Provisional draft report on UN Security Council and European Union blacklists

Committee on Legal Affairs and Human Rights

UN Security Council and European Union blacklists

Draft report

Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe

A. Preliminary draft resolution

1. The Parliamentary Assembly reaffirms its position that terrorism can and must be fought effectively with means that respect human rights and the rule of law.

2. It considers that international bodies such as the United Nations and the European Union ought to set an example for states in this respect, given the lofty goals laid down in their founding instruments and the credibility they need in order to attain those goals.

3. Targeted sanctions against individuals or specific groups ("blacklists") imposed by the United Nations Security Council (UNSC) and the Council of the European Union (EU) are, in principle, preferable to general sanctions imposed on states. General sanctions often have dire consequences for vulnerable population groups in the countries concerned, and generally not for their leadership, whilst targeted sanctions hurt only those found personally responsible for certain wrongdoings.

4. At the same time, targeted sanctions (such as travel restrictions, freezing of assets etc.) have a direct impact on individual human rights such as personal liberty and the protection of property. Whilst it is not entirely 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) as well as the United Nations Covenant on Civil and Political Rights (UNCCPR), respect certain minimum standards of procedural protection and legal certainty.

5. Procedural and substantive standards must also be guaranteed to ensure the credibility and effectiveness of the instrument of targeted sanctions.

5.1. Minimum procedural standards include the right:

5.1.1. to be notified and adequately informed of the charges held against oneself, and of the decision taken;

5.1.2. to enjoy the fundamental right to be heard and to be able to adequately defend oneself against these charges;

5.1.3. to be able to have the decision affecting one's rights reviewed by an independent, impartial body with a view to modifying or annulling it, and

5.1.4. to be compensated for any wrongful violation of one's rights.

5.2. Minimum substantive standards require a sufficiently clear definition of grounds for the imposition of sanctions and applicable evidentiary requirements.

5.3. The "black listing" procedure should in principle be limited in time. It is inadmissible that persons remain on the blacklist for years, whilst even the prosecuting authorities, after a long investigation, have not found any evidence against them.

6. The Assembly finds that the procedural and substantive standards currently applied by the UNSC and by the Council of the EU, despite some recent improvements, in no way fulfil the minimum standards as laid down above and violate the fundamental principles of human rights and the rule of law.

6.1. Concerning procedure, it must be noted and strongly deplored that even the members of the committee deciding on the blacklisting of an individual are not fully informed of the reasons for a request put forward by one member. The person or group concerned is usually neither informed of the request, nor given the possibility to be heard, nor even necessarily informed about the decision taken – until he or she first attempts to cross a border or use a bank account. There are no procedures for an independent review of decisions taken, and for compensation for infringements of rights. Such a procedure is totally arbitrary and has no credibility whatsoever.

6.2. Similarly, substantive criteria for the imposition of targeted sanctions are at the same time wide and vague, and sanctions can be imposed on the basis of mere suspicions.

7. The Assembly finds such practices unworthy of international bodies such as the United Nations and the European Union. Considering that it is both possible and necessary for states to implement the various sanctions regimes whilst respecting their international obligations under the ECHR and the UNCCPR, it urges:

7.1. the UNSC and the Council of the European Union to overhaul the procedural and substantive rules governing targeted sanctions, to comply with the requirements presented in paragraph 5 above;

7.2. those member states of the Council of Europe, which are permanent or non-permanent members of the UNSC, or members of the EU, to use their influence in these bodies in favour of upholding the values embodied in the ECHR, both by ensuring the necessary improvements in procedural and substantive rules and through the positions they take on individual cases;

7.3. the UN General Assembly and the European Parliament to take up, respectively, the UN and EU Council targeted sanctions regimes with a view to ensuring the necessary improvements in terms of respect for human rights and the rule of law.

8. The Assembly invites all member states of the Council of Europe to establish appropriate national procedures to implement sanctions imposed by the UNSC or the Council of the EU on their nationals or legal residents, in order to remedy the shortcomings of the procedures at the level of the UN or the EU as long as these shortcomings persist.

9. It reminds all member States of the Council of Europe that they have signed and ratified the European Convention on Human Rights and have therefore committed themselves to uphold its principles.

B. Preliminary draft recommendation

1. The Assembly, referring to its Resolution ... (2007), invites the Committee of Ministers to take up the issue of targeted sanctions and to invite:

1.1. the United Nations Security Council and the Council of the European Union to examine their targeted sanctions regimes and to implement procedural and substantive improvements aimed at safeguarding individual human rights and the rule of law, as a matter of the credibility of the international fight against terrorism, and

1.2. those member states of the Council of Europe, which are permanent or non-permanent members of the United Nations Security Council, or of the European Union, to use their influence in these international bodies in order to improve the respective targeted sanctions regime so as to ensure respect for human rights and the rule of law.

C. Explanatory memorandum

by Mr Dick Marty, Rapporteur

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1. Introduction

i. Procedure
1. The motion for a resolution on United Nations Security Council blacklists (Doc 10856 dated 23 March 2006) was transmitted to the Committee on Legal Affairs and Human Rights for report on 29 May 2006 (Reference No 3214). At its meeting on 6 July 2006, the Committee appointed Mr. Marty as Rapporteur. At its meeting on 19 April 2007, the Committee considered an Introductory Memorandum presented by the Rapporteur (AS/Jur (2007) 14). The Committee proceeded to declassify the memorandum and to broaden the scope of the report to include the European Union blacklists in addition to UNSC blacklists.

2. On 28 June 2007 a public hearing was held with the attendance of Mrs Maria Telalian, Minister Counsellor, Greek Representation to the United Nations (New York), Professor Syméon Karagiannis, Professeur agrégé de droit public, Université Robert Schuman de Strasbourg (Strasbourg), Mr David Vaughan CBE QC (London), and Mr Jean-Pierre Spitzer, Avocat (Strasbourg).

ii. Legal background

3. The United Nations Security Council (hereafter “(UNSC)”, acting under Chapter VIII of the United Nations (UN) Charter, first commenced targeted sanctions on 15 October 1999 with Resolution 1267 which provided for sanctions against the Taliban regime in Afghanistan. The Resolution was quickly followed by a series of resolutions expanding the list of sanctioned individuals to include, inter alia, Usama Bin Laden and his associates (see Resolutions 1333 (adopted 19 December 2000) and 1617 (adopted 29 July 2005)). Resolution 1730, adopted by the Council on 19 December 2006, created a de-listing procedure that was expanded by Resolution 1735, adopted on 22 December 2006.


5. In order to implement the measures described in the aforementioned Common Position 2001/931/CFSP, the Council, on 27 December 2001, adopted Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, on the basis establishing the European Community (EC). Regulation No 2580/2001 empowered the EU Council itself, and not just the UNSC, to maintain its own list of people and entities to whom the sanctions apply; the UNSC lists (UNSC Resolutions 1267 (1999) and 1333 (2000)) were implemented under Regulation (EC) No 467/2001.


7. Recent cases before the European Court of Justice (ECJ), the First Instance Court of the ECJ (CFI) and the European Court of Human Rights (ECHR) have raised serious questions about the UNSC and EU sanctioning procedures targeting individuals and entities. While no court to date has invalidated any national or regional measures implementing a UNSC resolution, the rising number of legal challenges suggests an increasing awareness of the procedures’ lack of protection for fundamental human rights.

8. The present report focuses on the deficit of protection for human rights in the UNSC and EU sanctions regimes and, in particular, on the inadequacies of the listing and de-listing procedures and the lack of remedies. Other issues to be included are the conflict between the sanctions procedures and major human rights conventions, namely the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).

II. Key issues related to UN and EU blacklist procedures

i. Overview

9. The human rights obligations of member states, both of the Council of Europe and of the United Nations, flow principally from the ECHR, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social, Economic and Cultural Rights (ICESCR), and the UN Charter. The UN and EU blacklisting regimes, in particular the travel restrictions, financial sanctions, and procedural rules, potentially infringe upon a large number of fundamental human rights guaranteed by the aforementioned documents.

10. The comprehensive travel restrictions found in the blacklist regimes potentially violate individuals’ rights to life, to health, to private and family life, to reputation, to freedom of movement and to freedom of religion, as defined in Article 6 ICCPR and Article 2 ECHR (right to life), Article 12 ICESCR (right to enjoy highest attainable standard of physical and mental health), Article 8 ECHR and Article 17 ICCPR (right to respect for private and family life and to reputation), Article 12 ICCPR and Article 2 of Protocol No 4 to the ECHR (freedom of movement), and Article 18 ICCPR and Article 9 ECHR (freedom of religion).

11. The financial sanctions freezing funds and other economic resources impact on the right to property and right to work as defined under Article 1 of Protocol No 1 to the ECHR (right to property) and Article 6 ICESCR (right of everyone to gain their living by work).

ii. Listing procedures

a. United Nations sanctions committees’ procedures

b. European Union procedures

c. Fundamental human rights violations and relevant case-law

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13. This report will use the practices of the 1267 Committee as representative of the other sanctions committees' practices since most of the other committees employing targeting sanctions have relied on the 1267 Committee's precedents, and virtually all of the United Nations sanctions committees require a basic description and justification of the sanctions procedures.

14. The earliest UN procedures totally lacked transparency. Under UNSC Resolution 1267, it was unclear who was able to submit listing requests and what type of information was needed to be provided with such requests. No notification was provided to individuals or entities upon listing and little guidance was provided on what constituted acceptable humanitarian exemptions. Listed parties were not allowed to directly communicate with the committees; a state intermediary was required.

15. Recent improvements (which remain wholly insufficient) in these vague procedures include stricter requirements for the amount and type of information needed for listing. For example, UNSC Resolution 1526 (2004) required states to include identifying and background information to the "greatest extent possible" when submitting new names for inclusion on the list. UNSC Resolution 1617 clarified this instruction further, mandating that states should provide the Committee with a "statement of case" describing the basis for the proposal. Resolution 1617 also further improved the listing procedures by further clarifying the definition of what constituted "associated with" Al-Qaeda, Usama bin Laden, or the Taliban. Resolution 1735 provided for a cover sheet for the listing of submissions and further clarified the required content of the "statement of case". This Resolution also necessitated the "obligatory" notification of individuals or entities upon listing.

16. However, serious problems remain with the listing procedures, which are to a large extent incompatible with the standards of a State which upholds the rule of law as a fundamental principle. There is still the prospect that individuals might be listed based on mistaken identity, and the "obligatory" notification does not necessarily include the reasons why the respective parties were listed, assuming that they even received notification of the listing.

b. European Union procedures

17. Under Article 25 of the UN Charter, the UN members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Under Article 103 of the Charter, the members agree "[i]n the event of a conflict between the obligations... under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Moreover, Article 27 of the Vienna Convention on the Laws of Treaties states "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

18. While neither the European Union nor the European Community are "members" of the United Nations, their constitutive treaties have made treaty obligations of the EC/EU member States superior to national law. The Court of the First Instance, in both Yusuf and in Kadi, , commented that "...the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the treaty establishing it..." It therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter...the provisions of that Charter have the effect of binding the Community..."

19. As a result of the aforementioned obligations, the Council of the European Union issued a set of regulations and decisions implementing the UNSC sanctions regimes.


21. The EU regulations implementing UNSC resolutions employ procedures very similar to those found in the UN documents, making the discussion of UN sanctions applicable to the EU as well. Thus, this section will focus on the EU managed list and its shortcomings in the human rights arena. The first regulation, No 2580/2001, did not mandate the use of a specific form or "cover sheet", nor did it provide for the obligations of EU member States to notify individuals or entities that have been listed. The protection that a specific form and mandatory notification of individuals or entities that have been listed. The Court of Justice, in the Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, held that, while arbitrary deprivation of property might be considered a violation of "property rights", interference with fundamental human rights due to the possibility of exemptions under UNSC Resolution 1452 and the potential for judicial review. The Court also held that the applicants' rights to a fair trial were not violated since states had the option of initiating a de-listing procedure on behalf of its citizens. The Court made similar arguments in response to the applicants' other allegations of violations.

22. Despite these purported "improvements" in listing procedures, fundamental human rights still remain unprotected by both the UNSC and the EU listing procedures. As mentioned previously, the very act of listing initiates travel restrictions (freedom of movement, right to health, freedom of religion) and the freezing of economic resources (right to property, to work).

23. Some of these violations have been unsuccessfully challenged before the Court of the First Instance. In Kadi and Yusuf, the CFI held that, while arbitrary deprivation of property might be considered a violation of "property rights", interference with fundamental human rights due to the possibility of exemptions under UNSC Resolution 1452 and the potential for judicial review. The Court also held that the applicants' rights to a fair trial were not violated since states had the option of initiating a de-listing procedure on behalf of its citizens. The CFI made similar arguments in response to the applicants' other allegations of violations.

24. Most importantly, the Kadi and Yusuf cases show that the CFI does find itself competent to examine the relationship between the UNSC resolutions and other international human rights covenants - a point that will be returned to later in this report.

25. Returning to the violation of property rights inherent in the current listing process (Article 1 of Protocol No 1 to the ECHR), in Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, the ECJ concluded that the sanctions leading to the aircraft seizure were not disproportionate. However, this case can be distinguished from the majority of blacklist cases. In Bosphorus, the applicants were the victims of general sanctions directed against a government and not the individuals themselves. Most blacklist cases involve sanctions directed against individuals; targeted, as opposed to comprehensive, sanctions potentially have more direct human rights consequences.

26. Another human rights violation inherent in the current listing procedures is the presence of defamation (Article 17(1) ICCPR). Merely being listed can besmirch one's reputation by implying that the individual or entity in question is associated with terrorists or even a direct participant in terrorism. In Zollmann v. UK, for example, two Belgian diamond merchants sued for slander after a British Minister publicly accused them of breaching the UN targeted sanctions against the UNITA party. The ECtHR declared the case inadmissible due to parliamentary immunity. In his report prepared for the Council of Europe, Professor Cameron argues that, if this immunity had not existed, the Zollmann case strongly suggests that the ECtHR would consider blacklisting to be an attack on one's reputation.

27. The most grievous human rights violation occurs in the sanctions regimes' disregard for "fair trial" rights in their listing procedures. Article 6 ECHR guarantees a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", as a condition of "fairness", that a person accused of a criminal offence shall be presumed innocent until proved guilty, and, in the cases of criminal charges, to be informed promptly of the charges, to have adequate time and facilities to prepare his or her defence, to be tried without undue delay, to be tried in his or her own presence, and to examine, or have examined, witnesses against him or her.

28. As demonstrated above, fair trial guarantees are more than mere formalities. In the case of both civil and criminal charges, the right to be informed promptly of the charges, to have adequate time and facilities to prepare his or her defence, to be tried without undue delay, to be tried in his or her own presence, and to examine, or have examined, witnesses against him or her.

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the indications must be examined in the light of the common denominator of the respective legislation of the various Contracting States…[t]he very nature of the offence is a factor of greater importance…also [consider] the degree of severity of the penalty that the person concerned risks incurring…

30. With respect to civil charges, the ECHR in König stated: "Whilst the Court thus concludes that the concept of "civil rights and obligations" is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance…[w]hether or not a right is to be regarded as civil…must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned…, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States…"

31. The Human Rights Committee does not provide much guidance to interpret the meaning of "criminal charge" in the ICCPR, but given the very similar wording in both Article 6 ECHR and Article 14 ICCPR, the case-law of the ECtHR also can be applied to the ICCPR.

32. In the light of the above definitions, the sanctions procedures seem to have both criminal and civil elements. The 1267 Committee lists individuals on the basis of their association with Al-Qaeda, Usama bin Laden, or the Taliban. Association with terrorism, a criminal activity, would seem to lower the level of some of the criminal element and the impact of the level of criminal sanctions. Yet, the Third Report of the 1526 Sanctions Monitoring Team states that "[a]lthough many of those on the list have been convicted of terrorist offences, and others indicted or criminally charged, the List is not a criminal list…the sanctions do not impose a criminal punishment of procedure...but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales".

33. However, it does not necessarily follow from the above excerpt that the sanctions in civil nature must be examined. While certain sanctions, such as the freezing of assets and the precluding of arms sales, do appear to have a more civil quality, other sanctions, such as the travel restrictions, seem to go a step further towards the criminal arena by limiting freedom of movement. This characterisation will become even more pertinent in the remedies discussion (§ iv) of this memorandum.

34. Regardless of the characterisation, which is open to debate, the fair trial guarantees under the ECHR, ICCPR, or customary international law are not met by the current UN and EU listing procedures. There is no type of hearing, public or private, before an individual or entity is listed. The absence of such a hearing necessarily precludes it from occurring before an "independent and impartial tribunal," but, in any case, the members of the sanctions committees are not "independent and impartial." A tribunal cannot meet those qualifications when the members serve multiple functions as both prosecutor and judge. Moreover, with respect to the UNSC, the five permanent members of the Council tend to dominate all proceedings, giving other states less input and further reducing any possibility of impartiality. The individuals or entities are not informed of the charges against them before being listed, do not have adequate time or facilities to prepare their defence, and are not tried in their own presence. Parties may not even be aware that they might need to defend themselves. Sanctioned parties are not given the opportunity to present evidence, if even informed at all, and little information is provided even to the decision-makers themselves. Nor are the listed presumed "innocent;" the sanctions committees admittedly even list individuals or entities that are merely suspected of having possible terrorist links. Some of the same problems arise in the UN and EU de-listing and review procedures addressed next.

iii. De-listing and review procedures

a. United Nations sanctions committees' procedures

35. The UNSC recently attempted to improve the notification and de-listing procedures for individuals or entities who want to appeal their listing. Originally, Resolution 1617 (2005) just "encouraged" states to notify parties of their listing; the government of a listed individual's citizenship or residence could submit a petition asking for new information.

36. Any state could request removal of a listed party, but only if no other state objected, the name would be removed. Parties were not allowed to appeal directly to a committee for de-listing, or to have any real involvement in the process. Moreover, the states concerned could often refuse to submit such de-listing requests for any reason without explanation, and the Committee guidelines were not always clear. UNSC Resolution 1425 (2002) was also very vague on the meaning of "basic expenses". While these terms were admittedly clarified to a small extent by Resolution 1735, they remain unclear. Several suggestions for improvement have been proposed by the Monitoring Team, but none have been implemented so far.

37. In 2006, UNSC Resolution 1730 called for the establishment of a "focal point" to receive de-listing requests. Listed parties can now submit a request through either the focal point process, permitting direct individual involvement in the sanctions process, or through their state according to the process mentioned above.

38. Resolution 1735 expanded the period of review for exemptions from 48 hours to 3 working days to give more time for the Committees to examine requests, but aside from that change, there have been no other major modifications of the humanitarian exemption process. However, humanitarian exemptions are generally granted for basic expenses such as foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums...for payment of reasonable professional fees", in addition to "extraordinary expenses". However, humanitarian exemptions can only be requested through states, not directly, and the guidelines for what constitutes a "humanitarian exemption" are not always very clear. UNSC Resolution 1730 devoted a large portion of the discussion on "reasonable expenses". While these terms were admirably clarified to a small extent by Resolution 1735, they remain unclear.

39. The process for reviewing listings was, and still is, at best, extremely cursory. Resolution 1267 initially did not provide for any form of review for the Al-Qaeda, Usama bin Laden, and the Taliban listings. The Monitoring Team recommended a listing review every five years, with automatic renewal of the list unless the Committee decided by consensus to remove the names of any individuals or entities from the list. Recently, some members of the Al-Qaeda and Taliban Committee proposed a two-year review period. However, neither of these two proposals were accepted.

40. Instead, the Committee recently decided that, every year, the Security Council would circulate all listings that have not been updated for more years, and any member of the Sanctions Committee has the option of proposing a review aimed at de-listing. This review occurred for the first time in March 2007, and only one individual, out of more than one hundred identified, was proposed by the Committee for review. Other problems also persist; only countries that are current members of the UNSC are able to review cases, which helps to preserve the opacity of the review process.

b. European Union procedures in comparison with UN procedures

41. Initially, Regulation No 2580/2001 and subsequent iterations of the separate EU managed list offered more protection than the UNSC 1267 procedures described above and implemented through Regulation No 337/2000. However, at this point in time, they offer less protection than the comparable UNSC measures.

42. At the start, UNSC Resolution 1267 did not have any provisions for de-listing or review, but Council Regulation (EC) No 2580/2001 had a provision for reviewing the blacklisted individuals and entities. This regulation also explained the meaning of "humanitarian exemption" in greater detail than did the UNSC resolution. The EU Common Position of 27 December 2001 included a provision for review at "regular intervals and at least once every six months".

43. Despite these measures and the adoption of other UNSC mandated changes, the EU ultimately did not create any type of more developed de-listing procedure, similar to the one adopted in UNSC Resolutions 1730 and 1735, for the EU managed lists. The EU only agreed after the 2006 OMPI judgment to include more information with the letters of notification.

44. Some new improvements include the Council's use of notices and review procedures. On 29 June 2007, the Council published a notice informing the listed individuals and entities that it intended to maintain them on the list, that it was possible to request the Council's statement of reasons for including them, that they could submit a request to the Council, together with documentation, to reconsider their listing, and that they have the right to challenge the Council's decision before the CFI. The Council Decision of 28 June 2007 states that the Council recently carried out a complete review of the list under Regulation (EC) No 2580/2001 and has updated it accordingly.

45. While Common Position 2001/931/CFSP mentioned above mandates a review every six months, such a review infrequently
occurs, and that had not occurred for years before the Organisation des Modjahedines judgment. As evidenced by the current situation in that case, and despite any recent procedural improvements, it remains nearly impossible de facto for an individual or an entity to get oneself removed from a blacklist – an unacceptable and unlawful situation.

c. Relevant EU case-law

46. The Kadi, Yusuf, Ayadi , and Hassan cases all involved European Community Regulation No 881/2002 which was adopted to implement UNSC resolutions instituting the 1267 Al-Qaeda and Taliban sanctions regime . The applicants in Kadi and Yusuf sought annulment of Regulation No 467/2001 on the grounds, inter alia, that it interfered with their rights to property, a fair hearing, and effective judicial review. In Kadi, the CFI also chose, by its own motion, to address the question of the Council’s competence to adopt the contested regulation, an allegation raised by the applicants themselves in Yusuf.

47. In Kadi and Yusuf, the Court, in nearly identical judgments, and relying on Articles 25, 48(2), and 103 of the UN Charter, Article 27 of the Vienna Convention and Article 307(1) of the EC Treaty, found that the Community is bound by UNSC resolutions and that obligations arising under the UN Charter prevail over any other obligation under Community law . Thus, the Court held it had no competence to question the lawfulness of the UNSC resolutions and was only able to review the measures to ensure they were not contrary to its cogent interests. In both cases, the Court ultimately concluded that the EU was bound by the terms of the resolutions, and governments to place limitations on certain rights. In particular, the right to judicial access could be restricted due to the nature of UNSC resolutions and the UN’s legitimate objective of protecting international peace and security.

48. In Ayadi and Hassan, the applicants sought the annulment of EC Regulation No 881/2002. The applicants argued first that the UN measures did not impose an obligation on the State to follow the sanctions; second, that the security measures were abusing their power and violating fundamental human rights; third, the measures violated the principle of proportionality; fourth, the measures failed to provide any form of judicial redress.

49. ECHR (and ECJ) case law generally holds that for limitations on court access or fair trial rights based on national security concerns, there must be a "reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal". While this test was theoretically applied in the above cases, a closer examination of Tinnelly and other cases suggests that the CFI failed to apply the test properly.

50. In Tinnelly, the Court began by acknowledging the major security consideration at stake in the case: the need for extreme caution when awarding contracts for work requiring access to vital power supplies and to buildings in the main centres of Northern Ireland. The Court ultimately found that the denial of the applicants' rights under Article 6(1) ECHR constituted a disproportionate restriction of their fair trial rights, commenting that "[t]he Court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case...[t]he right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the ipse dixit of the executive".

51. In support of its Tinnelly judgment, the Court cited several other cases, including Chahal v. United Kingdom, in which the Court stated: "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean… however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. Other relevant precedents cited by the Chahal court are, inter alia, Fox, Campbell and Hartley v. United Kingdom and Murray v. United Kingdom.

52. The above cases demonstrate that even national security considerations do not permit a complete negation of individuals’ fair trial rights under Article 6 ECHR, and especially not a complete denial of access to a court or tribunal. Similar to the blacklist cases, revolved around concerns of terrorism and national security, and the ECHR nevertheless held that the restrictions on fair trial rights for national security reasons do not justify the complete absence of such rights. While the ECHR has accepted the use of special courts in certain anti-terrorism matters, the manner of appointment of their members and the term of office, the existence of safeguards... and the question whether it [the special court] presents an appearance of independence”.

53. While the EU courts have declined to address the underlying question of the lawfulness of the UNSC resolutions, under a proportionality test as applied in Tinnelly and Chahal, access to a court or some type of decision-making body is necessary even in cases involving national security and terrorism. This court or body would also need to be informed of a reasonable amount of the evidence supporting the charges. Yet, individuals or entities on a UNSC blacklist are not allowed such access in clear violation of their fair trial rights and a proportionality test. The listed individuals are not even listed in the way any type of special court as were the applicants in Incal and Ocalan; the Incal standards listed in the previous section are not met by the members of the UNSC sanctions committee who currently “review” the lists. The committees do not even claim to present “an appearance of independence”.

d. Recent favourable Court of First Instance judgments

54. The CFI annulled Council Decision 2005/930/EC of 21 December 2005 in so far as it concerned OMPI in the case Organisation des Modjahedines du peuple d'Iran. OMPI was established with the aim of replacing the Shah of Iran’s regime by a democracy, and the organisation later participated in the founding of the National Council of Resistance of Iran (NCRI). OMPI was first included on a blacklist by the order of 28 March 2001 by the UK Secretary of State for the Home Department under the UK Terrorism Act 2000. The applicant was never included on a UNSC blacklist.

55. The CFI’s annulment in the 2006 judgment was based on its finding that not enough evidence was presented to support OMPI’s continued listing. According to the applicant, the organisation had denounced all military activity since June 2001. The Council was required to comply with this judgment under Article 233 EC by annulling or withdrawing the references to OMPI in its decisions.

56. To date, the Council has refused to remove OMPI from the list, claiming that the CFI ruling only dealt with procedural defects, which it had remedied. While the Court had annulled the Community Decision, the Council argues that it was replaced by a subsequent Decision, 2006/379/EC of 29 May 2006, and therefore the OMPI still legally remains on the list and its assets frozen. Even if the Council had remedied its procedures, the changed procedures still cannot be applied retroactively to decisions enacted prior to the adoption of the new procedures. In any case, the “new” procedures are just as flawed as the previous ones. The Council claims that by informing OMPI of its continued listing and by providing the organisation with a statement of reasons for its continued presence on the list, it had fully complied with the CFI judgment.

57. By these actions, the Council is no longer following the rule of law. The Council violated its obligations under Article 233 of the EC Treaty and, moreover, took the May 2006 Decision under the same faulty procedures as its previous Decision 2005/930/EC which the Council annulled. The Council has not only breached its obligations under the EC Treaty, but defied the Court of First Instance as well. OMPI’s fundamental rights continue to be violated.

58. The OMPI situation highlights another troubling problem indirectly related to the EU sanctions regimes: implementation of court judgments. While recent trends show courts beginning to annul certain decisions taken pursuant to the EU sanctions regime, these actions are meaningless unless actually implemented.

59. In a recent judgment, Sison v. Council, the CFI annulled Council Decision 2006/379/EC of 29 May 2006 in so far as it concerned Sison. The applicant in this case was a Filipino national who had resided in the Netherlands since 1987. In 1998, after the applicant’s passport was revoked by the Philippine Government, he applied for refugee status and for a residence permit on the grounds of humanitarian need. The State Secretary of Justice refused Sison’s application on the grounds of Article 1F of the Geneva Convention on the status of refugees, as amended by the New York Protocol of 31 January 2001. On 23 February 2005, OMPI had been included on a blacklist issued by the United States Treasury Department covered by Executive Order No 13224, which had then been implemented by the Netherlands Minister of Foreign Affairs (Sanctierregeling Terrorism 2002 III, Staatscourant No 153).

60. The Court found that a statement of reasons must be supplied to individuals or entities at the time of listing as required by Article 253 EC, and that the right to effective judicial protection is typically satisfied by parties’ right to bring an action before the Court of First Instance pursuant to the fourth paragraph of Article 230 EC. Sison, in this case, was not able to make effective use of this right since his rights of defence were disregarded.

61. The Court made a similar ruling in another judgment, Al-Aqsa v. Council, rendered on the same day. The applicant was a
Netherlands foundation with the main objective of alleviating the humanitarian crisis in the West Bank and the Gaza Strip by providing financial support to organisations in Israel and in the occupied territories. On 3 April 2003, the Minister for Foreign Affairs of the Netherlands placed the foundation on a blacklist, resulting in the freezing of its funds and assets. The sanctions were applied, according to the released list of reasons, on the grounds that there was evidence that the foundation had given funds to organisations supporting terrorism in the Middle East.

62. In its judgment, the CFI annulled Council Decision 2006/379/EC of 29 May 2006 in so far as it concerned Al-Aqsa, based on the finding that none of the decisions adequately stated the reasons for listing and that Al-Aqsa was not able to fairly employ its right to bring an action before the General Court. While the Court did annul the 2(a) of Council Regulation (EC) No 2580/2001 in so far as it applied to the applicant, the CFI declared that there was no need to rule on the question pursuant to Article 241 EC of whether Council Regulation No 2580/2001 is itself unlawful.

63. Despite these recent judgments beginning to acknowledge the violations of fundamental fair trial rights in the current de-listing and review procedures, no court has yet addressed the unlawfulness of UNSC resolutions and EU regulations. As a result, the UNSC and the Council have little impetus to alter their procedures.

iv. Lack of Remedies

a. Remedies for UN blacklisting under the ICCPR and the UN Charter

64. Article 2(3) ICCPR governs the right to an effective remedy, while Article 14 ICCPR details the right to compensation - both guarantees that are relevant to blacklisted parties. However, while Article 6(1) of the Covenant is also applicable, the applicant is entitled to a "judicial" remedy, and not merely an "effective" remedy which does not have to be judicial in nature. If Article 6(1) applies, requiring the determination that blacklisting implies civil and/or criminal consequences, the violation of the ECHR in their failure to provide a judicial remedy.

65. After de-listing requests have been denied, individuals and entities must have access to some independent and impartial form of review, and one preferably outside the UNSC's ambit. The ideal option is some type of independent panel or tribunal, since any other type of judicial remedy before the national courts seems to be impossible. The current review procedures are carried out by the internal sanctions committees themselves, preventing any type of independence or impartiality. Another option might be the use of an ombudsman.

b. Remedies for EU blacklisting under the ECHR

66. Articles 13 and 6(1) ECHR cover remedies and Article 3 of Protocol No 7 to the ECHR outlines the right to compensation for wrongful conviction. Articles 2(3) and 14 ICCPR could also be applicable depending on which states are parties to the Covenant.

67. The main issues raised in conjunction with the right to an effective remedy are whether blacklisting and its consequences are civil or criminal by nature, an issue which was discussed in detail earlier in the report, and the meaning of the term "effective". For the Article 13 provision for an "effective remedy" to apply, the applicant must allege a violation of a material right included in the ECHR. If Article 6(1) is also applicable, however, the applicant is entitled to a "judicial" remedy, and not merely an "effective" remedy which does not have to be judicial in nature. If Article 6(1) applies, requiring the determination that blacklisting implies civil and/or criminal consequences, the violation of the ECHR in their failure to provide a judicial remedy.

68. If Article 6(1) is found to be inapplicable, then the focus is shifted to Article 13 ECHR and the meaning of "effective remedy". In an early case, Klass and others v. Germany, the applicants, under Articles 6, 8, and 13 ECHR, challenged German legislation that permitted the State to open and inspect mail and to monitor telephone conversations to protect against dangers threatening the state and the "free democratic constitutional order". The applicants did not challenge Germany's right to employ such measures, but the absence of requirements to notify the persons concerned after surveillance had ceased and the lack of any remedy before the national courts.

69. While the Court ultimately found no breach of Article 13 in Klass, it observed that "an 'effective remedy' under Article 13...must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance...[i]t therefore remains to examine the various remedies available to the applicant to see whether they are 'effective' in this limited sense". The Court also stated that the authority in Article 13 ECHR is not necessarily in all instances "a judicial authority in the strict sense...[n]evertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy is effective". In Klass, the applicants had impeded access to a national court – a clear difference from the majority of blacklisted individuals.

70. In Tinnelly, the ECHR commented that the requirements of an "effective remedy" under Article 13 were much looser than those of Article 6(1). Nevertheless, the Court held that the Government's claim that the applicants' access was as effective as was possible under the circumstances must be rejected. The Court found that the proceedings at issue in the case never involved a full independent scrutiny of the factual basis for the decision to refuse a contract on national security grounds. The Judge in the High Court of Northern Ireland ultimately had declined jurisdiction due to his inability to assess whether there had been a sound factual basis for the withholding of the contract. Regardless, the ECHR concluded that "any substantive review of the grounds...would have been impaired in any event account of the fact that Mr Justice McCollum did not have sight of all the materials on which the Secretary of State had based his decision". This conclusion led the Court to hold that the applicants' access to judicial review was not sufficient to constitute an "effective remedy".

71. The Court also noted "that in other contexts it has been found possible to modify judicial procedures in such a way as to safeguard national security on an individual substantive concern...and yet accord the individual, or the defendant,...the right to have his case heard by an independent and impartial tribunal". The Court proposed an adjudicator or some type of tribunal fully satisfying Article 6(1) requirements. There is no reason why a similar institution to provide an "effective remedy" could not be created for the sanctions regimes.

72. In Chahal, the challenged proceeding was an advisory panel; the Court found that the panel did not offer sufficient procedural safeguards under Article 13 ECHR due to the facts that, inter alia, the applicant was not entitled to legal representation, was only given an outline of the reasons behind the decision to deport, that the panel had no power of decision and that the panel's findings were not disclosed. As a result, the applicant did not have access to an adequate remedy.

73. In summary, ECHR case-law requires some type of quasi-judicial remedy, with sufficient procedural guarantees including those detailed in Chahal, for blacklisted parties even under Article 13 ECHR.

74. The types of "remedies" offered by the EU sanctions regime are even sparser than those offered by the advisory panel "remedy" found to be inadequate in Chahal. The lawfulness of EU common positions cannot be challenged before the ECJ; Council decisions can be challenged only by an annulment action under Article 230 EC. There is the possibility of a review of the decision under Article 9 of Protocol No 7 to the ECHR, but this does not provide the same degree of scrutiny as a review of the decision. A national court hearing a dispute which raises the issue of the validity of a common position based on Article 24 EU, and which doubts whether that common position is intended to produce the legal effects on third parties that it does, can request a preliminary ruling on the position's legality from the ECJ (under the conditions of Article 35 EU). The ECJ can also review such acts when a Member State or the Commission brings an action under Article 35 EU. This type of review nevertheless makes it difficult for individuals to directly challenge the underlying Council common positions, making it unlikely that an "effective remedy" satisfying the requirements of Article 13 ECHR currently exists.

c. Right to compensation

75. Another type of possible remedy is monetary compensation (Article 14(6) ICCPR and Article 3 of Protocol No 7 to the ECHR). To date, however, no court has allowed any type of "punitive damages" for compensation. Recently, for example, Sison applied to the CFI for compensation under Article 288 EC, but his claim was rejected.

76. The Sison Court stated that, in order for the Community to incur non-contractual liability as set out in Article 288 EC, settled case law mandated that: (1) the conduct must have been unlawful, (2) actual damage must have been sustained, and (3) there must be a causal link between the conduct and the alleged damage. The unlawful damage must consist of a serious breach of legal rules intended to give rights to individuals.

77. In its holding denying monetary compensation in Sison, the CFI commented that failure to fulfill the obligation to state reasons is not, itself, enough to incur liability, but observance of the fundamental principles of the rights of the defence is a legal rule whose
breach may fulfill the second requirement of actual damage for the Community to incur non-contractual liability. Nevertheless, the Court denied Sison compensation based on its finding that the rights of the defence are essentially a procedural guarantee, making an amnullment of the contested measure adequate compensation for Sison's decision adequate compensation for Sison. The Court found that there was a sufficient causal link between the unlawfulness and his damage, and that the economic sanctions were a temporary measure, not affecting the substance of the individual's right to property.

78. More than pling by applicants would at least appear to open the possibility for them to receive some type of monetary compensation. The Sison case represents a form of this requirement cited by the CFI in Sison cases. The situation might also be different if the courts addressed the unlawfulness of the underlying EU measures. Prior to the question of compensation, however, it is essential that the sanction regimes either facilitate access to the courts, or set up some type of independent and impartial panels to review appeals that could also have the authority and the resources to provide some type of compensation.

v. European Convention on Human Rights – Conflict with UN/EU sanctions regimes

79. As mentioned previously, many human rights guarantees, including those under Articles 2, 6, 8, 9 and 13 of the ECHR, can be violated by the UN and EU sanctions regimes, raising the question of whether member states to the ECHR can at all be obliged to execute sanctions which infringe upon fundamental rights to such a large extent.

80. ECHR case law suggests the member states are not required to execute such sanctions. In Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirk salesman and the EC implemented an ICO of sanctions, the Court applied a type of "equivalence" test, stating "...[t]he collective action taken in compliance with...legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner at least equivalent to that which the Convention equivalent to that which the Convention provides in its own terms to the same extent. The Court is considered to be provided...the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership...any such presumption can be rebutted, if...it is considered that the protection of Convention rights was manifestly deficient".

81. In other words, if an organisation provides a level of human rights protection that is more or less equivalent to the level provided by the ECHR, then the Commission will refrain from taking up cases against EC member states for any residual responsibility for acts of the EC. However, if the level of protection is not generally equivalent, but "manifestly deficient," the states will be held accountable for any residual responsibility.

82. Bosphorus and a recent ECHR decision, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, show that the ECHR is willing to examine whether states are responsible for human rights violations under the ECHR in cases where only "manifestly deficient" protection was afforded. Targeted sanctions fit into this category perfectly, given that the sanctions regimes provide almost no protection of fundamental human rights.

83. In Segi, the applicants alleged "manifestly deficient" protections. The Segi case concerned EU targeted sanctions procedures intended to implement UNSC Resolution 1373. Segi, a Basque Youth organisation, applied to lift its listing before the ECHR. The Court declared the complaint to be inadmissible because Segi was not the victim of any violation under the ECHR. The Court held that it is intended to implement UNSC Resolution 1373. Segi, a Basque Youth organisation, appealed its listing before the ECtHR. The Court which enjoy much greater democratic legitimacy, to refrain from engaging in arbitrary "procedures" which are contrary to all rights, the rule of law and democracy, have chosen to forego these values, whilst the world has remained almost indifferent. It is just...
six countries have not found a shred of evidence of any wrongdoing – all this on the basis of a decision taken by the organisation of his fundamental rights and whose work of a lifetime was destroyed in the process – against whom the law enforcement authorities of the African Union, and who intend to destroy the system. The fight against new forms of crime – and not only against terrorism – certainly requires the adaptation of legal instruments both for prevention and repression. But nothing justifies falling into arbitrariness and neglect of the very values on which our society is built. The fight against terrorism, and against crime in general, provided it is rigorous and correct, can only strengthen the credibility of democratic institutions and thus weaken and de-legitimise its enemies. How can one today justify as part of the fight against terrorism the blacklisting for more than six years of a man who was thus deprived of his fundamental rights and whose work of a lifetime was destroyed in the process - against whom the law enforcement authorities of two countries have not found a shred of evidence of any wrongdoing? All this on the basis of a decision taken by the organisation which proclaims its "faith in fundamental human rights, in the dignity and worth of the human person [...]" and which undertakes "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"; a decision applied without hesitation by States which usually do not miss any opportunity to reaffirm their unconditional commitment to the values of the Council of Europe.

APPENDIX

Hyperlinks to the United Nations and European Union documents cited in this report

UN Documents:

Main page of the UNSC documents archive: http://www.un.org/documents/scres.htm

Briefing by the Chairman of the 1267 Sanctions Committee in the Security Council open briefing by the Chairman of subsidiary bodies of the SC on 22 May 2007, S/PV.5679


European Union/Community Documents:


Notice for the attention of the persons, groups and entities on the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism


Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons associated with the Al-Qaida network and the Taliban of Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan

Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan

Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000


Council Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism:

Council Decision 2001/927/EC of 28 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism

Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism

Council Regulation (EC) No 337/2000 of 14 February 2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan