

The United Nations, the European Union and the Court of Appeal all say: No procedural human rights guarantees for 'terrorist' suspects. **Bill Bowring** argues this is serious.

'TERRORIST': FLAG OF CONVENIENCE?

This article argues that the response of international organisations to the attacks on the United States now poses a shockingly serious threat to some fundamental human rights, especially procedural guarantees. These attacks were first the bombing on 7th August 1998 of the US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, leaving 258 people dead and more than 5,000 injured; and secondly, the notorious "9/11" on 11th September 2001 in New York and Washington.

Both these events have been characterised as "terrorist attacks", and the use of the word "terrorist" is at the root of most of the current problems. In a lecture delivered in 2004, the South African Professor John Dugard, now the UN's Special Rapporteur on the Palestinian Occupied Territories, said the following²:

"The Security Council of the United Nations, guided by the major powers (or power?) has shown little interest in... a search for a definition that takes account of the causes of terrorism and condemns both non-State terrorist and State terrorists even handedly.

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

The UN Security Council

The UN Security Council's response to both attacks was draconian. Acting under Chapter VII of the UN Charter, which gives it mandatory powers, the Security Council in UNSC Resolution 1267(1999) of 15 October 1999 ordered states to:

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

Within days of "9/11" the UNSC adopted Resolution 1373 (Terrorism) of 28th September 2001 which continues to be the focus of action by governments around the world against Al-Qa'ida financing. Resolution 1373 makes the connection between terrorism and organised crime, drug trafficking, arms trafficking and the illegal movement of weapons of mass destruction. The Resolution orders member states to:



1. I wish to acknowledge great assistance from Ben Hayes of Statewatch and Julien Arzuaga of Behatokia, Basque Observatory of Human Rights. All errors are my own.

2. The Rhodes University Centenary Lecture at <http://www.ru.ac.za/centenary/lectures/johndugardlecture.doc>.

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- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; ...

Did the Security Council act lawfully in adopting this Resolution? A number of international lawyers³ have warned that the Security Council, by laying down a series of general and abstract rules binding on all UN member states, purported to legislate unlawfully, *ultra vires* the UN Charter. Resolution 1373 differed from all previous Security Council decisions in Chapter VII, in that “the threat to the peace is identified is not any specific situation but rather a form of behaviour, ‘terrorist acts’. Indeed, it is a form of behaviour that the resolution leaves undefined.”⁴

Nevertheless, the Security Council has established a “Sanctions Committee” of all its members which has drawn up “terrorist lists” of organisations and individuals who are to be subjected to “asset freezing”.

The EU's response

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

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

Three questions arise. How did they get onto the list? What effects will it have on them? And how can they possibly get themselves removed? From the point of view of human rights and fundamental freedoms, the assessment by the international and national authorities of the need for an

3. Olivier, Clémentine (2004) “Human Rights Law and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations Under

International Human Rights Law? (Revisiting Security Council Resolution 1373)” v.73 *Nordic Journal of International Law* pp.399-419, p.419; Happold, Matthew (2003) “Security

Council Resolution 1373 and the Constitution of the United Nations” 16 *Leiden Journal of International Law* pp.593-610.

4. Happold, *ibid*, p.598.

'More recent developments are more disturbing still'

interference with a property right must be subject to procedural guarantees: there must be an avenue of appeal from the decision of a national authority to interfere with that right.

Ben Hayes and Tony Bunyan of 'Statewatch' have created a splendid web resource, containing details on all the cases under consideration.⁵

The case of Professor Sison

One case is being taken on by a Haldane colleague, the Belgian advocate Jan Fermon. This the case of inclusion in the list, and asset-freezing, with respect to an individual, Jose Maria Sison, Founding Chairman of the Communist Party of the Philippines and currently Chief Political Consultant of the National Democratic Front of the Philippines, who has since 1987 resided in the Netherlands where he is seeking asylum as a political refugee. He has been placed on "terrorist lists" by the United States, by the Netherlands Government, and finally by the European Union. On 6th February 2003 he applied to the Court of First Instance (CFI) of the ECJ for his removal. His application noted the following effects on him:

"Such a provision involves the loss of free disposition and a total dispossession of all the financial assets of the applicant. He can no longer make the least use of the entirety of his assets.

Excluding the applicant from all bank- and financial services deprives him from the possibility to obtain effective compensation for the violation of his basic human rights by the Marcos-regime as granted to him by a US court as well as from the possibility to benefit from an income from lectures and publishing books and articles and from possible regular employment as a teacher.

The freezing of Prof Sison's joint bank account with his wife and the termination of social benefits from the Dutch state agencies deprive him of basic necessities and violate his basic human right to life. The termination of said benefits should never be done for an undefined period of time under the pretext of antiterrorism.

The practical consequences of the decision are extremely harsh and cannot be justified by the avowed objectives of the Regulation to combat the financing of terrorism."

On 26th April 2005, the CFI rejected his applications. And on 1st February 2007 the First Chamber of the ECJ dismissed his appeal.

The case of the Basque youth movement

Another case went – without success – to both the CFI, in June 2004, and the European Court of Human Rights, in May 2002. This was the case of *SEGI*, a Basque youth movement, which requested the CFI to award damages for its allegedly illegitimate inclusion in the list annexed to Common Position 2001/931/CFSP, noted above, which implemented UNSC Resolution 1373 (2001).⁶ Christine Eckes has commented:

"The CFI... did not satisfy the fundamental principles upon which the Union is built and which the Courts have upheld in the past. This is deplorable. It not only infringes fundamental rights in the individual case, but it also harms the objective of promoting fundamental rights as such. Additionally, the doubtful factual basis on which the European blacklists are drawn up and the fact that the ECtHR did not show itself ready to grant protection of last resort, render the situation even more alarming."⁷



UN resolutions trump fundamental human rights

More recent developments are more disturbing still. The first two cases on "acts adopted in the fight against terrorism", *Ahmed Ali Yusuf and Al Barakaat International Foundation*, and *Yassin Abdullah Kadi*, both against *Council of the European Union and Commission of the European Communities*, have had a direct effect on UK courts. These were decided on 21st September 2005 by the CFI. The judgments established a "rule of paramountcy": according to international law, the obligations of Member States of the UN under the Charter of the UN prevail over any other obligation, including their obligations under the ECHR and under the EC Treaty. This is the result of the alleged operation of Article 103 of the UN Charter, which provides:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The CFI drew a clear distinction between *jus cogens* rights, for example the right not to be tortured or subjected to inhuman or degrading treatment, and other human rights, for example procedural rights, or other fundamental rights.

Lord Justice Brooke, in the Court of Appeal has summarised the effect of these decisions in a way which makes it quite clear how dangerous they are, especially when applied in domestic courts:

"... the court held (at paras 213-226) that the obligations of the members of the European Union to enforce sanctions required by a Chapter VII UN Security Council resolution prevailed over fundamental rights as protected by the Community legal order or by the principles of that legal order. The court also held that it had no jurisdiction to inquire into the lawfulness of a Security Council resolution other than to check, indirectly, whether it infringed *ius cogens*, "understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible... [restricted to] aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination"."

This was in the Court of Appeal's decision of 29th March 2006, in *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence*⁸ – the case of a British and Iraqi citizen detained indefinitely by British forces, on the decision of a certain Major General Rollo, without charge or trial, in Southern Iraq. The Court of Appeal followed the CFI in holding that a UN Security Council Resolution, in this case UNSCR 1546 (2004) of 8th June 2004, purporting both to end the occupation and to permit internment, trumps all human rights except *jus cogens*. The Court concluded:

"There is inevitably a conflict between a power to intern for imperative reasons of security during the course of an emergency, and a right to due process by a court in more settled times. In my judgment, Article 103 does give UNSCR 1546 (2004) precedence, in so far as there is a conflict... It has not been suggested that either of the major-generals who were concerned with the review decisions (see para 10 above) could be faulted in their approach..."

This also overrides the whole of the jurisprudence of the European Court of Human Rights on procedural guarantees

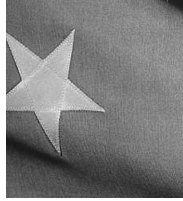
5. Statewatch 'Terrorist' Lists: Monitoring proscription, designation and asset-freezing www.statewatch.org/terrorlists/listslatest.html

6. See Eckes, Christine (2006) "How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of Segi" v.17 n.1 *Kings College Law Journal* pp.144-154

7. Eckes, *ibid*, p.154.

8. C1/2005/2251, [2006] EWCA Civ 327 – now on its way to the House of Lords

“The wider public remain blissfully unaware of these frightening developments”



where property rights are concerned. There is no doubt that “freezing orders” affect the property rights, and thus the civil rights, of the blacklisted organisations or individuals concerned. The Strasbourg cases show clearly that they must be able to challenge such orders in proper courts, in full and fair judicial proceedings in which the relevant matters can be argued in substance. Specifically, the courts must be regular courts, and the judges regular, independent and impartial judges; and the procedure must ensure “equality of arms” to the parties.

All of this has now been taken away.

The EU’s measures were challenged most recently in the cases of *Faraj Hassan v Council of the EU and the EC*⁹ and *Chafiq Ayadi v Council of the EU*¹⁰, heard by the Court of First Instance on 12th July 2006. Mr Ayadi is a Tunisian national resident in Dublin while Mr Hassan is a Libyan national held in Brixton Prison pending extradition to Italy. Both challenged their inclusion on the UN “terrorist list” (of supporters of Al-Qaeda or the Taliban), which is incorporated into EU law under Council Regulations. Both cases were dismissed – taking the number of unsuccessful challenges to proscription at the CFI to eight – though there an interesting spin was put on the rights of the individuals concerned to compel their governments to raise questions in the Security Council. This so-called “diplomatic remedy” is currently the only chance of de-listing on offer to affected individuals. Mr Ayadi had been in custody in the UK since 16th May 2002.

The wider public remain blissfully unaware of these frightening developments. There is no need to deny that very serious crimes, including the murder of thousands of civilians, have been planned and committed in recent years, and that their perpetrators should be brought to trial for the most serious offences known to criminal law – murder and conspiracy to murder.

However, the people and organisations placed on “terrorist lists” have never been suspected or accused of such crimes. Professor Christian Tomuschat, one of the leading scholars of human rights, has commented:

“In the long run, such a denial of legal remedies is untenable. To be sure, no one wishes to protect Al-Qaeda or the Taliban. But the freezing of assets is directed against persons alleged to have close ties to these two organisations. Everyone must be free to show that he/she has been unjustifiably placed under suspicion and that therefore the freezing of his/her assets has no valid foundation.”¹¹

The PMOI case

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

It is significant that PMOI was originally listed as a ter-

rorist organisation by the UK under the Terrorism Act 2000. Accordingly, the UK supported the European Council in opposing PMOI’s appeal. The CFI’s judgment contains an extraordinary rebuke to the Council and the UK.

170 ... it is not possible simply to accept the United Kingdom’s position at face value. At the hearing, moreover, the applicant reiterated its position that it did not know which competent authority had adopted the national decision in respect of it, nor on the basis of what material and specific information that decision had been taken.

171 Furthermore, at the hearing, *in response to the questions put by the Court, the Council and the United Kingdom were not even able to give a coherent answer to the question of what was the national decision on the basis of which the contested decision was adopted.* According to the Council, it was only the Home Secretary’s decision, as confirmed by the POAC (see paragraph 169 above). According to the United Kingdom, the contested decision is based not only on that decision, but also on other national decisions, not otherwise specified, adopted by competent authorities in other Member States. (My emphasis, BB)

As a result of this decision an organisation or individual placed on the “terrorist list” according to EU legislation (but not where listing is the result of a UN decision) may argue that it is entitled to a “statement of reasons”, although it is not clear that this applies to inclusion in the list, or simply liability to asset freezing. Moreover, there should be entitlement to a hearing before a court that is competent to review the lawfulness of the decision for inclusion in the “terrorist list”.

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

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

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

And in any event the EU has – outrageously – kept the PMOI on the “terrorist list”.

In its latest decision, on 27th February 2007, the Grand Chamber of the ECJ dismissed, with costs, the appeal of the Basque human rights organisation “Gestoras Pro Amnistia” and SEGI against the dismissal by the CFO of its claim for damages suffered as a result of inclusion in the “terrorist list”. Once again the UK intervened, with Spain, on behalf of the Council – the only other EU state to do so.¹³

Conclusion

On 21st December 2006 the EU added two groups and nine individuals to its “terrorist list”, which now contains a total of 50 groups and 54 individuals. Despite the positive outcome of the PMOI case, and the decision, on 18th January 2007¹⁴, to allow the PKK to continue with its claim to be removed from the list, the operation of EU (and UK) anti-terror legislation represents a severe threat to fundamental human rights. Especially, the procedural guarantees without which the worst violations can go unchallenged. ■

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9. Case T-49/04

11. Tomuschat, Christian (2003) *Human Rights: Between Idealism and Realism* (Oxford: OUP), p.90

10. Case T-253/02

12. Case T-228/02, <http://www.statewatch.org/terrorlists/docs/CFI-PMOI-judgment.pdf>

13. Case C-354/04 P, <http://www.statewatch.org/news/2007/mar/ecj-feb.pdf>

14. Case C-229/05 P