



Combating the Financing of Terrorism While Protecting Human Rights: A Dilemma?

Background Paper

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This background paper has been prepared by staff of the Human Rights Department at ODIHR but does not represent the views of the ODIHR, the OSCE, or its participating States.

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Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an overmighty State. Their observance and full exercise are the foundation of freedom, justice and peace.

-- OSCE Charter of Paris for a New Europe (1990)

Peace and security in our region is best guaranteed by the willingness and ability of each participating State to uphold democracy, the rule of law and respect for human rights....

We reaffirm that respect for human rights and fundamental freedoms, democracy and the rule of law is at the core of the OSCE's comprehensive concept of security.

-- OSCE Charter for European Security (1999)

I. INTRODUCTION

One occasionally encounters the view that when it comes to combating terrorism, human rights and security are in conflict and that human rights must give way before the imperatives of security. As a matter of principle, this view is inconsistent with OSCE commitments and the United Nations Global Counter-Terrorism Strategy.

In adopting the 2002 *OSCE Charter on Preventing and Combating Terrorism*, OSCE participating States affirmed:

[We] [u]ndertake to implement effective and resolute measures against terrorism and to conduct all counter-terrorism measures and co-operation in accordance with the rule of law, the United Nations Charter and the relevant provisions of international law, international standards of human rights and, where applicable, international humanitarian law...

[We] [a]re convinced of the need to address conditions that may foster and sustain terrorism, in particular by fully respecting democracy and the rule of law, by allowing all citizens to participate fully in political life, by preventing discrimination and encouraging intercultural and inter-religious dialogue in their societies, by engaging civil society in finding common political settlement for conflicts, by promoting human rights and tolerance and by combating poverty.¹

The same point was made succinctly in the U.N. Global Counter-Terrorism Strategy:

We resolve to undertake the following measures, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing.²

¹ OSCE Charter on Preventing and Combating Terrorism, MC(10).JOUR/2 (7 Dec. 2002), available at http://www.osce.org/documents/odihr/2002/12/1488_en.pdf.

² Global Counter-Terrorism Strategy, GA Res 60/288, UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/288 (20 September 2006), Annex [9].

The international community is thus clearly in agreement in principle that the protection and promotion of human rights is essential to the success of any counter-terrorism strategy.

Nevertheless, there is a perhaps understandable temptation on the part of policy makers to look to repressive measures as the most obvious means to achieve security while neglecting the more subtle task of incorporating human rights protections. Such an approach, however, is short-sighted and inherently self-defeating. As the U.N. Secretary-General wrote in his 2006 report:

Terrorism often thrives in environments in which human rights are violated and where political and civil rights are curtailed.... Past cases show that Governments that resort to excessive use of force and indiscriminate repression when countering terrorism risk strengthening the support base for terrorists among the general population. Such measures generally invite counter-violence, undermine the legitimacy of counter-terrorism measures and play into the hands of terrorists....

Only by placing counter-terrorism within a rule-of-law framework can we safeguard the internationally valued standard that outlaws terrorism, reduce the conditions that may generate cycles of terrorist violence, and address grievances and resentment that may be conducive to terrorist recruitment. To compromise on the protection of human rights would hand terrorists a victory they cannot achieve on their own.³

Indeed, a statistical analysis performed by two prominent economists concluded, “The data seem to suggest that a lack of civil liberties is associated with higher participation in terrorism”⁴

Clearly, respecting human rights while countering terrorism is not only a matter of principle, but it is vital to the success of counter-terrorism measures. Indeed, far from being a hindrance, human rights provide useful guideposts to the development of an effective counter-terrorism strategy. There is thus no “dilemma” in the sense of an opposition between the aims of providing security and protecting human rights. Instead, both aims must be pursued simultaneously as integral components of counter-terrorism strategy. As this paper illustrates, the challenges of doing so are considerable, but not insurmountable.

While a broad range of human rights are engaged by efforts to suppress terrorist financing, including freedom of speech and association, the right to property, the right to travel, and others, this background paper will focus on the due process rights implicated by the terrorist blacklisting regimes set up at the international, regional and national levels. The experiences of national governments, the European Communities, and the U.N. itself in this area have demonstrated that the failure to integrate adequate due process protections seriously undermines the effectiveness of

³ UN Secretary-General, *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, UNGAOR 60th sess, Agenda Items 46 and 120, UN DOC A/60/825 (27 April 2006) [7, 22].

⁴ Alan Krueger and Jitka Malesckova, “Education, Poverty and Terrorism: Is There a Causal Connection?” 17 J. ECON. PERSPECTIVES 142 (2003).

these efforts, yet the development and implementation of adequate due process protections has remained elusive.

II. HUMAN RIGHTS IN PRACTICE

In order to understand how rights work in practice, it is essential to recognize that, while all human rights are “universal, indivisible and interdependent and interrelated”⁵, they are not identical. In particular, rights differ in the degree to which they may permissibly be interfered with by governments. Civil and political rights can be categorized as follows:

- *absolute rights*, which permit no qualification or interference under any circumstances;
- *limited rights*, that can be limited within constraints that are spelled out in the article of the international convention provision that sets out the right;
- *qualified rights*, or those rights that permit restrictions intended to balance either between the individual and the community, or between two competing rights. Any restriction on these rights has to be for a legitimate purpose.

A. Absolute Rights

There can never be a justification for violating an absolute right. The classic example is the right to freedom from torture, inhuman, or degrading treatment. Thus, for example, the European Court of Human Rights (ECtHR) held in the *Ireland v. U.K.* case that certain interrogation techniques in relation to suspected terrorists in Northern Ireland amounted to inhuman and degrading treatment. As a result, not even national security could justify exposing individuals to such treatment.⁶

Moreover, in the *Chahal* case, the ECtHR held that due to the absolute nature of the right to protection from torture, the U.K. Government could not extradite someone in circumstances where that person would be exposed to likely torture even when national security issues were at stake.⁷ This approach was recently confirmed with the ECtHR’s decision in *Saadi*.⁸

Other examples of absolute rights include protection from slavery and elements of the obligation to protect life.

⁵ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 12 July 1993, U.N. Doc. A/Conf.157/23, available at

<http://daccessdds.un.org/doc/UNDOC/GEN/G93/142/33/PDF/G9314233.pdf?OpenElement>.

⁶ ECtHR, *Ireland v. UK*, Application no. 5310/71, 18 January 1978, ¶¶ 162-164.

⁷ ECtHR, *Chahal v. UK*, Case no. 70/1995/576/662, 25 October 1996.

⁸ ECtHR, *Saadi v. Italy*, Application no. 37201/06, 28 February 2008.

B. Qualified Rights

Sometimes rights can conflict with each other. For example, one person's right to private life may conflict with another person's right to freedom of expression. In such cases, a fair balance has to be struck between the two competing rights, which necessarily entails some restriction on one or both rights. Qualified rights can be lawfully restricted provided that the tests of legality, necessity, proportionality and non-discrimination have been satisfied.

Qualified rights can generally be easily identified in the human rights treaties, because the relevant treaty provisions typically first assert the right and then provide that it can be lawful to qualify the right if it is necessary in a democratic society to do so and that there is a legal basis for such limits. A typical example is the right of association, which is formulated in Article 22(1)-(2) of the International Covenant on Civil and Political Rights as follows:

- 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
- 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

Where an individual claims that a qualified right has been violated, the burden of proof is on the individual to establish that there has been an interference with his or her right. The burden then shifts to the state to justify the interference.

The ECtHR has a well-developed jurisprudence concerning qualified rights according to which any interference with the right must be:

1. “in accordance with the law” (i.e. a sufficiently precise legal basis which contains a measure of protection against arbitrariness);
2. in pursuit of one of the legitimate aims defined in the second paragraph (e.g., national security); and
3. “necessary in a democratic society”, (i.e., “that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued”⁹).

In practice, when a case is brought before the ECtHR, the Court applies a three-pronged proportionality test which asks (1) whether the measure is likely to be effective in achieving the government's stated purpose (the “suitability” test), (2) whether there are less restrictive ways of achieving the purpose (the “necessity”

⁹ ECtHR, *Olsson v. Sweden*, no. 10465/83, judgment of 24 March 1988, ¶ 67 (emphasis added).

test), and (3) whether the cost to the right is justified by the benefits to the pressing social need (“proportionality in the narrow sense”).

C. *Limited Rights*

Some rights are in principle absolute, but may be subject to certain limits. Thus, the relevant treaty provisions typically assert the right in absolute terms before stating that the right may be subjected to certain enumerated limits. For example, the right to liberty can be taken away from an individual following conviction by a competent court.¹⁰

Similarly, the right to a fair trial is absolute to the extent that the trial taken as a whole must be fair; however, the separate ingredients of the right to a fair trial can be limited in certain circumstances in the public interest, as long as the right to a fair trial as a whole is not compromised. For example, a defendant’s right to confront the witnesses against him or her may be limited where a particular witness is the victim or has been threatened by the defendant. In such circumstances, the methods and content of cross-examination can be limited to protect the rights of the particular witness. However, such modifications must be balanced to ensure that the defence is still provided a fair trial.

III. DUE PROCESS AND TERRORIST FINANCING BLACKLISTS

A. *Targeted Sanctions, the 1267 Committee, and the Consolidated List*

The cornerstone of the international counter-terrorism financing regime consists of the compilation of international and national blacklists of individuals and organizations involved in terrorism in order to freeze their assets and prohibit the provision of any further resources to such organizations or individuals.

The introduction of U.N. sanctions against individuals and groups involved in terrorism must be seen against the backdrop of the historical evolution of the use of sanctions by the U.N. Security Council.¹¹ The system of sanctions provided for under Article 41 of the U.N. Charter was designed as a means to act against states, although individuals (including but not limited to government officials) were frequently targeted. The frequency of the use of sanctions against states increased significantly in the 1990s, but the use of comprehensive sanctions against states gave rise to serious humanitarian concerns. Accordingly, it was hoped that “smart” or “targeted” sanctions could provide a better alternative, and U.N. Security Council Resolution

¹⁰ See, e.g., European Convention on Human Rights, Article 5(1)(a).

¹¹ See generally Watson Institute, “Strengthening Targeted Sanctions through Fair and Clear Procedures,” Thomas Biersteker and Sue Eckert (2006) at http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf; Noah Birkhauser, “Sanctions of the Security Council Against Individuals – Some Human Rights Problems,” European Society of International Law, at <http://www.esil-sedi.org/english/pdf/Birkhauser.PDF>.

1267 (1999) represented the first attempt to put such targeted sanctions into practice at the U.N. level.¹²

Through Resolution 1267, the U.N. Security Council imposed financial sanctions on the Taliban and established the 1267 Committee – composed of the members of the Security Council – to maintain the Consolidated List of proscribed organizations and individuals. These targeted sanctions were extended to Al Qaida by Resolution 1333 (2000). Any Member State may submit a name to the 1267 Committee, and if consensus is reached within the Committee, the name is added to the list. Where a person or group appears on the list, all U.N. Member States are obligated to (a) freeze their assets, (b) bar the individuals from travelling, and (c) prevent the supply of arms to such groups or individuals.

The creation of the 1267 Committee and the maintenance of the Consolidated List placed the Security Council in a new and unusual position in dealing with individual cases, a role which one commentator described as follows: “the Security Council is now behaving as a ‘quasi-criminal’ investigating, prosecuting and sentencing agency. It is starting to do things which were previously only done by national judges, police, prosecutors and intelligence officials.”¹³

Moreover, Resolution 1267 did not provide the Committee with guidance as to the legal standards for inclusion on the list or safeguards or remedies for individuals or organizations claiming to have been included on the list in error. As the Secretary-General’s High Level Panel on Threats, Challenges and Change observed in its 2004 report,

*The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions. The Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing cases of individuals and institutions claiming to have been wrongly placed or retained on its watch lists.*¹⁴

Since then the Security Council has implemented some improvements, most notably through Resolution 1730 (2006), which established a focal point within the U.N. Secretariat to receive de-listing requests directly from concerned parties, and Resolution 1735 (2006), which called on Member States to provide a statement of case when proposing names for inclusion on the list. More recently, Resolution 1822 (2008) directs the 1267 Committee to make available on the Committee’s website “a narrative summary of reasons for listing for the corresponding entry or entries on the Consolidated List.” However, as will be seen below, these changes have not

¹² See Conor Gearty, “Situating Human Rights Law in an Age of Counter-Terrorism,” John Kelly Memorial lecture, delivered at University College Dublin Law Faculty, 13 March 2008, at http://www.conorgearty.co.uk/pdfs/EU_UN_textFINAL.pdf.

¹³ Iain Cameron, *Protecting Legal Rights: on the (in)security of targeted sanctions*, in INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM 189 (2005)

¹⁴ UN Secretary-General, *A more secure world: Our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change*, UNGAOR 59th sess, Agenda Item 55, U.N. Doc. A/59/565 (2 Dec. 2004) [50], available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/602/31/PDF/N0460231.pdf?OpenElement>.

persuaded regional or national courts that the 1267 Committee's procedures adequately protect due process rights.

B. Procedural Rights Implicated by Terrorist Financing Blacklists

While the details of the blacklisting process are different in each country and at the regional and U.N. levels, the process typically involves the compilation of a dossier by an administrative agency on the basis of which the agency concludes that a group is involved in "terrorism". This dossier may include both public and confidential information. The group is then added to the blacklist, at which point its assets are frozen, its members¹⁵ are forbidden to travel, and it becomes a criminal offense for third parties to provide support to the group or its members. Normally, the group in question does not have an opportunity to participate in the administrative process leading to its inclusion on the list. However, in most cases, the group has some opportunity to appeal its inclusion on the list, whether through an administrative process or a court proceeding. In such proceedings, the confidential materials are typically not provided to the organization, but where judicial review is available, these materials are usually provided to the court or administrative tribunal reviewing the appeal.

As can be seen from the foregoing brief description, these terrorism blacklists engage a range of human rights concerns, including the right to privacy, the right to property, the right of association, and the right to travel or freedom of movement. However, this paper focuses on a selection of national and regional court cases in which listed persons or organizations have raised due process complaints in relation to the manner in which the lists are compiled as well as the availability of remedies. This selection is intended to be illustrative rather than comprehensive, and therefore other important issues may have been omitted.

In a report issued in March 2007, the U.N. High Commissioner for Human Rights summarized the procedural rights implicated by targeted sanctions at the U.N. level:

While the system of targeted sanctions represents an important improvement over the former system of comprehensive sanctions, it nonetheless continues to pose a number of serious human rights concerns related to the lack of transparency and due process in listing and delisting procedures.... [I]n brief, they include questions related to:

- *Respect for due process rights: Individuals affected by a United Nations listing procedure effectively are essentially denied the right to a fair hearing;*

¹⁵ Identifying the "members" of a proscribed organization is a separate problem, and there are divergent views as to the strength of connection required between an individual and the organization as well as the extent to which an individual must have knowledge of an organization's involvement in terrorism in order for the individual to be blacklisted.

- Standards of proof and evidence in listing procedures: *While targeted sanctions against individuals clearly have a punitive character, there is no uniformity in relation to evidentiary standards and procedures;*
- Notification: *Member States are responsible for informing their nationals that they have been listed, but often this does not happen. Individuals have a right to know the reasons behind a listing decision, as well as the procedures available for challenging a decision;*
- Time period of individual sanctions: *Individual listings normally do not include an “end date” to the listing, which may result in a temporary freeze of assets becoming permanent. The longer an individual is on a list, the more punitive the effect will be;*
- Accessibility: *Only States have standing in the current United Nations sanctions regime, which assumes that the State will act on behalf of the individual. In practice, often this does not happen and individuals are effectively excluded from a process which may have a direct punitive impact on them; and*
- Remedies: *There is a lack of consideration to remedies available to individuals whose human rights have been violated in the sanctions process.*¹⁶

Some, but not all of these due process issues also arise in the context of regional and national terrorist blacklists.

In this connection, it is important to note that although listing is linked at some level with involvement in criminal activity (“terrorism” – although there is still no internationally agreed definition of terrorism), a criminal trial is not a feature of the blacklisting process. As the 1267 Committee explains,

*A criminal charge or conviction is not necessary for inclusion on the Consolidated List as the sanctions are intended to be preventive in nature.*¹⁷

Because there are no criminal trials, the full range of fair trial rights available to a criminal defendant does not apply in such proceedings.¹⁸

¹⁶ U.N. High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc. A/HRC/4/88, 9 March 2007, pp. 10-11, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/117/52/PDF/G0711752.pdf?OpenElement>.

¹⁷ Al-Qaida and Taliban Sanctions Committee, *Guidelines of the Committee for the Conduct of its Work*, updated as of 12 February 2007, p. 3, available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

¹⁸ For example, the protections set out in articles 6(2) and 6(3) of the European Convention on Human Rights and in articles 14(2)-(7) of the International Covenant on Civil and Political Rights apply only to criminal defendants. However, Iain Cameron has argued that “The effects of blacklisting may be sufficiently serious to be a ‘determination of a criminal charge’, triggering the application of Article 6 in its entirety. If this is not the case, then blacklisting fits into the Convention framework of disputes over “civil rights” under Article 6 (1), i.e. the rights to property and to reputation.” Iain Cameron, *The European Convention on Human Rights, Due Process and UN Security Council Counter-Terrorism*

The terrorist blacklists represent new and highly unusual legal regimes. Conceived as “preventive” rather than “punitive” in nature, they nonetheless have serious consequences on listed parties as well as their family members. The use of administrative or civil procedures rather than criminal trials necessarily impacts the due process rights of the parties concerned, including by weakening (and in some cases reversing¹⁹) the burden of proof, limiting (or ignoring) the presumption of innocence, modifying evidentiary rules to permit secret evidence²⁰ and other types of evidence that would not be admissible in criminal trials, and lowering the standards for determining guilt²¹.

In January 2008, the Parliamentary Assembly of the Council of Europe (PACE) issued a resolution emphasizing that, whatever the precise nature of the sanctions, minimum due process protections are required:

*Whilst it is not at all clear and still being debated whether such sanctions have a criminal, administrative or civil character, their imposition must, under the European Convention on Human Rights (ECHR) (ETS No. 5) as well as the United Nations International Covenant on Civil and Political Rights (UNCCPR), respect certain minimum standards of procedural protection and legal certainty.*²²

Similarly, the Monitoring Team established to support the 1267 Committee noted in its November 2007 report:

*... there is continued concern that sanctions have a punitive effect, whatever is said about them as a preventive measure, and that the listing process should therefore incorporate higher standards of fairness.*²³

In its January 2008 resolution, the PACE concluded that:

Sanctions, Report prepared for the Council of Europe, 6 Feb. 2006, at p.2, available at http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/Texts_& Documents/2006/I.%20Cameron%20Report%2006.pdf.

¹⁹ Laura Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 375-76 (2006) (discussing asset forfeiture provisions under the USA Patriot Act).

²⁰ Secret evidence in this context refers to evidence, such as intelligence, that is available to the administrative decision-maker and (ordinarily) presented to the tribunal but not disclosed to the group or individual concerned.

²¹ The normal standard for criminal cases is proof beyond a reasonable doubt, whereas in civil cases a lower, balance of probabilities standard is ordinarily applied to basic findings of fact. However, in many blacklisting cases, the parties concerned had no participation in the original, administrative fact-finding proceedings, in which case the operative standard is the standard of judicial review applied by the reviewing court. In the U.S. cases discussed below, the reviewing courts apply a “substantial evidence” standard according to which listing would be upheld so long as it was supported by substantial evidence, which evidence could include evidence that would be inadmissible in criminal proceedings (i.e. hearsay) as well as secret evidence not disclosed to the party.

²² Parliamentary Assembly of the Council of Europe (PACE), *Resolution 1597* (2008), available at <http://assembly.coe.int/Documents/AdoptedText/ta08/ERES1597.htm>.

²³ *Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities*, UN Doc. S/2007/677, p. 11, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/606/64/PDF/N0760664.pdf?OpenElement>.

... the procedural and substantive standards currently applied by the UNSC and the Council of the European Union, despite some recent improvements, in no way fulfil the minimum standards laid down above [i.e. right to notice, a statement of reasons, a hearing, judicial review, and compensation for any rights violation as well as a clear definition of the grounds for imposition of sanctions and relevant evidence] and violate the fundamental principles of human rights and the rule of law.²⁴

The PACE went on to urge both the EU and the UN bodies “to implement procedural and substantive improvements aimed at safeguarding individual human rights and the rule of law, in the interest of the credibility of the international fight against terrorism.”²⁵ This call was echoed in the Reply by the Council of Europe’s Committee of Ministers on 21 July 2008 in which it “reiterates that it is essential that these sanctions be accompanied by the necessary procedural guarantees.”²⁶

The institutions of the Council of Europe are not alone in expressing concern that the due process problems in the listing/de-listing process risk undermining the credibility and effectiveness of the international counter-terrorism financing regime. Indeed, the report issued by the Monitoring Team set up by the 1267 Committee in May 2008 stated:

The Consolidated List remains the cornerstone of the sanctions regime. However, as the Team has noted in all its previous reports, the List has serious defects. It requires all Member States, under the active leadership of the Committee and with the help of the Team, to put this right; until that happens, the impact of the sanctions regime will continue to fade.²⁷

In particular, the Monitoring Team emphasized problems with the quality of the information on the list, noting that “some entries lack the basic identifiers necessary to make any check against them worthwhile,”²⁸ but it also noted due process criticisms relating to the fact that “listed parties do not know why they have been placed under sanctions and have no opportunity to challenge the evidence against them”²⁹ and the absence of any right of appeal.

While the need for fair procedures is universally acknowledged, considerable debate remains as to the nature of listing/delisting proceedings and the proper scope of due process rights in such proceedings. Meanwhile, as the debate continues, dissatisfaction with the existing procedural safeguards has grown to the point that it

²⁴ PACE, *Resolution 1597* (2008).

²⁵ PACE, “United Nations Security Council and European Union blacklists,” *Recommendation 1824* (2008), available at <http://assembly.coe.int/Documents/AdoptedText/ta08/EREC1824.htm>

²⁶ Committee of Ministers of the Council of Europe, *Reply to Recommendation 1824* (2008), (Reply adopted by the Committee of Ministers on 9 July 2008), available at <https://wcd.coe.int/ViewDoc.jsp?id=1325221>.

²⁷ *Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities*, UN Doc. S/2008/324, 13 May 2008, p. 12, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/341/88/PDF/N0834188.pdf?OpenElement> (hereinafter, Monitoring Team Report, May 2008).

²⁸ Monitoring Team Report, May 2008, p. 12.

²⁹ Monitoring Team Report, May 2008, p. 17.

risks undermining the entire sanctions regime. As states lose confidence in the process and doubts persist about the credibility of the lists, states will be increasingly unwilling to provide names or information to the 1267 Committee or to vigorously implement the sanctions within their domestic legal order. Moreover, the condemnation of the current procedures by national and regional courts, some examples of which are discussed below, make it increasingly difficult to implement the regime at all, at least within Europe, and yet the sanctions must be global if they are to be effective.

Nonetheless, the cases discussed in the remainder of this paper point to an emerging consensus on at least two points. The first point is that the basic due process requirements for blacklisting include, at a minimum³⁰:

- notice to the listed party of the case against it (although confidential material may in some cases be withheld);
- an opportunity for the party to be heard and challenge that case; and
- an opportunity to appeal the listing decision to an independent tribunal that must have access to the confidential materials and be empowered to grant an effective remedy.

The second point of consensus is that existing blacklisting processes at the U.N., regional, and national levels frequently fall short of these minimum standards. At the same time, there does not appear to be consensus regarding the standards of proof applicable to initial listing decisions, nor regarding the standard of judicial review to be applied by a reviewing court or tribunal.

IV. REVIEW OF SELECTED CASES CONCERNING BLACKLISTS

A. Cases Reviewing Implementation of U.N.S.C. Resolution 1267

As a technical legal matter, it is not open to any national, regional or international court to review the compatibility of the U.N. sanctions regime itself with due process norms, because the regime was established by way of Security Council resolutions adopted under Chapter 7 of the U.N. Charter. As the Court of First Instance of the European Communities explained,

[T]he resolutions of the Security Council at issue were adopted under Chapter VII of the Charter of the United Nations. In these circumstances, determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security

³⁰ A 2006 study commissioned by the U.N. Office of Legal Affairs also included a right of the party to be advised and represented. See Bardo Fassbender, *Targeted Sanctions and Due Process*, 20 March 2006, pp. 8, 28-32 available at http://www.un.org/law/counsel/Fassbender_study.pdf.

*Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts....*³¹

Nonetheless, in the cases discussed in this section, courts in the E.C. and U.K. have struck down implementing measures on human rights and rule of law grounds, and in the process have expressed severe criticisms of the limited procedural protections afforded at the U.N. level.

1. European Communities

In a decision rendered on September 3, 2008 in the cases of *Kadi* and *Al Barakaat*, the Court of Justice of the European Communities annulled measures taken to implement UNSC Resolution 1267 at the European level for failing to comply with due process norms. The Court emphasized that such implementing measures needed to be subjected to strict judicial review precisely because the due process protections afforded by the 1267 Committee were so poor:

The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.

Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.

*It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.*³²

The rationale for the Court of Justice's conclusion here is not made explicit, but may be more clearly understood through the Court's reference to the decision by the ECtHR in the *Bosphorus* case. In that case, the ECtHR was called upon to consider whether the seizure of an aircraft by the Irish authorities, a measure taken pursuant to Ireland's obligations under European Community law to implement sanctions against

³¹ *Yassin Abdullah Kadi v Council of the European Union*, Case T-315/01 (Judgment, Court of First Instance, 21 September 2005) ¶ 219, *reversed on other grounds*, *Yassin Abdullah Kadi & Al Barakaat Int'l Fdn. v Council of the European Union*, Cases C-402/05 P and C-415/05 P (Judgment of the Court, Grand Chamber, 3 Sept. 2008).

³² *Yassin Abdullah Kadi & Al Barakaat Int'l Fdn. v Council of the European Union*, Cases C-402/05 P and C-415/05 P (Judgment of the Court, Grand Chamber, 3 Sept. 2008) ¶¶ 324-26 (hereinafter, ECJ, *Kadi*).

the Federal Republic of Yugoslavia, was consistent with Ireland's human rights' obligations.³³ The ECtHR stated:

*In the Court's [ECtHR's] view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental human rights, as regards both substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides...*³⁴

Given the dim view the Court of Justice expressed regarding the due process protections afforded at the U.N., the Court evidently did not consider that the actions taken to implement Resolution 1267 – which involved the mere transposition of names from the 1267 Committee's list into the Annex of the regulation, without any further process for the affected persons and entities³⁵ – were justified. The Court stated:

*[I]n the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held 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.... Because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage.... In addition ... the appellants were also unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that their right to an effective legal remedy has also been infringed.*³⁶

Accordingly, the Court has effectively held that, in circumstances where the 1267 Committee does not afford adequate due process protections, the European authorities cannot simply take the names provided by the 1267 Committee and add them to the European list: they must provide any listed entity with an opportunity to be informed of and respond to the evidence against them. Thus, the limited due process rights afforded by the 1267 Committee have jeopardized the successful implementation of the sanctions at the European level, and this may have serious consequences for the regime as a whole. The Court suspended the effectiveness of its ruling temporarily in order to afford the European Communities with an opportunity to rectify the problems with the existing regulation, but it is unclear how the problem can be resolved without changes at the U.N. level.

³³ At issue was an aircraft belonging to Yugoslav Airlines (JAT) which had been leased to a Turkish company. When the aircraft was sent to Ireland for servicing, it was seized by Irish authorities pursuant to U.N.S.C. Resolution 820 (1993) which provided that states should impound all aircraft within their territories "in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY]". Resolution 820 was implemented in the European Communities through Regulation (EEC) no. 999/93.

³⁴ *Bosphorus Hava Yollari v. Ireland*, Application no. 45036/98 (Judgment, Grand Chamber, 30 June 2005) ¶ 155.

³⁵ See ECJ, *Kadi*, ¶¶ 32-33.

³⁶ ECJ, *Kadi*, ¶¶ 334, 348-49.

2. United Kingdom

Prior to the decision of the ECJ in *Kadi* discussed above, five individuals subject to asset freezing orders made by the U.K. government in connection with the implementation of UNSC Resolutions 1267 and 1373 brought an action before the High Court, raising various due process and human rights issues. On 24 April 2008, the High Court issued a decision that struck down the orders on the basis, *inter alia*, that the orders had the effect of overriding a listed person's fundamental human rights, and only Parliament had the power to authorize such measures.³⁷ The Court also found that the criminal offenses created by the statute were impermissibly vague and therefore violated the principle of legal certainty³⁸, noting that "The very wide definition of economic resources makes it impossible for members of the family of the designated person in particular to know whether they are committing an offence or a license was needed."³⁹

The Court also considered at some length the claim that the order implementing Resolution 1267 (the "AQO" or "Al Qaida Order") should be struck down on the basis that it denied the listed person his right to be heard and to judicial review. The Court described the delisting procedure established by the 1267 Committee and stated,

*It is I think obvious that this procedure does not begin to achieve fairness for the person who is listed. Governments may have their own reasons to want to ensure that he remains on the list and there is no procedure which enables him to know the case he has to meet so that he can make meaningful representations.*⁴⁰

However, the High Court found that this claim had to be considered in light of the decision rendered by the Court of First Instance (CFI) of the European Communities in the *Kadi* case, which rejected a similar claim against the applicable E.C. regulation. Although bound by the CFI's decision, the High Court strongly disagreed with it and quoted approvingly from the Opinion of the Advocate General which urged the European Court of Justice (ECJ) to grant *Kadi*'s appeal. The High Court noted that "the acceptance [by the ECJ] of the Advocate General's views would inevitably lead to the quashing of the AQO."⁴¹ As discussed above, the ECJ did in fact grant the appeal in the *Kadi* case, thereby confirming the High Court's view that due process concerns were of sufficient weight to require the quashing of both the U.K. order and the E.C. regulation.

³⁷ *A, K, M, Q & G v. Treasury*, [2007] EWHC 869 (Admin) at ¶ 38, *see also* ¶¶ 24-25.

³⁸ "Legal certainty" incorporates the principles of legitimate expectations and of non-retroactivity. In this case, the High Court quoted the definition provided by the House of Lords in *R v Rimmington* [2006] 1 A.C. 459 ¶ 33: "no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done." *A, K, M, Q & G v. Treasury*, [2007] EWHC 869 at ¶ 43.

³⁹ *A, K, M, Q & G v. Treasury*, [2007] EWHC 869 at ¶¶ 42-46.

⁴⁰ *A, K, M, Q & G v. Treasury*, [2007] EWHC 869 at ¶ 18.

⁴¹ *A, K, M, Q & G v. Treasury*, [2007] EWHC 869 at ¶ 32.

Thus, the High Court and the Court of Justice are now in agreement that, given the absence of due process protections at the U.N. level, it is not permissible to simply implement freezing orders on the basis of the Consolidated List without providing listed parties with an opportunity to be heard and to challenge the case against them. The message is clear: if the blacklisting regime under Resolution 1267 is to survive and be effective, it must integrate adequate due process protections for listed parties.

B. Cases Concerning National and Regional Listing/Delisting

The 1267 Sanctions Committee, however, is not alone in its difficulties in integrating due process protections into the counter-terrorism financing regime. While some countries had established terrorist blacklists prior to September 11, these efforts were given significant impetus by U.N. Security Council Resolution 1373 (2001), which called upon all States, *inter alia*, to enact measures to freeze the assets of persons or entities involved in terrorism and to criminalize the provision of resources to such persons or entities. The cases discussed below involve challenges brought by a single organization, the People's Mojahadeen Organisation of Iran ("PMOI") against its inclusion in the U.S., U.K. and E.C. lists. A review of these cases provides an illustrative snapshot of some of the approaches to the due process problems, particularly on the use of secret evidence, the standard for determining guilt, and the proper scope of judicial review, taken by national and regional governments and courts.

1. United States

U.S. statutory law⁴² empowers the Secretary of State to designate an organization as a "foreign terrorist organization" if the Secretary finds that the organization (a) is foreign, (b) "engages in terrorist activity", and (c) the terrorist activity "threatens the security of U.S. nationals or the national security of the United States." When an organization is so designated, its assets are frozen, its members cannot enter the United States (and may be deported), and it becomes a criminal offence to provide any "material support or resources" to a designated organization.

PMOI was designated as a "foreign terrorist organization" in 1997, and brought a challenge before the Court of Appeals for the District of Columbia Circuit.⁴³ In its opinion, the Court expressed clear misgivings about how proceedings were conducted under the statute:

The statute before us is unique, procedurally and substantively. On the basis of an "administrative record," the Secretary of State is to make "findings" that an entity is a foreign organization engaging in terrorist activities that threaten the national security of the United States.... But unlike the run-of-the-mill administrative proceeding, here there is no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to the entity affected by the Secretary's internal deliberations.... Any classified information on which the Secretary relied in bringing about these consequences may

⁴² 8 U.S.C. § 1189 (2006), available at <http://uscode.house.gov/pdf/2006/2006usc08.pdf>. It should be noted that this is only one of several terrorist blacklists maintained by the U.S. government.

⁴³ *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999).

continue to remain secret, except from certain members of Congress and this court.... There is a provision for "judicial review" confined to the material the Secretary assembled before publishing the designation... Because nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities, the "administrative record" may consist of little else.

The Court further emphasized that the limited scope of its review did not permit it to take any position as to the veracity of the underlying facts:

At this point in a judicial opinion, appellate courts often lay out the "facts." We will not, cannot, do so in these cases. What follows in the next two subsections may or may not be facts. The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating....

However, because PMOI had no presence or assets within the United States, the Court concluded that it “has no constitutional rights, under the due process clause or otherwise” and that the only rights PMOI had were those contained in the statute itself, i.e., the right to judicial review of whether the designation was “arbitrary, capricious, an abuse of discretion,” “in excess of statutory jurisdiction”, or “lacking substantial support in the administrative record taken as a whole or in classified information” or not made “in accord[ance] with the procedures required by law. Consequently, despite the Court’s evident misgivings, it felt compelled to conclude that the Secretary had not violated the statute in designating PMOI a foreign terrorist organization:

We ... believe that the record, as the Secretary has compiled it, not surprisingly contains "substantial support" for her findings that the [PMOI] engage in "terrorist activities" within the meaning of 8 U.S.C. § 1182(a)(3)(B).... We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. [T]he record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received--something we have no way of judging.

Two years later, however, PMOI was offered a second opportunity to challenge its designation when the Secretary of State re-designated PMOI as a foreign terrorist organization and also concluded that the National Council of Resistance of Iran (“NCRI”) was an alter ego or alias of the PMOI and therefore must also be designated. Unlike PMOI, the NCRI had a bank account in the United States and was therefore able to invoke the due process protections of the U.S. Constitution. Since the Secretary of State had found that the two organizations were one and the same, these due process protections also extended to PMOI.

In the second case,⁴⁴ the Court reiterated its concerns over the procedures in place:

Despite the seriousness of the consequences of the determination, the administrative process by which the Secretary makes it is a truncated one.... The unique feature of this statutory procedure is the dearth of procedural participation and protection afforded the designated entity. At no point in the proceedings establishing the administrative record is the alleged terrorist organization afforded notice of the materials used against it, or a right to comment on such materials or the developing administrative record.... The Secretary may base the findings on classified material, to which the organization has no access at any point during or after the proceeding to designate it as terrorist.

The scope of judicial review is limited as well.... Again, this limited scope is reminiscent of other administrative review, but again, it has the unique feature that the affected entity is unable to access, comment on, or contest the critical material. Thus the entity does not have the benefit of meaningful adversary proceedings on any of the statutory grounds, other than procedural shortfalls so obvious a Secretary of State is not likely to commit them.

The Court concluded that this manner of proceeding did not satisfy PMOI's due process rights, and went on to describe the sort of procedure which might be satisfactory:

[T]he fundamental norm of due process clause jurisprudence requires that before the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him notice and hearing....

The notice must include the action sought, but need not disclose the classified information to be presented in camera and ex parte to the court under the statute. This is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect.... We therefore require that as soon as the Secretary has reached a tentative determination that the designation is impending, the Secretary must provide notice of those unclassified items upon which he proposes to rely to the entity to be designated. There must then be some compliance with the hearing requirement of due process jurisprudence--that is, the opportunity to be heard at a meaningful time and in a meaningful manner recognized in Mathews, Armstrong, and a plethora of other cases. We do not suggest "that a hearing closely approximating a judicial trial is necessary." Mathews, 424 U.S. at 333. We do, however, require that the Secretary afford to entities considered for imminent designation the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations.

At present, it is unclear precisely what procedures have been put in place by the State Department to comply with the requirement that designated entities be provided notice of the unclassified evidence and a hearing at which to present their views. However, the governing statute was modified after the court's decision by the

⁴⁴ *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001).

Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004. Whereas previously, a designation would lapse after two years unless it was renewed, under the IRTPA, the burden is now upon the designated organization to initiate a revocation proceeding at the expiry of the two-year period. Moreover, the organization also bears the burden of proof:

*PROCEDURES- Any foreign terrorist organization that submits a petition for revocation under this subparagraph must provide evidence in that petition that the relevant circumstances described in paragraph (1) are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted.*⁴⁵

Given that a designation may be based entirely or primarily on secret evidence, it is at least theoretically possible that an organization would have no knowledge of the basis for its original designation and therefore would have considerable difficulty in presenting contrary evidence.

2. European Communities

The minimal due process requirements of notice and a hearing were affirmed in similar terms by the CFI in another case involving PMOI. In addition, the CFI highlighted the requirement that a blacklisting decision must be accompanied by a statement of reasons in order to afford the affected party a reasonable opportunity to challenge the designation.

On 27 December 2001, the Council of the European Union sought to implement U.N. Security Council Resolution 1373 (2001) by establishing its own list of terrorist organizations and providing for the freezing of their assets. It did so through the adoption of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. On 2 May 2002, PMOI was added to the list, and brought a challenge before the CFI.⁴⁶

The Court described the PMOI's due process rights in terms largely similar to those employed by the U.S. Court of Appeals:

It follows from that case-law that, subject to exceptions (see paragraph 127 et seq. below), the safeguarding of the right to be heard comprises, in principle, two main parts. First, the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of the evidence adduced'). Second, he must be afforded the opportunity effectively to make known his view on that evidence ('hearing')...

⁴⁵ Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, § 7119(a)(2), codified at 8 U.S.C. § 1189(a)(4)(B)(iii). A similar burden of proof for revocation of designation applies to other U.S. terrorism-related blacklists, see 31 CFR §§ 501.807 (describing procedures for removal of names from lists of specially designated nationals, specially designated terrorists, or specially designated narcotics traffickers maintained by the U.S. Department of the Treasury).

⁴⁶ *Organisation des Modjahedines du peuple d'Iran v Council of the European Union*, Case T-228/02 (Judgment of Court of First Instance, 12 Dec. 2006).

127 *At the same time, however, certain restrictions on the right to a fair hearing, so defined in terms of its purpose, may legitimately be envisaged and imposed on the parties concerned, in circumstances such as those of the present case, where what are in issue are specific restrictive measures, consisting of a freeze of the financial funds and assets of the persons, groups and entities identified by the Council as being involved in terrorist acts.*

In terms of restrictions on the right to a fair hearing, the Court found that, in light of the need for surprise if an asset-freezing order is to be effective, notification to the concerned party and the required hearing need not occur before the freeze but should occur “either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds” (§§ 128-29). The Court similarly found that confidential information could be withheld from the concerned party:

[O]verriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them and, in consequence, the hearing of those parties with regard to such evidence, during the administrative procedure.... (§ 133).

However, the Court also went beyond the decision of the U.S. Court of Appeals in two respects. First, it emphasized the importance of a statement of reasons in order to afford the concerned party a reasonable opportunity to contest its inclusion on the list:

If the party concerned is not afforded the opportunity to be heard before the adoption of an initial decision to freeze funds, compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the party concerned, especially after the adoption of that decision, to make effective use of the legal remedies available to it to challenge the lawfulness of that decision (§ 140).

Second, the Court also observed that judicial review of a decision to list an organization would extend to an assessment of the underlying facts as well as any confidential materials:

[T]he 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.... The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.

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. (§ 154-55).

In light of the foregoing, the Court concluded that PMOI's rights to a fair hearing had been violated. In particular the Court found that "at no time before this action was brought was the evidence adduced against the applicant notified to it" and that, "it had not been apprised of the specific evidence adduced against it in order to justify the sanction envisaged and was not, therefore, in a position effectively to make known its views on the matter" (¶¶ 160-61). As a result, the Court annulled the contested decision of the Council in so far as it applied to PMOI.

3. United Kingdom

The United Kingdom has set up a specialized administrative tribunal known as the Proscribed Organisations Appeal Commission ("POAC") to which organizations can appeal their inclusion by the Secretary of State for the Home Department on the U.K.'s list of terrorist organizations. A decision by the POAC may be appealed by either party to the Court of Appeal. Where a case involves confidential material, such material is dealt with in a closed session in which the appellant is not present but is represented by a "Special advocate" appointed by the Attorney General.

An unusual application was brought before the POAC on behalf of PMOI by a group composed of 35 members of the two Houses of Parliament. The application was successful, and the POAC concluded that PMOI was not an organization concerned in terrorism. The Secretary appealed the decision of the POAC, but the Court of Appeal affirmed.

In its decision,⁴⁷ the Court of Appeal considered that both the POAC and the Court should undertake an intensive scrutiny of the facts relating to a determination by the Secretary of State that a particular organization was concerned in terrorism:

Thus the question for the [Secretary of State for the Home Department] was whether she believed that PMOI was "otherwise concerned in terrorism" within the meaning of section 3(5)(d) [of the Terrorism Act 2000]....

The question of whether an organisation is concerned in terrorism is essentially a question of fact. Justification of significant interference with human rights is in issue. We agree with POAC that the appropriate course was to conduct an intense and detailed scrutiny of both open and closed material in order to decide whether this amounted to reasonable grounds for the belief that PMOI was concerned in terrorism.

After reviewing both the open and closed material, the Court concluded that there was no basis to find that PMOI was concerned in terrorism within the meaning of the Terrorism Act 2000:

The reality is that neither in the open material nor in the closed material was there any reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future....

Accordingly, the Court affirmed the conclusion of the POAC:

⁴⁷ *Secretary of State v Lord Alton of Liverpool & Ors*, [2008] EWCA Civ 443.

“In those circumstances, 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.”

Thus the Court of Appeal, echoing the CFI in the case discussed above, has offered an unambiguous affirmation of the principle that courts must exercise “intense and detailed scrutiny” over attempts by state authorities to justify significant interference with human rights.

V. CONCLUSION

Terrorist financing is a global problem and its suppression clearly requires concerted action at the international level. However, as the cases reviewed in this paper show, where such action fails to incorporate adequate human rights protections, the credibility and, ultimately, the effectiveness of these efforts is seriously undermined.

It remains to be seen how the relevant actors at the United Nations, European and national levels will respond to the recent court decisions discussed in this paper. The Monitoring Team further observed that “the sanctions are at a legal crossroads”⁴⁸ referring to the *Kadi* case then pending before the European Court of Justice and observing that if the European implementing measures were struck down, this could lead to further challenges both within and outside the E.U. in a manner that could “quickly erode enforcement.”⁴⁹ Moreover, the Monitoring team further noted that

Moreover, it is unclear what options would exist for a longterm fix. Advocate General Maduro suggested that it would be difficult for individual European Union member States to replace the Community’s regulation with domestic legislation, since any such measures likewise would be subject to the same European due process standards.⁵⁰

Indeed, the fact that individual E.U. member states will have difficulty in replacing the E.C. regulations was confirmed by the English High Court.⁵¹

Any solution, it seems, will need to address the procedural problems at the U.N. level, but as the Monitoring Team has emphasized, the unique position and role of the Security Council make it extraordinarily difficult to rectify the procedural deficiencies, particularly with regard to the right of judicial review:

The Committee has made a series of incremental improvements to its procedures which have addressed many of the concerns expressed about the fairness of the sanctions but one major issue remains: the suggestion that listing decisions by the Committee be subject to review by an independent panel. It is difficult to imagine that the Security Council could accept any review panel that appeared

⁴⁸ Monitoring Team Report, May 2008, p. 16.

⁴⁹ Monitoring Team Report, May 2008, p. 16.

⁵⁰ Monitoring Team Report, May 2008, p. 17.

⁵¹ *A, K, M, Q & G v. Treasury*, [2007] EWHC 869 at ¶ 32.

to erode its absolute authority to take action on matters affecting international peace and security, as enshrined in the Charter. This argues against any panel having more than an advisory role, and against publication of its opinions, to avoid undercutting Council decisions.⁵²

In fact, a proposal for an “advisory panel” was in fact formally submitted in mid-2008 by the governments of Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland.⁵³ Notable features of this proposal include:

- “independent, impartial, and judicially qualified” panel members to be proposed by the Secretary General and appointed by the Security Council;
- member states and international organizations to provide information to the panel, including, to the extent possible, confidential information;
- the panel may disclose non-confidential information;
- procedures before the panel would be “governed by general principles of international law concerning fair procedure” (although these are not specified);
- the panel should recommend de-listing “where the information and evidence available to the panel members does not justify the listing”; and
- a “summary report with the recommendation(s) of the panel shall be published together with the decision(s) taken by the Security Council...”.

The fate of this particular proposal – and its compliance with due process norms – remains to be determined. A 2006 study commissioned by the U.N. Office of Legal Affairs suggested several additional options, including:

- an independent international court or tribunal;
- an ombudsman office;
- an inspection panel following the model of the World Bank Inspection Panel;
- a commission of inquiry;
- a committee of experts following the model of Article 28 of the ICCPR.

Clearly significant changes are necessary at the U.N. and E.U. level if the sanctions regime is to be effective in the wake of the decisions by the ECJ and the High Court in England. In the absence of improvements, the Monitoring Team’s prediction of quickly eroding enforcement of the sanctions may well come to pass. Indeed, this review of cases concerning terrorist blacklisting regimes demonstrates that counter-terrorism practitioners ignore human rights at their peril: a failure to pursue security and human rights jointly and concomitantly can result in the degradation of both human rights and security.

⁵² Monitoring Team Report, May 2008, p. 17.

⁵³ *Identical letters dated 23 June 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council*, U.N. Docs. A/62/891 & S/2008/428, 2 July 2008, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/411/57/PDF/N0841157.pdf?OpenElement>.