



## Statewatch analysis

### “Terrorist lists” still above the law

*Ben Hayes, August 2007*

#### Introduction

On 11 July 2007 the Court of First Instance (CFI, the EU’s lower court) ruled that the EU decisions to freeze the assets of Professor Jose Maria Sison and Stichting al-Asqa, both based in the Netherlands, were unlawful (see judgments in [Case T-47/03](#) and [Case T-327/03](#)). The Court followed the same reasoning as the December 2006 judgment in favour of the People’s Mujahadeen of Iran (PMOI) against their inclusion on the EU “terrorist list” (see judgment in [Case T-228/02](#)).

In each case the Court ruled that fundamental rights and procedural guarantees had been infringed. Specifically, affected parties did not receive any reasons for the imposition of the sanctions against them and were consequently unable to exercise their defence and fair trial rights in accordance with the European Convention on Human Rights. The Court was also unable to effectively review the lawfulness of the decisions that led to their inclusion on the EU “terrorist list”. While the CFI ruled the asset-freeze unlawful in these three cases, it has repeatedly upheld the validity of the EU proscription regime itself, so despite their victories, the PMOI, Sison and Al-Asqa remain on the “terrorist list”. In May 2007 the PMOI lodged a new case seeking removal from the list, enforcement of the Court’s decision and €1,080,000 euros in damages (see appeal in [Case T-157/07](#)).

The December 2006 judgment in the PMOI case precipitated a “full review” of the proscription regime by the EU. This review considered the procedures for adding groups and individuals to the lists, the need for a statement of reasons justifying the decision, notification of those proscribed, requests for ‘de-listing’, and the six-monthly review of the lists. In the light of the review, conducted largely in secret, the EU has decided to make only modest changes to current procedures.

On 28 June 2007, following the review, the EU adopted its latest “terrorist” list, upholding 101 out of 104 existing “terrorist” designations [three obscure Italian left-wing groups were removed from the list and [Epanastatikos Agonas](#), a Greek group described as a splinter group of the Revolutionary 17 November Organisation was added]. The PMOI was again included in the list for the purposes of asset-freezing, as were Sison and Al-Asqa. As to the judgments by the CFI, the EU has basically decided that since it has “reformed” its procedures, the Court’s concerns for fundamental rights and due process have now been addressed (see [Council press release](#)). So after waiting four-and-a-half years for the CFI to rule in favour of their appeals, the successful parties are effectively back to ‘square one’. The PMOI

has just lodged a fresh case challenging the EU decision of 28 June ([Case T-256/07](#)) and requesting the Court to apply the “accelerated procedure” to its appeal.

This article examines the development of the EU and UN proscription regimes and the effect of the recent “reforms”. For more information see [Statewatch's “terrorist list” website](#).

### The EU “terrorist lists”

The EU “terrorist lists” were created on 27 December 2001 through Common Position 2001/931/CFSP (OJ 2001 L 344/93), which provides the (dubious) legal basis for proscription by the EU, and Regulation 2580/2001/EC, which provides for the freezing of the assets of “foreign” (non-EU) terrorists. Decision 2001/927/CFSP (OJ 2001 L 344/83; since amended) placed the first 29 individuals and 13 groups on the EU “terrorist list”. None of these measures was subject to any democratic scrutiny. Extraordinarily, they were adopted by “written procedure” just two days after Christmas (see [Statewatch analysis](#)).

According to the Common Position, groups and individuals are listed on the basis of their “involvement in terrorist acts” - subject to the overbroad definition of terrorism in the EU Framework Decision of 2002 - and

*“precise information or material... which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution”*

“Competent authority” means “a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area”. In other words: any “authority” will do.

In response to the questions put by the Court of First Instance at the hearing in the PMOI case (T-228/02), the Council and the United Kingdom were, in the Court’s words, “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 contradicted each other as to what “authority” had taken the decision. The Court therefore found itself unable to review the lawfulness of the decision (see [judgment, Case T-228/02](#)).

Since 2001, the EU “terrorist list” has been updated (or simply re-adopted) every six months, growing from 29 to 54 individuals and from 13 to 48 groups (see [current EU “terrorist list”](#), adopted 28 June 2007). Although the decisions 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” have been kept completely secret. Moreover, the 2001 EU legislation made no provision for the notification of those included in the terrorist list (either prior to or after their proscription) and no provision for them to appeal against their designation as “terrorist”. By using a Common Position to introduce the lists, the EU also denied affected parties the possibility of challenging the proscription

regime in the national courts. The only specified possibility was for those whose assets had been frozen by an EU member state to appeal to that state for a "specific authorization" to unfreeze funds and resources on humanitarian grounds, but even then this had to be discussed with the other member states and the European Commission. In the event, eight of the persons/groups listed by the EU have challenged their proscription at the EU courts (see [Statewatch observatory](#)).

The creation of the EU terrorist list followed the incorporation into EC law in 2000 of the UN "terrorist list" (of associates of the Taleban, Usama Bin Laden or Al-Qaida). This means that 365 individuals and 125 groups and entities currently listed by the Security Council are also subject to the EU sanctions and asset-freezing (current [UN "terrorist" list](#)). The European Commission is empowered to supplement and/or amend the UN list on the "basis of pertinent notification or information by the UN Security Council, the Taliban Sanctions Committee and the Member States, as appropriate". According to the draft IGC mandate for the EU "Reform Treaty" (resurrecting the Constitutional Treaty), the EU may also soon acquire the executive power to freeze the assets of EU citizens and companies (see [Statewatch analysis](#)).

### Reform 1: the creation of "CP 931 WP"

Central to the EU's "reform" of the "terrorist lists" is the creation of "CP 931 WP", an EU "Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism" (see [EU Council doc. 10826/1/07](#)). It is difficult to see, however, quite how the "new" group differs from the *ad hoc* EU "clearing house" on the "terrorist lists" established in 2002 (above).

The "new" group has a mandate to examine and evaluate information with a view to listing and de-listing of persons, groups and entities pursuant to Common Position 2001/931/CFSP; assess whether the information meets the criteria set out in Common Position 2001/931/CFSP; prepare the regular review of the list as foreseen in Article 1(6) of the Common Position; and make recommendations for listings and de-listings. Representatives of EUROPOL (the EU Police Office) and SITCEN (the EU Joint Situation Centre) may participate in CP 931 WP to provide "background information in order to facilitate discussion". Non-EU member states, such as the United States, may also submit proposals for EU "terrorist" listing (and de-listing) to CP 931 WP. Like the existing "clearing house", the proceedings of CP 931 WP will be completely secret. Meetings will be held in a "secure environment" and the date, agenda, organisational details and proceedings will all be confidential. While the rules on public access to EU documents apply, it is extremely unlikely that any documents will be disclosed in practice (see further below).

### Reform 2: the "statement of reasons"

Following the EU Court's decision in the PMOI case, the EU immediately announced that it would provide a "statement of reasons" to those included in the terrorist lists. According to the Council review (see [EU Council doc. 10826/1/07](#)), the 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". Specifically, the statement of reasons will include:

- a) Terrorist act or acts committed with reference to Article 1(3) of Common Position 2001/931/CFSP [the EU definition of terrorism];
- b) Nature or identification of the competent authority or authorities which took the decision to proscribe;
- c) Type of decision taken with reference to Article 1(4) of Common Position 2001/931/CFSP [“whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds”];
- d) Nature of proscription in respect to Article 2(3) of Regulation 2580/2001/EC [e.g. natural person, legal person, associates of natural/legal person etc.]

### Reform 3: notification of affected parties

*After* a listing decision has been taken by the EU Council, the General Secretariat will send the affected party (where practically possible) a letter setting out the “statement of reasons”, the possibility of appealing against the decision and a request for consent to give public access to the statement. Consent is required because the Council has arrived at the curious conclusion that to publish the allegations those on its “terrorist list” would breach their right to data protection, so as a rule the “statement of reasons” will remain confidential. This contrasts procedures in the UK and US, where although the reasoning is extremely brief, some public justification for the sanctions is at least provided (see for example the [Home Office website](#)).

*Statewatch* was recently refused access to the EU “statement of reasons” behind the current listings and lodged an unsuccessful appeal (see [EU Council doc. 7968/07](#)). In an earlier case brought by Jose Maria Sison’s lawyers, the EU Court of Justice upheld the Council’s refusal of access to documents relating to his inclusion in the EU “terrorist list” (judgment, [Case T-110/03](#)). The “statement of reasons” provided to PMOI (see [statement](#)) and Jose Maria Sison (see [statement](#)) have now been published. The EU has also published in its *Official Journal* (OJ 2007 C 144/1, 29 June 2007) a [Notice for the attention of people on the EU “terrorist list”](#), informing affected parties of where to obtain their “statement of reasons” (in case they had not received it in the post) and how to appeal against the Council decision.

### Reform 4: applications for de-listing

Those included in the EU “terrorist list” can now submit at any time a request to the Council, together with any supporting documentation, that the decisions to include and maintain them on the list should be reconsidered. Such requests will be received by the General Secretariat and sent to CP 931 WP (above), with delegates given 15 days to consider the application. CP 931 WP will then recommend to COREPER (the permanent representatives of the member states) whether to maintain the proscription or remove the applicants from the list.

For the first time, the EU has also “drawn the attention” of proscribed organisations to the possibility of challenging the Council’s decision at the EU Court of Justice. However, this possibility is apparently limited to listing that has “given rise to an asset freeze”, which means that “domestic” (EU-based) terrorists – for example Basque and Irish organisations, whose assets the EU currently lacks the powers to freeze – can not challenge their proscription. It is not clear whether such organisations can even request de-listing from CP 931 WP, since the [Notice](#)

published in the Official Journal refers to the Regulation (on asset-freezing) rather than the Common Position (on proscription).

### **Fundamental problems remain**

The EU's review of the "terrorist lists" has failed to address the major criticisms of many legal experts and NGOs. Eight fundamental problems remain:

(1). While the production of a "statement of reasons" is welcome insofar as it provides some basic information to affected parties, the legal basis for proscription is still highly dubious. There is no formal requirement for states proposing additions to the "terrorist lists" to demonstrate as much as preliminary investigation let alone provide evidence demonstrating a connection to terrorism (on this problem see the case of Yousef Nada, below).

(2). "Competent authority" has been defined so broadly so as to allow any national decision vis-à-vis "terrorist" designation to be incorporated into EU law. By encouraging member states to create their own "terrorist lists", the EU and UN have simultaneously encouraged the expansion of their lists, since inclusion on a national list is grounds for inclusion on an international list. The overbroad EU definition of terrorism encourages the inclusion of groups who have never advocated or engaged in the indiscriminate killing of civilians.

(3). This cycle of criminalisation is both arbitrary and unaccountable. There is neither judicial nor democratic control because the secret decisions taken by individual member states in the framework of CP 931 WP cannot be challenged in national courts.

(4). The new EU procedures for requests for de-listing do not offer adequate judicial protection or recourse for affected parties. In making CP 931 WP responsible for both listing and de-listing, this unaccountable group effectively acts as judge, jury and executioner. As noted earlier, the EU has just undertaken a "full review" of the "terrorist list" (something it should have been doing every six months anyway) and upheld 101 out of the 104 existing "terrorist" designations, suggesting that affected parties will be extremely hard pressed to convince CP 931 WP that it has erred in its judgment.

(5). The right to a fair trial demands the possibility of independent judicial review. The possibility of appeal to the EU Court of Justice does not meet this requirement since that Court is not in a position to consider the substantive issues relating the "terrorist" designation. The primary concern of the ECJ is whether the EU has acted in accordance with the Treaties and any implementing legislation and appeals are now effectively limited to the question of asset-freezing.

(6). There is no doubt that proscription breaches or carries the risk of a substantial breach of a number of the rights guaranteed by the European Convention on Human Rights - not just the right to a fair trial but the prohibition of extrajudicial punishment, the rights to respect for private and family life, to freedom of expression and association, and the right to an effective remedy. The EU Courts have, however, repeatedly rejected these arguments, broadly accepting the validity of the proscription regimes. It remains to be seen whether the new EU procedures are enough to satisfy the Court's concern for due process.

(7). As Professor Bill Bowring and many other legal experts have pointed out, there is no doubt that “freezing orders” affect the property rights, and thus the civil rights, of the blacklisted organisations or individuals concerned (see [legal analyses](#)). The case law of the European Court of Human Rights is clear that affected parties 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 been taken away by the regime instituted by the EU and the issue is certainly destined for the Strasbourg Court.

(8) Proscription goes well beyond the issue of asset-freezing. In the climate engendered by the “War on Terrorism” the allegation that someone is a “terrorist” or a “supporter of terrorism” are among the most serious that states can make. In addition to the stigma and prejudice of the “terrorist” branding, the sanctions that apply to those proscribed are devastating, not just for those named in the lists but for their associates, suspected associates and entire communities with which they are associated. Proscribing international ‘terrorist’ organisations thus has the effect of criminalising the diaspora communities with which those organisations are associated. This encourages the repression of legitimate political activities at the expense of genuine counter-terrorism efforts. Grouping together a host of complex historical and political conflicts under the banner of ‘terrorism’ is also disingenuous, and undermines the prospect of conflict resolution – a point that was made strongly by Norway’s withdrawal from the EU terrorist list in 2006 (see [press release](#)).

### UN blacklisting regime even worse

The UN has undertaken a similar review of procedures in respect to its list of 365 individuals and 125 groups (allegedly) associated with al-Qaeda, Bin Laden or the Taliban. With two crucial exceptions, the UN has instituted the same cosmetic changes as the EU (see [UN Guidelines](#) as amended on 29 November 2006 and [SC Resolution 1730](#)).

In place of the CP 931 WP, a “Taliban Sanctions Committee” (or the “1267 Committee”) takes decisions on listing and de-listing on behalf of the UN Security Council, again acting as judge, jury and executioner. However, the UN has decided *not* to notify affected parties of their inclusion on the list, or to provide a statement of reasons, greatly undermining the already limited prospect of challenging such decisions. [The UN’s review of its procedures does suggest that a statement of reasons relating to each proscription should at least exist, but the UN has just made no provision for affected parties to challenge the allegations in any such statement]. So while affected parties can now request de-listing by the UN Security Council in the same way as they can petition the EU Council, they may not even know the allegations against them.

Moreover, since there is no UN tribunal comparable to the EU Courts, there is no prospect whatsoever for judicial review. Ten of the individuals and groups listed by the UN have challenged their proscription in the EU Courts (seeking to annul the EC Regulations implementing the UN list into EU law) but the Court has rejected all of the cases it has heard so far (see [Statewatch observatory](#)). A clear distinction has thus emerged between UN proscription – where the CFI has rejected procedural rights arguments – and EU proscription, where the CFI has ruled that there must be procedural rights. All of this is compounded by the UN’s failure to agree on a

definition of terrorism. As Professor John Dugard, the UN's Special Rapporteur on the Palestinian Occupied Territories has put it, "Terrorism is for the Security Council what obscenity was for the American judge who remarked that he knew obscenity when he saw it!".

In March 2007, Dick Marty, the Swiss Senator famous for heading the Council of Europe inquiries into "extraordinary rendition", announced the launch of an enquiry into the UN "blacklists". In an [explanatory memorandum](#), Senator Marty suggested:

*The UN's current "blacklisting" procedure not only violates fundamental rights, by doing flagrant injustice to many persons against whom there is no proof of any wrongdoing. It also decedibilises the whole of the international fight against terrorism, which is badly needed and ought to be able to rely on the widest possible support from the international community and public opinion. International organisations, first and foremost the United Nations, should play an exemplary role for the whole of the international community. Using arbitrary procedures violating the most elementary rights risks doing a disservice to the fight against terrorism: states attached to the rule of law - as required in principle from all states! - should surely hesitate to put forward persons for inclusion in such lists which do not provide for any protection of fundamental freedoms.*

#### Fundamental problems at national level

[UN Security Council Resolution 1373](#) requires signatory states to "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" (Article 1(c)). In order to comply with this demand, national governments have introduced legislation giving state institutions the power to issue freezing orders.

The UK government used the "royal prerogative" to introduce by "statutory order" (i.e. without debate) legislation giving the Bank of England, on behalf of the Treasury, the power to "designate" individuals and organisations for the purposes of asset freezing, and criminalising any financial support (see [Terrorism \(United Nations Measures\) Order 2001](#) (SI 2001/3365), as amended by [SI 2001/3801](#)). Those affected by the asset-freeze are must apply for a licence to access even the smallest amount of money (e.g. £25 for a family outing). Anyone giving them any money is committing a very serious criminal offence. [UK readers may recall that the introduction of criminal law by "royal prerogative" is something that the new Prime Minister has promised to end].

The separate asset-freezing regime means that the UK now effectively operates two "terrorist lists". First, the list of banned "international terrorist organisations", under the Terrorism Acts of 2000 and 2006, which now contains 58 organisations (including 14 in Northern Ireland and two banned for the "glorification of terrorism" under the 2006 legislation, see [Home Office website](#)). This list is maintained by the Home Secretary, who must lay an order before Parliament to amend the list. These orders then become law if there are no major objections from MPs, which given the lack of debate is a given in itself. Those included in the list can challenge their proscription in the first instance by requesting the Home Secretary to reconsider his or her decision, and then by

appeal to the Proscribed Organisations Appeal Commission. "POAC" has the same constitution as the infamous "SIAC" (Special Immigration Appeals Committee) tribunals - government appointed judges, secret hearings, secret evidence and special advocates). There have been no successful challenges to date.

Second, is the [consolidated Treasury list](#) of persons and legal persons subject to asset-freezing for the purposes of counter-terrorism, over which there is no democratic control or provision for appeal. This list currently stands at 105 individuals and 60 groups. Of this total [of 165], 48 relate to the UN terrorist list, and 57 to the EU list. Most are individuals and organisations named in those lists, but a number are listed as "associates" or "members" of proscribed groups and individuals. Interestingly, 78 are described as "post UK listing", meaning simply that the UK proscribed them before they were added to the EU or UN list. In practice, the UK is also likely to be the "competent authority" and thus the source of many of those decisions. Some 24 out of the 50 groups on the EU "terrorist list" were proscribed in the UK before being banned at EU level, adding to the widely held belief that the UK was the main player in the unaccountable predecessor to "CP 931 WP". Given the UK and the EU Council's failure to satisfy the EU Court of First Instance that a competent national decision had been taken in respect to the PMOI, the legality of including almost half the organisations on the EU list (on the basis of UK policy) could also be called in to question.

There is little in the way of explanation as to why the other 60 individuals and organisations on the Treasury list [but not (yet) on the EU or UN list] are there. Asif Mohammed Hanif and Omar Sharif, both dead, are listed in connection with the "Tel Aviv bombing 2003", and four men are named as "Senior Hamas Officials". No further information is provided. Recent additions to the list (in 2007) include Bilal Talal Abdullah, arrested last month at Glasgow airport after failing to blow himself up, two Tamil men currently standing trial for fundraising and membership the LTTE, and a number of British citizens of Moroccan, Pakistani and Bangladeshi origin, the allegations against whom are unknown.

Defence lawyers in the UK confirm that asset-freezing has become a routine accompaniment to terrorism charges (and even arrests), while others appear to have been proscribed by simple association. In another case brought to *Statewatch's* attention, the Charities Commission, apparently acting at the behest of the security services, has suspended a UK-based organisation on the grounds that it has "failed to disassociate" with a foreign organisation proscribed under the Terrorism Act 2000.

### Justifying the unjustifiable

In order to justify the exclusion of the judiciary from current procedures, states cite a distinction between "judicial" freezing and "administrative" freezing (see EU "best practice guidelines", [EU Council doc. 11769/07](#)). This argument suggests that:

*In general terms, administrative freezing could be considered as primarily an act providing the basis for comprehensively preventing all uses made of frozen funds and economic resources and of all transactions by a person, group or entity, designated by a competent authority.*

Whereas:

*Judicial freezing, however, could be considered primarily as an action preparatory to confiscation, which is part of a criminal law procedure in the Member State concerned.*

So while criminals whose assets are frozen in connection with their criminality can challenge that freezing (and any subsequent confiscation order) in the courts, "designation" by a competent authority is enough to deny those rights to alleged and convicted terrorists alike. Although the EU Court has ruled that this approach is wholly unacceptable, the UK, EU and UN are doing their utmost to maintain it.

### **The nightmare of proscription: an example**

The now notorious case of Yousef Nada, a successful businessman who has lived for more than thirty years in Campione D'Italia, a small Italian enclave in Switzerland, demonstrates perfectly the problems that can arise in international proscription regimes. In October 2001, Mr. Nada and his company, Al Taqwa, is included in the first UN "terrorist list" - it later transpires that he is accused by the US of having funded the "9/11" attacks. His business is raided by the Swiss police, all his assets are frozen and he is barred from traveling outside the 1.5 km<sup>2</sup> confines of his village. He has never been in trouble with the Swiss authorities before. He is charged with financing terrorism and Swiss prosecutors open an investigation.

In 2005, Mr. Nada's lawyers take legal action against the Swiss Federal Prosecutor, arguing that no action had been taken on the case for more than two years. The authorities were given a deadline of 31 May 2005 to bring the accusation before the Federal criminal court or to close the case. On 1 June 2005 the charges were dropped. It later emerges that the US has failed to comply with a formal request for mutual legal assistance under a bilateral treaty with the Swiss. Mr. Nada's legal expenses (around €80,000) were paid by the Swiss state but he remained on the UN list.

Mr. Nada then sues for the Swiss authorities for damages in the civil courts. He is awarded (a paltry) 5,000 Swiss francs (€3,000) for damages incurred during the Swiss investigation, with the court inferring that the damages arising from the blacklisting and the asset-freeze were not the fault of the Swiss state but the UN. Yousef Nada remains on the UN blacklist despite the lack of any credible evidence against him.

Mr. Nada is an Italian national of Egyptian origin and a Muslim. He has been a member of the Muslim Brotherhood for many years and has never tried to hide this fact. As Dick Marty puts it: "is this sufficient to justify that this man, who is 75 years old and has serious health problems, sees the fruit of a working life destroyed and cannot visit his children and grandchildren?". Mr Nada is still forbidden to travel outside Campione D'Italia, which is a mere 20km from Italy, his country of citizenship.

### **A cycle of injustice**

No-one is suggesting that states should not have the power to freeze the assets of individuals and organisations in order to prevent further acts of terrorism. But the basic principles of criminal law and procedure must apply - there must be credible evidence that the measures are necessary, and those affected must be able to

challenge that evidence in a competent, impartial tribunal. The global regime put into place by UN Security Council Resolution 1373, and extended significantly by the EU, denies affected parties those basic rights. Unaccountable intergovernmental committees have instituted a cycle of criminalisation in which it is hard enough to ascertain which state or intergovernmental organisation is responsible, never mind the grounds for the sanctions. The old adage that one person's terrorist is another's freedom fighter has been replaced by George Bush's principle that you are either "with us" (the "international community"), or with the "terrorists". This principle has then been instituted into international law. Organisations like the UN and the EU were created to protect fundamental rights and prevent this kind of arbitrary governance. They are now its very source.

#### Notes

[1] I am grateful to Steve Peers, Bill Bowring and Heiner Busch for their help in the preparation of this article.

[2] Please send any information regarding the policy and practice of proscription in EU member states to [office@statewatch.org](mailto:office@statewatch.org).