10. Nov 2010]
- 22 Cortright, D. and de Wet, E. Sanctions and Security Research Program. *Human Rights Standards for Targeted Sanctions* (January 2010) [at p.10]. Available at: [www.fourthfreedom.org/pdf/10\\_01\\_HR\\_STANDARDS\\_FINAL\\_WEB.pdf](http://www.fourthfreedom.org/pdf/10_01_HR_STANDARDS_FINAL_WEB.pdf) [date accessed 27. Oct 2010].
- 23 *Supra* note 10 [at p.18]
- 24 Criticisms of Resolution 1904, and the deficiencies of the Ombudsperson, have been widespread. See, for example: *Supra* notes 1, 3, 10, 21 & 22; Cameron, I. et al. European Commission for Democracy through Law (Venice Commission). *Report on Counterterrorism Measures and Human Rights* (2010). Available at: <http://www.venice.coe.int/docs/2010/CDL-AD%282010%29022-e.pdf> [date accessed 10. Nov 2010]
- 25 *Supra* note 3 [at para. 78]
- 26 *Supra* note 1
- 27 Although, as suggested below, Regulation 1286/2009 should be read together in this context with Regulation 1190/2008 (of 28 November 2008) which predates it.
- 28 *Supra* note 1
- 29 *Ibid* [at para. 171]
- 30 *Ibid*
- 31 *Ibid* [at para. 172]
- 32 *Ibid* [at para. 173]
- 33 *Ibid* [at paras. 179 - 181]
- 34 Biersteker, T. and Eckert, S. *Supra* note 9 [at p.31]
- 35 *Ibid*. See also, in particular, Biersteker, T. and Eckert, S. The Watson Institute. *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (30 March 2006). Available at: [http://www.watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf) [date accessed: 28. Oct 2010]; Cameron, I. ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’ in *Nordic Journal of International Law* (2003) 72: 159 - 214; Cameron, I. Report to the Council of Europe. *The European Convention on Human Rights: Due Process and United Nations Security Council Counter-Terrorism Sanctions*. (6 February 2006). Available at: [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/public\\_international\\_law/Texts\\_& Documents/Docs%202006/31.%20Cameron%20Report%2006.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_& Documents/Docs%202006/31.%20Cameron%20Report%2006.pdf) [date accessed: 02. Nov 2010]; Scheinin, M. (*Supra* notes 10 and 13); Eckes, C. (*Supra* note 12) [especially at pp. 372 - 419]. Cortright, D. and de Wet, E. (*Supra* note 22)
- 36 *Ibid* (Cameron, 2006 [at p.28])
- 37 Biersteker, T. and Eckert, S., *Supra* note 9 [at p. 31]
- 38 UN Doc A/63/223 [at pp. 6-7]. Available at: [http://www.realinstitutoelcano.org/wps/wcm/connect/2e23a3004f018b89b8d7fc3170baead1/UN-GA\\_SpecialRapporteur\\_HumanRights\\_CounterTerrorism.pdf?MOD=AJPERES&CACHEID=2e23a3004f018b89b8d7fc3170baead1](http://www.realinstitutoelcano.org/wps/wcm/connect/2e23a3004f018b89b8d7fc3170baead1/UN-GA_SpecialRapporteur_HumanRights_CounterTerrorism.pdf?MOD=AJPERES&CACHEID=2e23a3004f018b89b8d7fc3170baead1) [date accessed 10. Nov 2010]
- 39 Cameron, I. (2003) (*Supra* note 35) [at p.183]; Biersteker, T. and Eckert, S. *Supra* note 9 [at p.28]
- 40 *Ibid* (Cameron). For a detailed discussion of the strengths and limitations of this type of reform see Cameron, I. [*Ibid*, at pp. 208 - 211] and Biersteker, T. and Eckert, S. *Supra* note 9 [at pp. 28 and 31-32]
- 41 Bothe, M. (2008) ‘Security Council’s targeted sanctions against presumed terrorists: the need to comply with human rights standards’ in *Journal of International Criminal Justice* no 6(3) 541 - 555 [at p. 545]; Cameron, I. (2003) (*Supra* note 35) [at p.198]
- 42 Eckes, C. (*Supra* note 12) [at pp. 418 and 405 respectively]. For a similar approach, see Cameron, I. (2003) (*Supra* note 35) who argues “200 years of building up safeguards in criminal procedure ought not be capable of being removed by waving an international law wand”.
- 43 Marty, D. Council of Europe Parliamentary Assembly Report. *United Nations Security Council and European Union Blacklists*. Doc. 11454. (16 November 2007) [at para. 84]. Available at: <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11454.htm> [date accessed 10. Nov 2010]
- 44 *Ibid*.
- 45 *Supra* note 10 [at p.17, para. 39]. See also, Eckes, C. (*Supra* note 12) [at p.405]
- 46 Biersteker, T. and Eckert, S. (*Supra* note 9) [at pp. 25 - 26]
- 47 Cameron, I. (2003) (*Supra* note 35) [at p. 205]
- 48 Biersteker, T. and Eckert, S. (*Supra* note 9) [at p. 31]
- 49 Fair Trials International (FTI) have undertaken extensive research, policy, casework and campaigning on this issue. See, for example, *UK views on the European Union’s Justice and Home Affairs Future Work Programme 2009 - 2014. Policy Submission*. (17 September 2009). Available at: [http://www.fairtrials.net/campaigns/article/submission\\_on\\_the\\_stockholm\\_programme\\_to\\_the\\_uk\\_ministry\\_of\\_justice/](http://www.fairtrials.net/campaigns/article/submission_on_the_stockholm_programme_to_the_uk_ministry_of_justice/)
- 50 Cameron, I. (2003) (*Supra* note 35) [at p. 208]
- 51 For discussion of this model of reform, see Scheinin, M. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. (22 October 2008) UN Doc. A/63/223 [at p.7]. Available at: <http://www2.ohchr.org/english/issues/terrorism/rapporteur/reports.htm> [date accessed 10. Nov 2010]. See also Cameron, I. (2003) (*Supra* note 35) [at pp. 211 - 213] and Biersteker, T. and Eckert, S. (*Supra* note 9) [at pp. 26 and 31]
- 52 *Supra* note 10 [at pp. 11 - 19]
- 53 *Ibid* [at p.2]
- 54 *Ibid* [at pp. 11 - 12]
- 55 *Ibid* [at p.12, paras. 37 and 39]
- 56 *Ibid* [at p.16, para. 52]
- 57 *Ibid* [at p. 12, para. 38]
- 58 *Ibid* [at p. 11, para. 35]
- 59 *Ibid* [at p.18, para. 57]
- 60 Biersteker, T. and Eckert, S. (*Supra* note 9) [at p.31]
- 61 As discussed in part.5.3 - 5.4 of this Report, Resolution 1267 was first introduced as a type of emergency measure under Chapter VII of the UN Charter, then modified by Resolution 1390 which set up a regime of open-ended blacklisting unrelated to any specific territory or state. Similarly, Resolution 1373 was adopted in the immediate aftermath of the 11 September 2001 attacks and created general, permanent obligations on states, unlimited in time or space, to criminalise acts of terrorism worldwide. It is in this sense that we argue that both UN blacklisting regimes are founded on a permanent, yet now normalized, state of exception. See also, Scheinin, M. (*Supra* note 10) [at paras. 34 and 52].
- 62 See, for example, Hardt, M. and Negri, A. (2000) *Empire* Harvard University Press: Harvard [especially at Ch. 1.1, pp. 3 - 21] and Reid, J. (2005) ‘The Biopolitics of the War on Terror’: a critique of the ‘return of imperialism’ thesis in international relations’ in *Third World Quarterly* no 26(2) [at pp.237 - 252]
- 63 Biersteker, T. and Eckert, S. (*Supra* note 9) [at p.20]
- 64 *Supra* note 10 [at p.7]
- 65 Cameron, I. (2003) (*Supra* note 35) [at p.211]
- 66 *Supra* note 13 [at p.15, para.32]
- 67 As discussed earlier, Common Article 1(1) of the ICCPR and ICESCR expressly states: “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. This principle

recognises the fundamental principle that people exercising their right to self-determination have, in the last resort, a license to engage in armed conflict against an oppressor state. In this way, armed resistance by national liberation movements is generally held to be in compliance with international law.

68 See, for example, Council Common Position 2001/931/CFSP. [at para. 5, Preamble]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF> [date accessed: 10. Nov 2010] and EC Regulation No 2580/2001 [at para. 3 - 5, Preamble] Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF> [date accessed 10. Nov 2010]

69 The European commitment to fight the financing of terrorism, however, extends well beyond Common Position 2001/931/CFSP and EC Regulation 2580/2001. See, *inter alia*, *European Security Strategy: A Secure Europe in a Better World* (12. December 2003) Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> [date accessed 10. Nov 2010] and *EU Counter-Terrorism Strategy* (30. November 2005) Available at: <http://register.consilium.eu.int/pdf/en/05/st14/st144669-re04.en05.pdf> [date accessed 10. Nov 2010]

70 Council Doc. 19826/07 [at para. 17]

71 *Ibid* [at paras. 20-21]

72 *Ibid*, Annex II [at para. 4]

73 Eckes, C. (*Supra* note 12) [at p.380 & 378]

74 Case T-47/03, *Jose Maria Sison v Council and Commission* (*Supra* note 11) [at para. 219]

75 Eckes, C. (*Supra* note 12) [at p. 392]

76 *Ibid* [at pp. 372 - 393]

77 For a similar approach see Liberty. *From War to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010* (2010)[at pp. 44 - 45]. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf> [date accessed 10. Nov 2010]

78 EC Regulation 2580/2001 [at Article 6]

79 *Ottawa Principles on Anti-Terrorism and Human Rights*, Principle 5.4.1. Available at: <http://aix1.uottawa.ca/~cforcese/hrat/principles.pdf> [date accessed 1. Nov 2010]

80 Eckes, C. (*Supra* note 12) [at p.385]

81 Case T-256/07, *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3019 [*PMOI II*] [at para. 107]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007A0256:EN:HTML> [date checked: 04. Nov 2010]

82 See, for example, Art. 2 (a) of the 1998 *League of Arab States Convention for the Suppression of Terrorism* which states that "All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of International Law, shall not be regarded as an offence".

83 For good analyses of EU security networks see Bigo D. 'Liberty, Whose Liberty? The Hague Programme and the Conception of Freedom' in Balzacq, T. and Carrera, S. (eds) (2006) *Security v Freedom? A Challenge for Europe's Future* Aldershot: Ashgate; and Bigo, D. "Globalized (in)Security: the Field and the Ban-opticon" in Bigo, D. and Tsoukala, A (eds) (2006) *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11* Routledge: London; Hayes, B. *NeoConOpticon: The EU Security Industrial Complex*. (2009) Available at: <http://neoconopticon.wordpress.com/read-the-report/> [date accessed 10. Nov 2010]

84 Dillon, M. (1996) *Politics of Security: Toward a Political Philosophy of Continental Thought*. Routledge: London [at p. 35]

85 For good analyses of the limits of liberal theory and values in responding to the 'exceptionalism' marking the 'war on terror', see Agamben, G. (2005) *State of Exception* Chicago University Press: London; Reid, J. (2006) *The Biopolitics of the War on Terror: Life Struggles, Liberal Modernity and the Defence of Logistical Societies* Manchester University Press: Manchester ; Ericson, R. "The State of Preemption: managing terrorism through counter law" in Amooore, L. and de Goede, M. (eds) (2008) *Risk and the War on Terror* Routledge: London; Bigo, D. and Tsoukala, A (*Supra* note 83).

## VII

# Conclusion

This Report has documented the development of terrorism blacklisting at the UN, EU and national levels. By examining the human rights and broader political impacts of this new form of security governance, focusing in particular on the ways they have been highlighted and challenged in the Courts, we have sought to offer a framework for understanding the crisis that currently threatens to undermine the blacklisting regimes.

There can be no doubt as to the extent of this crisis. The negative impact of the blacklisting regimes on human rights and the ongoing denial of due process to affected parties are abundantly clear. The need for effective law enforcement measures and international counter-terrorism cooperation does not serve to justify the wholesale and systematic restriction of fundamental rights in any case, but here even these principles do not apply.

The first blacklisting regime was created by the UN as a means of exerting international pressure on the political elites of ‘problem states’ - in particular, with Resolution 1267 (1999), to force the Afghan regime to extradite Usama bin Laden. However, with the attacks of 11 September 2001, and the subsequent introduction of Resolutions 1373 (2001) and 1390 (2002) as emergency measures, blacklisting was developed and deployed as a new method for targeting nefarious ‘terrorist networks’ and their perceived supporters, criminalising self-determination struggles and providing the foundation for unprecedented supranational and national powers to preemptively target individual terror suspects and groups.

However well intentioned the reasons for the hasty and ill-conceived adoption of the blacklisting regimes may have been at that time, they cannot in our view be seen as effective, proportionate or necessary counter-terrorism measures almost a decade later. The need for radical reform is essential if the UN and EU are to maintain a meaningful commitment to the values upon which they are founded and the broader impacts and problems of such measures are to be properly addressed.

Although the regimes that have been built and the problems that have been created are international in scope, we have focused our critical analysis on a European level and therefore believe that a twofold European response to the problem must be developed. First, the EU and its member states must take their share of responsibility for the failure to resolve the crisis of the blacklists at the level of the United Nations. It is simply unacceptable for EU officials to continue to complain privately that they wish the UN had not saddled the European judicial system with the ‘burden’ of a glut of human rights and due process cases



while failing to press the UN to engage in the meaningful reform so clearly demanded by its own Courts. Second, it is equally clear that the EU must address its own shortcomings and failures in respect to the autonomous EU blacklist by getting its own ‘house in order’ - particular with respect to the way its autonomous listing regime is criminalising resistance movements paralysing peace processes. The EU’s failure to positively engage with the crisis of blacklisting at the UN level is strongly indicative of a desire to maintain its own discredited blacklist in the face of widespread calls for domestic reform.

At the same time, whilst fully supporting the calls for the UN blacklists to be repealed as outlined in the previous chapter, we acknowledge that the problems of blacklisting regimes are bigger and more complex than the specific laws that implement them. The abolition of the blacklisting regimes is also an opportunity to open a broader public debate about how we ought best respond to the problem of terrorism. The transformation of the UN Security Council into a supranational authority with new quasi-legislative powers to target individuals; the relationship between exceptional, preemptive administrative measures and the conventional criminal justice systems of liberal democracies that they are supplanting; the status of the right of peoples to self-determination and the criminalisation of liberation struggles (and the communities that support them) through counter-terrorism sanctions; the devastating impact that these measures have on the lives of the partners and children of those who are listed; the ways that blacklisting has been used productively to create new forms of social control far removed from the original purpose of the regimes. These are just some of the broader and more fundamental questions and problems of blacklisting which should not be simply left alone for states and policy-makers to resolve. We hope this report has gone some way to opening a space for this much-needed discussion to take place.

Targeted sanctions, preemptive security and fundamental rights

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