Statewatch Analysis

Time to rethink terrorist blacklisting

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The terrorist proscription regimes enacted by the United Nations (UN) and the European Union (EU) after the attacks of 9/11 have been seriously undermined by growing doubts about their legality, effectiveness and disproportionate impact on the rights of affected parties.

Introduction

At face value, terrorist blacklisting (the act of designating a group or individual as 'terrorist', as an associate of known terrorists, or as a financial supporter of terrorism) seems like a reasonable response to the crimes of 9/11 and subsequent terrorist attacks. Ostensibly, these 'smart sanctions' (which target groups and individuals rather than whole populations) are designed to disrupt the activities of terrorist groups by criminalising their members, cutting off their access to funds and undermining their support. In practice, however, far too many people have been included in national and international terrorism lists. At the same time, they have been systematically denied the possibility of mounting a meaningful defence to the allegations against them. Moreover, many listings are clearly politically or ideologically motivated, undermining genuine counter-terrorism efforts and paralysing conflict resolution efforts.

The UN blacklisting regime stems from UN Security Council Resolution 1267, which created the first list of alleged terrorists "associated with Osama bin Laden, the Taliban and Al-Qaeda". Those included in the list (which currently stands at 397 individuals and 92 organisations) are subject to asset-freezing, travel bans, an arms embargo and other sanctions. UN Security Council Resolution 1373, adopted in the immediate aftermath of 11 September 2001, encouraged states to create their own blacklists to prevent "the financing of terrorist acts" and enact other counter-terrorism provisions criminalising support for terrorism and breaches of the UN sanctions. The EU's terrorist lists stem from the measures it took to transpose Resolution 1373 into EU law and currently stands at 57 individuals and 47 organisations. In addition to the UN and EU lists, many states have adopted domestic blacklists, massively expanding the net of criminalisation.

Whereas the EU has adopted a (particularly broad) definition of 'terrorism', the UN has failed to reach such an understanding, despite decades of deliberation. UN Security Council Resolution 1373 thus effectively outsources the definition of terrorism to nation states, encouraging the criminalisation of groups on the basis of geopolitical, foreign policy or diplomatic interests. The criminalisation of self-determination movements that has

resulted has transformed the migrant and Diaspora communities that support them into 'suspect communities' and obstructed peace processes aimed at resolving such conflicts.

An abject lack of due process

There is now an irrefutable body of expert legal opinion that views international proscription regimes as incompatible with the most basic standards of due process. The adverse and unacceptable impact of the sanctions on fundamental human rights is also abundantly clear and systemic violations have been recognised repeatedly in judicial proceedings, particularly within Europe. Listing decisions are usually based on secret intelligence material that neither blacklisted individuals nor the Courts responsible for reviewing the implementation of the lists will ever see. Needless to say, affected parties cannot contest the allegations against them (and exercise their right to judicial review) if they are prevented from knowing what the allegations actually are.

Like control orders and administrative detention without charge, blacklisting has been seen as a key component of the pre-emptive security agenda pursued by states in the years since 9/11. Whilst it is widely accepted that the lists have been largely ineffective in blocking terrorist financing, states have nonetheless prioritised blacklisting as a means of facilitating prolonged interference with the lives of terrorist suspects on the basis of intelligence material incapable of withstanding judicial scrutiny. Indeed, should the legislation on control orders be repealed by the coalition government in the UK (a prospect that now seems increasingly unlikely despite manifesto commitments and post-election pledges) those subject to the measures will likely be placed on a UK terrorist blacklist instead in order to maintain state control over their lives.

Challenging terrorist blacklisting

There have now been scores of legal challenges to the national and international terrorist blacklists in domestic and regional courts. Many successful challenges have resulted in 'pyrrhic victories' for listed groups and individuals as the executive bodies of the UN and EU have simply ignored the growing judicial dissent and substance of the judgments while maintaining the successful litigants on the blacklists.

One of the most important legal challenges brought to date has been the case of Yassin Abdullah Kadi, a Saudi businessman. Mr Kadi successfully challenged the European implementation of his UN listing in the EU Courts. Significantly, in 2008 the European Court of Justice (ECJ) ruled that despite the supremacy of the United Nations in the hierarchy of international law, the principle of due process enshrined in the European Convention on Human Rights had to take priority. In response, the UN and EU introduced several due process reforms – culminating in the 2009 appointment of an Ombudsperson (OP) to facilitate de-listing requests. Yet they maintained the sanctions against Mr Kadi. In 2010 the ECJ ruled against the European implementation of the UN list for a second time, noting that the creation of the OP fell far short of the standard necessary to ensure compliance with European human rights law. Mr. Kadi may ultimately be removed from the list to prevent further successful litigation. But it will not be long before the fundamental problems created by the UN and EU proscription regimes return to the EU Courts.

Another important case recently heard by the UK Supreme Court involved five blacklisted men (known as A, K, M, Q and G) who successfully challenged the implementation of the relevant UN Security Council Resolutions by the British government. The Court held that the UK implementing regulations were *ultra vires* the United Nations Act because of their devastating impact on fundamental rights (a similar judgment is now expected from the Canadian Courts in the case of Abousfian Abdelrazik, see below). In a scathing judgment,

the Supreme Court found that the UK/UN regime "strike[s] at the heart of the individual's basic right to live his own life as he chooses" and effectively renders "designated persons... prisoners of the state". The Court ruled that such a draconian regime could only be justified by an Act of Parliament, which would have surely introduced an appeals procedure. This decision led to the UK's implementing measures being struck down by the Court. However, instead of referring the UN terrorism list to parliament, the UK government has simply chosen to directly apply the EU Regulations that transpose the UN terrorism list into EU law. Put more simply: people in the UK who have been blacklisted by the UN will remain "prisoners of the state" because of EU governments' unflinching reluctance to demand meaningful reform at the UN.

In Switzerland, which is home to the assets of numerous blacklisted individuals, legislative reforms have been introduced that empower the Swiss Federal Council to refrain from implementing the UN 1267 blacklist in certain circumstances – including, *inter alia*, where blacklisted individuals and groups have not been afforded access to an independent mechanism of review and/or where they have been listed for more than three years without being brought before the Court. Upon approval of the proposal in March 2010, the Swiss Parliament stated that the government "should make clear that it is not possible for a democratic country based on the rule of law that sanctions imposed by the Sanctions Committee, without any due process guarantee, result in the suspension, for years and without any democratic legitimacy, of the most basic human rights that are proclaimed and propagated by the United Nations".

In Canada, a challenge to the UN list is pending at the Federal Court in the case of Abousfian Abdelrazik. Mr Abdelrazik was jailed in Sudan in 1989 after the successful military coup of Omar Al-Bashir. He managed to flee to Canada in 1990, where he was granted refugee status and, subsequently, Canadian citizenship. In March 2003, after some of his acquaintances had been charged or convicted for participating in terrorist attacks, Mr Abdelrazik returned to Sudan in order to visit his mother and escape harassment by the Canadian Security Intelligence Service (CSIS). Upon arrival, however, he was promptly arrested and detained for two periods of eleven and nine months without charge, during which time he was questioned by CSIS and tortured by Sudanese authorities. In July 2006 Mr Abdelrazik was placed on the UN 1267 terrorist list at the request of the US government, which alleged that he was a senior Al-Qaida official with personal connections to Osama Bin Laden, had trained in a terrorist camp in Afghanistan and fought with Islamic militants in Chechnya.

In late 2007, Abdelrazik was released from Sudanese imprisonment and cleared of all charges by both Sudanese authorities and Canadian police and intelligence agencies. But when he attempted to fly home to Canada he was prevented from leaving; airlines refused to carry him because of his inclusion on a 'no-fly' list and the Canadian authorities refused to issue him with the emergency travel documents necessary to leave Sudan on the basis of his 1267 blacklisting. After repeated visits from Canadian officials failed to facilitate his repatriation, Mr Abdelrazik was granted temporary refuge at the Canadian embassy in Khartoum where he spent the next 14 months, initially sleeping on a mattress in the lobby. Finally, following a legal challenge and public campaign in Canada which saw his airline ticket paid for by supporters in direct breach of Canada's 'material support' provisions, Mr Abdelrazik was allowed to return home in June 2009. In the Court judgment that paved the way for his return, Justice Zinn of the Canadian Federal Court noted that the UN's delisting process requires the petitioner to prove a negative (that s/he is not associated with Al-Qaida), something akin to trying to prove that "fairies and goblins do not exist". The situation for a blacklisted individual, he added, is "not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime". Despite this judgment, Mr

Abdelrazik remains on the UN blacklist, with Canada's implementation of the UN regime the subject of further proceedings at the Federal Court (these mirror the Supreme Court challenge brought by A, K, M, Q and G in the UK, above).

The broader implications of the list

Despite numerous Court rulings and widespread proclamations of this nature, there has been very little public debate about the role and function of terrorist blacklisting. The discussion that has taken place within institutional and academic circles has tended to follow the increasingly complex legal architecture arising from litigation and piecemeal reform. It is crucial therefore that the wider political significance of the blacklisting regimes is not overlooked because their impact extends far beyond individual human rights to fundamental matters of social justice, self-determination, peace-building and conflict resolution. These matters call into question the very role and function of the "international community".

Blacklisting has had a tremendously negative impact on attempts to resolve long-standing conflicts and complex struggles for self-determination, often undermining the right to self-determination itself. International development organisations have had to adjust to a new regime of due diligence obligations at home while simultaneously finding their work in conflict zones and fragile states paralysed by the blacklisting of groups and individuals in the communities in which they operate. In Europe and North America, migrant and Diaspora communities have come under particular scrutiny because of their association with terrorist organisations. Kurds, Palestinians, Tamils, Kashmiris, Baluchis and other minority communities have all felt the effect of suspicion and stigmatisation. The practice has had a disproportionate and gendered impact on the lives of women and other family members of those who are designated. It has also facilitated the creation of new forms of unaccountable and supranational authority at the UN level to directly target and interfere with the rights of individuals. The adoption of terrorist lists by the UN and EU also sets a dangerous precedent that legitimises the principle of blacklisting and encourages its use in other security frameworks, with worrying long-term implications for civil liberties.

Overdue process

There is an emerging consensus that something urgently needs to be done about terrorist blacklisting that goes beyond mere procedural tinkering. However, there are only actually two options available to the United Nations that could satisfy constitutional due process safeguards and international human rights law. These are: either (a) introduce an independent judicial review mechanism at the UN Level, or (b) allow judicial review of UN blacklisting decisions in national courts. In reality, the permanent members of the Security Council will sanction neither development. In the face of such intransigence, the time has therefore come to radically rethink the issue and for the international legal framework underpinning the blacklisting regimes to be abolished. As Martin Scheinin, UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, has observed:

> *Whatever justification there was in 1999 for targeted sanctions against Taliban leaders as the de facto regime in Afghanistan, the maintenance of a permanent global terrorist list now goes beyond the powers of the Security Council. While international terrorism remains an atrocious crime … it does not justify the exercise by the Security Council of supranational sanctioning powers over individuals and entities.*

Although the EU's legal system provides a relatively higher standard of 'due process' than the UN, its blacklisting regime falls far short of any reasoned interpretation of the substantive obligations on the Union to introduce a much fairer system – one that respects both fundamental rights and the principles of proportionality and democratic control. If the fundamental flaws of the blacklisting regimes are to have any chance of being properly addressed, then both wholesale reform and a broader public debate about how terrorism ought best be dealt with is required.

"Blacklisted: Targeted sanctions, pre-emptive security and fundamental rights", by Gavin Sullivan and Ben Hayes with a foreword by Martin Scheinin (UN Special Rapporteur on human rights and countering terrorism), was published by the European Center for Constitutional and Human Rights in December 2010. The report is available to download at: http://www.statewatch.org/news/2010/dec/eu-ecchr-blacklisted-report.pdf

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