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Human Rights versus Security

Which Human Rights Problems arise from the Setup of Terrorist Lists in the EU and how can they be solved?

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Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.

Benjamin Franklin, 1759

Table of Contents

Introduction	1
Context and relevance	4
Methodology	5
Structure	5
1. Background	6
1.1 UN Security Council and EU powers	7
1.2 UN Security Council Counter-Terrorism measures	
1.3 Implementation in the European Union	
1.4 Subconclusion	12
2. Infringement of human rights	14
2.1 Protection of human rights in the UN and EU legal order	14
2.2 Freezing versus the right to own property	16
2.3 Inclusion procedure versus the right to a fair trial	19
2.4 Possibilities of appeal versus the right to an effective remedy	29
2.4.1 Challenging freezing before the CFI and ECJ	30
2.4.2 Challenging freezing before the ECtHR	35
2.4.3 Other levels to challenge freezing	36
2.5 Subconclusion	39
3. Justification of human rights violations	40
3.1 The right to own property and the test of proportionality	41
3.2 Restricting access to court in the case of emergency	43
3.3 Restricting access to court for national security reasons	48
3.4 Subconclusion	52
4. Making human rights and sanctions compatible	53
4.1 Proposal for an extensive role of national courts	54
4.1.1 Full review of UN SC Resolutions by national courts	54
4.1.2 Challenging Community acts through preliminary references	58
4.2 Proposal for an effective review body on UN level	60
4.3 Involving ECJ and ECtHR jurisprudence	64
4.4 Subconclusion	65
5. Conclusion and Recommendations	66
Epilogue	71
Reference List	72
Anney	80

List of abbreviations

CFI Court of First Instance

CFSP Common Foreign and Security Policy
COREPER Committee of Permanent Representatives
CT Treaty establishing a Constitution for Europe

CTC Counter-Terrorism Committee

ECHR European Convention on Human Rights

ECJ European Court of Justice

ECtHR European Court of Human Rights

ESA European Space Agency

EU European Union

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ICJ International Court of Justice IRA Irish Republican Army

OJ Official Journal of the European Union PMOI The People's Mujahedeen of Iran

SC Security Council

TEC Treaty establishing the European Community

TEU Treaty on European Union

UDHR Universal Declaration of Human Rights

UNC United Nations Charter

UN United Nations UK United Kingdom

List of Tables and Figures

Figure 1.1 Overview on legal acts connected to terrorist lists

Figure 2.1 The institutional, judicial triangle

Table 4.1 Comparison of Review Mechanisms at UN level

Introduction

In the "War on Terrorism", the United Nations (UN) have increasingly used the possibility to impose sanctions on individuals. Those sanctions find their legal basis in Article 41 of the UN Charter, which states that "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."

In Resolution 1333, the Security Council (SC) requested to "maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization" for the purpose to freeze funds and other financial assets of those mentioned on the list. After the terror attacks of 11 September 2001, the range of anti-terrorist measures was extended in Resolution 1373 to all "persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts".

In the European Union (EU), all UN Resolutions have been implemented through Common Positions in the area of Common Foreign and Security Policy (CFSP, second pillar) and Regulations within the first pillar. In Common Position 2001/931/CFSP, the EU published for the first time its own list of persons, groups and entities involved in terrorist acts. It is updated regularly and consists of 54 individuals and 48 groups and entities at present (Common Position 2007/448/CFSP).

The consequences for individuals on the list are extremely serious: "The effect[s] of a freezing order, if it is effectively implemented, are devastating for the target, as he or she cannot use any of his or her assets, or receive pay or even, legally speaking, social security." Against the background of those implications, it is important that human rights, especially due process (or procedural) rights, deriving from the Universal Declaration of Human Rights (UDHR) or the European Convention on Human Rights (ECHR), are respected and guaranteed for people that have been put on terrorist lists. These include the peaceful enjoyment of one's possessions (Article 17 UDHR and Article 1 ECHR Protocol

¹ Cameron, Iain (2003): European Union Anti-Terrorist Blacklisting. In: Human Rights Law Review, Vol. 3, No. 2, p. 227

1), the right to a fair and public hearing by an independent and impartial tribunal (Article 10 UDHR and Article 6.1 ECHR), and the right to have an effective remedy. (Article 8 UDHR and Article 13 ECHR).

It is a question at issue, whether the listing mechanisms in the EU are in accordance with such rights. The control of assets held in bank accounts falls within the scope of the right to property, and an infringement of this right has to be based on a carefully conducted test of 'fair balance' or necessity and proportionality.²

Concerning the way how individuals or organizations are listed, the EU does not require a specific procedure. Article 1(4) of CFSP Common Position 931 states: "The list [...] shall be drawn on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority". Except some recently published broad guidelines, no public document in any member state of the EU is known that works out the details of the procedure. It appears from information provided by the Dutch government that a clearing house, consisting of officials from the Ministries for Foreign Affairs and, for some member states, of representatives from the intelligence services, decides with unanimity on each individual and organization.³ It does not seem that a judicial check by a court is necessary.

Concerning the right to have an effective remedy, case law of the European Court of Human Rights (ECtHR) makes clear that "the guarantee of an effective remedy requires as a minimum that a competent, independent appeals authority must exist which is to be informed of the reasons behind the decision, even if such reasons are not publicly available." Neither Common Position 2201/931/CFSP, nor Council Regulation 2580 provide for such a remedy. Individuals and organizations challenging their listing, no matter whether in national courts, the European Court of Justice (ECJ, or "the Court") or the European Court of Human Rights (ECtHR), are facing great problems in their attempt to have their names

³ Tappeiner, Imelda (2005): The fight against terrorism. The lists and the gaps. In: Utrecht Law Review, vol. 1 Issue 1, p. 106

nts/2006/I.%20 Cameron%20 Report%2006.pdf

² Bowring, Bill (2007): The human rights implications of international listing mechanisms for 'terrorist' organisations. www.statewatch.org/terrorlists/OSCE-UN-feb-2007.pdf

⁴ Cameron, Ian (2006): The European Convention on Human Rights Due Process and United Nations Security Council Counter-Terrorism Sanction, p. 2. http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/Texts_&_Docume

removed: According to Article 35 Treaty on European Union (TEU), Common Positions cannot be challenged before the ECJ, and national courts cannot ask questions about their interpretation and validity. Regulations and Decision that are connected to the Common Position are also not subject to rulings by the Court. As a consequence, thirteen applications have been dismissed by the European Court of First Instance (CFI) and the ECJ.

In December 2006, the Court of First Instance ruled for the very first time in favour of an appeal. The People's Mujahedeen of Iran (PMOI) had challenged their inclusion in the EU's list in June 2002 and sought to partial annul the relevant Common Positions and decisions. While the Court dismissed these requests, it stated at the same time that the applicant "has not been placed in a position to avail itself of its right of action before the Court, given the aforementioned links between safeguarding the right to a fair hearing, the obligation to state reasons and the right to an effective legal remedy." In the meanwhile, the Court has made two other judgements, following the same argumentation.

The topic of terrorist lists and its human rights implications has been the subject of a lively discussion. Academics have written a number of articles (see following paragraph), but none of them has been published after the recent CFI judgements. This paper is meant to update the discussion by including possible consequences of the judgements for other applicants. At the same time, the changes in the listing procedure that have recently been made by the Council, i. e. the provision auf a statement of reason, are critically examined.

While some more human rights may also be infringed, I will concentrate on the property right and, in detail, on due process rights, since they are the key to all other human rights. Without a fair and public hearing and the possibility of effective remedy, which build the basic factors that allow for judicial check, infringements are likely to remain undiscovered, uncompensated and unsolved.

⁵ Bowring, Bill (2007): The human rights implications of international listing mechanisms for 'terrorist' organisations, op. cit.

⁶ Statewatch provides an regularly updated list at www.statewatch.org/terrorlists/listchallenges.html

⁷ Court of First Instance: Organisation des Modjahedines du peuple d'Iran v Council of the European Union, Case T-228/02, Judgement of 12 December 2006, para. 165.

⁸ Comp. Court of First Instance Cases T-47/03 and T-327/03, Judgements of 11 July 2007.

⁹ "Problems under other articles for assets freezing and travel sanctions can possibly be solved within the existing system, by issuing dispensation." See Cameron (2006), op. cit.

To clarify these issues from a legal point of view, the paper focuses on the following research question: "Which human rights problems arise from the setup of terrorist lists in the EU and how can they be solved?"

Context and relevance

The relevance of a research topic becomes evident when it is embedded in its context, which in turn is determined by the problem source, the point of time and the rationale behind the research question.

The "War on Terrorism" as a whole has many times touched the very sensitive question about the degree of individual liberty that has to be given up to guarantee public safety. The various actions that have been taken in the UN and EU have raised great concern whether the limitation of the former can influence the latter. This discussion is not new: As Benjamin Franklin once said, "those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety." The tension between the need to stop terrorist activities by freezing funds and uphold human rights at the same reflects exactly the same problem. Following the politics on terrorist lists, it seems that those politicians who try to enforce safety at any price are in the majority. It is necessary to monitor these actions carefully, since "balancing legitimate national security needs against the rights of those individuals living in the nation is a true test of a nation's adherence to democratic values."

On UN level, Fassbender has written a detailed report on the lack of legal procedures available to individuals and entities targeted with sanctions. ¹² On the European level, two studies on human rights implications of international listing mechanisms have been presented by Bowring and Cameron. ¹³ Continuous monitoring is conducted by the non-profit organization Statewatch. ¹⁴

 10 Labaree, Leonard W. (ed., 1963): The Papers of Benjamin Franklin, Vol. 6, p. 242.

¹¹ Guiora, Amos (2006): Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism, p. 1. http://ssrn.com/abstract=898874

¹² Fassbender, Bardo (2006): Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter.

http://www.un.org/law/counsel/Fassbender_study.pdf

¹³ Bowring, Bill (2006) and Cameron, Ian (2006), op. cit.

¹⁴ www.statewatch.org

The problem is not new, but the legislative framework is constantly changing. In addition, the judgement of the CFI concerning PMOI's inclusion on the EU's terrorist list, the first success after thirteen dismissed applications, makes it interesting to reconsider the topic, since the Courts comments on statement of reason and the right to a fair hearing may also pave the way for other individuals or entities listed. So far, there is (at least to my knowledge) no publication that includes the substance of these judgements.

Thus, the rationale behind the paper is to remember the permanent "test of a nation's adherence to democratic values", and to mark possible mistakes in this test not with a red pen, but with academic accuracy and helpful recommendations.

Methodology

The methodology used to answer the research question will consist of desk research. With regard to the topic, I will concentrate on a number of types of literature and use them for a content analysis: Primary Data in the form of legal acts by the UN and EU, Secondary Data from political and legal scientists who work in the field. The up-to-date of the topic implicates that only to a few monographs is referred. Most information is used from journals in the field of legal and political studies. All findings will be connected to relevant case law of the European Court of Human Rights, the Court of Justice and the Court of First Instance.

Structure

The main research question ("Which human rights problems arise from the setup of terrorist lists in the EU and how can they be solved?") will be answered with the help of four sub questions. The question in chapter one is: What decisions have been taken in the UN and EU with regard to terrorist lists? The chapter is meant to give an overview of the various Resolutions, Common Positions and Regulations on the UN and EU level, which serves as an introduction for the reader.

Chapter two follows the question: How are human rights infringed by the setup of terrorist lists? In this chapter the relevant human rights are identified, it will be analysed whether the right at issue falls within the ambit of the right, and the interference is demonstrated. The consequences for individuals and organizations that are included in the list will be presented in detail, the mechanism that leads towards a listing, and the problems concerning appeal.

Since not every human right violation is per se illegal, chapter three answers the question: Can infringements be justified? Here the requirements for derogation are discussed, and it is analyzed whether any violation is allowed for national security reasons or in a case of emergency. Concerning property rights, the fair balance and necessity/proportionality test will be applied.

The fourth chapter aims to investigate the possibilities to tackle the problems. The question is: Which options exist to fill the judicial gap? In the conclusion, the main findings are summarized and recommendations on how to improve the situation with regard to human rights are given.

1. Background

Dealing with the topic of counter-terrorism is a challenge for every academic in the field: Despite the fact that terrorism is not a new phenomenon, the attacks of 11 September have increased the quantity of measures on the international, intergovernmental and national level by far. Governments and international regimes have produced an amount of legislation that makes it difficult to get an overview and to sort out the relevant texts.

The first chapter aims to explain this multi-layered framework, following the sub question: What decisions have been taken in the UN and EU with regard to terrorist lists? One may argue that such an introduction is unnecessary, since it has firstly been written many times before and is secondly well known by the reader. However, I consider a chapter about the legislative background as important. It does not mean to think little of previous works (some of them will be even quoted here), but it is supposed to add value by streamlining them with regard to the main research question. As soon as this more explanatory work is done, we can start with the analysis in the second chapter.

1.1 UN Security Council and EU powers

By naming the main actors, we will find out that legislation around terrorist lists follows a strong top-down process. On top we find the United Nations Security Council that formulates policies in its Resolutions, which are subsequently implemented directly within the Member States or within other intergovernmental organizations, in this case the European Union. In this paragraph I will describe the powers on which the UN and EU base their actions and how the top-down process works concerning UN Security Council Resolutions calling for sanction measures.

Article 1(1) of the Charter of the United Nations defines the purpose of the organization as "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,[...]". The measures are mentioned more precisely in Art. 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." It is an important question whether this article also provides for measures (or: sanctions) against individuals, since the primary actors in the system of the United Nations were supposed to be states.

In fact, ever since the UN has imposed sanctions, they were also targeted against individuals. In 1966, Art. 41 was applied for the very first time, against the white minority government of Southern Rhodesia (SC Res. 232, 16 December 1966). In the cases of Liberia (SC Res. 1343, 7 March 2001) and Côte d'Ivoire (SC Res. 1572, 15 November 2004) members of governments and their closest associates and relatives were sanctioned. Nevertheless we can observe a change in the way Art. 41 is used: Firstly, in the aforementioned sanction regimes people were still connected to a specific country (or, as in the first case, to a British colony). This connection is missing completely in Resolutions 1373 (28 September 2001) aimed 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". It appeared that those "smart

¹⁵ Birkhäuser, Noah: Sanctions of the Security Council Against Individuals – Some Human Rights Problems, p. 1. http://www.statewatch.org/terrorlists/docs/Birkhauser.PDF

sanctions" against individuals and other non-state actors are more effective then measures against whole populations (as for example in the SC Res. 661, 6 August 1990 concerning Iraq). And secondly, the quantity of measures increased by far after the end of the Cold War, since the SC could act under new unity. 16

Smart sanctions are an acknowledgment of the growing importance of the individual in international law.¹⁷ Nevertheless it is not easy to argue that their application is covered by the scope of Art. 41 of the Charter. Wessel mentions two reasons for their legality: Firstly, the list in Art. 41 is not of a limitative nature, therefore there is no reason why the Security Council should not interfere in the rights of individuals. And secondly, "practice even seems to support a tendency to make use of Art. 41 in this manner."¹⁸

Following the above mentioned top-down process, we will now have look on the European Union, where UN measures are implemented. According to the UN Charter, it is the task of its Member States to implement measures that have been decided. Art. 25 states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Art. 41 reaffirms this with a slightly different wording. In the European Union it has become common practice to implement UN obligations on the European level with the instruments that the Treaty establishing the European Community (TEC) and the TEU provide. The UN allows for such a procedure in Article 48(2) of the Charter: "Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they remembers."

The first act that follows a UN Security Council Resolution is a Common Position on the basis of Art. 15 TEU. As part of the second pillar on Common Foreign and Security Policy, such a Common Position "define[s] the approach of the Union to a particular matter of a geographical or thematic nature." (Art. 15 TEU) It requires unanimity from the EU Member States.

¹⁶ Ibid., p. 2

 ¹⁷ Bartelt, Sandra and Zeitler, Helge Elisabeth (2003): "Intelligente Sanktionen" zur
 Terrorismusbekämpfung in der EU. In: Europäische Zeitschrift für Wirtschaftsrecht 23/2003, page
 712

¹⁸ Wessel, Ramses (2004): Debating the ,Smartness' of Anti-Terrorism Sanctions: The UN Security Council and the Individual Citizen, p. 640. In: Fijnaut, C. Wouters; J. and Naert, F. (eds., 2004): Legal Instruments in the Fight Against International Terrorism. A transatlantic Dialogue.

In a second step, the Common Position instructs the European Community to act and implement the measures originally laid down in the UN Resolution.¹⁹ Article 301 TEC provides that whenever a Common Position requires the Community "to interrupt or to reduce, in part or completely, economic relations with one or more third countries," the Council acts on a proposal by the Commission. Council Regulations are direct applicable and have direct effect in the member states.

1.2 UN Security Council Counter-Terrorism measures

This paragraph aims to list the relevant UN Security Council Resolutions in order to achieve an understanding of the legal basis for terrorist lists.

The first important Resolution 1267 (1999)²⁰ is known as the Taliban Resolution. Its purpose was to freeze financial assets of and impose economic sanctions against the Taliban, since they did not follow the demands made in Resolution 1214 (1998)²¹, i. e. to "stop providing sanctuary and training for international terrorists and their organizations" and to "cooperate with efforts to bring indicted terrorists to justice." The Taliban were in particular accused to support Usama Bin Laden, who was indicted for the bombings of the United States embassies in Nairobi and Dar es Salaam on 7 August 1998. The failure of the Taliban authorities to respond to those demands was regarded as a threat to international peace and security.

In Resolution 1267 (1999) the Taliban Sanction Committee was set up, given the task to monitor the implementation of the resolution and draw up a list of persons and entities that are connected to the Taliban regime. The Committee has established its own guidelines with regard to composition, decision-making and all necessary procedures around the "consolidated list", such as inclusion, revision and delisting.²²

http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

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¹⁹ Bowring states that "for reasons of expediency" both texts – Common Position and Council Regulation – are discussed parallel and adopted simultaneous. Bowring (2006), op. cit., p. 9.

²⁰ Resolution 1267 (1999), adopted by the Security Council on 15 October 1999. http://daccessdds.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf

²¹ Resolution 1214 (1998), adopted by the Security Council on 8 December 1998. http://daccessdds.un.org/doc/UNDOC/GEN/N98/387/81/PDF/N9838781.pdf

²² Security Council Committee established pursuant to Resolution 1267 (1999): Guidelines of the Committee for the conduct of its work"

In Resolution 1333 (2000)²³, the financial assets of Usama bin Laden himself and persons and entities associated with him were frozen. In the following years it was decided to continue the imposed measures (Resolutions 1390 (2002)²⁴ and 1455 (2003)²⁵). An exception for the coverage of essential human needs was introduced with UN SC Resolution 1452 (2002).²⁶

The range of measures reached a new dimension after the attacks of 11 September 2001. In Resolution 1373(2001)²⁷, all limitations with regard to territory, regime, state or time were eliminated. The Resolution states in paragraph 1 c that all states shall "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." Neither the word Taliban nor Usama bin Laden are mentioned in the text. Under paragraph 6, a Counter-Terrorism Committee (CTC) is established with the purpose to monitor the implementation of the Resolution. The CTC does not maintain an own list, but aims "to increase the ability of States to fight terrorism". ²⁸

The most important difference between the two sanction regimes is the fact that in UN SC Resolution 1390 a list of groups and entities is already included, while UN SC Resolution 1373 demands members states to set up and update own lists. This has an impact on the implementation and design of EU measures.

1.3 Implementation in the European Union

The EU has responded to every UN SC Resolution quickly and implemented them by taking decisions which oblige its member states to take action.

The 11 September Resolution (UN SC Resolution 1373(2001)) has been implemented by adopting Common Position 2001/930/CFSP and 2001/931/CFSP on 27 December 2001. The first states that funds and financial assets of persons

²³ Resolution 1333 (2000), adopted by the Security Council on 19 December 2000. http://daccessdds.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf

Resolution 1452 (2002), adopted by the Security Council on 20 December 2002. http://daccessdds.un.org/doc/UNDOC/GEN/N02/751/64/PDF/N0275164.pdf

²⁸ UN Security Council Counter-Terrorism Committee. http://www.un.org/sc/ctc

²⁴ Resolution 1390 (2002), adopted by the Security Council on 16 January 2002. http://daccessdds.un.org/doc/UNDOC/GEN/N02/216/02/PDF/N0221602.pdf

²⁵ Resolution 1455 (2003), adopted by the Security Council on 17 January 2003. http://daccessdds.un.org/doc/UNDOC/GEN/N03/214/07/PDF/N0321407.pdf

²⁷ Resolution 1373 (2001), adopted by the Security Council on 28 September 2001. http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf

and entities who commit, or attempt to commit terrorist acts, shall be frozen (Article 2), that shelter for those shall be denied (Article 6 and 7), that those shall be brought to justice (Article 8) and that effective border checks shall prevent their movement (Article 10). The latter describes the procedure how freezing is conducted (known as the "clearing house procedure" and includes a list of persons and entities in the annex. In Article 1 it defines what is meant with the words "terrorist" and "terrorist act". It then describes how persons or entities are put on the list. Since this is a crucial point for the following chapters, the procedure is worth being quoted in length:

"The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file 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 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. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.." (Article 1.4)

A "competent authority" is defined in the same paragraph as "a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area." The names on the list shall be reviewed at least every six month to ensure that it is justified to keep them on the list. (Article 1.6) This is done by means of new Common Positions of the CFSP Council, the most recent one at time of writing is Common Position 2007/448/CFSP, adopted on 27 June 2007.

The Common Positions, in its turn, instruct the Council to act. On the same day, the Council adopted Regulation 2580/2001 to implement Article 2 of CFSP Common Position 931. An addition has been made concerning financial assets which are necessary to cover essential human needs. Authorities may grant a specific authorization that allows natural persons on the list to use parts of the frozen money for foodstuffs, medicines, the rent or mortgage for the family

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 $^{^{\}rm 29}$ Bartelt, Sandra et. al. (2003): op. cit., p. 713.

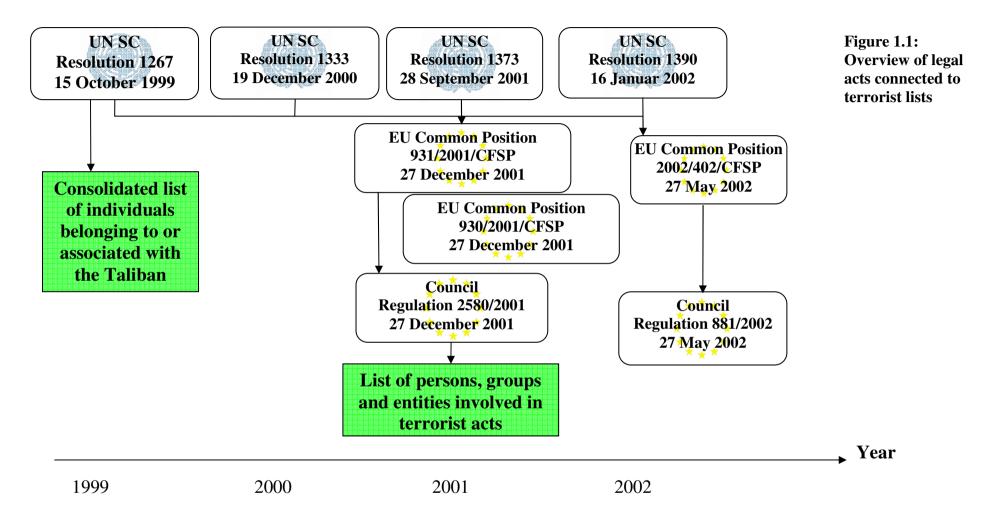
residence and fees and charges concerning medical treatment of members of that family. (Article 5.1)

The Taliban sanction regime, consisting of UN SC Resolutions 1267, 1333 and 1390, has been implemented by adopting Common Position 2002/402/CFSP on 27 May 2002.³⁰ The EC implemented the Common Position by adopting Regulation 881/2002 at the same day. The restrictive measures are the same as laid down in the UN SC Resolution 1373. In the annex of the regulation a list with suspects is included, which represents the decisions made by the Taliban Sanction Committee on UN level. Any changes or amendments on the list are only made after a decision by the Committee and are then carried out by the Commission. (Article 7)

1.4 Subconclusion

The aim of the first chapter was to show, which decisions have been taken in the UN and EU with regard to terrorist lists. It became clear that action follows a topdown process: The UN adopts on the basis of Art. 41 of its Charter Resolutions that include measures against individuals. It calls upon member states to implement the Resolutions, which is done on Community level for the EU member states. Following this process, two big sanction regimes have been installed since 1999: The subject of the first one, consisting of UN SC Resolution 1267, 1333 and 1390, is Usama bin Laden, people that are connected with him, and the Taliban regime. A list of persons, groups and entities is set up and maintained on the UN level by the Taliban Sanction Committee. The second sanction regime, installed with UN SC Resolution 1373, has a much wider scope: Subjects are all persons who commit or attempt to commit terrorist acts. The EU has implemented both sanction regimes. For the latter, it maintains its own list, following the clearing house procedure described in Common Position 2001/931/CFSP. The restrictive measures are the same for both regimes: funds and financial assets of persons, groups and entities on the lists are frozen to prevent the financing of terrorist acts. An overview of the most important legal acts connected to terrorist lists is provided on the following page (Figure 1.1).

 $^{^{30}}$ Common Position 2002/402/CFSP repeals Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP.



Note: For lack of space not all amending and repealing acts have been included.

Source: Own figure

2. Infringement of human rights

The above mentioned measures have an enormous impact on the life of people that are put on the lists. Practically, in the modern world it is almost impossible to live a normal life without a bank account. For such extensive decisions, as for every other decision that is made by a state's authority, the lawfulness has to be guaranteed. The measures that are discussed here have caused concern with regard to their lawfulness, since they touch upon some of peoples fundamental rights that are laid down in the European Convention of Human Rights and the Universal Declaration of Human Rights. Therefore the subquestion in this chapter is: How are human rights infringed by the setup of terrorist lists? To answer this question, three steps are necessary: The relevant rights have to be identified, it has to be analysed whether the inclusion on the list falls within the ambit of the right, and it has to be ascertained that the right in question has been interfered with. The first step is done in paragraph 2.1, afterwards each paragraph deals with one specific right. The logically following question, whether the interference is justified, is answered in chapter three.

2.1 Protection of human rights in the UN and EU legal order

Human Rights derive from a number of sources on the international and regional level. They determine, in slightly different wording, the protection of the individual against state interference.

On top rule the United Nations themselves, among whose purposes we find the promotion of respect for human rights and fundamental freedoms (UN Charter Art. 1.3). The preamble states that the peoples of the United Nations have declared their determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." Since the founder of the UN did not expect that the organization would ever interfere with the rights and freedoms of individuals, they did not make human rights directly binding on the UN. Accordingly, binding rules in the Charter are missing.³¹ What has been formulated in Art. 13 UN Charter (UNC) in 1945 was

³¹ Fassbender, Bardo (2006): Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and

more a vision that has been concretized in the following years by the work of the UN, the General Assembly and the Commission on Human Rights. As a result, a recognized body of human rights in international law developed, of which the Universal Declaration of Human Rights and the two Human Rights Covenants – International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) – are the most important. Today, the UN and its organs have to respect human rights and fundamental freedoms of individuals as much as possible. If they refused to do so, the UN violated the maxim of *venire contra factum proprium*³², which has become a general principle of law in Art. 38 para. 1 c of the International Court of Justice (ICJ) Statute. Since the wording of Art. 1.3 is very vague, the three above mentioned documents serve as a relevant standard.³³

Unfortunately, the legal situation is not that easy. Article 103 UNC states that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Does this mean that Charter obligations prevail over all other norms of general international law? Do states have to implement a Security Council Resolution, even if it clearly breaks human rights? Indeed, it is a strong opinion that the UNC prevails over other general international law, since "the binding of Security Council decisions to all provisions of general international law would undermine the meaning of Articles 25 and 103 and render the measures of the Council toothless." Nevertheless there are some norms that prevail over all other norms, even the UNC. Those fundamental principles of international law, called *jus cogens* norms, cannot be violated by any state or party. It is subject of debate, whether the rights at issue are part of the *jus cogens* body. This question will be carefully examined for each right in the following subparagraphs.

Concerning regional human right treaties in the European Union, it must be noted that the EU is not a party to any human rights treaty. Nevertheless, in Article 6(2) TEU reference is made to the European Convention for the Protection of Human

entities targeted with sanctions under Chapter VII of the UN Charter, p. 25.

http://www.un.org/law/counsel/Fassbender_study.pdf

³² Ibid., p. 23: No one is allowed to act contrary to, or inconsistent with, one's own behaviour. ³³ Ibid., p. 26.

³⁴ Birkhäuser, Noah: op. cit., p. 13.

Rights: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common in the Member States, as general principles of Community law." The reference does not mean that the EU is either legally bound by the individual provisions of the ECHR, or by the ECtHR's interpretation. But in a number of cases the ECJ has taken into account case law of the ECtHR and thereby made clear that the ECHR has "special significance" for the protection of human rights in the EU.³⁵ In 1974 the Court decided that "fundamental rights form part of the general principles of Community law that it is required to uphold, and that in safeguarding such rights it should be guided by the constitutional traditions of the Member States." In 1991, the Court held that it "draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories" and that therefore "the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed."³⁶ Thanks to the ECJ, today fundamental rights form a part of the general principles of EU law and are equivalent to primary Community law.³⁷

2.2 Freezing versus the right to own property

Article 1 ECHR Protocol 1 states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for

³⁵ Bultermann, Mielle (2007): Multilevel economic regulation and the EC protection of fundamental rights, p. 2. In: A. Føllesdal, R.A. Wessel and J. Wouters (Eds.): Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes (forthcoming).

³⁶ ECJ: Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, Case C-260/89, Judgment of 18 June 1991, para. 41.

³⁷ The Treaty establishing a Constitution for Europe would have improved the institutional framework for the protection of fundamental rights in the EU, since it would have included the Charter of Fundamental Rights. According to a Report by the E.U. Network of Independent Experts on Fundamental Rights, "The Charter is the visible manifestation of what the European Union has achieved in the area of fundamental rights. In this respect, it can contribute to legal certainty." Since the entry into force of the Constitution is unclear, the legal effect of the Charter will not be part of this study. (E.U. Network of Experts on Fundamental Rights (2005): Report on the Situation of fundamental rights in the European Union in 2004, p. 11. http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2004_en.pdf)

by law and by the general principles of international law." Article 17 UDHR uses a slightly different wording. Apart from that, Art. 1 ECHR Protocol 1 allows a state "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." (Art. 1 ECHR Protocol 1)

The scope of this Article is wide. In a judgement from 1979, the ECtHR has said, that "Article 1 is in substance guaranteeing the right to property." Therefore we will, without any further elaboration, assume that money which is held in bank accounts constitutes a "property right" and falls under the ambit of the quoted article.

Although it seems easy to prove that freezing of financial assets means de facto a deprivation of property, the ECtHR has specified that a confiscation of property used in crimes is not a deprivation, but rather a "control on use", which is covered by the second paragraph of Article 1.³⁹ This interpretation means that a state is allowed to freeze financial assets when evidence is at hand that the owner of the money is a criminal or, in the case of terrorist lists, a terrorist.

The Court of First Instance followed this interpretation in the Yusuf Case. Ahmed Ali Yusuf had requested annulment of Council Regulations that impose restrictive measures directed against persons and entities associated with Usama Bin Laden and the Al-Qaeda network and the Taliban. In its judgement, the Court stated that the freezing was not a confiscation, but "a precautionary measure which (...) does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof." This interpretation sounds very technical and neglects the fact that for the applicant the effect of the "precautionary measure" is the same as it would be in the case of a confiscation. In addition, the UN has requested a working group to think about possibilities to establish an international fund to compensate victims of terrorist acts and their families, which might be financed through money that has been frozen. Thus it is

³⁹ European Court of Human Rights: Agosi v. UK, Appl. No. 9118/80, Judgement of 24 October 1986, para. 51.

⁴¹ Ibid, para. 299.

³⁸ Marckx v. Belgium, 13 June 1979, para. 63. Quoted in: OSCE and UN (2007): Expert Workshop on Human Rights and International Co-operation in Counter-Terrorism, p. 89. http://www.statewatch.org/terrorlists/OSCE-UN-feb-2007.pdf

⁴⁰ Court of First Instance: Yusuf and Al Barakaat International Foundation v Council and Commission, Case T-306/01, Judgement of 21 September 2005.

likely that at least parts of the money are actually irrecoverable confiscated. Insofar, Cameron is right when he writes that "the content of the property right is relatively weak. Whether or not a state measure, or combination of measures, controlling the use of property is regarded as being sufficiently serious to constitute a denial of peaceful enjoyment of possessions or a deprivation of property is a matter of degree. Where it falls short of a denial or deprivation the measure is judged under the looser requirements of paragraph (2) [of Article 1 ECHR Protocol 1]."

In the same case, the Court made some very interesting comments concerning the question whether the right to own property is a jus cogens norms. It denied to grant this status for two reasons: Firstly, the UN SC Resolution 1452(2002), implemented by Council Regulation 561/2003, provides the possibility to declare the freezing of funds inapplicable for money that is needed to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges. This provision, following the Courts argumentation, "clearly shows that it is neither the purpose nor the effect of that measure to submit those persons to inhuman or degrading treatment."⁴³ Secondly, the Court refers to Art. 17(2) UDHR that states: "[n]o one shall be arbitrarily deprived of his property". Thus, only an arbitrary deprivation might be regarded being contrary to jus cogens. Since the freezing of financial assets is the practical consequence of a Resolution of the UN Security Council and "it is appropriate to stress the importance of the fight against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations"⁴⁴, the measure can not be considered being arbitrary and therefore not violating a jus cogens norm.

The judges conclude that the objective of the measure – to combat in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts – is "of fundamental public interest for the international community" and therefore covered by the exemption mentioned in Art. 1 ECHR Protocol 1.

⁴² Cameron, Ian (2006): op. cit., p. 16.

⁴³ Court of First Instance: Case T-306/01, op. cit., para. 291.

⁴⁴ Ibid., para. 296.

⁴⁵ Ibid., para. 298.

Unlike the accustomed elaborateness of the Courts judgements, the conclusion remains nonproven. This is astonishing, as the ECJ, as well as the ECtHR, have made clear that a test of proportionality between goal and infringement is in any case necessary. This test has to prove the necessity of the measure and its capability to fulfil the expected aim. It will therefore be conducted in Chapter 3.1 of this paper.

2.3 Inclusion procedure versus the right to a fair trial

Article 6 ECHR states: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." It continues that everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law. The corresponding passages in the UDHR can be found in Articles 10 and 11. The ICCPR provides in Article 14(1) that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

This right applies in cases where a criminal charge against the suspect has been imposed. But is the freezing of assets a criminal charge? Unfortunately, the Human Rights Committee does not provide an interpretation of the term. But as the wording is similar to Article 6 ECHR, one might look at the case law of the ECtHR. In Lutz v. Germany it stated: "To apply in virtue of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention [...] or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the "criminal" sphere." In Lauko v. Slovakia, the Court established a three-step-test to evaluate whether the term applies: Firstly, it has to be ascertained whether or not the text defining the offence belongs, in the legal system of the respondent State, to the criminal law. Secondly, the nature of the

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⁴⁶ EUCtHR: Case Lutz v. Germany, Application No 9912/82, Judgement of 25 August 1987, para. 55.

offence and, thirdly, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined.⁴⁷

The 1267 Committee and the Monitor Team have not accepted that the freezing of assets has the character of a criminal charge, but insist that it is a purely administrative measure. 48 The reasons for not regarding blacklisting as a criminal charge are firstly that many states have not yet criminalized acts of international terrorism and, secondly, that the relevant evidence against terrorists might lie outside a State's jurisdiction or not be admissible in criminal cases because it is classified.49

Whether, in the end, the measure fulfils the requirements of a "criminal charge", is debateable. On the one hand, the nature and degree of severity, as demanded by the ECtHR, brings the measure very well in the "criminal sphere", thus one might affirm the question.⁵⁰ The UN Human Rights Council itself states that "sanctions against individuals clearly have a punitive character."51

On the other hand, Cameron mentions a case where the ECtHR has ruled that "proceedings for the confiscation of the assets of a convicted criminal (as presumed earnings from drug trafficking) was not the "determination of a criminal charge". One can argue thus that as freezing, being a lesser measure than confiscation, should not be covered either."52 If we follow this argumentation, Article 6 ECHR may only be applied since disputes concerning property count as a civil right, for which the right to a fair trial is also guaranteed.

To sum up the findings, it can be said that in the case of freezing financial assets there is – no matter whether following the previous or the latter argumentation – a right to a fair trial as described in Article 6 ECHR. To assess the question whether the right is infringed, it is necessary to show how persons and entities are put on

⁴⁷comp. ECtHR; Case Lauko v. Slovakia, Appl. No. 4/1998/907/1119, Judgement of 2 September 1998, para. 56.

⁴⁸ United Nations Security Council (2005): Letter dated 2 September 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, S/2005/572, para. 41.

http://daccessdds.un.org/doc/UNDOC/GEN/N05/407/94/PDF/N0540794.pdf

⁴⁹ Ibid, para. 40.

⁵⁰ Comp. Wessel, Ramses (2004): op. cit., p. 19.

⁵¹ UN Human Rights Council (2007): Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, p. 10. http://daccessdds.un.org/doc/UNDOC/GEN/G07/117/52/PDF/G0711752.pdf ⁵² ECtHR: Case Phillips v. UK, No. 41087/98, Judgement of 5 July 2001, quoted in Cameron, Ian (2006): op. cit., p. 10.

the list and whether the involved institution complies with the in Article 6 ECHR mentioned characteristics. Since the procedure for the EU and UN lists is different, both will be described in separate paragraphs.

Concerning the list established in UN SC Resolution 1267 (1999) and directed against individuals and entities belonging to, or associated with, Al-Qaeda and the Taliban, the relevant institution is the 1267 Committee, established under UN SC Resolution 1267 Article 6. It consists of all members of the Security Council and has the task "to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization". In UN SC Resolution 1390 (2002) the work of the committee is described more precise. It has to provide "periodic reports to the Council on information submitted to the Committee regarding the implementation of this resolution" (Article 5 sub. c), and "to make information it considers relevant, including the list [...], publicly available through appropriate media" (Article 5 sub. e). For its detailed mode of operation, the Committee was requested to set up guidelines and criteria that are necessary to implement the measures mentioned in the resolution. (Article 5 sub. d)

These guidelines have been adopted on 7 November 2002⁵⁴ and include provisions for the composition of the Committee, their meetings, decision-making procedure and the consolidated list, including updating, delisting and the possibility to grant exemptions as introduced in UN SC Resolution 1452 (2002). The relevant facts for this paper are: The committee meets in closed sessions (Article 3 sub. b) and decides by consensus of its members (Article 4 sub. a). The only people that may by invited to attend the meetings are members of the UN, representatives of the member states, members of the Secretariat, the Analytical Support and Sanctions Monitoring Team or any other person that might supply expertise or information. (Article 3 sub. b/c)

Basically, the Resolutions and the quoted guidelines are the only official sources that provide information about the mode of operation of the 1267 Committee. Such scarce knowledge raises more questions than it is giving answers, and

⁵³ UN SC Resolution 1333 (2000), Article 8 sub. c.

⁵⁴ In the meanwhile, four amendments have been made. The newest version at time of writing was adopted at 12 February 2007. http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

regarding the compliance of the procedure with Article 6 ECHR doubts are obviously appropriate.

Firstly, the fact that the Committee works in closed sessions contradicts the requirement of a "public hearing" mentioned in Article 6 ECHR. After the decision, no public account is given of the work, and the reasons on which the decision is based are not disclosed.⁵⁵ The individual is merely informed about the measures by receiving a copy of the publicly releasable portion of the statement of case. (1267 Guidelines Article 6 sub. h) It is neither allowed to attend the session, nor is the individual invited to defend himself personally or by a representative.

Secondly, it is highly questionable whether the Committee is competent to evaluate the reasons why an individual is set on the list. Unlike other courts, which are conducting a hearing of evidence and thereby gathering facts and information that form the basis of their judgement, the Committee acts purely on request by other states. Such a request consists of a cover sheet attached to the Guidelines (see Annex 1) and a statement of case, which "should provide as much detail as possible on the basis(es) for listing [...], including: (1) specific information supporting the association or activities alleged; (2) the nature of the information (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.) and (3) supporting information or documents that can be provided."⁵⁶

As far as it is known, during the Committee's sessions it has almost never been asked what serves as the basis for a persons' listing. In the rare cases this question was asked, the answer was that "the information is transmitted by a reliable source, which, as well as its content, can not be passed on due to national security reasons." It seems evident that much of the information that leads to inclusion on the list comes from intelligence agencies.

Thirdly, the Committee does not fulfil the requirement to be an "independent and impartial tribunal", since the separation of powers, a fundamental element of the *Rechtsstaat*, is violated. By "legislating by list", the Security Council acts as

⁵⁶ Cover Sheet for Member State Submissions to the Committee, attached to the Guidelines of the 1267 Committee, op. cit., p. 10.

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⁵⁵ Comp. Cannizzaro, Enzo (2006): A Machiavellian Moment? The UN Security Council and the Rule of Law. In: International Organizations Law Review, Vol. 3, 2006, p. 199.

⁵⁷ Biehler, Gernot (2003): Individuelle Sanktionen der Vereinten Nationen und Grundrechte. In: Archiv des Völkerrechts, Vol. 41, 2003, p. 172.

legislature, judiciary and executive at the same time.⁵⁸ One might imagine that representatives attending the meetings of the 1267 Committee are subject to great political pressure to show results. This pressure clearly contravenes the standard of an "independent and impartial tribunal." Cameron comments, that "for a lawyer trained in the idea of the *Rechtsstaat*, blacklisting strikes at such a basic level of his or her understanding of what *is* law that it calls into question why it should be obeyed."⁵⁹

The procedure within the European Union to implement UN SC Resolution 1373 is somewhat different, but poses, as we will see, similar problems. The basis on which an individual or an organization is put on the list is defined in Article 1(4) of Common Position 2001/931/CFSP: "The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file 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 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. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list."

Concerning the exact procedure, even less details are available than in the case of the 1267 Committee. On 15 October 2001, a working group on cooperation on terrorism, located under the Home Affairs Council, was mandated by the Committee of Permanent Representatives (COREPER) to draft a list of terrorist organisations. Working groups are normally standard meetings of mid-ranking EU diplomats, which pre-agree EU decisions before they are adopted by EU ambassadors and then decided by EU ministers. However, this working group (also known as the "clearing house") does not appear in any EU listings, and it is not known how often they meet. With regard to any amendment that is made after the first list was drafted, the initiative comes from a member state of the EU. Two weeks before their meeting, the proposal is handed out to all members of the

⁵⁸ Cameron, Ian (2006): op. cit., p. 8.

⁵⁹ Ibid., p. 9

⁶⁰ The following paragraph is a summary from Cameron, Ian (2003): op. cit., pp. 234-235.

⁶¹ The EU Observer writes that the interval of meetings may be "every six month or so". EU Observer (13 June 2007): EU's secretive counter-terror group to face scrutiny. http://euobserver.com/9/24266

working group. It is then discussed with relevant officials from the interior and foreign ministry, anti-terror experts from the police, security and intelligence services as well as the military. Only when agreement is reached, the formal decision is taken in the Council or in COREPER by written procedure. The decision is taken by unanimity, which means that any state can object to a proposal.

Similar to the 1267 Committee, the "clearing house" procedure raises serious questions concerning the lawfulness of its acts. The working group decides behind closed doors and does not make public what has been the basis for its decisions. The concerned individual is neither allowed nor invited to attend the meeting in order to defend himself or through a representative. This procedure is contradictory to the requirements of a "fair hearing" as guaranteed by EHRC Article 6.

In December 2006, the Court of First Instance ruled for the very first time in favour of an appeal by the People's Mujahedeen of Iran against their inclusion on the list. PMOI, a Socialist political party that wants to replace Iran's theocracy with a democracy, had been put on the list on 2 May 2002, when the Council adopted Common Position 2002/340/CFSP. PMOI claimed that the Court should annul Common Positions 2002/340 and 2002/462 and Council Decision 2002/460 and declare it inapplicable in respect of it. Concerning the annulment of the Common Positions, the Court referred to its previous judgements (Segi and Others v Council) and dismissed the action as "clearly inadmissible and, in part, clearly unfounded".62 The - until this point of time - unique and therefore highly interesting part of the judgement is that the applicant was indeed successful with its claim to declare the Council Decision that put him on the list inapplicable insofar as it concerns his person. The Court found that the right to a fair hearing, as a matter of principle, is "fully applicable in the context of the adoption of a decision to freeze funds". 63 According to the Court, this right comprises two parts: "First, the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of the evidence adduced'). Second, he must be afforded the opportunity effectively to make known his view on that

⁶² Court of First Instance: Case T-228/02, op. cit., para. 45. The Courts competences are examined in more detail in chapter 4.3.

⁶³ Ibid., para. 108.

evidence ('hearing')."⁶⁴ Both parts are not maintained in the inclusion procedure: As described above, the Common Position 931/2001/CFSP and Regulation 2580/2001 do not provide for a procedure for notification of the evidence or for a hearing.

Besides this, the Court found that it is a duty of the Council to provide a statement of reason. The purpose of such a statement of reason is "to provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested before the Community Courts and, second, to enable the Community judicature to review the lawfulness of the decision." Since the Council failed to state reason, the applicant has not been placed in a position to avail itself of its right of action before the Court. According to the Court, such failure is viewed in the case-law as prejudicing the right to a fair hearing.

Even after the oral hearings, the Court found itself unable to review the lawfulness of the decision, since the representatives of the Council and the United Kingdom did not answer the question which national decision by a competent authority, as required by Article 1(4) of Common Position 2001/931, was the basis on which the contested decision was adopted.⁶⁷

Based on those three findings, the Court declared the annulment of the contested decision, in so far as it concerns the applicant. That means that it was clearly a judgement against the decision to include PMOI in the EU terrorist list, since its right to a fair hearing was violated.

It was not a ruling against the EU legislation behind, although it was rightly expected by Statewatch that this judgement "paves the way for other groups listed by the EU on the basis of a dubious decision to challenge their own listing". ⁶⁸ On 11 July 2007 the Court, following a similar argumentation, decided that the inclusion of Jose Mario Sison and the Stichting al-Aqsa was unlawful. ⁶⁹ In 1995, the Dutch Raad van State found that Jose Maria Sison, who has Filipino

⁶⁴ Ibid., para. 93.

⁶⁵ Ibid., para 138.

⁶⁶ Ibid., para 165.

⁶⁷ Ibid., para 171.

⁶⁸ Statewatch: Successful challenge to EU "terrorist" list by PMOI.

http://www.statewatch.org/news/2007/jan/04ecj-pmoi.htm

⁶⁹ Court of First Instance: Jose Maria Sison v. Council of the European Union, Case T-47/03 and Stichting Al-Aqsa v. Council of the European Union, T-327/03, Judgements of 11 July 2007.

nationality and resides in the Netherlands, was the head and chairman of the Communist Party of the Philippines. Holding this position, he was also found to be the head of the military wing of this party, known as the NPA, which was responsible for a large number of terrorist acts in the Philippines. On 28 October 2002, the applicant was put on the terrorist list by Common Position 2002/847/CFSP. The Stichting al-Aqsa describes itself as an "Islamic social welfare institution." Governed by Dutch law, it gives financial support to several organizations in Israel, the West Bank and the Gaza Strip in order to alleviate the humanitarian emergencies in these areas. In 2003, the Minister for Foreign Affairs of the Netherlands adopted the *Sanctieregeling Terrorisme 2003*, which ordered the freezing of Al-Aqsa's funds and financial assets. It was holds that the organization supported terrorism in the Near East, especially Hamas. Subsequentely, Al-Aqsa was included in the EU terrorist lists by means of a Common Position and a Council Decision on 27 June 2003.

The reasons for the judgement are similar in both cases and follow the approach the Court had taken in the case of PMOI: In the absence of any statement of reason, the Court found that it is unable to review the lawfulness of this decision. In combination with the fact that the decision was adopted "in the course of a procedure during which the applicant's rights of the defence were not observed", the Court decided that the decision had to be annulled as far as it concerns the applicant.⁷¹

Those drastic judgements, which clearly approve the unlawfulness of the procedure concerning listing in the EU and, at the same time, show that the Court is willing to take human rights into account when sanctions are based on EU lists, forced the Council to react. In a short statement made at the day of the judgement it announced: "The Council intends to provide a statement of reasons to each person and entity subject to the asset freeze, wherever that is feasible, and to establish a clearer and more transparent procedure for allowing listed persons and entities to request that their case be re-considered." Indeed, at the COREPER meeting at 31 October 2006, the idea to send a statement of reason to every

⁷⁰ CFI Press Release No. 47/07, 11 July 2007: Judgements of the Court of First Instance in Cases T-47/03 and T-327/03. http://curia.europa.eu/en/actu/communiques/cp07/aff/cp070047en.pdf

⁷¹ Court of First Instance: Case T-47/03, op. cit., para. 226 and 227.

⁷² Bowring, Bill: 'Terrorist': Flag of Convenience?, p. 27. In: Socialist Lawyer, April 2007, pp.24-27.

individual or group on the list was endorsed. 73 Until May 2007, the Council sent such statements to all 104 individuals and entities on the list in order to comply with the judgement. Afterwards it intended to wait "to see which of the parties appeal before reviewing who should stay on the register". ⁷⁴ Declassified versions of those statements of reasons are publicly available. In the case of PMOI, it refers to attacks against oil installations during 1993, the assassination of the deputy chief of the Iranian Armed Forces General Staff, Ali Sayyad Shirazi, in 1999, and "further hit-and-run raids against the Iranian military" in 2000 and 2001.⁷⁵ According to the Council, these acts fall within the provision of Article 1(3) of Common Position 2001/931/CFSP ("seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation"). The statement further refers to a decision by the UK Secretary of State to proscribe PMOI as an organisation concerned in terrorism under the UK Terrorism Act 2000. This shall be proof that a competent authority, as required by Article 1(4) Common Position 2001/931/CFSP, has taken the decision.

In the statement of reason that was sent to the advocate of Mr. Sison, the accusations concerning his responsibility for the terrorist attacks conducted by the military wing of the Philippine Communist Party are repeated. Reference is made to the decision of the Raad van State to refuse the status of asylum seeker for the same reasons, to the decision of the Dutch Foreign Affairs and the Minister of Finance to freeze all means of Sison and his party, and to the decision of the American government to name him a "Specially Designated Global Terrorist" pursuant to US Executive Order. Following the statement, all of them are competent authorities as required by Article 1(4) Common Position 2001/931/CFSP.

Both victims of the listing, PMOI and Sison, remain on the list, since the Council argues it complies with the judgement by sending the statement of reason to them.

⁷³ Council of the European Union (2007): Fight against the financing of terrorism. Doc. No. 10826/1/07. http://consilium.eu.int/uedocs/cmsUpload/st10826-re01en07.pdf

EU Observer: Iran mujahidin to challenge EU terror list. 12 May 2007. Archived by http://www.ncr-iran.org/content/view/3429/167/

⁷⁵ Council of the European Union: Follow-up to the judgment of the Court of First Instance in case T-228/02 - OMPI v. Council. http://register.consilium.europa.eu/pdf/en/07/st05/st05418-re03.en07.pdf

⁷⁶ Council of the European Union: Letter to Schoolplein Advocaten. http://www.defendsison.be/pages_php/0705301.php

Since at least PMOI does not agree with the Council's decision, it has recently submitted a new case to the European Court of Justice. PMOI states that the Council did not follow its obligation from the previous judgement to remove its name from the list, and furthermore has not followed the obligation to review the list on a regular basis, at least every six month.⁷⁷

Some more changes have been made to the listing mechanism in the aftermath of the PMOI and Sison judgements. From now on, a formal Council working party is charged with the implementation of Common Position 2001/931/CFSP ("Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism", in short CP 931 WP). A draft mandate and practical arrangements have been developed, that come close to the Guidelines of the 1267 Committee.⁷⁸ It described, how proposals for designations shall be handled, how the statement of reason must look like and how a review procedure is to be conducted.

The question is, whether these changes may dispel the Court's doubts concerning the lawfulness of he Council's decisions. A partial improvement of the procedure can not be denied. It is, for instance, now possible for the Court to find out which decision by which competent authority is the basis for listing. This insufficiency had been criticized in the PMOI judgement. On the other hand, it is not clear whether the given information in the statement of reason will be regarded as sufficient for a judicial review of the decision by the Court. The statement of reason for Mr. Sison does not consist of relevant new details that have not been revealed during the hearing. Unlike in the PMOI case, the "competent authorities" have been known before. The foremost problem was that the Court assumed that other matters on file exist, which are confidential and not made public. Those matters, if they exist, have, unsurprisingly, still not been made public. Therefore it would be astonishing, if the Court changed its opinion about its ability to review the lawfulness of the decision.

⁷⁷ See note in Official Journal of the European Union, C 140/43, 23 June 2007.

⁷⁸ Council of the European Union: Fight against the financing of terrorism, op. cit., pp. 4-13.

⁷⁹ See CFI Case T-228/02, op. cit., para. 171.

⁸⁰ Ibid., para. 223.

2.4 Possibilities of appeal versus the right to an effective remedy

Article 13 ECHR states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The equivalent in the UDHR is Article 8: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

The text makes clear that the right to an effective remedy is a subsidiary article, which can only be demanded when another right mentioned in the Convention is violated. At this point it is interesting to make a small comment on the "Treaty establishing a Constitution for Europe" (CT), where the scope of this right has been extended: The relevant Article II-107(1) CT provides for a judicial implementation of *all* rights guaranteed by Union law.⁸¹

From the jurisprudence of the ECtHR, some principles emerge on the interpretation of Article 13 ECHR. Those include:

- "(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress [...];
- (b) the authority referred to in Article 13 [...]may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective;
- (c) although no single remedy may itself entirely satisfy the requirements of Article 13 [...], the aggregate of remedies provided for under domestic law may do so [...];
- (d) neither Article 13 [...] nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention for example, by incorporating the Convention into domestic law [...].

⁸¹ Pabel, Katharina (2005): The Right to an Effective Remedy Pursuant to Art. II-107 para. 1 of the Constitutional Treaty, p. 1603. In: German Law Journal Vol. 6 No. 11, 1 November 2005, pp. 1601-1616.

It follows from the last-mentioned principle that the application of Article 13 [...] in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 (art. 1) directly to secure to anyone within its jurisdiction the rights and freedoms set out in section I [...].",82

Since the Court has ruled that rights guaranteed in the ECHR have been infringed, it is, without any further elaboration, assumed that the listing falls within the ambit of the right to an effective remedy. Therefore, those persons that are subject of listing are entitled to enjoy the right to an effective remedy following the principles laid down by the ECtHR. In general, one might think about different levels where this right can be claimed: 1. Before a national court, since the decision that builds the basis for a listing is made by a national authority. As soon as this national decision would be contradicted, the legal basis for the decision of the Council would be missing, and the name would have to be removed from the list. 2. Before the ECtHR, since it is the institution to enforce the rights guaranteed in the ECHR. 3. Before the ECJ, since it is a Council decision and therefore community law that violates the rights of the individual. These courts build the judicial triangle shown in Figure 2.1. 4. It is, at least in theory and neglecting the judicial reality, logical to address claims directly to the UN SC (or its subcommittee), since the UN SC Resolutions are the basis for the implementation measures in the EU.

2.4.1 Challenging freezing before the CFI and ECJ

At first, we will have a look to the possibilities for remedy for those subject to the Taliban sanction regime before the CFI and ECJ. A number of cases have been submitted to the CFI, and all of them are facing great difficulties with regard to access to justice. The leading case for this matter is Ahmed Ali Yusuf and Al barakaat International Foundation v. Council and Commission.⁸³ The names of Yusuf and the al barakaat International Foundation have been put on the terrorist list by the Sanction Committee on 9 November 2001 for the reason of their

⁸² ECtHR: Silver and others v. The United Kingdom, Appl. No. 5947/72 et. al., Judgement of 25 March 1983, para. 113. ⁸³ CFI: Case T-306/01, op. cit.

alleged association with the regime of the Taliban in Afghanistan, which is denied by the applicant. Subsequently, the European Commission amended its Regulation 467/2001 and added the names to the annex. In the application, Yusuf claimed that the Court should annul this regulation and declare it inapplicable for two reasons: Firstly, the Community had no competence to adopt the regulation, and secondly, the fundamental rights of the applicant, for instance their right of access to justice, had been infringed. St

In the judgement of 21 September 2005, the problems of persons who find themselves on the UN list and want to challenge this listing became apparent. Firstly, the Court ruled that the EC had very well the competence to adopt the contested regulation on the basis of Articles 60, 301 and 308 EC. As Eckes mentions, this conclusion is contested, but that part of the judgement is only of minor importance for this paper. 86 More interestingly, the Court limited its judicial review to the question, whether any jus cogens norm had been violated. The Court explained this limitation with the existence of the UN SC Resolution which was the basis for the contested regulation: "Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions."87 However, the Court has no authority to call in question, whether directly or indirectly, the lawfulness of an UN SC Resolution in the light of Community law. 88 The only thing it can do is "to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible."89 The Court thus recognizes UN law giving precedence over any Community obligation.

⁸⁴ Ibid., para. 81.

⁸⁵ Ibid,. Para 78.

⁸⁶ Eckes, Christina (2007): Trapped between courts or How terrorist suspects lost their right to a remedy. In: In: A. Føllesdal, R.A. Wessel and J. Wouters (Eds.), op. cit.

⁸⁷ CFI: Case T-306/01, op. cit., para. 266.

⁸⁸ Ibid., para 276.

⁸⁹ Ibid., para 277.

This restriction means a serious limitation of the sanctioned individual's possibility for a meaningful judicial remedy, and therefore the judgement has been criticised in the academic sphere. The first strand of critic concerns the Courts statement about the precedence to UN law over EC law. Feinäugle states that this point "was probably based more on political reasons than on sound legal reasoning, since the argument that the EC is not a member of the UN would seem to suggest a conclusion to the contrary."90 Indeed, the Court has ruled in a previous judgement concerning an embargo on trade against Iraq, that the Community is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council. 91 Another strand of critic concerns the strong connection that the Court made between reviewing a Community decision and thereby reviewing a UN SC Resolution. This critic states that even in the case of approving the precedence of UN law on Community law, a possibility exists to review the Regulation at hand. "Any review by a European Court is only a judgement of the legal situation under European law. It does not imply a judgement on the legality of the activity of the Security Council under international law."92 This means: The Court could very well have reviewed the Regulation, as it is empowered to do so by Article 220 ECT. In any way, it would have been more comprehensible to review a European decision in the light of European law principles instead of choosing jus cogens and interpret a legal act outside the Court's jurisdiction. 93 The third strand of critic concerns the limitation on jus cogens. Although the Court examined "with sober seriousness", whether any of the claims fell within the scope of jus cogens, this meant nothing else than the reduction of human rights protection to a minimum standard. It is even a task of great difficulty, since it is debatable which norms are part of jus cogens and which norms are peremptory. 95 Tomuschat, who is in general in favour of the judgement, calls the limitation on jus cogens "devoid of any actual substance." 96

⁹⁰ Feinäugle, Clemens (2007): Legal Protection of the Individual Against UN Sanctions in a Multilevel System. In: A. Føllesdal, R.A. Wessel and J. Wouters (Eds.): op. cit.

⁹¹ CFI Case T-184/95, quoted in CFI Case T-306/01, op. cit., para. 242.

⁹² Eckes, Christina (2007): op. cit., p. 17. For details on this matter see Chapter 4.1.1.

⁹³ Ibid., p. 19.

⁹⁴ Tomuschat, Christian (2006): Case Law, p. 546. In: Common Market Law Review 43, pp. 537-551.

Feinäugle, Clemens (2007) op. cit., p. 3.

⁹⁶ Tomuschat, Christian (2006): op.cit., p. 551.

In the Yusuf case, the Court came unsurprisingly to the conclusion that no *jus cogens* norm had been violated, thus the action was dismissed.

The situation at the ECJ is different for those suspects that are listed on the EU's own lists. However, we have to divide the possible applicants into two groups: On the one hand, we find those groups and entities that are listed in the Annex of Common Position 931/2001/CFSP and that are subject to financial sanctions as laid down in the corresponding EC Regulation 2580/2001. On the other hand, we find some groups and entities in the annex that are marked with an asterisk. A footnote states that "Persons marked with an * shall be the subject of Article 4 only." Article 4 demands member states to "afford each other the widest possible assistance in preventing and combating terrorist acts" through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union. That also means that those marked with an asterisk are not subject to EC Regulation 2580/2001 and the freezing of financial assets. About half of the listed people are marked, and all of them are suspected being involved in the Basque terrorism or being part of Northern Ireland terrorist groups. 97

This difference creates two legal regimes, one based on Union law, the other based on Community law.⁹⁸ Thus, both groups have to challenge different acts, which is with regard to the ECJ's competence somewhat problematic.

For the first group, the leading case is Segi v. Council. Segi, a Basque youth movement residing in Spain and France, was put on the list annexed to Common Position 2001/931/CFSP due to its connection to the terrorist organization E.T.A., which was also listed. The applicants claimed that the Court should grant damages for its allegedly illegitimate inclusion in the list. The Court found itself unable to grant such damages, as the applicant did not challenge a Community measure, but a third pillar measure, i. e. Article 4 Common Position 931/2001/CFSP. However, the list of the Court's competences in Article 46 TEU is exhaustive, and does not provide a competence for the third pillar. The Court also questioned whether it

⁹⁷ Cameron, Ian (2003): op. cit., p. 231.

⁹⁸ It appears, from a comment made by the Dutch Government that this construction was chosen since EU 'internal' terrorist suspects are not subject to the scope of the CFSP by definition. The imposition of financial sanctions on EU subjects is thus being regarded as 'internal policy', for which Article 11 TEU is not applicable and the CFSP Council not authorised. Comp. Tappeiner, Imelda (2005): op. cit., p. 109.

⁹⁹ CFI: Segi and others v. Council of the European Union, Kingdom of Spain, Kingdom of Great Britain and Northern Ireland, Case C 355/04, Judgement of 27 February 2007.

would be possible to draw a general competence from Article 6(2) TEU, which includes the Union's obligation to respect human rights. However, it answered in the negative, as "the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU". 100

This situation, without any doubt, is unsatisfactory, even for the Court. A comment revealed to great extend then helplessness in this area: "Concerning the absence of an effective remedy invoked by the applicants, it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts, with regard to the inclusion of Segi on the list of persons, groups or entities involved in terrorist acts." ¹⁰¹

Does this absence really exist? Some authors commented the Court had an unjustified "isolated view" on the case: The Court ruled that Segi was only subject of Article 4 of Common Position 931/2001/CFSP, and therefore only of a third pillar measure. Nevertheless, the list is annexed to the Common Position and thereby structurally linked to the whole document as an instrument of the second pillar. "It does not contain any indication that the different provisions could stand independently or were intended to be adopted on separate legal bases. Consequently, taking a fragmented view appears to be unjustifiable. Despite the fact that it might formally be possible to confine certain operational provisions to apply only to specific persons, the stigmatising effect of being listed in an antiterrorism measure cannot, effectively, be limited by such a formal construction." However, if one accepted this view, the consequence for the applicant would not change, since the above mentioned Article 46 TEU does not provide a competence for the Court in CFSP measures.

It is therefore practically impossible for the EU "internal terrorist suspects" to enjoy the right to have an effective remedy before the ECJ. The Advocate-General in the Segi Case, Mengozzi, suggested that national courts should fill the gap of judicial protection. This possibility is discussed in paragraph 2.4.3 and 4.1.

¹⁰⁰ CFI: Case T-338/02, para. 38.

¹⁰² Eckes, Christina (2006): How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of Segi, p. 147. In: King's College Law Journal, Vol. 17 Issue 1 (2006), pp. 144-154.

¹⁰³ Ibid., p. 148.

The second group of suspects has a better chance that the ECJ follows their claims. Since they are directly affected by an EC Regulation, the jurisdiction of the ECJ is beyond dispute: The individuals can resort to general principles of EU and EC law. The first method is to challenge a Council Decision by an annulment action according to Article 230 TEC. This article provides that "The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties", and further "Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person". The two most recent judgements by the Court concerning PMOI and Sison have proven that it is possible for this group to challenge their inclusion successfully, although the Council did not follow the judgement and kept the names on the list. Both judgements are outlined in chapter 2.3.

2.4.2 Challenging freezing before the ECtHR

So far, there has not been lodged a complaint before the ECtHR by anyone who was listed on the basis of the Taliban sanction regime. However, in its Bosphorus judgement the ECtHR has set out that it will scrutinize any action of a state as to its compatibility with the ECHR, irrespectively of an underlying UN obligation. In this respect, it clearly differs from the opinion of the CFI: For the ECtHR, the existence of an UN SC Resolution "is not the end of discussion." ¹⁰⁴

Concerning the EU lists, one case deserves attention: Besides his action before the ECJ, Segi also lodged a complaint before the ECtHR against 15 EU Member States that have put him on the list annexed to Common Position 931/2001/CFSP.¹⁰⁵ Segi stated that these states violated Article 6 (Right to a fair trial), Article 6(2) (Presumption of innocence) and Articles 10 (freedom of expression), 11 (freedom of assembly and association) and 13 (right to an effective remedy) of the Convention and Article 1 of Protocol No. 1 (Protection of property). The Court found that the complaint is inadmissible, as Segi can not be

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¹⁰⁴ Eckes, Christina (2007): op. cit., p. 23.

¹⁰⁵ ECtHR: Decision of 23 May 2002, joint cases of Segi (Appl. No. 6422/02) and Gestoras Pro Amnistia (Appl. No. 9916/02)

entitled the status of a victim alone on the fact that he is included in a list. However, this is a precondition for an application mentioned in Article 34 of the Convention, and the Court stated in an earlier case that this Article "does not institute for individuals a kind of actio popularis for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment." 106 Article 4 of the Common Position does not create any new power for the member states, it just obliged them to afford each other with police and judicial cooperation. This obligation, however, is not directed against individuals and does not affect them directly. 107 Nevertheless, the Court acknowledges that Article 4 might be used as the legal basis for concrete measures, for instance through Europol, which could affect the applicant's rights. If such a concrete measure is adopted, it would be subject to judicial review. But as a general rule, with highly rarely exceptions, the Court can only find a violation a posteriori. 108 Misleadingly, the Court states that even in the case that a measure is adopted, the applicant "could always apply to the Court of Justice of the European Communities." 109

Five years later, after the judgement of the CFI concerning Segi, we know that the ECtHR was wrong with this statement. That means nothing else than that everybody alleged to be a terrorist in a CFSP list does not satisfy the procedural requirements and has no possibility to find justice before the ECtHR. It is questionable, whether the concerned individuals will ever be able to prove that a concrete measure has violated their rights guaranteed in the ECHR. Thus, it seems that this way is a judicial dead-end street.

2.4.3 Other levels to challenge freezing

Two more levels to challenge freezing are, at least in theory, conceivable: The international, and the nation state level. In the international domain, no fully

108 Ibid.

¹⁰⁶ ECtHR: Klass and Others v. Germany, Judgment of 6 September 1978. Quoted in ECtHR: Case of Segi, op. cit.

¹⁰⁷ Ibid.

¹⁰⁹ Ibid.

established judiciary is available, and it is up to the SC to decide which form of legal protection is included in a sanction regime. The "principal judicial organ of the United Nations"¹¹⁰, the International Court of Justice, is not accessible for individuals, but only for states.¹¹¹ In the case of the Taliban sanction regime, the 1267 Committee has introduced a delisting procedure that allows in principle for a review of the listing. Although this Committee is not a Court, it is worth to have a look on this procedure.

The basic changes where introduced in UN SC Resolution 1730 (2006), that does provide a de-listing procedure for all active UN Sanctions Committees. This is conducted by a "focal point", which is an administrative body within the Secretary-General. Its task is described in the resolution: It shall receive de-listing requests, verify whether it is a new or repeated request, forward or return the request, and inform the petitioner about the decision of the Sanction Committee that may grant the de-listing. A petitioner may be an individual, a group, an undertaking, and entities included on the list. Besides using the focal point, the petitioner can also submit its request to the state of residence or citizenship. 114

If the petitioner chooses the focal point, the procedure will be conducted as follows: As a first step, the designating states and the states of citizenship and residence are allowed to comment the delisting request within a period of three month. If any of these governments recommends a de-listing, the request will be placed on the agenda of the Sanctions Committee. Opposing comments are forwarded to the Committee. If no party involved comments within the given period, the request is forwarded to the members of the Committee, and everybody is allowed to recommend a de-listing by providing an explanation to the Chairman. If this does not happen either after one month, the request is deemed rejected. If the petitioner chooses to submit his request through the state of residence or citizenship, the petitioned state has to consult the designating state on a bilateral basis. If after this consultation the states or one of them want to pursue

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¹¹⁰ UNC Article 92.

¹¹¹ Statute of the International Court of Justice, Article 34(1).

¹¹² UN SC Resolution 1730 (2006), p. 2

¹¹³ Security Council Committee established pursuant to Resolution 1267 (1999): Guidelines of the Committee for the conduct of its work, Art. 8a.

http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

¹¹⁴ Ibid., Art. 8e.

¹¹⁵ Comp. Ibid., para. 8d.

the delisting request, they can submit jointly or separately the request.¹¹⁶ The Committee afterwards decides by consensus of its members. If consensus can not be reached, the matter can be submitted to the Security Council.¹¹⁷

An assessment reveals the weaknesses of this procedure: Besides others, the same problems that have been identified for the listing procedure in chapter 2.3 remain for the de-listing procedure. Firstly, the Committee works in closed sessions. Secondly, the Committee is not "impartial", since its members are the members of the Security Council, which act on the basis of political interests of their states and not on the basis of law. Thirdly, the focal point is a purely administrative body and represents in no way an independent judicial body. Fourthly, the governments of the involved states remain the "guards at the door to the Committee". And fifthly, most important, the Committee is still an "iudex in causa sua", i. e. deciding about its own previous decision and therefore not independently. Thus, the de-listing procedure at UN level is a possibility for a remedy, but does in no way fulfil the standards of the right to an effective remedy as guaranteed in the aforementioned human rights treaties.

The second possibility that deserves attention, open for those that are on the EU's own list, is the national level. The idea is to challenge directly the decision of the national authority that is the basis for listing: The individual could bring an action for the breach of national law, for instance contract law, against his bank. The bank will then defend itself by referring to the EC Regulation, and the national court could ask the ECJ for a preliminary ruling under Article 234 TEC. ¹²⁰ A second idea was brought in by the Advocate-General Mengozzi in the Segi case. He suggested that national courts should fill the judicial gap and review the legality of the acts of the Union. His starting point is Article 6(1) and (2) TEU, which state that the Union recognises the judicial review of the legality of the action of its institutions, but that nowhere in the Treaty the court is given an exclusive power to assess the legality of such acts. ¹²¹ He derives such a power for national court from "the principles of the rule of law and respect for fundamental

¹¹⁶ Comp. Ibid., para 8e.

¹¹⁷ Comp. Ibid., para. 8f.

¹¹⁸ Feinäugle, Clemens (2007): op. cit., p. 17.

¹¹⁹ Ibid.

¹²⁰ Comp. Bowring, Bill (2006): op. cit., p. 26.

¹²¹ CFI: Case C-355/04 P and C-354/04 P, op. cit., Opinion of Advocate General Mengozzi, para. 104

rights on which the Union is based" and from "the principle of loyal cooperation."122

So far, no national court has gone this way, and in the Segi case the Court did not follow the idea of the Advocate General.

2.5 Subconclusion

The results found in this chapter show that in the field of terrorist lists in the European Union human rights protection is in disorder. The subquestion of this chapter was "How are human rights infringed by the setup of terrorist lists?" After the analysis, and with regard to the richly quoted case law, the answer is a bit of an evidence of incapacity for the international legal order: A sufficient protection against human rights violations under the two examined sanction regimes is lacking. Concerning the right to own property, the ECtHR refused to accept that freezing touches the right, since it is only a "control in use" of financial assets. In addition, the CFI refused to grant this right the status of jus cogens. Concerning the right to a fair trial, both procedures – in the 1267 Committee and the "clearing house" – do not fulfil the principles mentioned in Article 6 ECHR. The reasons for concern are at foremost the intransparency and the secretiveness on which basis a decision has been made. The recent changes that the Council decided, i. e. to provide a statement of reason for the parties, are only of help if they put the Court in the position to review the decision. However, the publicly available statements do not seem to include those details. Most important, the right to have an effective remedy is undermined. While the ECJ is of help at least for decisions that are made within the first pillar, individuals that are only listed in the annex of the Common Position have no possibility to invoke that right. The unsatisfactory limitation of the CFI to a judicial review in the light of jus cogens gives reason to worry. In the case of Segi the ECtHR has judged that a listing alone is not a sufficient prove to be a victim in the meaning of the Convention, therefore an application to this Court is not possible. Finally, the UN Sanction Committee allows for a de-listing request, but since the body that decides about the request is neither a court, nor fulfilling any of the requirements of Article 13 ECHR, this possibility is not satisfactory with regard to human rights protection.

¹²² Ibid., para. 105

European **European Court** Court of Human Rights Persons and of Justice entities listed on UN and EU lists

National courts

Figure 2.1: The institutional, judicial triangle

Source: Own figure.

3. Justification of human rights violations

In chapter two of this paper, some serious human rights violations have been revealed. It follows as a logical step to examine whether there are any justifications, based on an appropriate legal base, for these violations. In the public debate, it appears that politicians are rather creative in finding ever new excuses for scaling down human rights protection: Famous examples are US President Georg W. Bush's "war on terrorism" 123, or Tony Blairs statement on mass terrorism as "the new evil in our world today" 124. Those statements are motivated by political desirable intention, and they serve their purpose: Even judges have stated that to combat threats to international peace and security caused by terrorist acts is "of fundamental public interest for the international community", and therefore granted the derogation from human rights. 125

It is beyond dispute that judges should abstain from such propaganda, and rely alone on law. But which possibilities does law provide for a situation as we are facing today? It is the aim of this chapter to find out, and therefore the subquestion is: "Can human rights violations be justified?"

¹²³ Comp. George W. Bush: Address to a Joint Session of Congress and the American People, 20 September 2001, available at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html Available at http://news.bbc.co.uk/1/hi/world/americas/1537800.stm ¹²⁵ CFI: Case T-306/01, op. cit., para. 298.

Two possibilities exist for justification: Firstly, a deprivation of property is possible under Article 1 Protocol 1 ECHR if it is in the "public interest". In this case, the scope of the right is limited directly in the concerned article of the law. Secondly, a more general possibility is given by derogation clauses, which have been introduced in human rights treaties to allow governments to deal effectively with national emergencies. In the ECHR Article 15 states: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." However, for some rights the ECHR explicitly states that derogation is not possible (Art. 2, 3, 4(1) and 7). In any case where a contracting party decides to derogate from a right, it has to keep the Secretary General of the Council of Europe informed about the measures and the reasons for it. (Article 15(3)). We will now see, whether the violations that have been found can be based on any of these two provisions.

3.1 The right to own property and the test of proportionality

The first right at issue is the right to own property (compare chapter 2.2). As stated above, the CFI and ECtHR have ruled that the freezing of financial funds is not a deprivation of property, or confiscation, but rather a "control in use". The ECHtHR has stated that even for such a "control in use" a general test of proportionality between the infringement and the goal that the government wants to achieve has to be applied. 126

However, the court turned out to be very generous concerning its acceptance of government's explications. According to the court, the reason for this behaviour is that the national authorities enjoy "a certain margin of appreciation" and are in principle better placed than the international judge to appreciate what is "in the public interest". 127 Therefore, the court made clear that it will only dismiss the government's explications when they are "manifestly without reasonable foundation."128

128 Ibid.

¹²⁶ Comp. Cameron, Ian (2003): op. cit., p. 253.

¹²⁷ ECtHR: James v. UK, Appl. No. 8793/79, Judgement of 21 February 1986, para. 46.

So far, the court has never conducted a serious proportionality test in its judgements concerning terrorist lists. This is disappointing, since the result would possibly not be in favour of the EU/EC's action. Three single criteria have to be passed: The measure must be necessary, it has to exist a reasonable relationship between the measure and the aim to be achieved, and it must be capable of achieving the goal. The difficult point in applying this test is that it has to be conducted on an individual basis. It is not enough simply to measure the overall effect of blacklisting on terrorism. However, it is very hard to assess the influence of an individual person on the financing of terrorism.

Out of the three criteria, especially the last one is problematic. The goal meant to be achieved is to "prevent and suppress terrorist acts". 129 But since the introduction of the lists, a number of terrorist acts in the European Union occurred: For 2006, the Europol EU Terrorism Situation and Trend Report lists 498 attacks. 130 In addition, two of the worst attacks ever in Europe occurred notwithstanding the sanction regime (in London on 7 July 2005 and in Madrid on 11 March 2004). From this number it is not possible to conclude how many attacks have been prevented, and even officials are overstrained to provide information. The 1267 Monitoring Team comments on the Taliban Sanction Regime that it has "difficulty of quantifying its effect", but believes that it "is an essential element of the international effort against Al-Qaida, the Taliban and their associates." ¹³¹ Instead of proved evidence, whether in general terms or on an individual basis, the Monitoring Team justifies the existence of sanctions with platitudes: "As most terrorist acts cost little and may require few operatives or arms, stopping even a small amount of money or any travel or arms sales may save lives." In addition it claims that "there is the significant symbolic value of the sanctions regime as an expression of international condemnation of Al-Qaida and the Taliban". 132 Other authors are not that optimistic and raise even the question whether freezing has any significant effect on terrorism. The official Report of the 9/11 Commission states: "Worldwide asset freezes have not been

¹²⁹ UN SC Resolution 1373.

¹³⁰ Europol (2007): TE-SAT 2007. EU Terrorism Situation and Trend Report 2007, p. 13.

¹³¹ UN SC: Document S/2005/572, op. cit., para. 38.

¹³² Ibid.

adequately enforced and have been easily circumvented, often within weeks, by simple methods." ¹³³

Those comments are not sufficient to pass the test of proportionality. No one doubts that money is needed to conduct terrorist attacks, and in today's world it will be more difficult for terrorist networks to transfer their money than it was ten years ago. But those generalizations should never be the basis for individual sanctions. With regard to the facts (ongoing terrorist attacks) and the quoted comments, it is implausible that the sanction regimes are capable of achieving the goal. Thus, they do not pass the test of proportionality. If the ECtHR should conduct this test in one of its future judgements, it is likely that it will find a violation of Article 1 Protocol 1 ECHR.

3.2 Restricting access to court in the case of emergency

The second right at issue is the right to a fair trial (compare chapter 2.3). Since it is closely connected to the right to have an effective remedy (compare chapter 2.4) both rights will be handled together in this chapter.

As stated above, the ECHR provides the possibility to derogate from Article 6(1) and 13 in a "case of emergency threatening the life of the nation" (Article 15 ECHR). Article 15(1) lists those Articles, from which derogation is not possible. Article 6 is not part of this list. Thus it is a question at issue, whether the threat of terrorism represents such a case and might therefore justify derogation.

In one of its early judgements, the ECtHR has defined a "case of emergency" as "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question." ¹³⁴ If a threat of terrorism shall represent a "case of emergency", it has to fulfil all elements of this definition.

The basic problem in conducting a test of the various elements is the fact that a general definition of the word "terrorism" is missing. For the European Union, Article 1 Common Position 931/2001/CFSP defines a "terrorist act" as an offence

¹³³ The 9/11 Commission Report, p. 382. http://www.9-11commission.gov/report/911Report.pdf ¹³⁴ ECtHR: Case Lawless v. Ireland, Appl. No. 332/57, Report adopted on 19 December 1959, p. 84.

with the aim of "seriously intimidating a population, or (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation". Several similar tries have been made in international legal instruments, but none of them has overcome the difficulty to describe it exactly enough to make a clear difference towards other forms of organised crime. However, a clear definition is necessary if for terrorist offences a special legal treatment, consisting of special decision making methods and leading to special serious consequences, such as sanctions, is given. This is a basic principle of lawfulness in criminal matters. However, a clear definition is necessary if for terrorist offences and leading to special serious consequences, such as sanctions, is given. This is a basic principle

In the absence of a general and commonly accepted definition, I will choose a way more related to practice: The UN Resolutions that introduced the two sanction regimes refer to a number of attacks or organizations with terrorist activities. Are these altogether fulfilling the elements in the definition of a "case of emergency", and are they thus sufficient to declare this case?

In the UN SC Resolutions reference is made to:

Resolution 1267:

- The Taliban in Afghanistan for sheltering and training terrorists and planning terrorist acts; and for providing safe haven for Usama bin Laden;
- Usama bin Laden for his indictment in the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States.

Resolution 1333:

• the capture by the Taliban of the Consulate-General of the Islamic Republic of Iran and the murder of Iranian diplomats;

¹³⁵ For an overview see Footnote 1 in E.U. Network of Independent Experts in Fundamental Rights (2003): The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats, p. 7.

¹³⁶ Ibid., p. 11.

• previous allegations as made in Resolution 1267.

Resolution 1373:

- the terrorist attacks which in New York, Washington, D.C. and Pennsylvania on 11 September 2001;
- the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism.

Resolution 1390:

- the continued activities of Usama bin Laden and the Al-Qaida network in supporting international terrorism;
- previous allegations as made in Resolution 1267.

Do these events and activities constitute an "exceptional or imminent danger or crisis"? It is possible to summarize the events and activities in two groups: Firstly, single events that occurred at a special point of time in the past and had the character of a terrorist attack (for instance the attacks on 11 September 2001). And secondly, activities that are observed permanently and have a potential risk to lead to a terrorist attack (for instance the training of terrorists in Afghanistan).

An imminent danger would exist as soon as an attack is "on the verge of breaking out at any moment". This definition excludes any forms of potential threats as well as events that occurred already in the past, as the Siracusa principles state: "Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger." Thus, the UN SC Resolutions are of no help in this matter. In addition, officials in the European Union's member states have only in very rare occasions stated that an imminent danger exists. In contrary, the terminology most often

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, p. 9. In: Human Rights Quarterly, Vol. 7, No. 1. (February 1985), pp. 3-14.

¹³⁷ Svensson-McCarthy, Anna-Lena (1998): The International Law of Human Rights and States of Exception With Special Reference to the Travaux Preparatoires and Case-Law of the International Monitoring Organs, p. 299.

used is that "the security situation is unchanged tense, but there is no concrete evidence for immediate impending terrorist attacks." ¹³⁹ In summary, it must be denied that there is an "imminent danger or crisis" that could justify the measures. The same is valid for the phrase "exceptional": It can be accepted that the attacks of 11 September 2001, as well as those in Kenya and Tanzania constituted an "exceptional crisis". However, a crisis that continues over years is very unlikely to be exceptional, even if during this period other attacks happen, as they occurred in London and Madrid. The fact that the quoted comment on the security situation in the EU has been stated in the same wording in 2001 and 2007 (see previous footnote), confirms this assessment. In addition, a dissenting judge in the Case Lawless v. Ireland stated that "only potential [danger], having persisted in virtually unchanged for years [...] cannot be regarded as of exceptional gravity, but only as a latent emergency of a minor degree."140 At the time of the judgement, the potential for a terrorist attack in Ireland could be regarded higher than in the rest of Europe. Therefore the quoted sentence can today, more than ever, be applied to all EU member states.

As already the first two elements of the definition of a "case of emergency" did not pass the test, it is not necessary to conduct a test for the remaining elements. It is, in my opinion, clear that as soon as the ECtHR would conduct the same test, it came to a similar result: The kind of terrorism we are facing today in the EU does not constitute a "case of emergency".

Although the answer is unambiguous, the result leaves a bad taste: Using the definition of a "case of emergency" in such a strict way, it is almost impossible to justify any measures that are meant to be pre-emptive. The most disastrous attacks in the last years have shown that terrorists do not provide any warnings before they attack, since their aim is not only to create a permanent state of fear, but also to kill or violate as many people as possible. Today, attacks are "more random" and "less easily ascertainable". ¹⁴¹ Therefore the question is, whether an almost 50

¹³⁹ Tagesspiegel: USA warnen vor neuen Terrorangriffen. 30 October 2001. http://www.tagesspiegel.de/politik/;art771,2276993 and Tagesspiegel: Videoband-Drahtzieher in Deutschland vermutet. 12 March 2007. http://www.tagesspiegel.de/politik/International-Terrorismus-Video-Irak;art123,1880165

¹⁴⁰ ECtHR: Case Lawless v. Ireland, op. cit., p. 101.

¹⁴¹ Macken, Claire (2005): Terrorism as a State of Emergency in International Law. Presentation at the Anzsil 2005 Conference, Canberra, 16-18 June 2005. http://law.anu.edu.au/cipl/Conferences&SawerLecture/05%20ANZSIL%20Papers/Macken.pdf

years old definition is still appropriate, but it would go beyond the scope of this paper to give an answer to this question.

However, the considerations made so far are very normative. The reality, manifested in the ECtHR judgements concerning derogation in the case of emergency, looks different. Already in the Lawless case it became clear that states would have wide latitude in determining what constitutes a case of emergency. In response to the release of almost 100 Irish Republican Army (IRA) prisoners and subsequently fears that IRA activities could intensify, the United Kingdom (UK) declared a case of emergency. The Court stated: "While the concept of a 'public emergency threatening the life of the nation' is sufficiently clear, it is by no means an easy task to determine whether the facts and conditions of any particular situation fall within that concept." Therefore, and due to "the high responsibility which a Government has to its people to protect them", the Court granted "a certain margin of appreciation" for its action. (That sounds familiar: Indeed, the court has used a similar approach in the James case concerning a limitation of the right to own property. See Chapter 3.1) This margin was granted in relation to whether an emergency existed and what measures were necessary to overcome it, and it led to the result that the strict wording of Article 15 ECHR was softened. "In practice, then, the Court lends substantial deference to the judgment of derogating governments."144

Despite this margin of appreciation, states are not allowed to overreact. The principle of proportionality requires that any emergency measure is "strictly required by the exigencies of the situation" (Article 15(1) ECHR): Derogating measures have to be concretely connected to the emergency situation, they have to be suitable to lessen or remove the situation, and the measures have to be taken only if no less drastic alternatives are available. In the case Ireland v. United Kingdom it became apparent that these requirements are softened clearly by the margin of appreciation: The Court stated that forms of internment without trial "were reasonable in the circumstances" without checking whether any alternatives would have been capable of dealing with the situation. The failure to do so has

¹⁴² ECtHR: Case Lawless v. Ireland, op. cit., p. 84.

¹⁴³ Ibid., p. 85.

¹⁴⁴ Brendan, Mangan (1988): Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform, p. 375. In: Human Rights Quarterly, Vol. 10, No. 3. (Aug., 1988), pp. 372-394.

been heavily criticised: "Surely such an approach can be expected of a body charged with the protection of human rights and aiming to give guidance to decision-makers in the States party to the Convention. Indeed, does not the term 'strictly required' in Article 15 (1) mandate such exploration of alternatives even if, at the end of the day, they are rejected on rational grounds?" ¹⁴⁵

In other judgements dealing with terrorist cases, the Court was similarly open for government's measures. Concerning the secret surveillance of suspected terrorists by German authorities, the case stated: "Being aware of the danger such a law poses of undermining or even destroying democracy on the grounds of defending it, [the Court] affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate." But with a simple reference to the "development of terrorism in Europe" the Court found the German measures justified.

What does that mean for terrorist lists in the EU? Of course the case Ireland v. United Kingdom dealt with another Article of the Convention (the Irish complaint focussed on Articles 3 and 5 ECHR), as well as the Klaas v. Germany case did (basically Article 8(2) ECHR), but the judgements revealed a serious problem: The Court intends to give precedence to the margin of appreciation and disregards the test of proportionality. Would it do the same if a member state of the EU based its freezing of funds on a case of emergency and its margin of appreciation? This is a hypothetical question, since no state has done so in the past. The intention of this chapter was to show that there is a *theoretic* possibility to derogate from Article 6(1) and 13 ECHR if a state can prove that terrorism constitutes a "state of emergency" and the court finds that it has not exceeded its margin of appreciation.

3.3 Restricting access to court for national security reasons

The last paragraph in this chapter is dealing with a popular phrase, which is used to excuse authority's behaviour that does not fit in the normal procedure: National

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¹⁴⁵ Bonner, David (1978): Ireland v. United Kingdom, p. 905. In: The International and Comparative Law Quarterly, Vol. 27, No. 4. (October 1978), pp. 897-907.

¹⁴⁶ ECtHR Case of Klaas v. Germany, A/28, para. 49. Quoted in Warbrick, Colin (1983): The European Convention on Human Rights and the Prevention of Terrorism, p. 90. In: The International and Comparative Law Quarterly, Vol. 32, No. 1. (January 1983), pp. 82-119. ¹⁴⁷ Ibid.

security. Is it possible to restrict access to court for the reason of national security?

Since the beginning of drafting human rights treaties in the last century, human rights have often been regarded as competing with or compromising national security. Therefore, the promotion of human rights has long been seen as a luxury that is acceptable when a government has "spare diplomatic capacity" and "national security is not being jeopardised." Although this view has changed, relicts of it can be found in the ECHR. A number of articles in the ECHR refer to "national security" and allow a government to limit a right on its basis (see Article 8, 10 and 11 ECHR). The basic right to a fair hearing in Article 6(1) ECHR is not limited in its core, but a limit with regard to publicity is possible: "Press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." However, the Article does not mention the possibility to restrict other aspects of the right to a fair trial for national security reasons.

Before going into details of the ECtHR judgements, we have to define the term "national security". Ullman defines it as "an action or sequence of events that (1) threatens drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of a state, or (2) threatens significantly to narrow the range of policy choices available to the government of a state or to private, nongovernmental entities (persons, groups, corporations) within the state." The first category comprises all kinds of disturbances and disruptions: Wars, rebellions, blockades and boycotts and natural disasters. The second category is explained by Ullmann with the situation before the US entered the World War II: A successful Hitler or Stalin regime, occupying Western Europe or even other parts of the globe, would have resulted in fewer opportunities for American traders and investors. But there also would have been fewer opportunities for

 ¹⁴⁸ Burke-White, William W. (2004): Human Rights and National Security: The Strategic Correlation, p. 251 In: Harvard Human Rights Journal Vol. 17 (Spring 2004), pp. 249-280.
 ¹⁴⁹ Ullman, Richard (1983): Redefining Security, p. 133 In: International Security, Vol. 8, No. 1. (Summer, 1983), pp. 129-153.

"unfettered intellectual, cultural, and scientific exchange." Therefore, the US assessed a threat of its national security and started to wage a war.

As stated above, Article 6 ECHR does not provide a restriction of the core right for national security reasons. As we will see in the ECtHR case law, certain modifications can be made to trial proceedings involving national security or terrorist matters, but states can not hide completely the purported evidence in support of a freezing order behind the argument of national security. So far, there is no case concerning UN sanctions and their implementation in the EU where a party used the "national security" argument. In the field of terrorism and national security, the leading case is Tinnelly & Sons Ltd and Others and McElduff and Others v. UK. 151 The case concerned the decision of the Northern Ireland Electricity Services not to grant work to a number of companies in the area due to security considerations. The company provided a certificate of the Secretary of State for Northern Ireland, stating that the company's decision was "an act done for the purpose of safeguarding national security or of protecting public safety or public order". 152 For a judicial review of the decision, the Employment Agency for Northern Ireland asked for the discovery of the documents backing the certificate. Subsequently, the Secretary of State produced a list of documents, but some of them were sealed or covered up. The Secretary commented: "I am of the view that if the independent information which I obtained in the present case were to be disclosed it could enable terrorist organisations to know the nature and extent of the information known about them and would aid them in their unlawful acts." 153 He continued that "for the safeguarding of national security and the protection of public safety and public order, it would be contrary to the public interest that any of the said documents should be disclosed in these proceedings except as sealed and covered up."154 It was expected that the material - if it existed – came in large parts from the intelligence services.

In its assessment, the Court allowed a margin of appreciation for states with regard to the limitation of the right in Article 6(1) ECHR. By the same time, it remembered that "the limitations applied do not restrict or reduce the access left

¹⁵⁰ Ibid., p. 134.

¹⁵¹ ECtHR: Tinnelly & Sons Ltd and others and McElduff and others v. UK, Appl. No. 62/1997/846/1052–1053, Judgement of 10 July 1998.

¹⁵² Ibid., para. 18.

¹⁵³ Ibid., para 20.

¹⁵⁴ Ibid.

to the individual in such a way or to such an extent that the very essence of the right is impaired."¹⁵⁵ In addition, the Court referred to the principle of proportionality, which has always to be considered. With regard to this case, the Court found the behaviour of the Secretary of State disproportionate, since a full scrutiny of the factual basis of the Secretary of State's certificate was not possible. ¹⁵⁶

The similarity to the EU terrorist lists is apparent. Presumably, intelligence material is an important factor in the decision making of the clearing house and the 1267 Committee, and this material is not revealed during the process. However, the ECtHR has not considered security issues completely irrelevant. Despite the general rule that all material evidence for or against the accused must be made available to the defence, it does not mean that any kind of restrictions constitutes automatically an unfair trial. It is more important, whether the court based its findings on material that was not available for the defence, whether the non-disclosure put the defence at a significant disadvantage and if so, whether there existed a form of compensation. ¹⁵⁷

In the case of Haas v. Germany, the ECtHR stated that it is allowed to keep the identity of informers and intelligence operations secret when the accused is a member of a terrorist organization.¹⁵⁸ Haas, a member of the German terror organization *Rote Armee Fraktion*, had been sentenced to imprisonment by the German Federal Court of Justice. She lodged a complaint as she felt Article 6(1) ECHR had been violated in the trial. The ECtHR decided that two factors are important for trials that include witnesses from the intelligence: Firstly, the Court should not base its findings solely on the intelligence material. And secondly, the handicaps under which the defence labours have to be counterbalanced by the procedures followed by the judicial authorities.¹⁵⁹ In the case of Haas, the first requirement was fulfilled: The evidence obtained from intelligence had not been decisive for Haas' conviction and had been corroborated by other items. The second requirement was fulfilled by giving the defence the opportunity to

¹⁵⁹ Ibid.

¹⁵⁵ Ibid., para 72.

¹⁵⁶ Ibid., para 74.

¹⁵⁷ Comp. Cameron, Ian (2006): op. cit., p. 13.

¹⁵⁸ ECtHR: Haas v. Germany, Appl. No. 7304/01, Decision of 17 November 2005.

question the anonym witnesses in court. Thus, the Court dismissed Haas' application.

What can we learn from the quoted judgements with regard to EU terrorist lists? Firstly, despite the fact that the wording of Article 6(1) does not explicitly provide a possibility of derogation, states are enjoying a certain degree of appreciation in the way they conduct their trials. Under consideration of the principle of proportionality they are allowed to modify the procedure, as long as the essence of the right remains. Secondly, in cases against terrorists it is possible to remain the identity of witnesses from the intelligence as well as details about their operations secret, as long as they are not the only source of evidence against the accuse and the disadvantages resulting from the cover-up is counterbalanced somehow.

However, a pure reference to "national security reasons" does not justify *every* limitation of rights. The doctrine of national security is not of an "open-ended nature", and such an understanding would be "inimical" to a proper view of Article 6 ECHR.¹⁶⁰

3.4 Subconclusion

The last chapter might be disappointing for everybody who believed in human rights as a strong concept of agreed norms and values that are not allowed being abolished. However, if it really was like that, it would not have been necessary to dedicate a whole chapter to the question whether human rights violations can be justified. The answer is two-sided: Yes, derogation is possible, but only to a certain degree. Concerning the right to own property, a derogation provision is made directly in same article that grants the right. The ECtHR has ruled that states enjoy a margin of appreciation when they choose to limit the right to own property, but that in any case the test of proportionality has to be applied. This test has also to be applied for cases of "control in use". It is not sufficient to apply the test for the measure in general, but it has to be done on a case-by-case basis. For asset freezing, it is unlikely that the measure passes the test, since its capability of achieving the goal is not proven. Thus, a justification for the infringement does not exist.

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¹⁶⁰ Comp. Hartmann, Joan F. (1985): Working Paper for the Committee of Experts on the Article 4 Derogation Provision, p. 93/94. In: Human Rights Quarterly, Vol. 7, No. 1 (Feb., 1985), pp. 89-131.

A second idea to justify restrictions with regard to court access was to announce terrorism a "case of emergency" and use the derogation clause in Article 15 ECHR. However, it turned out that the absence of a general accepted definition of the word terrorism is a problem. In addition, the terrorist acts and activities mentioned in the UN SC Resolutions underlying asset freezing do not satisfy all elements of the definition of a "case of emergency", since they do not constitute an "exceptional and imminent danger". In contrary to this normative argument, the reality is a bit different: Even here the state has a margin of appreciation, and earlier judgements have shown that the court trusts national governments a lot in determining whether a case of emergency exists.

The third train of thoughts regards national security. Following the case law of the ECtHR, it is indeed possible to limit the right of access to court in matters dealing with terrorism and security relevant issues. However, the core of the right is not allowed to be touched, and all disadvantages for the accused have to be compensated somehow. It does not appear that, in any way, the listing procedure on EU or UN level does fulfil these requirements.

4. Making human rights and sanctions compatible

The situation that has been revealed in the first three chapters casts a cloud over the present multilevel regulatory structure. The UN, one of the great promoters of human rights development throughout the world, has installed a sanction system that seems not to follow the organization's own principles. Should it not be the task of the UN better to over-fulfil its own requirements instead of amending a policy that is mistrusted by many? In the last years, UN and the EU have produced a judicial gap that brings serious problems for the affected individuals. They find themselves "trapped between courts" unable to claim there rights.

Since the beginning of the two sanction regimes until today, some improvements on both levels have been made. On UN level, the revised guidelines of the 1267 committee and the establishment of the "focal point" with the direct possibility for individuals to hand in a delisting request are part of these improvements. On EU level, the provision of a "statement of reasons" and the release of similar guidelines for the "clearing house" has to be mentioned. Their effectiveness, at

¹⁶¹ Eckes, Christina (2007): op. cit., p. 1.

least on UN level, can be recognized by the number of legal challenges: Almost all cases that are pending today stem from designations made in the first month after the attacks on 11 September 2001. 162 It is likely that the improvements in listing requirements could reduce cases of wrongful listings. But as we have seen, a number of problems persist, and it is important to find solutions. Otherwise, the reputation of the UN as the promoter of human rights might be tarnished.

So far, authors in the academic field of legal studies agree. Different conceptions exist concerning the degree of alteration and the level where it has to be conducted. Do we need an institutional reform, or are some procedural adjustments enough? Is it more promising to start on UN, EU or nation state level? Are there even ways within the existing system that allow for sufficient solutions? From the many suggestions, the most convincing concepts will be presented in this last chapter, following the question: Which options exist to fill the judicial gap?

4.1 Proposal for an extensive role of national courts

Only a few words have been said about the role of national courts in this multilevel procedure. The simple reason is that so far they did not enter the scene as a serious actor and left the work for institutions on community level or the ECtHR. Since neither of them could fill the judicial gap, many authors point to the institution that traditionally was responsible to provide legal protection for the individuals in a state. Basically, the national courts could exert there influence in two different ways: Firstly, they could use preliminary rulings to ask for the interpretation and validity of community legislation. And secondly, they could conduct full review of UN SC Resolutions. Both possibilities will be described in detail in the following paragraph.

4.1.1 Full review of UN SC Resolutions by national courts

The problem for an argumentation in favour of full review of UN SC Resolutions by national courts is to define where such a power can be derived from. Three possibilities might serve as a legal basis: The first implies some general theory

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¹⁶² Watson Institute for International Studies (2006): Strengthening Targeted Sanctions through clear and fair procedures, p. 7.

concerning the relation between domestic and international law. Cannizzaro states that any review by a domestic court is in no case part of the international judicial function. If a domestic judge is confronted with a case where it is necessary to make considerations about a UN SC Resolution, then his findings constitute not more than the conduct of a national state organ. From an UN perspective, "a judicial determination as to the legality of a SC resolution by a domestic court is, by itself, legally irrelevant." Therefore it has no influence on the competence of a domestic court whether in the international legal sphere a rule exists that does not allow for a review of UN SC Resolution.

A second argument is made by de Wet and Nollkaemper: If states become member of an international organization like the UN, they have to ensure that the protection of human rights is guaranteed in the organization. If this is not the case, the responsibility to grant such protection remains in the single state. This principle is part of a judgement of the ECtHR concerning a labour dispute at the European Space Agency (ESA). Germany had granted ESA immunity from jurisdiction, which the Court did not accept: "Where states establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competencies and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution." ¹⁶⁴ In short: States cannot hide behind the action of an international organisation with the argument that they have transferred competence to it. They are still responsible for the consequences of any action of this organisation.

It is not only possible to argue that this responsibility remains when states become a member of international organisations after the entry into force of the ECHR. It is even possible to draw the conclusion that the responsibility applies also to treaties that been concluded before the ECHR, thus the UNC. The reason is that

¹⁶³ Cannizzaro, Enzo (2006): op. cit., p. 205

¹⁶⁴ ECtHR: Waite and Kennedy v. Germany, Appl. No. 26083/94, Judgement of 18 February 1999, para. 67. Quoted in: de Wet, Erika and Nollkaemper, André (2003): Review of Security Council Decisions by National Courts, p. 188 In: German Yearbook of International Law 2003, pp. 166-202.

only the five permanent members (France, UK, Russia, USA, and China) have a direct possibility to exercise control in the UN Security Council. Since all other states are also responsible for the result of the decision, they should also have the right to review it.¹⁶⁵

The third and last possibility to base a review on is the wording of Article 25 UNC: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." If a UN SC decision *per se* leads to human rights violations, it is not in accordance with Article 1(3) UNC, and therefore it is impossible to carry it out "in accordance with the present charter". That means: In cases where a UN SC decision fails to stick to human rights obligations, member states are allowed not to give effect to these obligations, even if that means not to implement the decision. 166

A forth possibility applies only to some states, in which a review of decisions of international organisations is anchored in national constitutional law. In Germany the Federal Constitutional Court decided that the transfer of sovereign powers to international organizations is only allowed if the core elements of the German constitution and human rights are preserved. If any of these rights if infringed, the Court has to review the decision and can deny its implementation.¹⁶⁷

The opinion of national courts in various countries towards these considerations was in the past ambivalent: While some of them came to the result that a review of UN SC decisions is possible (e. g. the Dutch District Court of The Hague in the case of Milošević, the Swiss Bundesgerichtshof in the case of Rukundo), others denied this (e. g. the United States Supreme Court in the case of Ntakirutimana). ¹⁶⁸

If we accept the courts potential role to review UN SC decisions, the next question is to what extend a review should be conducted. Two standards are available: *jus cogens* as an international minimum standard of human rights, or domestic standards. Cannizzaro points out that as a first step, judges should base their analysis on an international standard: "Domestic courts are likely to introduce in the process of determination of the *jus cogens* the sensitivity of

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¹⁶⁵ Ibid., p. 191.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid., p. 190.

¹⁶⁸ Ibid., p. 193/194.

judges accustomed to dealing with human rights and experiences in drawing a fair balance between individual liberties and collective interests." As a second step, and only in cases where the international standard cannot provide a sufficient human rights protection, domestic standards should be applied. This is logical, since the application of domestic law is part of the judicial review function that national courts are supposed to conduct. However, it would be short-sighted if domestic standards in total are applied. The UN is a heterogeneous system, consisting of countries with different legal traditions. Therefore it is necessary to balance the standards of these various legal systems. In the end, "a more relaxed" review might be the solutions, that conducts on a case-by-case basis a fair balance test between the need to preserve international peace and security and the rights guaranteed in the domestic legal sphere. 170

What are the consequences if a national court comes to the result that a UN SC decision breaks fundamental human rights? Clearly, a national court can not annul a UN SC decision. In absence of any provision for the termination of UN SC decisions, the principle of "parallelism of competence" provides that it is to the Council itself to end or modify its actions. However, the national court would refuse to apply the decision in the case at hand. If, as a result of the judgement, the state considers itself unable to comply with the obligation from the contested decision, the judicial finding may have effects that are inconsistent with the UNC. Fears that the UN might impose any kind of impositions to the country are unfounded: In Switzerland, besides other countries, it is common practise that individuals can appeal to the Swiss Federal Court when they think that there rights are violated by a SC action. The Court can conduct a full review, factual as well as judicial, of the UN SC resolution or the implementing measure. The SC has noticed these proceedings but has not acted against them.

Let us apply these findings to a case where a national court reviews the freezing of assets: If the court can not find sufficient evidence against the accused, it would

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¹⁶⁹ Cannizzaro, Enzo (2006): op. cit., p. 215.

¹⁷⁰ Ibid., p. 217/218. This is indeed the weak point in the concept of judicial review by national courts: The "relaxed judicial review" might open "a crack in the legal protection of domestic fundamental values" (ibid.). This weakness seems unavoidable, and underlines the character of a second-best solution.

¹⁷¹ Caron, David D. (1993): The Legitimacy of the Collective Authority of the Security Council, p. 578. In: The American Journal of International Law, Vol. 87, No. 4. (October 1993), pp. 552-588.

¹⁷² Cannizzaro, Enzo (2006): op. cit., p. 205.

¹⁷³ Birkhäuser, Noah: op. cit., p. 15.

refuse to apply sanctions against this individual. However, the judgement would have no consequences for other states or the UN SC resolution itself.

Despite this, from an UN perspective relatively small but nevertheless important effect, certain dangers concerning the UN system have been highlighted in the academic literature. Would it be possible that states evade UNC obligations by making reference to alleged arguments of their illegality? Are there indeed "risks of a Breakdown of the Charter System"?¹⁷⁴ I do not see these dangers, but instead a chance for a subsequent improvements of the international regulatory system. As soon as a considerable number of courts starts to challenge the UN SC Resolutions concerning terrorist lists, the organization would be forced to react. The review process might, as Cannizzaro comments, "encourage the development of remedies within the UN legal system open to individuals and able to counterbalance the otherwise unfettered power of the SC."175 However, a review of UN SC decisions by national courts should only be regarded as a second-best solution of temporary duration. For the effectiveness of the actions of the UN it would be better to install a review mechanism directly at the UN level. The existence of such an organ would, as a consequence, cease the legal basis for a national review.

4.1.2 Challenging Community acts through preliminary references

It follows from the Segi judgement that the CFI would like to see national courts taking responsibility for those listed on the EU's own terrorist lists. The judges explain in detail how the right to have an effective remedy can be claimed at the national level (and, by doing so, why they have to reject the applicants appeal). The magic word is "preliminary references": Next to direct action proceedings, preliminary reference processes form the second pathway to the ECJ. The applicant has to take the route via a national court: As soon as a process in one member state strikes a question about community law, and the answer is necessary to solve the dispute, article 234 ECT allows lower national courts to ask the ECJ to interpret the relevant norm and check their validity. Courts of last instance even *have* to ask the ECJ for a preliminary ruling. Article 35 TEU

¹⁷⁵ Cannizzaro, Enzo (2006): op. cit., p. 191.

¹⁷⁴ De Wet, Erika and Nollkaemper, André (2003): op. cit., p. 196.

describes the courts competences: "The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them." Obviously the jurisdiction of the court is less extensive under Title V and VI of the TEU, i. e. CFSP and Police and Judicial Cooperation in Criminal Matters: Since the list is exhaustive, it follows that it is not possible for national courts to ask for a preliminary ruling concerning the interpretation of a common position.

Although these provisions seemed to be clear, the Segi judgement includes a new interpretation, coming to the result that a preliminary ruling concerning Common Positions is very well possible. The judges argue that, under normal circumstances, a Common Position can not be expected to produce any legal effect in relation to third parties. 176 This characteristic can simply be concluded from the wording of the relevant treaty norms: According to Article 34(2)a TEU, a Common Position shall define "the approach of the Union to a particular matter". The only obligation that follows directly from such a Common Positions is laid down in Article 37 TEU: "Within international organisations and at international conferences in which they take part, Member States shall defend the common positions adopted under the provisions of this title." All other acts mentioned in Article 35 TEU are indeed capable of producing legal effect in relation to third parties. Being this the decisive criterion, and acknowledging that the objective of preliminary rulings is "to guarantee observance of the law in the interpretation and application of the Treaty" 177, the court follows that the right to make a reference for a preliminary ruling exists "in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties". The court thereby declares that the individual character of a measure decides whether reference can be made, and not the list in Article 35 TEU.

¹⁷⁶ CFI: Case C-355/04 P, op. cit., para. 52.

¹⁷⁷ Ibid., para. 53

¹⁷⁸ Ibid., stress added by author.

The court then turns to the very special character of Common Position 931/2001/CFSP. Without going into detail, it comments that "because of its content, [this Common Position] has a scope going beyond that assigned by the EU Treaty to that kind of act." This sentence refers to the listing of individuals and entities in the annex of the Common Position, which is indeed a unique feature of a Common Position so far. Finally, the court states that it must be possible to review such a Common Position. If a national court has any doubts about its validity or interpretation or whether the common position is intended to produce legal effects in relation to third parties, it is allowed to ask the ECJ to give a preliminary ruling. For the same reasons, the Court would also have jurisdiction to review the lawfulness of such acts when an action has been brought by a Member State or the Commission under the conditions fixed by Article 35(6) EU. 181

Reviewing other academic papers, not many authors attach great importance to the role of national courts with regard to maintain human rights protection in this multi level game. However, the possibilities offered in this judgement should not be underestimated. The judge's argumentation is a strong weapon in the hands of listed individuals: "One could assume that the ECJ would have accepted jurisdiction in the present case, if SEGI had attacked national implementation measures – e. g. the exchange of information required by Article 4 of the common position 17 – and the domestic court had made a preliminary reference." ¹⁸³

4.2 Proposal for an effective review body on UN level

As stated above, the review of UN SC Resolutions by national courts is only a second-best solution, since it might decrease the effectiveness of UN politics. The present gap in the multilevel regulatory framework could be closed, if a review body on UN level was installed, which is independent and impartial and accessible for individuals and entities. At the same time this review body should avoid having the same weaknesses as the current institutions, i. e. focal point and

¹⁷⁹ Ibid., para. 54.

¹⁸⁰ Ibid.

¹⁸¹ Ibid., para 55.

¹⁸² For opposing opinions see Eckes (2007): op. cit., p. 42 and Albin, Silke: Kein Rechtsschutz bei Individualsanktionen zur Terrorbekämpfung – Eine Lücke des modernen Völkerrechts. www.boell.de/downloads/silke_albin_Rechtsschutz_Papier.pdf

¹⁸³ Eckes, Christina (2006): op. cit., p. 148.

1267 Committee. The review body is especially interesting for individuals and entities listed under Resolution 1267, but it is also conceivable to allow access for those that are subject to other UN sanction regimes. The Watson Institute came up with some suggestions that shall be presented in short, since they seem to fulfil the requirements made above. However, they differ slightly with regard to composition, power and procedure. ¹⁸⁴

In the first model, the SC would install a judicial institution that is accessible for listed individuals and entities. This institution can review decisions of the Sanction Committee concerning delisting requests, and the decision would be binding upon the SC and the Sanction Committee. With regard to the requirements of the UDHR and the ECHR concerning fair trial and effective remedy, this solution is a favourite: It is guaranteed that the court is independent and impartial, it is clearly effective, and the procedure is transparent. At the same time, this model is facing great difficulties when it comes to its realization. It touches upon a controversial question: "Who Is the Ultimate Guardian of UN Legality?" 186

During the Cold War, the antagonism between the Soviet Union and Western countries provided a form of political check, and the question of a judicial review was not pressing. This kind of political checks and balances dropped out with the collapse of the USSR, and nowadays UN member states find themselves obliged to implement measures that are not in line with their national interests. The second reason why the call for review emerged lies in the SC own behaviour: As examined in this paper, the SC tends to forget its constitutional basis – i.e. the Charter provision – on which it acts, and the rights that derive from this basis. However, there is opposition to a right of review, whether by the ICJ or any other judicial body. The argument is that the SC has to decide about political questions, which should – in general – abstain from the judicial sphere: "It would, in principle, be quite wrong to allow any Court to question matters of political judgment. In particular, it would be wrong to allow any court to question the

¹⁸⁴ For all details see Watson Institute for International Studies (2006): op. cit., pp. 43-48. The differences are presented in a Table 1, which is based on the same source.

¹⁸⁵ Comp. on this point Biehler (2003): op. cit., p. 179/180.

¹⁸⁶ Franck, Thomas M. (1992): The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality? In: The American Journal of International Law, Vol. 86, No. 3. (July 1992), pp. 519-523.

Bowett, Derek (1994): The Impact of Security Council Decisions on Dispute Settlement Procedures, p. 89. In: European Journal of International Law, Vol. 5, No. 1 (1994), pp. 89-101.

Council's judgment that a Chapter VII situation – a 'threat to peace, breach of peace, or act of aggression' – either had, or had not, occurred." It is thus a matter of the authority of the UN SC and the presumption of legality of its acts which impede judicial review. With regard to the changing nature of the UN SC decisions, which have more and more a clear effect on individuals, it would be wise for the UN SC respectively its permanent members to reconsider this topic. As long as this does not happen, we have to accept other models.

The second model consists of an arbitral panel, either on an *ad hoc* basis or as a standing body. The Secretary-General would compose a list of arbitrators and experts that have knowledge in criminal and administrative law, security and human rights. The Sanction Committee would, as soon as a delisting request appears, delegate the authority to decide about the request to the panel, and its decision would be binding on the Committee. As for the previous solution, the advantages are the independence of the institution, its effectiveness and enhanced transparency. Naturally, the degree of effectiveness depends largely on the amount of material that the panel receives from the Sanction Committee. In an ideal type it comprises all information in the file that can prove guilt or innocence of the accused. An assessment of the chances to realize this model is not much better than for the installation of a court. Bowett comments on this idea: "The likelihood of the Security Council accepting such a new solution must be extremely low. The present mood of the Council seems to indicate an impatience with legal restraints, rather than a willingness to create them." 189

Recognising the UN SC's refusal to share or even dispense its power, and considering the enormous problems and, most likely, endless discussions that an institutional reform releases, it is more practical to return to a small solution. A third model would step back from the ideal to maintain all elements of a fair trial and an effective remedy and is, in principle, a continuation of the improvements already made in UN SC Resolution 1730 (2006). It would leave the final decision for the SC or its sub-committees, but provide a non-binding, advisory opinion. There are three alternatives regarding the conception of such a body: Firstly, the task could be delegated to the already existing 1267 Monitoring Group that has

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¹⁸⁸ Ibid., p. 95.

¹⁸⁹ Ibid., p. 99.

been established in Resolution 1363 (2001). As it is done today, the group would be appointed by the Secretary-General and be comprised of experts in the affected areas. The point of access could remain in the focal point or handed over directly to the Group. However, the rights of the group are not as extensive as for the two previous models: There would not be any possibility for individuals to appear, and recommendations would not been made public. On the one hand, besides the important factor that the UN SC is more likely to accept this model, the advantage is that an already existent infrastructure is used, and it is not necessary to create an expensive bureaucratic institution. On the other hand, a conflict of interest might appear between monitor and support the sanction committee (as required in Resolution 1363 (2001) and serve as an independent advisory body.

Secondly, the Secretary-General could appoint an Ombudsman to which individuals could appeal. As an independent person, the Ombudsman could make a non-binding recommendation to the Sanction Committee. He would be directly accessible for individuals, but with regard to the extent of its review the same restrictions as for the Monitoring Group persist.

Thirdly, a panel of experts could deliver non-binding recommendations. Such panels have a long tradition inside and outside the UN framework, and their decisions have in the vast majority of cases been broadly accepted. The panel would have full access to the information in the file, and its recommendations would be made public.

¹⁹⁰ For an overview of the Groups reports see http://www.un.org/Docs/sc/committees/1267/1267mg.htm

Table 4.1: Comparison of Review Mechanisms at UN level

	Current Practice	Judicial Review	Arbitral Panel	1267 Monitor- ing Team	Ombuds- man	Panel of experts
Composition	-	+	+	+	+	+
Authority	+	+	+	-	+	+
Power	-	+	+	-	-	-
Procedural Guarantees	-	+	+	+	+	+
Investigatory Power	-	+	+	+	-	+
Hearing	-	+	+	-	-	+
Transparency	-	+	+	-	+/-	+
Chance of Realization	/	-	-	+	+	+

Source: Compare Watson Institute for International Studies (2006): Strengthening Targeted Sanctions through clear and fair procedures, p. 48.

4.3 Involving ECJ and ECtHR jurisprudence

Having commented on the possibilities for national courts to fill the judicial gap and having provided suggestions about possible institutional and procedural reforms on UN level, two institutions remain until the review is complete. Situated on the regional level, the ECJ and the ECtHR have not been a great help in the past. In contrary, both institutions seem to support, or at least to accept blindfolded, the erosion of human rights when it comes to anti-terrorism measures. In the case of terrorist lists, anticipating the result of this chapter, this is unlikely to change.

Firstly, the ECtHR has shown in the Segi case that it does not accept EU internal terrorists as victims of human rights violations just because their name is mentioned on a list. ¹⁹¹ That closes the door for judicial protection before the ECtHR for all EU internal terrorists. It is likely that applications of other listed individuals will be dismissed for the same reason. In general, Cameron observes a weakness of the ECHR: "There are substantive limits on the ECHR. In many areas there is little concrete guidance in the case law, and so the ECHR standards are still rudimentary. [...] Moreover, the ECHR, naturally enough, puts few limits on states' powers to criminalise in general, or to sentence offenders." ¹⁹² From the many sources that human rights can be derived from, the ECHR is only "the

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¹⁹¹ Comp. Chapter 2.4.2.

¹⁹² Cameron, Ian (2003): op. cit., p. 256.

lowest common denominator of European protection."¹⁹³ Therefore, he concludes, the scrutiny of the ECtHR, as well as any other international body, can never be "a substitute for proper democratic scrutiny of legislation at the national level."¹⁹⁴

Concerning the ECJ, a number of critics are at hand. The most profound allegation is its tendency to defend Community institutions when their discretionary powers are questioned. Besides, it is doubtful whether the ECJ has the competence to review cases in the area of security, and the procedure of unanimous judgements is not appropriate for human rights cases. Besides these critics, the court has done what it could do: Firstly, it has declared the Council Decision that is responsible for the listing as inapplicable insofar as it concerns the three applicants, PMOI, Sison and Stichting Al-Aqsa. And secondly, it has provided a way to a judicial remedy via national courts with its new interpretation concerning preliminary references in the Segi case. In the future the court will have to comment on the new statement of reasons and judge whether they are sufficient to enable the court to review the lawfulness of the listing decision.

4.4 Subconclusion

In the previous chapters, a "judicial gap" with regard to human rights protection was identified. In this chapter the question was how this judicial gap can be filled. The main findings can be summarised in two points.

Firstly, in the absence of any sufficient review body on UN level, and with regard to the judgements of the CFI and ECtHR, the national courts in the European Union should take the responsibility to protect human rights for their citizens. Two options exist: Despite the precedence of UN law and its obligation to implement UN SC decisions, national courts can very well review those decisions at least in the light of *jus cogens*. In cases where *jus cogens* can not guarantee a sufficient protection, courts can even apply domestic law. However, to avoid the complete loss of effectiveness of UN measures, national courts are advised to choose a "relaxed" application of those national standards. The second option for national courts is the possibility to ask the ECJ for a preliminary ruling concerning Common Position 931/2001/CFSP. Contrary to the wording of Article

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¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid, p. 255.

35 TEU, which does not include the option to make preliminary references on the interpretation and validity of Common Positions, the CFI suggested this *modus operandi* in its Segi judgement. The CFI could then deliver a judgement concerning the lawfulness of the Common Position.

The advantage of using national courts is that they already today have the necessary powers, and no institutional changes have to be made. Possible disadvantages concerning the erosion of UN effectiveness or even a "breakdown of the Charter system" are counter-balanced by the growing pressure on the UN to adjust their sanction system.

Secondly, an effective review body on UN level, which is independent and impartial and accessible for individuals and entities, would be desirable. A direct comparison of various models shows that those which are really independent to not have a chance of realization, since the members of the Security Council want to remain the "Ultimate Guardian of UN Legality." For the purpose of realizing such a review body, one has to step back from the ambition to save all elements that are necessary for a fair trial and effective remedy. A solution might be to remain the UN SC's independence and install an institution that has only an advisory status, such as a Panel of Experts, an Ombudsman or an expansion of the 1267 Monitorung Group's competences.

For various reasons, the ECJ and ECtHR are not capable of directly filling the judicial gap.

5. Conclusion and Recommendations

Before we turn to a summary of the findings of this paper, it is worth to quote Dag Hammarsjöld, who was UN Secretary-General between 1953 and 1961: "The Universal Declaration [...] as a common standard of achievement for all peoples and all nations [...] it not only crystallizes the political thought of our times on these matters, but it has also influenced the thinking of legislators all over the world." If this influence still holds, it would not be necessary to write almost 70 pages about the research question "Which human rights problems arise from the setup of terrorist list in the EU and how can they be solved?" Unfortunately, something seems having changed in the thinking of legislators, and the results are alarming.

What is the quintessence of the findings in this paper? In chapter one, the legal acts behind the sanction regimes have been presented. Based on Article 41 UNC, the Security Council installed two different sanction regimes: The first one, introduced in Resolution 1267(1999), imposes sanctions upon the Taliban and has subsequently been extend upon Usama bin Laden, persons associated with him, and the Al Qaida organization. The second one, introduced in Resolution 1373(2001) after the terrorist attacks at 11 September 2001, imposes sanctions upon all persons who commit or attempt to commit terrorist acts. The EU has implemented both sanction regimes by adopting Common Positions and Council Regulations. While the effect of both regimes is the same – funds and financial assets of persons, groups and entities are frozen to prevent the financing of terrorist acts – the procedural method differs: For the Taliban Sanction regime, the UN provides own lists through a SC subcommittee. For the other regime, the EU establishes an autonomous list.

In chapter two, the question was examined how human rights are infringed by the setup of those terrorist lists. Although the UN SC is not directly bound to human rights, it follows from Article 1(3) of the Charter and the role of the UN as the promoter of human rights in the world that it has to respects those rights as much as possible. The EU is not party of any human rights treaty, but it follows from Article 6(2) TEU and the case law of the ECJ that the ECHR has special significance. Acknowledging the fact that far more rights can be infringed, only the right to own property (as guaranteed in Article 1 Protocol 1 ECHR) and due process rights have been evaluated (right of an effective remedy in Article 13 ECHR and right to a fair trial in Article 6 ECHR). Concerning the first right, the CFI denied an infringement in the case of Yusuf, as a freezing of financial assets does not constitute a deprivation of property, but rather a "control in use". This finding is contested, since the duration of the measure and the effect for the accused put the freezing close to a confiscation. In addition, the court argued that no jus cogens norm has been violated, because the UN SC provides the possibility to declare freezing of funds inapplicable for money that is needed to cover basic expenses, such as foodstuffs, rent, medicines and medical treatment. Due to a missing test of proportionality, also this finding is contested.

Concerning the right to affair trial, serious doubts as to the lawfulness of the procedure in the 1267 Committee and the clearing house are deemed appropriate.

The most serious violations are the excluded public, the fact that no defence for the accused is allowed, the missing independence of the body and the nondisclosure of evidence. The CFI confirmed the last deficit in two cases (PMOI and Sison) and ruled that a listing was unlawful. These judgements are reasonable, although the Council decided to remain both applicants on the list. A first evaluation of the newly introduced statements of reason, which were submitted ex post to all listed individuals, cannot eliminate all open questions. It is therefore welcomed that Sison lodged a new complaint on the Council's non-compliance with the judgement's obligation to remove his name from the list.

The last right at issue is not as easy to evaluate in short, since it depends on the sanction regime and the group of accused the individual belongs to whether the right is violated. In general, the possibilities to have an effective remedy are scarce. The biggest problems occur for two groups of persons: Firstly, those that are listed directly at the UN level. For these applicants, as in the Yusuf case, the ECJ limits its review on the violation of any *jus cogens* norm. This decision is subject to criticism. Secondly, the group of EU internal terrorist suspects has problems to lodge a complaint at the ECJ since they are not involved in any first pillar measure. In addition, the ECtHR refuses to grant them the status of a victim of the Convention, which is a precondition for an application. This situation is highly unsatisfactory. A de-listing request via nation states or the focal point at UN level is possible, but the procedure lacks basically the same problems that are already mentioned under the right to a fair trial.

After these – necessarily broad – considerations, Chapter 3 aims to answer the question whether human rights violations can be justified. Indeed, states have ways to limit human rights: The right to own property can be limited if a limitation is in the public interest. In my opinion, it is not enough to prove the public interest for the measure in general, but on a case-by-case basis. This is not done so far. Article 15 ECHR provides derogation in the case of emergency, whereas states enjoy a margin of appreciation in the determination of such a case. However, terrorism does not fulfil the elements of a case of emergency: Neither is there an exceptional, nor an imminent danger or crisis. In this context, the missing common definition of the word terrorism is distressing. A third idea is often heard in the public sphere: The limitation of the right of access to court due to national security reasons. The ECtHR has confirmed this possibility in its case law, but the

core of the right is not allowed to be touched, and all disadvantages for the accused have to be compensated somehow. This compensation, for the both lists, is not granted. Therefore it appears that no justifications for human rights violations in this matter are on hand.

It is not only the demand of this paper to describe and analyze a status quo, but also to identify ways out of the dilemma. Therefore the question in Chapter 4 is: Which options exist to fill the judicial gap? The basic message in this last part of the paper is the promotion of national court's influence. They can exercise their power in two different first. Firstly, they can very well review UN SC Resolutions in the light of jus cogens or domestic standards. This right can be derived from the wording of Article 25 UNC, a general state responsibility for the action of an international organization, or from theoretic considerations about the relationship between international and national law. Fears concerning an erosion of the UN's authority are in my opinion unjustified. In contrary, the UN system will benefit from such national activity, since it is eventually forced to adjust its own structure and provide a review body at UN level. Such a step would be in conformity with the changing role of UN acts and its growing influence directly on individuals.

Secondly, national courts can ask the ECJ for a preliminary reference concerning Common Position 931/2001/CFSP. Although Article 35 TEU does not provide for such a possibility, the CFI affirmed in the case of Segi that it nevertheless exists: Unlike other Common Positions, the one at issue might be able to produce legal effects in relation to third parties. Since it is the purpose of preliminary rulings to guarantee observance of the law in the interpretation and application of the Treaty, it must – by way of exception – be possible to review this common position.

Solutions for a review body on UN level contain one problem: As soon as they fulfil all elements that are necessary to guarantee a fair trial and an effective remedy, the chances to realize such a body are minimal. The permanent members of the UN SC want to remain the ultimate guards of UN legality. My suggestion, again, is to use the power of national courts and thereby force the UN, in their own interest, to react.

Perhaps the above can be distilled into three messages. Firstly, the current practice of listing is clearly at odds with the ECHR and the UDHR. Secondly, the United

Nations risk their authority and effectiveness if they do not react to this problem. And thirdly, it appears that despite the growing importance of international organization the system is not mature enough to renounce the nation state as a resort of human rights protection.

Influences, to come back to Dag Hammarsjöld, change over time. Some disappear, others emerge. They follow the course of the world and are shaped by our experience, our knowledge, and our interests. Thereby they do not follow a straightforward road, but they take curves or double back. As the twentieth century has shown, they are not immune against wrong decisions, or even propaganda. Today, the experience of terror attacks in a number of countries in the European Union, the knowledge about the aggression potential against western states, and the interest to avoid the outbreak of this potential have a major influence on legislators, in the United Nations Security Council and in the European Union. Together they caused the political will to do everything in solidarity against the spread of terrorism and allowed for an unprecedented international *Eingriffsermächtigungsgesetz*. ¹⁹⁶

As a consequence, some load-bearing pillars of the international community of states are at risk. Above all, the community is facing a loss of its credibility. This is regrettable, since it is not an automatism, but an effect of own decisions. These decisions have not been taken under any form of coerciveness, at least not of the kind that is based on facts.

Hopefully, influences change again, and allow a policy that makes human rights compatible with measures that are supposed to maintain international peace and security.

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¹⁹⁶ In the context of anti terrorist measures and terrorist lists, this phrase has been introduced by Biehler, Gernot (2003): op. cit., p. 171.

Epilogue

This paper has hopefully given some insight into the topic of terrorist lists and the human rights violations that are connected to this measure in the fight against terrorism. As stated in the introduction, this matter is a challenge for every academic in the field: It is necessary to deal with three different levels of legislation, two different sanction regimes and correspondingly different groups of victims. In addition, legislation is continuously amended, and new judgements contribute to the continuation of a heated debate. During the time of writing the judgement in the Sison case and the Council's release of statements of reasons made it necessary to adjust my original outline. For the purpose of being up-to-date I tried to include these new developments as much as possible.

I hope I was able to deal with these difficulties and could present my findings in a way that enriches the reader and adds value to the collection of academic works dealing critically with multilevel regulation and human rights in the face of terrorism. For those that are interested in improving their knowledge in the topic, the reference list might be a good starting point to find literature. Especially the website of Statewatch and their terrorist lists observatory was a great help for this paper. If anyone wishes to make a comment on this work, to send criticism or questions as regards content, please use my contact details on the cover sheet.

Last but not least I want to thank all people that supported me in the last three month in different ways. Be it the boost of my motivation, the provision of literature or just the acceptance of my absence - you all added a great deal to the success of this work.

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Annex

A1: Cover Sheet of the 1267 Committee used for listing request

I. IDENTIFIER INFO	ORMATIO	N – for Indi	viduals			
Where possible, note the nationality or cultural or ethnic sources of names/aliases. Provide all available spellings.	Surname/ Family Name/ Last Name	First Name	Additional name (e.g. father's name or middle name), where applicable	Additional name (e.g. grandfather's name), where applicable	Additional name, where applicable	Additional name, where applicable
Full Name: (in original and Latin script)						
Aliases/"Al so Known As" (A.K.A.s): Note Former						
whether it is a strong or weak alias.						
Other nom de guerre, pseudonym:			Honorary, profes	Title: ssional, or religious title		
Employment/Occupation: Official title/position				Nationality/ Citizenship:		
Date of Birth: (DD/MM/YYYY)			(Number, issui	Passport Details: ing date & country, expiry date)		
Alternative Dates of Birth (if any): (DD/MM/YYYY)			Nu	onal Identification nmber(s), Type(s): rd, Social Security)		
Place of Birth: (provide all known details including city, region, province/state, country)			-	Address(es): n details, including city, province/state, country)		
Alternative Place(s) of Birth (if any): (city, region, province/state, country)			(provide all know	vious Address(es): n details, including city, province/state, country)		
Gender:				anguages spoken:		
Father's full name:				other's full name:		
Current location:			Pro	evious location(s):		
Undertakings and entities owned or controlled, directly or indirectly by the individual (see UNSCR 1617 (2005), para. 3):						
Other relevant detail: (such as physical description, distinguishing marks and characteristics)						

IDENTIFIER INFORMATION For Groups, Undertakings, or Entities						
Name:						
Also Known As	Now Known As (N.K.A.s)					
(A.K.As):						
Where possible, note whether it is a strong or	Formerly Known As (F.K.A.s)					
whether it is a strong of weak A.K.A.						
Address(es):						
Headquarters and/or						
branches.						
Provide all known details,						
including street address,						
city, province/state,						
country						
Tax Identification						
Number: (or local						
equivalent, type)						
Other Identification						
Number and type:						
Other Information:						
II. BASIS FOR LIST	ING					
May the Committee	publicly release the following information? \Box Yes \Box No					
•						
Complete one or more						
(a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of Al-Qaida (AQ), Usama bin Laden (UBL), or the Taliban, or any cell, affiliate, splinter group or derivative thereof.						
	or in support of Al-Qaida (AQ), Usama bin Laden (UBL), or the Tailban, or any cell, affiliate, splinter group or derivative thereof:					
	, spinior group or derivate and con-					
(b) supplying, selling or transferring arms and related materiel to AQ, UBL or the Taliban, or any cell, affiliate, splinter group or derivative thereof. ¹						
Name(s) of cell, affiliate	, splinter group or derivate thereof:					
(c) recruiting for AQ, UBL of	or the Taliban, or any cell, affiliate, splinter group or derivative thereof.					
	, splinter group or derivate thereof:					
	A CAN TIPLE A					
	s or activities of AQ, UBL or the Taliban, or any cell, affiliate, splinter group or derivative thereof. , splinter group or derivate thereof:					
Name(s) of cent, arrinate	, spiniter group of derivate increof.					
(e) Other association with A	Q, UBL or the Taliban, or any cell, affiliate, splinter group or derivative thereof.					
Briefly explain nature of	association and provide name of cell, affiliate, splinter group or derivate thereof:					
(f) Entity owned or controlle	d, directly or indirectly, by, or otherwise supporting, an individual or entity on the Consolidated List. ²					
	entity on the Consolidated List:					
Please attach a Statement of Case which should provide as much detail as possible on the basis(es) for listing						
indicated above, including: (1) specific findings demonstrating the association or activities alleged; (2) the nature of						
the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.) and (3)						
supporting evidence or documents that can be supplied. Include details of any connection with a currently listed						
individual or entity. Ind	licate what portion(s) of the Statement of Case the Committee may publicly release or release					

III. POINT OF C	ONTACT The individual(s) below may serve as a point-of-contact for
further questions on thi	s case: (THIS INFORMATION SHALL REMAIN CONFIDENTIAL)
Name:	Position/Title:

¹¹ S/RES/1617 (2005), para. 2 ² S/RES/1617 (2005), para. 3