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## United Nations Security Council and European Union blacklists

Report  
Committee on Legal Affairs and Human Rights  
Rapporteur: Mr Dick MARTY, Switzerland, Alliance of Liberals and Democrats for Europe

### *Summary*

The Committee finds that terrorism can and must be fought effectively with means that fully respect human rights and the rule of law. International bodies such as the United Nations (UN) and the European Union (EU) ought to set an example for states in this respect, as a matter of their own credibility and that of the fight against terrorism in general.

Targeted sanctions against individuals or specific groups ("blacklists") imposed by the United Nations Security Council and the Council of the European Union are, in principle, preferable to general sanctions imposed on states that often have dire consequences for vulnerable population groups whilst targeted sanctions such as travel restrictions and freezing of assets hurt only those found personally responsible.

As they have a direct impact on individual human rights such as personal liberty and the protection of property, the imposition of such targeted sanctions must respect minimum standards of procedural protection and legal certainty, as guaranteed by the European Convention on Human Rights and UN human rights instruments. The procedures currently in use at the UN and at the EU fall far short of these standards, as the present report and the examples given by the Rapporteur show.

The Committee therefore appeals to the Council of Europe's member states to use their influence in the United Nations and in the European Union to improve procedures for the imposition of sanctions in the two bodies in line with its recommendations and encourages national and European courts to provide the necessary legal remedies to the victims of unfair procedures currently in use.

**A. Draft resolution**

1. The Parliamentary Assembly reaffirms its position that terrorism can and must be fought effectively with means that respect human rights and the rule of law.
2. It considers that international bodies such as the United Nations and the European Union ought to set an example for states in this respect, given the lofty goals laid down in their founding instruments and the credibility they need in order to attain those goals.
3. Targeted sanctions against individuals or specific groups ("blacklists") imposed by the United Nations Security Council (UNSC) and the Council of the European Union (EU) are, in principle, preferable to general sanctions imposed on states. General sanctions often have dire consequences for vulnerable population groups in the countries concerned, and generally not for their leadership, whilst targeted sanctions hurt only those found personally responsible for certain wrongdoings.
4. At the same time, targeted sanctions (such as travel restrictions and freezing of assets) have a direct impact on individual human rights such as personal liberty and the protection of property. Whilst it is not at all clear and still being debated whether such sanctions have a criminal, administrative or civil character, their imposition must, under the European Convention on Human Rights (ECHR) as well as the International Covenant on Civil and Political Rights, respect certain minimum standards of procedural protection and legal certainty.
5. Procedural and substantive standards must also be guaranteed to ensure the credibility and effectiveness of the instrument of targeted sanctions.
  - 5.1. The minimum procedural standards under the rule of law are the rights:
    - 5.1.1. to be notified and adequately informed of the charges held against oneself, and of the decision taken;
    - 5.1.2. to enjoy the fundamental right to be heard and to be able to adequately defend oneself against these charges;
    - 5.1.3. to be able to have the decision affecting one's rights speedily reviewed by an independent, impartial body with a view to modifying or annulling it;
    - 5.1.4. to be compensated for any wrongful violation of one's rights.
  - 5.2. Minimum substantive standards require a sufficiently clear definition of grounds for the imposition of sanctions and applicable evidentiary requirements.
  - 5.3. The "blacklisting" procedure should in principle be limited in time. It is inadmissible that persons remain on the blacklist for years, whilst even the prosecuting authorities, after a long investigation, have not found any evidence against them.
6. The Assembly finds that the procedural and substantive standards currently applied by the UNSC and by the Council of the EU, despite some recent improvements, in no way fulfil the minimum standards as laid down above and violate the fundamental principles of human rights and the rule of law.
  - 6.1. Concerning procedure, it must be noted and strongly deplored that even the members of the committee deciding on the blacklisting of an individual are not fully informed of the reasons for a request put forward by one member. The person or group concerned is usually neither informed of the request, nor given the possibility to be heard, nor even necessarily informed about the decision taken – until he or she first attempts to cross a border or use a bank account. There are no procedures for an independent review of decisions taken and for compensation for infringements of rights. Such a procedure is totally arbitrary and has no credibility whatsoever.
  - 6.2. Similarly, substantive criteria for the imposition of targeted sanctions are at the same time wide and vague, and sanctions can be imposed on the basis of mere suspicions.
7. The Assembly finds such practices unworthy of international bodies such as the United Nations and the European Union. Considering that it is both possible and necessary for states to implement the various

sanctions regimes whilst respecting their international obligations under the ECHR and the UNCCPR, it urges:

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

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

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

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

9. The Assembly reminds all member states of the Council of Europe that they have signed and ratified the European Convention on Human Rights and its Protocols and have therefore committed themselves to uphold its principles, and this also applies to the implementation of sanctions imposed by the United Nations and the European Union.

**B. Draft recommendation**

1. The Parliamentary Assembly, referring to its Resolution ... (2007) on UN Security Council and European Union blacklists, invites the Committee of Ministers to take up the issue of targeted sanctions and to invite:

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

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

## C. Explanatory memorandum, by Mr Dick Marty, Rapporteur

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#### I. Introduction

##### *i. Procedure*

1. The motion for a resolution on United Nations Security Council blacklists (Doc 10856 dated 23 March 2006) was transmitted to the Committee on Legal Affairs and Human Rights for report on 29 May 2006 (Reference No 3214). At its meeting on 7 June 2006, the Committee appointed Mr Dick Marty as Rapporteur. At its meeting on 19 April 2007, the Committee considered an Introductory Memorandum presented by the Rapporteur (AS/Jur (2007) 14)<sup>1</sup>. The Committee proceeded to declassify the memorandum and to broaden the scope of the report to include the European Union blacklists in addition to UNSC blacklists.

2. On 28 June 2007 a public hearing was held with the attendance of Mrs Maria Telalian, Minister Counsellor, Greek Representation to the United Nations (New York), Professor Syméon Karagiannis, Professor of Public law, Robert Schuman University (Strasbourg), Mr David Vaughan CBE QC (London), and Mr Jean-Pierre Spitzer, Avocat (Paris).<sup>2</sup>

##### *ii. Legal background*

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

<sup>1</sup> Available at [http://assembly.coe.int/CommitteeDocs/2007/20070319\\_ajdoc14.pdf](http://assembly.coe.int/CommitteeDocs/2007/20070319_ajdoc14.pdf).

<sup>2</sup> The minutes of the hearing (Item 22 of document AS/Jur (2007) PV 06) were declassified by the Committee on 12.11.2007.

<sup>3</sup> See the Appendix for hyperlinks to the UNSC archive and all other UN documents referenced in this report.

4. On 27 December 2001, the Council of the European Union (hereinafter “the Council”) adopted, under Articles 15 and 34 of the Treaty on European Union, Common Positions 2001/930/CFSP<sup>4</sup> and 2001/931/CFSP on specific sanctions to combat terrorism.

5. In order to implement the measures described in the aforementioned Common Position 2001/931/CFSP, the Council, on 27 December 2001, adopted Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities<sup>5</sup> with a view to combating terrorism, on the basis of Articles 60, 301 and 308<sup>6</sup> of the Treaty establishing the European Community (EC). Regulation No 2580/2001 empowered the EU Council itself, and not just the UNSC, to maintain its own list of people and entities to whom the sanctions apply; the UNSC lists (UNSC Resolutions 1267 (1999) and 1333 (2000)) were implemented under Regulation (EC) No 467/2001.

6. The Council has adopted several common positions and decisions updating both sets of lists; the acts in force at the time this report was written include Commission Regulation (EC) No 760/2007 of 29 June 2007, updating Council Regulation (EC) No 881/2002 and repealing Council Regulation (EC) No 467/2000, Council Common Position 2007/448/CFSP of 28 June 2007, updating Common Position 2001/931/CFSP and repealing Common Positions 2006/380/CFSP and 2006/1011/CFSP, and Council Decision 2007/445/EC of 28 June 2007, implementing Article 2(3) of Regulation No 2580/2001 and repealing Decisions 2006/379/EC and 2006/1008/EC.

### **iii. Interpretation of the mandate**

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

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

## **II. Key issues related to UN and EU blacklist procedures**

### **i. Overview**

9. The human rights obligations of member states, both of the Council of Europe and of the United Nations, flow principally from the ECHR, the ICCPR, the International Covenant on Social, Economic and Cultural Rights (ICESCR), and the UN Charter<sup>8</sup>. The UN and EU blacklisting regimes, in particular the travel restrictions, financial sanctions, and procedural rules, potentially infringe upon a large number of fundamental human rights guaranteed by the aforementioned documents.

10. The comprehensive travel restrictions found in the blacklist regimes potentially violate individuals’ rights to life, to health<sup>9</sup>, to private and family life, to reputation, to freedom of movement and to freedom of religion<sup>10</sup>, as defined in Article 6 ICCPR and Article 2 ECHR (right to life), Article 12 ICESCR (right to

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<sup>4</sup> See the Appendix for hyperlinks to all of the European Union documents mentioned in this report.

<sup>5</sup> The initial list of individuals and entities to which this Regulation applies was established by the Council Decision 2001/927/EC of 27.12.2001.

<sup>6</sup> Articles 60 and 301 EC, together with 308 EC, allows the Council to impose sanctions directly on individuals (as opposed to being applied indirectly by the member states).

<sup>7</sup> Cases include *Organisation des Modjahedines du peuple d’Iran v. Council of the European Union*, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, *Gestoras Pro Amnistía*, *Juan Mari Olano Olano and Julen Zelarain Errasti v. Council of the European Union, Kingdom of Spain, United Kingdom of Great Britain and Northern Ireland*, *Jose Maria Sison v. Council of the European Union*, and *Stichting Al-Aqsa v. Council of the European Union*.

<sup>8</sup> The UN Charter does not specifically protect any particular right; the UN declares in Article 55, Chapter IX of the UN Charter its “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

<sup>9</sup> For example, if one needs to travel to receive necessary medical care.

<sup>10</sup> For example, if one’s religion requires making pilgrimages to a certain site.

enjoyment of the highest attainable standard of physical and mental health), Article 8 ECHR and Article 17 ICCPR (right to respect for private and family life and to reputation), Article 12 ICCPR and Article 2 of Protocol No 4 to the ECHR (freedom of movement), and Article 18 ICCPR and Article 9 ECHR (freedom of religion).

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

12. The sanction regimes provide few, if any, protection of fundamental procedural rights, including the rights to a fair trial, to be informed of charges and evidence, to trial within a reasonable time, to have access to an impartial review mechanism, to compensation for wrongful infliction of sanctions infringing fundamental rights, and to a reasoned decision. While procedural assurances do vary in civil and criminal proceedings<sup>11</sup>, certain “fair trial” rights must be respected in any type of proceeding. The right to a fair trial is guaranteed by Article 14 ICCPR, Article 6 ECHR, Article 10 of the Universal Declaration of Human Rights (UDHR) and Article 25 of the American Convention on Human Rights (ACHR). Other relevant articles include Article 8 ACHR (presumption of innocence in criminal proceedings), Article 14 ICCPR and Article 3 of Protocol No 7 to the ECHR (right to compensation for wrongful conviction), and Article 2(3) ICCPR<sup>12</sup>, Articles 6 and 13 ECHR, and Article 8 UDHR (right to an effective remedy).

## *ii. Listing procedures*

### *a. United Nations sanctions committees’ procedures*

13. This report will use the practices of the 1267 Committee as being representative of the other sanctions committees’ practices since most of the other United Nations targeted sanctions committees have relied on the 1267 Committee’s precedents, and virtually all of them require a basic description and justification of the reasons for listing<sup>13</sup>.

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

15. Recent improvements (which remain wholly insufficient) in these vague procedures include stricter requirements for the amount and type of information needed for listing. For example, UNSC Resolution 1526 called upon states to include identifying and background information to the “greatest extent possible” when submitting new names for inclusion on the list. UNSC Resolution 1617 clarified this instruction further, mandating that states should provide the Committee with a “statement of case” describing the basis for the proposal. Resolution 1617 also further improved the listing procedures by mandating the submission of a specific form and by further clarifying the definition of what constituted “associated with” Al-Qaeda, Usama bin Laden, or the Taliban. Resolution 1735 provided for a cover sheet for the listing of submissions and further clarified the required content of the “statement of case”<sup>14</sup>. This Resolution also necessitated the “obligatory” notification of individuals or entities that have been listed<sup>15</sup>.

<sup>11</sup> The characterisation of sanctions as criminal charges, civil obligations, or measures of a different kind is important for two main reasons. First, the characterisation determines what type of evidence is required for listing. If the sanctions are characterised as criminal charges, the evidence has to meet the “beyond a reasonable doubt” standard, but if characterised as civil, the evidentiary burden for listing is much lower. Second, the characterisation of the sanctions has direct consequences for the requirements of a review mechanism. If Article 6 ECHR is applicable, then the review mechanism has to be judicial in nature, but if it is not applicable, Article 13 ECHR still applies, but does not require a judicial remedy. Moreover, even if Article 6 is applicable, the question remains of whether it can be limited on the basis of national security concerns. These questions will be addressed later in this memorandum.

<sup>12</sup> See also Human Rights Committee General Comment No. 31 entitled “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (29.03.2004):

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument)

<sup>13</sup> However, practices do vary across committees and even within them.

<sup>14</sup> The “statement of case” should provide as much information as possible, including: specific information supporting a determination that the individual or entity meets the relevant criteria, the nature of the information, any supporting information or documents, and details of any connection between the proposed individual or entity and any currently listed individual or entity. See UNSC Resolution 1735, adopted 22.12.2006, § 5.

<sup>15</sup> States are required to “take reasonable steps according to their domestic laws and practices to notify or inform the listed individual or entity of the designation and to include ... a copy of the publicly releasable portion of the statement of

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

### **b. European Union procedures**

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

18. While neither the European Union nor the European Community are “members” of the United Nations, their constitutive treaties<sup>16</sup> have made treaty obligations of the EC/EU member states sources of Community/Union law which they are bound to observe. The Court of First Instance, in both *Yusuf* and in *Kadi*<sup>17</sup>, commented that “... the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the treaty establishing it ... It therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter ... the provisions of that Charter have the effect of binding the Community”<sup>18</sup>.

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

20. The EU implemented UNSC Resolution 1267 through Regulation (EC) No 337/2000, and added UNSC Resolution 1333 through Regulation (EC) No 467/2001. Subsequently, the EU also adopted another series of regulations, beginning with Regulation No 2580/2001, to establish an EU-managed list.

21. The EU regulations implementing UNSC resolutions employ procedures very similar to those found in the UN documents, making the discussion of UN sanctions applicable to the EU as well. Thus, this section will focus on the EU-managed list and its shortcomings in the human rights arena. The first regulation, No 2580/2001, did not mandate the use of a specific form or “cover sheet”, nor did it provide for the obligatory notification of individuals or entities that have been listed. Furthermore, the listed parties were not notified of the evidence leading to their inclusion on the list. Following the 12 December 2006 CFI judgment in *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* [OMPI]<sup>19</sup>, however, the EU Council released a statement on 29 June 2007 saying that a statement of reasons (“letter of notification”), in addition to information on how to appeal, will now be provided for parties who have their assets frozen. As of the date of this report, it is still unclear how effective these changes will be in practice.

### **c. Fundamental human rights violations and relevant case-law**

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

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case, a description of the effects of designation ... the Committee’s procedures for considering delisting requests ...” *Id.* at § 11.

<sup>16</sup> See, e.g., Article 307 of the Treaty establishing the European Community (“The rights and obligations arising from agreements concluded before 01.01.1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty”).

<sup>17</sup> *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, judgment of 21.09.2005, T-315/01 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0315:EN:HTML>).

<sup>18</sup> *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, judgment of 21.09.2005, T-306/01, §§ 243, 253 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0306:EN:HTML>); *Kadi*, §§ 182-90.

<sup>19</sup> Judgment of 12.12.2006, T-228/02

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0228:EN:HTML>).

23. Some of these violations have been unsuccessfully challenged before the Court of First Instance. In *Kadi* and *Yusuf*, the CFI held<sup>20</sup> that, while arbitrary deprivation of property might be considered a violation of *jus cogens*<sup>21</sup>, there was no disproportionate interference with fundamental human rights due to the possibility of exemptions under UNSC Resolution 1452 and the potential for judicial review<sup>22</sup>. The Court also held that the applicants' rights to a fair trial were not violated since states had the option of initiating a de-listing procedure on behalf of its citizens<sup>23</sup>. The CFI made similar arguments in response to the applicants' other allegations of violations.

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

25. Returning to the violation of property rights inherent in the current listing process (Article 1 of Protocol No 1 to the ECHR), in *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*<sup>25</sup>, the ECJ concluded that the sanctions leading to the aircraft seizure were not disproportionate. However, this case can be distinguished from the majority of blacklist cases. In *Bosphorus*, the applicants were the victims of general sanctions directed against a government and not the individuals themselves<sup>26</sup>. Most blacklist cases involve sanctions directed against individuals; targeted, as opposed to comprehensive, sanctions potentially have more direct human rights consequences.

26. Another human rights violation inherent in the current listing procedures is the presence of defamation (Article 17(1) ICCPR). Merely being listed can besmirch one's reputation by implying that the individual or entity in question is associated with terrorists or even a direct participant in terrorism. In *Zollmann v. UK*<sup>27</sup>, for example, two Belgian diamond merchants sued for slander after a British Minister publicly accused them of breaching the UN targeted sanctions against the Angolan UNITA party. The ECtHR declared the case inadmissible due to parliamentary immunity. In his report prepared for the Council of Europe, Professor Cameron argues that if this immunity had not existed, the *Zollmann* case strongly suggests that the ECtHR would consider blacklisting to be an attack on one's reputation<sup>28</sup>.

27. The most grievous human rights violation occurs in the sanctions regimes' disregard for "fair trial" rights in their listing procedures. Article 6 ECHR guarantees a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in the case of both civil and criminal charges. In criminal cases, the accused shall be presumed innocent<sup>29</sup>, has the right to be informed promptly of the charges, to have adequate time and facilities to prepare his or her defence, to defend himself or herself in person, and to examine or have examined witnesses against him or her. Both civil and criminal charges are accompanied by the right to a judicial remedy. If the charges are not civil or criminal then Article 13 ECHR, providing an "effective remedy", still applies. The meaning of an "effective remedy" will be discussed in greater length in section II.iv. of this report.

<sup>20</sup> While both applicants did make arguments about the unlawfulness of the EC regulations, the case centered on the underlying UNSC resolutions.

<sup>21</sup> In *Yusuf*, the Court, while raising the issue of arbitrary deprivation of property, never addressed the substance of the issue, focusing only on whether protection of property was a *jus cogens* norm.

<sup>22</sup> *Kadi*, §§ 234-52; *Yusuf*, §§ 285-303. Both cases are currently on appeal to the ECJ (C-402/05 and C-415/05).

<sup>23</sup> *Kadi*, §§ 261-91; *Yusuf*, §§ 309-46.

<sup>24</sup> To date, the ICJ has evidenced its continuing reluctance to review UNSC resolutions; see, e.g., *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, ICJ Reports 1992.

<sup>25</sup> Judgment of 30.07.1996, C-84/95 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995J0084:EN:HTML>).

<sup>26</sup> See the report of Professor Iain Cameron for a thorough examination of this difference: *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, 02.06.2006, p. 17 ([http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/public\\_international\\_law/Texts\\_& Documents/2006/I.%20Cameron%20Report%2006.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/Texts_& Documents/2006/I.%20Cameron%20Report%2006.pdf)).

<sup>27</sup> Application No. 62902/00, 27.11.2003

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=671866&portal=hbkm&source=externalbydocnumb er&table=F69A27FD8FB86142BF01C1166DEA398649>).

<sup>28</sup> Professor Iain Cameron, *supra* note 24, p. 11.

<sup>29</sup> In *Phillips*, the ECtHR held that the right to be presumed innocent forms part of the general "fair hearing" notion under Article 6(1); under this reading, the right would also apply in civil cases. See *Phillips v. the United Kingdom*, Application No. 41087/98, 05.07.2001, § 40

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=697435&portal=hbkm&source=externalbydocnumb er&table=F69A27FD8FB86142BF01C1166DEA398649>). See also *Saunders v. the United Kingdom*, Application No. 19187/91, 17.12.1996.

28. Article 14 ICCPR provides a similar set of fair trial guarantees: everyone is entitled to a “fair and public hearing by a competent, independent and impartial tribunal established by law”, to be presumed innocent until proven guilty, and, in the cases of criminal charges, to be informed promptly of the charges, to have adequate time and facilities to prepare his or her defence, to be tried without undue delay, to be tried in his or her own presence, and to examine, or have examined, witnesses against him or her.

29. As demonstrated above, fair trial guarantees are more extensive in the case of criminal charges. In determining the nature of a charge, the ECtHR has offered the following definitions. With respect to criminal charges, the ECtHR in *Engel* commented: “... it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently ... The indications ... must be examined in the light of the common denominator of the respective legislation of the various Contracting States .... The very nature of the offence is a factor of greater import ... also ... [consider] the degree of severity of the penalty that the person concerned risks incurring ....”<sup>30</sup>

30. With respect to civil charges, the ECtHR in *König* stated: “Whilst the Court thus concludes that the concept of “civil rights and obligations” is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance .... Whether or not a right is to be regarded as civil ... must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned .... the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States ...”<sup>31</sup>

31. The Human Rights Committee does not provide much guidance to interpret the meaning of “criminal charge” in the ICCPR, but given the very similar wording in both Article 6 ECHR and Article 14 ICCPR, the case-law of the ECtHR also can be applied to the ICCPR<sup>32</sup>.

32. In the light of the above definitions, the sanctions procedures seem to have both criminal and civil elements. The 1267 Committee lists individuals on the basis of their association with Al-Qaeda, Usama bin Laden, or the Taliban. Association with terrorism, a criminal activity, would seem to have a criminal element and the impact of some of the measures imposed arguably rises to the level of criminal sanctions. Yet, the Third Report of the 1526 Sanctions Monitoring Team states that “[a]lthough many of those on the List have been convicted of terrorist offences and others indicted or criminally charged, the List is not a criminal list. The sanctions do not impose a criminal punishment of procedure ... but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales”<sup>33</sup>.

33. However, it does not necessarily follow from the above excerpt that the sanctions are civil in nature. According to the definition proffered by the ECtHR in *König*, the substance and the effect of the right under the domestic law of the state concerned must be examined. While certain sanctions, such as the freezing of assets and the precluding of arms sales, do appear to have a more civil quality, other sanctions, such as the travel restrictions, seem to go a step further towards the criminal arena by limiting freedom of movement. This characterisation will become even more pertinent in the remedies discussion of this memorandum (chapter II.iv.)<sup>34</sup>.

34. Regardless of the characterisation, which is open to debate<sup>35</sup>, the fair trial guarantees under the ECHR, ICCPR, or customary international law are not met by the current UN and EU listing procedures. There is no type of hearing, public or private, before an individual or entity is listed. The absence of such a hearing necessarily precludes it from occurring before an “independent and impartial tribunal,” but, in any

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<sup>30</sup> *Engel and Others v. The Netherlands*, Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 08.06.1976, § 82

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695356&portal=hbkm&source=externalbydocnumb er&table=F69A27FD8FB86142BF01C1166DEA398649>).

<sup>31</sup> *König v. Germany*, Application No. 6232/73, 28.06.1978, § 89

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695389&portal=hbkm&source=externalbydocnumb er&table=F69A27FD8FB86142BF01C1166DEA398649>).

<sup>32</sup> The French wording of both articles is even more similar. See Thomas J. Biersteker and Sue E. Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, 30.03.2006, pp 11-14 ([http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf)).

<sup>33</sup> Third Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities, 09.09.2005, S/2005/572, §§ 39-41.

<sup>34</sup> One can argue that if the sanctions are neither criminal nor civil, Article 14 ICCPR and Article 6 ECHR might not be applicable; see *infra* note 35.

<sup>35</sup> Given that the sanctions regimes contain both civil and criminal elements, a strong argument can be made that Article 6(1) applies in addition to Article 13, regardless of the civil/criminal distinction.

case, the members of the sanctions committees are not “independent and impartial.” A tribunal cannot meet those qualifications when the members serve multiple functions as both prosecutor and judge. Moreover, with respect to the UNSC, the five permanent members of the Council tend to dominate all proceedings, giving other states less input and further reducing any possibility of impartiality. The individuals or entities are not informed of the charges against them before being listed, do not have adequate time or facilities to prepare their defence, and are not tried in their own presence. Parties may not even be aware that they might need to defend themselves. Sanctioned parties are often not informed of all of the evidence against them, if even informed at all, and little information is provided even to the decision-makers themselves. Nor are the listed presumed “innocent;” the sanctions committees admittedly even list individuals or entities who are merely suspected of having possible terrorist links. Some of the same problems arise in the UN and EU de-listing and review procedures addressed below.

### **iii. De-listing and review procedures**

#### **a. United Nations sanctions committees’ procedures**

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

36. Any state could request removal of a listed party, but only if no other state objected, the name would be removed. Parties were not allowed to appeal directly to a committee for de-listing, or to have any real involvement in the process. Moreover, the states concerned could often refuse to submit such de-listing requests for any reason without explanation, and the Committee guidelines often provided for additional requirements that had to be fulfilled before the state could submit a de-listing request<sup>36</sup>. There was no form of hearing or review if the state’s request for de-listing was denied.

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

38. Resolution 1735 expanded the period of review for exemptions from 48 hours to 3 working days to give more time for the committees to examine requests, but aside from that change, there have been no other major modifications of the humanitarian exemption process. Humanitarian exemptions are generally granted for “basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums ... or payment of reasonable professional fees”, in addition to “extraordinary expenses”<sup>38</sup>. However, humanitarian exemptions can only be requested through states, not directly, and the guidelines for what constitutes a “humanitarian exemption” are not always clear<sup>39</sup>. UNSC Resolution 1425 (2002) was also very vague on the meaning of “basic expenses”. While these terms were admittedly clarified to a small extent by Resolution 1735, they remain unclear. Several suggestions for improvement have been proposed by the Monitoring Team<sup>40</sup>, but none have been implemented so far.

39. The process for reviewing listings was, and still is, at best, extremely cursory. Resolution 1267 initially did not provide for any form of review for the Al-Qaeda, Usama bin Laden, and the Taliban listings. The Monitoring Team recommended a listing review every five years, with automatic renewal of the list unless the Committee decided by consensus to remove the names of any individuals or entities from the list<sup>41</sup>. Recently, some members of the Al-Qaeda and Taliban Committee proposed a two-year review period<sup>42</sup>. However, neither of these two proposals were accepted.

<sup>36</sup> For example, the requesting state was often required to engage in bilateral talks with the state that had requested listing about the possibility of de-listing the individual or entity in question.

<sup>37</sup> The focal point procedure became operational on 27.03.2007.

<sup>38</sup> UNSC Resolution 1452 of 20.12.2002.

<sup>39</sup> Mrs Maria Telalian Minister Counsellor, Greek Representation to the UN (New York) emphasised this shortcoming during the blacklist hearings of 28.06.2007.

<sup>40</sup> See, e.g., Sixth report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Resolutions 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities, 08.03.2007, S/2007/132.

<sup>41</sup> See Fourth report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Resolutions 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities, 10.03.2006, S/2006/154, § 50.

<sup>42</sup> See Sixth report, *supra* note 40.

40. Instead, the Committee recently decided that, every year, the Security Council would circulate all listings that have not been updated for four or more years, and any member of the Sanctions Committee has the option of proposing a review aimed at de-listing<sup>43</sup>. This review occurred for the first time in March 2007, and only one individual, out of more than one hundred identified, was proposed by the Committee for review<sup>44</sup>. Other problems also persist; only countries that are current members of the UNSC are able to review cases, which helps to preserve the opacity of the review process.

### **b. European Union procedures in comparison with UN procedures**

41. Initially, Regulation No 2580/2001<sup>45</sup> and subsequent iterations of the separate EU-managed list offered more protection than the UNSC 1267 procedures described above and implemented through Regulation No 337/2000. However, at this point in time, they offer less protection than the comparable UNSC measures.

42. At the start, UNSC Resolution 1267 did not have any provisions for de-listing or review, but Council Regulation (EC) No 2580/2001 had a provision for reviewing the blacklisted individuals and entities<sup>46</sup>. This regulation also explained the meaning of “humanitarian exemptions” in greater detail than did the UNSC resolutions<sup>47</sup>. The EU Council Common Position of 27 December 2001 included a provision for review at “regular intervals and at least once every six months”<sup>48</sup>.

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

44. Some new improvements include the Council’s use of notices and review procedures. On 29 June 2007, the Council published a notice<sup>49</sup> informing the listed individuals and entities that it intended to maintain them on the list, that it was possible to request the Council’s statement of reasons for including them, that they could submit a request to the Council, together with documentation, to reconsider their listing, and that they have the right to challenge the Council’s decision before the CFI. The Council Decision of 28 June 2007 states that the Council recently carried out a complete review of the list under Regulation (EC) No 2580/2001 and has updated it accordingly.

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

### **c. Relevant EU case-law**

46. The *Kadi, Yusuf, Ayadi*<sup>50</sup>, and *Hassan*<sup>51</sup> cases all involved European Community Regulation No 881/2002<sup>52</sup> which was adopted to implement UNSC resolutions instituting the 1267 Al-Qaeda and Taliban

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<sup>43</sup> See *id.*

<sup>44</sup> See briefing by the Chairman of the 1267 Sanctions Committee in the Security Council open briefing by the Chairmen of subsidiary bodies of the SC on 22.05.2007, S/PV.5679; Mrs Telalian, *supra* note 39, used this point to emphasise that the many complaints voiced by member states about the review of listings would seem to have been unwarranted.

<sup>45</sup> See Council Regulation (EC) No 2580/2001 of 27.12.2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, § 15 (“The European Community has already implemented UNSCR 1267 (1999) and 1333 (2000) by adopting Regulation (EC) No 467/2001 ... freezing the assets of certain persons and groups [associated with Al-Qaeda, Usama bin Laden, and the Taliban] and therefore those persons and groups are not covered by this Regulation”).

<sup>46</sup> See *id.* at Article 2(3).

<sup>47</sup> *Id.* at Article 5(2).

<sup>48</sup> Council Common Position of 27.12.2001 on the application of specific measures to combat terrorism, 2001/931/CFSP, Article 1(6).

<sup>49</sup> Notice for the attention of the persons, groups and entities on the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (2007/C 144/01).

<sup>50</sup> *Chafiq Ayadi v. Council of the European Union*, judgment of 12.07.2006, T-253/02 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0253:EN:HTML>).

<sup>51</sup> *Faraj Hassan v. Council of the European Union and Commission of the European Communities*, judgment of 12.07.2006, T-49/04 ([http://www.astrid-online.it/eu/Documenti/Giurisprud/TPI\\_Hassan\\_luglio06.pdf](http://www.astrid-online.it/eu/Documenti/Giurisprud/TPI_Hassan_luglio06.pdf)).

sanctions regime<sup>53</sup>. The applicants in *Kadi* and *Yusuf* sought annulment of Regulation No 467/2001 on the grounds, *inter alia*, that it interfered with their rights to property, a fair hearing, and effective judicial review. In *Kadi*, the CFI also chose, by its own motion, to address the question of the Council's competence to adopt the contested regulation, an allegation raised by the applicants themselves in *Yusuf*.

47. In *Kadi* and *Yusuf*, the Court, in nearly identical judgments, and relying on Articles 25, 48(2), and 103 of the UN Charter, Article 27 of the Vienna Convention and Article 307(1) of the EC Treaty, found that the Community is bound by UNSC resolutions and that obligations arising under the UN Charter prevail over any other obligation under Community law<sup>54</sup>. Thus, the Court held it had no competence to question the lawfulness of the UNSC resolutions and was only able to review the measures to ensure they were not contrary to *jus cogens*<sup>55</sup>. In both cases, the Court ultimately concluded, following a proportionality test, that it was not improper for governments to place limitations on certain rights. In particular, the right to judicial access could be restricted due to the nature of UNSC resolutions and the UN's legitimate objective of protecting international peace and security<sup>56</sup>.

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

49. ECtHR (and ECJ) case law generally holds that for limitations on court access or fair trial rights based on national security concerns, there must be "a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal"<sup>57</sup>. While this test was theoretically applied in the above cases, a closer examination of *Tinnelly* and other cases suggests that the CFI failed to apply the test properly<sup>58</sup>.

50. In *Tinnelly*, the Court began by acknowledging the major security consideration at stake in the case: the need for extreme caution when awarding contracts for work requiring access to vital power supplies and public buildings in the main centres of Northern Ireland. The Court ultimately found that the denial of the applicants' rights under Article 6(1) ECHR constituted a disproportionate restriction of their fair trial rights, commenting that "[t]he Court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case ... The right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive"<sup>59</sup>.

51. In support of its *Tinnelly* judgment, the Court cited several other cases, including *Chahal v. United Kingdom*<sup>60</sup>, in which the Court stated: "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved"<sup>61</sup>. Other relevant precedents cited by the *Chahal* court are, *inter alia*, *Fox, Campbell and Hartley v. United Kingdom*<sup>62</sup> and *Murray v. United Kingdom*<sup>63</sup>.

<sup>52</sup> Or, more accurately, in the cases of *Kadi* and *Yusuf*, Council Regulation No 467/2001, which was then amended by Regulation No 881/2002.

<sup>53</sup> Thus, all of the four applicants were listed under UNSC resolutions as well as EU regulations.

<sup>54</sup> See *Kadi*, §§ 181-98; *Yusuf*, §§ 228-57.

<sup>55</sup> Defined 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". *Yusuf*, § 277. See also *Kadi*, §§ 225-27.

<sup>56</sup> See *Kadi*, §§ 288-89; *Yusuf*, §§ 343-44.

<sup>57</sup> *Tinnelly and Sons Ltd and others and McElduff and others v. UK*, Application No. 20390/92, 10.07.1998, § 76

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696072&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>).

<sup>58</sup> While, as mentioned earlier in this report, it is unclear whether Article 6 applies in the blacklist context, this does not change the fundamental right of listed parties to have access to some type of review.

<sup>59</sup> *Tinnelly*, § 77.

<sup>60</sup> Application No. 22414/93, 15.11.1996

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695881&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>).

<sup>61</sup> *Id.* at § 131.

<sup>62</sup> Application Nos. 12244/86; 12245/86; 12383/86, 30.08.1990.

<sup>63</sup> Application No. 14310/88, 28.10.1994.

52. The above cases demonstrate that even national security considerations do not permit a complete negation of individuals' fair trial rights under Article 6 ECHR, and especially not a complete denial of access to a court or tribunal<sup>64</sup>. The *Tinnelly* and *Chahal* cases, similar to the blacklist cases, revolved around concerns of terrorism and national security, and the ECtHR nevertheless held that the restrictions on fair trial rights for national security reasons do not justify the complete absence of such rights. While the ECtHR has accepted the use of special courts<sup>65</sup> in certain anti-terrorism matters, those courts still need to be cognisant of "... the manner of appointment of its members and their term of office, the existence of safeguards ... and the question whether it [the special court] presents an appearance of independence"<sup>66</sup>.

53. While the EU courts have declined to address the underlying question of the lawfulness of the UNSC resolutions, under a proportionality test as applied in *Tinnelly* and *Chahal*, access to a court or some type of decision-making body is necessary even in cases involving national security and terrorism. This court or body would also need to be informed of a reasonable amount of the evidence supporting the charges. Yet, individuals or entities on a UNSC blacklist are not allowed such access in clear violation of their fair trial rights and the proportionality test<sup>67</sup>. The listed individuals are not even provided with access to any type of special court as were the applicants in *Incal* and *Ocalan*; the *Incal* standards listed in the previous section are not met by the members of the UN sanctions committees who currently "review" the lists. The committees do not even claim to present "an appearance of independence".

#### **d. Recent favourable Court of First Instance judgments**

54. The CFI annulled Council Decision 2005/930/EC of 21 December 2005 in so far as it concerned OMPI in the 2006 case *Organisation des Modjahedines du peuple d'Iran*<sup>68</sup>. OMPI was established with the aim of replacing the Shah of Iran's regime by a democracy, and the organisation later participated in the founding of the National Council of Resistance of Iran (NCRI)<sup>69</sup>. OMPI was first included on a blacklist by the order of 28 March 2001 by the UK Secretary of State for the Home Department under the UK Terrorism Act 2000. The applicant was never included on a UNSC blacklist<sup>70</sup>.

55. The CFI's annulment in the 2006 judgment was based on its finding that not enough evidence was presented to support OMPI's continued listing<sup>71</sup>. According to the applicant, the organisation had renounced all military activity since June 2001<sup>72</sup>. The Council was required to comply with this judgment under Article 233 EC<sup>73</sup> by annulling or withdrawing the references to OMPI in its decisions.

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

57. By these actions, the Council is no longer following the rule of law. The Council violated its obligations under Article 233 of the EC Treaty and, moreover, took the May 2006 Decision under the same faulty procedures as its previous Decision 2005/930/EC which the CFI annulled. The Council has not only

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<sup>64</sup> This is the point of view put forward by the Rapporteur in his recent brief before the Supreme Court of the United States in the *El-Masri* case. See Parliamentary Assembly press release of 07.09.2007: <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=1953>

<sup>65</sup> See, e.g., *Incal v. Turkey*, Application No. 22678/93, 9.06.2998, and *Ocalan v. Turkey*, Application No. 46221/99, 12.05.2005, §§ 112-18.

<sup>66</sup> *Incal*, § 65.

<sup>67</sup> While a party on an UNSC and EU list can apply to the ECJ, they will only have a real chance of being removed if they are only on an EU list (as was the case in OMPI).

<sup>68</sup> To date, the EU courts have appeared more willing to review EU blacklisting procedures than EU regulations solely implementing UNSC resolutions.

<sup>69</sup> *Organisation des Modjahedines du peuple d'Iran*, § 1.

<sup>70</sup> See *id.* at §§ 3-17.

<sup>71</sup> The Court held that "... the contested decision did not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant's right to a fair hearing had not been observed". *Id.* at § 173.

<sup>72</sup> *Id.* at § 1.

<sup>73</sup> "The institution or institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice".

breached its obligations under the EC Treaty, but defied the Court of First Instance as well. OMPI's fundamental rights continue to be violated<sup>74</sup>.

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

59. In a recent judgment, *Sison v. Council*<sup>75</sup>, the CFI annulled Council Decision 2006/379/EC of 29 May 2006 in so far as it concerned Sison. The applicant in this case was a Filipino national who had resided in the Netherlands since 1987<sup>76</sup>. In 1998, after the applicant's passport was revoked by the Philippine Government, he applied for refugee status and for a residence permit on the grounds of humanitarian need<sup>77</sup>. The State Secretary of Justice refused Sison's application on the grounds of Article 1F of the Geneva Convention on the status of refugees, as amended by the New York Protocol of 31 January 1967<sup>78</sup>. The applicant had been included on a blacklist issued by the United States Treasury Department covered by Executive Order No 13224, which had then been implemented by the Netherlands Minister of Foreign Affairs (Sanctieregeling Terrorism 2002 III, Staatscourant No 153)<sup>79</sup>.

60. The Court found that a statement of reasons must be supplied to individuals or entities at the time of listing as required by Article 253 EC<sup>80</sup>, and while the right to effective judicial protection is typically satisfied by parties' right to bring an action before the Court of First Instance pursuant to the fourth paragraph of Article 230 EC<sup>81</sup>, Sison, in this case, was not able to make effective use of this right since his rights of defence were disregarded<sup>82</sup>.

61. The Court made a similar ruling in another judgment, *Al-Aqsa v. Council*<sup>83</sup>, rendered on the same day. The applicant was a Netherlands foundation with the main objective of alleviating the humanitarian crisis in the West Bank and the Gaza Strip by providing financial support to organisations in Israel and in the occupied territories<sup>84</sup>. On 3 April 2003, the Minister for Foreign Affairs of the Netherlands placed the foundation on a blacklist, resulting in the freezing of its funds and assets<sup>85</sup>. The sanctions were applied, according to the released list of reasons, on the grounds that there was evidence that the foundation had given funds to organisations supporting terrorism in the Middle East<sup>86</sup>.

62. In its judgment, the CFI annulled Council Decision 2006/379/EC of 29 May 2006 in so far as it concerned Al-Aqsa, based on the finding that none of the decisions adequately stated the reasons for listing

<sup>74</sup> OMPI's lawyers, Mr David Vaughan CBE QC and Mr Jean-Pierre Spitzer, avocat, are currently in the process of bringing a third case before the ECJ.

<sup>75</sup> *Jose Maria Sison v. Council of the European Union*, judgment of 11.07.2007, T-47/03

[http://curia.europa.eu/juris/cgi-](http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en&lango=en&Submit=Rechercher&alldocs=alldocs&docjo=docjo&docop=docop&docor=docor&docj=docj&docrequire=&numaff=T-47/03%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

[bin/form.pl?lang=en&lango=en&Submit=Rechercher&alldocs=alldocs&docjo=docjo&docop=docop&docor=docor&docj=docj&docrequire=&numaff=T-47/03%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100](http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en&lango=en&Submit=Rechercher&alldocs=alldocs&docjo=docjo&docop=docop&docor=docor&docj=docj&docrequire=&numaff=T-47/03%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)).

<sup>76</sup> *Sison*, § 46.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* The New York Protocol states that the provisions of the Convention are not to be applied to any person with respect to whom there are substantial reasons for considering that the person: "... has committed a crime against peace, a war crime, or a crime against humanity ... has committed a serious non-political crime outside the country of refuge ... has been guilty of acts contrary to the purposes and principles of the United Nations". *Id.*

<sup>79</sup> *Id.* at § 79.

<sup>80</sup> "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."

<sup>81</sup> "Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

<sup>82</sup> "...the Court finds that no statement of reasons has been given for the contested decision and that the latter was adopted in the course of a procedure during which the applicant's right of the defence were not observed. What is more, the Court is not, even at this stage of the procedure, in a position to undertake the judicial review of the lawfulness of that decision in light of the other pleas in law, grounds of challenge and substantive arguments invoked in support of the application for annulment." *Sison*, § 226.

<sup>83</sup> *Stichting Al-Aqsa v. Council of the European Union*, judgment of 11.07.2007, T-327/03

[http://curia.europa.eu/juris/cgi-](http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-327/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

[bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-327/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100](http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-327/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)).

<sup>84</sup> *Id.* at § 15.

<sup>85</sup> *Id.* at § 16.

<sup>86</sup> *Id.* at §§ 17-20.

and that Al-Aqsa was not able to fairly employ its right to bring an action before the Court<sup>87</sup>. While the Court did annul the Council Decision implementing Article 2(3) of Council Regulation (EC) No 2580/2001 in so far as it applied to the applicant, the CFI declared that there was no need to rule on the question pursuant to Article 241 EC of whether Council Regulation No 2580/2001 is itself unlawful<sup>88</sup>.

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

**iv. Lack of remedies**

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

64. Article 2(3) ICCPR governs the right to an effective remedy, while Article 14 ICCPR details the right to compensation - both guarantees that are relevant to blacklisted parties. However, with respect to the ICCPR, the United States declared that the provisions of articles 1-27 of the Covenant are not self-executing and therefore do not create rights that are judicially enforceable in the American courts. Furthermore, the UN enjoys complete immunity from any form of legal proceedings before any national court under the Article 105<sup>89</sup> of the UN Charter. In the light of these two facts, there are scarcely any remedies available to individuals and entities on a UN blacklist.

65. After de-listing requests have been denied, individuals and entities must have access to some independent and impartial form of review, and one preferably outside the UNSC's ambit. The ideal option is some type of independent panel or tribunal, since any other type of judicial remedy before the national courts seems to be impossible. The current review procedures are carried out by the internal sanctions committees themselves, preventing any type of independence or impartiality<sup>90</sup>. Another option might be the use of an ombudsman<sup>91</sup>.

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<sup>87</sup> "... the applicant has been unable to make an effective challenge, from the moment this action was brought, to the Council's opinion that the order made by the court hearing the application for interim measures satisfied the definition given by Article 1(4) of Common Position 2001/931, a challenge that it was unable to make except purely hypothetically in its application and that it really developed with full knowledge of the facts only at ... [this] stage of its reply...." *Id.* at § 64.

<sup>88</sup> The question also was not reached in *Sison* judgment.

<sup>89</sup> "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization."

<sup>90</sup> Opposition to any type of external judicial review is strong, especially among the five permanent members of the UNSC. Concerns include infringement upon the UNSC's authority under Chapter VII of the Charter and a variety of security worries.

<sup>91</sup> This option was rejected as impractical by Professor Karagiannis at the blacklist hearing of 28.06.2007.

### ***b. Remedies for EU blacklisting under the ECHR***

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

67. The main issues raised in conjunction with the right to an effective remedy are whether blacklisting and its consequences are civil or criminal by nature, an issue which was discussed in detail earlier in the report, and the meaning of the term “effective”. For the Article 13 provision for an “effective remedy” to apply, the applicant must allege a violation of a material right included in the ECHR. If Article 6(1) is also applicable, however, the applicant is entitled to a “judicial” remedy, and not merely an “effective” remedy which does not have to be judicial in nature. If Article 6(1) applies, requiring the determination that blacklisting implies civil and/or criminal consequences, then the sanctions regimes<sup>92</sup> are in clear violation of the ECHR in their failure to provide a judicial remedy.

68. If Article 6(1) is found to be inapplicable, then the focus is shifted to Article 13 ECHR and the meaning of “effective remedy”. In an early case, *Klass and others v. Germany*<sup>93</sup>, the applicants, under Articles 6, 8, and 13 ECHR, challenged German legislation that permitted the State to open and inspect mail and to monitor telephone conversations to protect against dangers threatening the state and the “free democratic constitutional order”<sup>94</sup>. The applicants did not challenge Germany’s right to employ such measures, but the absence of requirements to notify the persons concerned after surveillance had ceased and the lack of any remedy before the national courts.

69. While the Court ultimately found no breach of Article 13 in *Klass*, it observed that “... an ‘effective remedy’ under Article 13 ... must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance ... It therefore remains to examine the various remedies available to the applicants under German law to see whether they are ‘effective’ in this limited sense”<sup>95</sup>. The Court also stated that the authority in Article 13 ECHR is not necessarily in all instances “a judicial authority in the strict sense ... Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy is effective”<sup>96</sup>. In *Klass*, the applicants had unimpeded access to a national court – a clear difference from the majority of blacklisted individuals.

70. In *Tinnelly*, the ECtHR commented that the requirements of an “effective remedy” under Article 13 were much looser than those of Article 6(1)<sup>97</sup>. Nevertheless, the Court held that the Government’s claim that the applicants’ access was as effective as was possible under the circumstances must be rejected<sup>98</sup>. The Court found that the proceedings at issue in the case never involved a full independent scrutiny of the factual basis for the decision to refuse Tinnelly a contract on national security grounds. The Judge in the High Court of Northern Ireland ultimately had declined jurisdiction due to his inability to assess whether there had been a sound factual basis for the withholding of the contract. Regardless, the ECtHR concluded that “any substantive review of the grounds ... would have been impaired in any event on account of the fact that Mr Justice McCollum did not have sight of all the materials on which the Secretary of State had based his decision”<sup>99</sup>. This conclusion led the Court to hold that the applicants’ access to judicial review was not sufficient to constitute an “effective remedy”<sup>100</sup>.

71. The Court also noted “that in other contexts it has been found possible to modify judicial procedures in such a way as to safeguard national security concerns ... and yet accord the individual a substantial degree of procedural justice”<sup>101</sup>. The Court proposed an adjudicator or some type of tribunal fully satisfying Article 6(1) requirements. There is no reason why a similar institution to provide an “effective remedy” could not be created for the sanctions regimes.

<sup>92</sup> Especially the UN sanctions regime.

<sup>93</sup> Application No. 5029/71, 06.09.1978

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695387&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>).

<sup>94</sup> *Id.* at § 17.

<sup>95</sup> *Id.* at § 69; see also *Chahal*, § 142 and *Leander v. Sweden*, Application No. 9248/81, 26.03.1987, § 84.

<sup>96</sup> *Klass*, § 67.

<sup>97</sup> *Tinnelly*, § 77.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at §§ 74-5.

<sup>100</sup> *Id.* at § 77 (“Such mechanisms cannot be considered therefore to compensate for the severity of the limitations which the section 42 certificates imposed on the applicants’ right of access to a court and cannot be weighed in the balance when assessing the proportionality of those limitations for the purposes of Article 6 § 1 of the Convention”).

<sup>101</sup> *Id.* at § 78.

72. In *Chahal*, the challenged proceeding was an advisory panel; the Court found that the panel did not offer sufficient procedural safeguards under Article 13 ECHR due to the fact that, *inter alia*, the applicant was not entitled to legal representation, was only given an outline of the reasons behind the intention to deport, that the panel had no power of decision and that the panel's findings were not disclosed<sup>102</sup>. As a result, the applicant did not have access to an adequate remedy.

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

74. The types of "remedies" offered by the EU sanctions regime are even sparser than those offered by the advisory panel "remedy" found to be inadequate in *Chahal*. The lawfulness of EU common positions cannot be challenged before the ECJ<sup>103</sup>; Council decisions can be challenged only by an annulment action under Article 230 EC<sup>104</sup>. There is the possibility that the ECJ will undertake a broader review than the CFI of the sanctions regimes, however<sup>105</sup>. A national court hearing a dispute which raises the issue of the validity of a common position based on Article 34 EU, and which doubts whether that common position is intended to produce the legal effects on third parties that it does, can request a preliminary ruling on the position's legality from the ECJ (under the conditions of Article 35 EU)<sup>106</sup>. The ECJ can also review such acts when a Member state or the Commission brings an action under Article 35 EU<sup>107</sup>. This type of review nevertheless makes it difficult for individuals to directly challenge the underlying Council common positions, making it unlikely that an "effective remedy" satisfying the requirements of Article 13 ECHR currently exists.

### c. Right to compensation

75. Another type of possible remedy is monetary compensation (Article 14(6) ICCPR<sup>108</sup> and Article 3 of Protocol No 7 to the ECHR). To date, however, no court has allowed any type of "punitive damages" for compensation. Recently, for example, *Sison* applied to the CFI for compensation under Article 288 EC<sup>109</sup>, but his claim was rejected<sup>110</sup>.

76. The *Sison* Court stated that, in order for the Community to incur non-contractual liability as set out in Article 288 EC, settled case law mandated that: (1) the conduct must have been unlawful, (2) actual damage must have been sustained, and (3) there must be a causal link between the conduct and the alleged damage<sup>111</sup>. The unlawful damage must consist of a serious breach of legal rules intended to give rights to individuals<sup>112</sup>.

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<sup>102</sup> *Chahal*, § 154.

<sup>103</sup> Under Title VI of the EU Treaty, only decisions can be the subject of an annulment action before the ECJ because theoretically, common positions themselves are not supposed to produce legal effects on third parties. See, e.g., *Gestoras Pro Amnistía, Juan Mari Olano Olano and Julen Zelarain Errasti v. Council of the European Union, Kingdom of Spain, United Kingdom of Great Britain and Northern Ireland*, judgment of 27.02.2007, C-354/04 P, § 52 (<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-354/04>).

<sup>104</sup> "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 ... [a]ny natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

<sup>105</sup> Although the *Gestoras Pro Amnistía* case might suggest otherwise.

<sup>106</sup> See *Gestoras Pro Amnistía*, § 54. The Court used this rationale to hold that the applicants did have an "effective remedy" under the contested Common Position No 2001/931/CFSP. See *id.* at § 57. See also *Segi, Aritz Zubimendi Izaga and Aritz Galarrage v. Council of the European Union, Kingdom of Spain, United Kingdom of Great Britain and Northern Ireland*, judgment of 27.02.2007, C-355/04 P.

<sup>107</sup> Generally, however, Titles VI and V of the Treaty on European Union give the ECJ more limited jurisdiction than do the comparable articles under the EC Treaty.

<sup>108</sup> In the case of criminal convictions only, and, in any case, the provision is not self-executing in United States courts.

<sup>109</sup> "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

<sup>110</sup> See *Sison*, §§ 232-51.

<sup>111</sup> *Id.* at § 232. See also *FIAMM and FIAMM Technologies v. Council and Commission*, judgment of 14.12.2005, T-69/00, § 85.

<sup>112</sup> *Sison*, § 234. See also *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission of the European Communities*, judgment of 4.07.2000, C-352/98 P, §§ 40-42.

77. In its holding denying monetary compensation in *Sison*, the CFI commented that failure to fulfill the obligation to state reasons is not, in itself, enough to incur liability, but observance of the fundamental principles of the rights of the defence is a legal rule whose breach may fulfil the second requirement of actual damage for the Community to incur non-contractual liability<sup>113</sup>. Nevertheless, the Court denied *Sison* compensation based on its finding that the rights of the defence are essentially a procedural guarantee, making annulment of the contested decision adequate compensation for *Sison's* damage<sup>114</sup>. The Court also found that *Sison* had not established a sufficient causal link between the unlawfulness and his damage, and that the economic sanctions were a temporary measure, not affecting the substance of the individual's right to property<sup>115</sup>.

78. More thorough pleading by applicants would at least appear to open the possibility for them to receive some type of monetary compensation. The three requirements cited by the CFI in *Sison* would appear to be met for the majority of blacklist cases. The situation might also be different if the courts addressed the unlawfulness of the underlying EU measures. Prior to the question of compensation, however, it is essential that the sanction regimes either facilitate access to the courts, or set up some type of independent and impartial panels to review appeals that could also have the authority and the resources to provide some type of compensation<sup>116</sup>.

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

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

80. ECtHR case law suggests the member states are not required to execute such sanctions. In *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*<sup>117</sup>, the Court was faced with the EC implementation of UN comprehensive sanctions. The Court applied a type of “equivalence” test, stating “... State action taken in compliance with ... legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner ... at least equivalent to that which the Convention applies ... If such equivalent protection is considered to be provided ... the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership ... any such presumption can be rebutted, if ... it is considered that the protection of Convention rights was manifestly deficient”<sup>118</sup>.

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

82. *Bosphorus* and a recent ECtHR decision, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*<sup>119</sup>, show that the ECtHR is willing to examine whether states are responsible for fundamental human rights violations under the ECHR in cases where only “manifestly deficient” protection was afforded. Targeted sanctions fit into this category perfectly, given that the sanctions regimes provide almost no protection of fundamental human rights.

<sup>113</sup> *Id.* at § 239.

<sup>114</sup> *Id.* at § 241.

<sup>115</sup> *Id.* at §§ 243-45.

<sup>116</sup> The idea of compensation raises another set of issues; for example, would compensation only be provided for economic losses or for other types of losses as well?

<sup>117</sup> Application No. 45036/98, Grand Chamber, 30.06.2005

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=670335&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>).

<sup>118</sup> *Id.* at §§ 155-56; see also *M. & Co. v. Federal Republic of Germany*, Application No. 13258/87, 9.02.1990. It must also be noted that the *Bosphorus* case involved comprehensive, and not targeted, sanctions; arguably, targeted sanctions present even more of a threat to human rights.

<sup>119</sup> Application No. 71412/01, 31.05.2007

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=818144&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>).

83. In *Segi*<sup>120</sup>, the applicants alleged “manifestly deficient” protections. The *Segi* case concerned EU targeted sanctions procedures intended to implement UNSC Resolution 1373. *Segi*, a Basque Youth organisation, appealed its listing before the ECtHR. The Court declared the complaint to be inadmissible because *Segi* was not the victim of any violation under the ECHR. The Court held that it is not possible to complain about potential violations of one’s rights that may occur at some point in the future, or about a law *in abstracto*<sup>121</sup>. This case suggests that the act of listing an individual or entity would not be enough to trigger a violation of fundamental human rights; however, the Court drew a clear distinction between being listed as “associated with” terrorism and as a direct participant in terrorist activities<sup>122</sup>. This distinction implies that an individual or entity listed as a direct participant in terrorist activities could be a victim of ECHR violations. The outcome also might be different if the applicants were individuals, not an organisation, and were able to show more direct violations of their rights, as will likely be the case in many blacklist actions.

84. Switzerland can serve as an interesting case study on the question of implementation of sanctions and the ECHR. In order to implement the measures of UNSC Resolution 1483, for example, Switzerland amended its regulations to further protect Swiss nationals and their interests<sup>123</sup>. Before freezing funds and assets, the Swiss authorities inform the party concerned and give them thirty days to address the decision; the party can then apply for an exemption or even appeal to Switzerland’s federal court<sup>124</sup>. While Switzerland’s practices might contravene UNSC resolutions, it justifies its measures with its national and international human rights obligations<sup>125</sup>. It is, however, regrettable that this argumentation was limited to the resolution on Iraq, and to Swiss and Swiss residents’ interests<sup>126</sup>. Thus, Switzerland, and possibly even the ECtHR, if they were consequent, would answer the question in the negative: ECHR member states are *not* obliged to implement “automatically” UNSC sanctions that flout individuals’ fundamental human rights. The Rapporteur encourages all ECHR states parties to follow Switzerland’s lead in fulfilling their human rights obligations. In addition, the Rapporteur encourages those member states of the Council of Europe which are permanent or non-permanent members of the UNSC to bring to bear considerations of human rights protection flowing from their international obligations under the ECHR through the positions they take and their actions in the UNSC and its committees.

85. Once the EU and UN procedures are altered, the question of this conflict becomes irrelevant – a state of affairs which should help to provide the necessary impetus for states to fix their procedures.

### III. Conclusions and recommendations

86. As illustrated in this report, the current listing and de-listing procedures of the UN and EU sanction regimes, although improved, still fail to provide satisfactory protection of fundamental human rights, including both procedural and substantive rights.

87. Individuals or entities listed under the UNSC sanctions regime are often even unable to appeal their listing, and have no access to any type of independent and impartial review mechanism. While individuals or entities listed under the EU sanctions regimes in theory have access to the courts, the OMPI case demonstrates that the courts’ judgments will not always be implemented, creating a dangerous gap between theory and actual practice. It also appears nearly impossible to challenge the legality of the underlying UNSC

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<sup>120</sup> *Segi and Gestoras Pro-Amnistía and others v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Application Nos. 6422/02;9916/02, 23.05.2002

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=705990&portal=hbkm&source=externalbydocnumb er&table=F69A27FD8FB86142BF01C1166DEA398649>).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (“The mere fact that the names of two of the applicants ... appear in the list referred to in that provision as ‘groups or entities involved in terrorist acts’ may be embarrassing, but the link is much too tenuous to justify application of the Convention”.)

<sup>123</sup> See Noah Birkhäuser, *Sanctions of the Security Council Against Individuals – Some Human Rights Problems*, presented at the European Society of International Law (ESIL) Research Forum on International Law: Contemporary Issues, Graduate Institute of International Studies (HEI) Conference, 26-28.05.2005, pp 9-10

(<http://www.statewatch.org/terrorlists/docs/Birkhauser.PDF>).

<sup>124</sup> *Id.* at 9.

<sup>125</sup> *Id.* at 10.

<sup>126</sup> see, for example, the Swiss position as illustrated in Parliament on 07.12.2005 by the Minister of Justice (French only): [http://www.parlament.ch/ab/frameset/f/s/4710/211739/f\\_s\\_4710\\_211739\\_211848.htm](http://www.parlament.ch/ab/frameset/f/s/4710/211739/f_s_4710_211739_211848.htm)

resolutions and EU decisions – a situation that increases the responsibility on the Council of Europe member states to improve their own procedures.

88. Furthermore, parties listed under targeted sanctions regimes lack adequate remedies to address any cases of unlawful listing. Some type of compensation should be available for the economic, and even emotional, losses suffered by such parties as a result of their listing.

89. Improved protection for fair trial rights and the creation of adequate remedies would also help to address the substantive rights violations inherent in the current listing procedures.

90. States parties to the ECHR are in clear violation of their human rights responsibilities towards listed individuals. ECtHR case law appears to stipulate that individuals or entities who are listed under the targeted sanctions regimes as participants in terrorism should be able to hold the ECHR member state(s) concerned responsible.

91. In my opinion, the above violations can most readily be addressed through states' improvement of their internal targeted sanctioning (implementation) procedures. My hope is that this report will spur states to alter their procedures, whether out of an obligation for their human rights commitments or simply out of a desire to avoid being held accountable before the ECtHR, with the understanding that the UN and EU will take further steps in improving their respective regimes. The three Council of Europe permanent members of the UNSC, as well as the other non-permanent members, have an obligation under the ECHR to ensure that all legal rules take into consideration human rights protection. The three permanent members, in particular, have an especially crucial responsibility to employ their influence in the UNSC to ensure the fulfilment of the ECHR.

92. It is regrettable and worrisome that important and prestigious international bodies, founded on the protection of human rights, the rule of law and democracy, have chosen to forego these values, whilst the world has remained almost indifferent. It is just as sobering to note how easily states abandon the principles laid down in the European Convention on Human Rights, the fundamental document they have ratified. Governments give themselves good conscience by simply invoking the priority they must attach to the decisions of the UN Security Council. This may be correct, at least in principle, but it does not dispense states from protesting – which they have in general failed to do – and to consider themselves bound by other formal international undertakings, which enjoy much greater democratic legitimacy, to refrain from engaging in arbitrary “procedures” which are contrary to all fundamental principles of the legal culture of civilised countries. Surely, the fight against terrorism is a need that nobody can put into question. But we consider it unacceptable to forego, in the name of this fight, the fundamental principles of a democratic society. This is intolerable from a legal point of view, ethically unacceptable and hardly defensible as a matter of efficiency.

93. It is not the very principle of blacklists which is in question: this may be a useful instrument in certain circumstances and, in any event, for a limited period of time. But it is unacceptable that no clear procedure is foreseen and the most elementary rights are thus violated. If one adds to this picture the practice of abductions (“extraordinary renditions”), of secret detention centres and the trivialisation of torture, this provides a worrying, devastating message: principles that are as fundamental as the rule of law and the protection of human rights are optional accessories applicable only in fair weather. Such an approach means nothing more and nothing less than handing the terrorists their first victory - to criminals who precisely wish to put into question the validity of our free and democratic societies and who intend to destroy the system.

94. The fight against new forms of crime – and not only against terrorism – certainly requires the adaptation of legal instruments both for prevention and repression. But nothing justifies falling into arbitrariness and neglect of the very values on which our society is built. The fight against terrorism, and against crime in general, provided it is rigorous and correct, can only strengthen the credibility of democratic institutions and thus weaken and de-legitimise its enemies. How can one today justify as part of the fight against terrorism the blacklisting for more than six years of a 78 year-old man - who was thus deprived of his fundamental rights and whose work of a lifetime was destroyed in the process - against whom the law enforcement authorities of two countries have not found a shred of evidence of any wrongdoing? All this on the basis of a decision taken by the organisation which proclaims its “faith in fundamental human rights, in the dignity and worth of the human person ...” and which undertakes “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”<sup>127</sup>; a decision applied without hesitation by states which usually do not miss any opportunity to reaffirm their unconditional commitment to the values of the Council of Europe.

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<sup>127</sup> Preamble of the Charter of the United Nations Organisation.

## APPENDIX

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

#### **UN Documents:**

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

**Briefing by the Chairman of the 1267 Sanctions Committee** in the Security Council open briefing by the Chairmen of subsidiary bodies of the SC on 22 May 2007, S/PV.5679  
<http://www.un.org/Docs/journal/asp/ws.asp?m=S/PV.5679>

**Fifth report of the Analytical Support and Sanctions Monitoring Team** appointed pursuant to resolution 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities, 20 September 2006, S/2006/750  
<http://www.un.org/Docs/journal/asp/ws.asp?m=S/2006/750>

**Sixth report of the Analytical Support and Sanctions Monitoring Team** appointed pursuant to resolution 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities, 8 March 2007, S/2007/132  
<http://www.un.org/Docs/journal/asp/ws.asp?m=S/2007/132>

**Third Report of the Analytical Support and Sanctions Monitoring Team** appointed pursuant to resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities, 9 September 2005, S/2005/572  
<http://www.un.org/Docs/journal/asp/ws.asp?m=S/2005/572>

#### **European Union/Community Documents:**

**Commission Regulation (EC) No 760/2007** of 29 June 2007 amending for the 80th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001  
[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_172/l\\_17220070630en00500051.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_172/l_17220070630en00500051.pdf)

**Council Common Position 2007/448/CFSP** of 28 June 2007 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Positions 2006/380/CFSP and 2006/1011/CFSP  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:169:0069:01:EN:HTML>

**Council Decision 2007/445/EC** of 28 June 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC  
[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_169/l\\_16920070629en00580062.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_169/l_16920070629en00580062.pdf)

**Notice for the attention of the persons, groups and entities on the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001** on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (2007/C 144/01)  
[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c\\_144/c\\_14420070629en00010001.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c_144/c_14420070629en00010001.pdf)

**Council Decision 2006/379/EC** of 29 May 2006 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/930/EC  
[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l\\_144/l\\_14420060531en00210023.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_144/l_14420060531en00210023.pdf)

**Council Decision 2005/930/EC** of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/848/EC  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:340:0064:01:EN:HTML>

**Council Regulation (EC) No 881/2002** of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and

services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002R0881:EN:HTML>

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

[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l\\_067/l\\_06720010309en00010023.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_067/l_06720010309en00010023.pdf)

**Council Common Position 2001/931/CFSP** of 27 December 2001 on the application of specific measures to combat terrorism

[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l\\_344/l\\_34420011228en00930096.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_344/l_34420011228en00930096.pdf)

**Council Common Position 2001/930/CFSP** of 27 December 2001 on combating terrorism: [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001E0930&model=quichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001E0930&model=quichett)

**Council Decision 2001/927/EC** of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001D0927:EN:HTML>

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

[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l\\_344/l\\_34420011228en00700075.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_344/l_34420011228en00700075.pdf)

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

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R0337:EN:HTML>

*Reporting committee:* Committee on Legal Affairs and Human Rights

*Reference to committee:* Doc 10856, Reference No 3214 of 29 May 2006

*Draft resolution and draft recommendation* adopted unanimously by the Committee on 12 November 2007

*Members of the Committee:* Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr György Frunda, Mrs Herta Däubler-Gmelin (Vice-Chairpersons), Mr Athanasios Alevras, Mr Miguel Arias, Mrs Aneliya Atanasova, Mr Abdülkadir **Ateş**, Mr Jaime Bartumeu Cassany, Mrs Meritxell Batet, Mrs Marie-Louise **Bemelmans-Vidéc**, Mr Erol Aslan **Cebeci**, Mrs Pia Christmas-Møller, Mrs Ingrida **Circene**, Mrs Alma Čolo, Mrs Lydie Err, Mr Valeriy Fedorov (alternate: Mr Alexey **Aleksandrov**), Mr Aniello Formisano, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Stef Goris, Mr Valery Grebennikov, Mrs Carina Hägg, Mr Holger **Haibach**, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Andres Herkel, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Želiko **Ivanji**, Mrs Kateřina Jacques, Mr Karol Karski, Mr Hans Kaufmann, Mr András **Kelemen**, Mrs Kateřina Konečná, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Eduard **Kukan**, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Humfrey **Malins**, Mr Andrija Mandić, Mr Pietro **Marcenaro**, Mr Alberto Martins, Mr Andrew McIntosh (alternate: Lord John **Tomlinson**), Mr Murat Mercan, Mrs Ilinka **Mitreva**, Mr Philippe Monfils, Mr João Bosco **Mota Amaral**, Mr Philippe Nachbar, Mrs Nino Nakashidzé, Mr Fritz Neugebauer, Mr Tomislav **Nikolić**, Mrs Ann **Ormonde**, Mr Ángel Pérez Martínez, Mr Claudio Podeschi, Mr Ivan **Popescu**, Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr Christos **Pourgourides**, Mr John **Prescott**, Mr Jeffrey Pullicino Orlando, Mr Valeriy Pysarenko, Mrs Marie-Line Reynaud, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Paul **Rowen**, Mr Armen **Rustamyan**, Mr Kimmo Sasi, Mr Ellert **Schram**, Mr Christoph Strässer (alternate: Mr Jürgen **Herrmann**), Mr Mihai **Tudose**, Mr Vasile Ioan Dănuț **Ungureanu**, Mr Øyvind **Vaksdal**, Mr Egidijus Vareikis, Mr Miltiadis Varvitsiotis (alternate: Mrs Elsa **Papadimitriou**), Mrs Renate **Wohlwend**, Mr Marco Zacchera, Mr Krzysztof Zaremba, Mr Vladimir Zhirinovskiy, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

*Secretariat of the Committee:* Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin

Doc. 11454 Addendum  
22 January 2008

## UN Security Council and European Union blacklists

Addendum to the report<sup>1</sup>  
Committee on Legal Affairs and Human Rights  
Rapporteur: Mr Dick MARTY, Switzerland, Alliance of Liberals and Democrats for Europe

### I. Introduction

1. The publication, on 16 November 2007, of the draft resolution and recommendation, and of the explanatory memorandum on the blacklists, reported by the media in many Council of Europe member states, has helped to revive discussion of this issue in political and academic circles.
2. The following up-dated information is provided in anticipation of the debate, at the Parliamentary Assembly's January 2008 part-session, on the report adopted by the Committee on Legal Affairs and Human Rights.

### II. New developments

#### *i. The Nada case*

3. In a decision of principle given on 27 November 2007, the Swiss Federal Court dismissed the application brought by Mr Youssef Nada (77), who has been battling for years to secure unfreezing of his accounts and recover the right to leave the tiny commune of Campione<sup>2</sup>. Cleared after lengthy enquiries by Swiss Prosecution Service investigators, he has failed to secure removal of his name from the "blacklist" by the United Nations Security Council. The Swiss Federal Court takes the view that, in spite of manifest shortcomings in the procedures for inclusion on, and removal from, those lists, the measures ordered by the Security Council to combat Islamic terrorism leave states no room for manoeuvre, making it impossible for them to relax, even in the name of human rights, the system of sanctions established by the Security Council. The Swiss Federal Court has at least recognised that Switzerland must support Mr Nada in his approaches to the UN authorities.
4. In paragraph 7 of its draft resolution, the Committee on Legal Affairs and Human Rights takes the view "that it is both possible and necessary for states to implement the various sanctions regimes whilst respecting their international obligations under the ECHR and the UNCCPR". My relatively positive verdict on Swiss policy regarding the sanctions decreed by the Security Council<sup>3</sup>, based in particular on certain procedural adjustments, has thus proved – alas – too optimistic.
5. At the hearing with legal experts in this field on 28 June 2007, the possibility that states might disregard the Security Council if conflict arose with their obligations under the ECHR was certainly mentioned. I share the disappointment of the first commentators<sup>4</sup> at the decision of the Swiss Federal Court,

<sup>1</sup> See Doc. 11454 du 16.11.2007.

<sup>2</sup> See introductory memorandum, AS/Jur (2007) 14, available at <http://assembly.coe.int/CommitteeDocs/2007/20070319-fjdoc14.pdf>

<sup>3</sup> See Doc. 11454, § 84.

<sup>4</sup> Cf. interview with Professor Michel Hottelier, *Le Temps*, 28.11.2007: "le TF fait prévaloir un peu vite le droit des Nations unies".

which has missed an opportunity to show the way towards putting an end to the scandal of totally inadequate procedures within international bodies, which violate the most basic of "fair trial" rights<sup>5</sup>: by themselves deciding on the validity of their nationals' inclusion on the blacklist, in the absence of fair proceedings at international level, national courts could actually compel the UN authorities to improve their procedures and so help to increase the legitimacy of these lists which are – as we acknowledge<sup>6</sup> - a potentially useful instrument in the fight against terrorism. In my view, the "procedure" at the UN violates the domestic *ordre public*, by ignoring elementary procedural defense rights, which are considered as essential in our culture. It is not enough to make nice speeches on the importance of human rights; we must also have the courage to act in accordance with our lofty words.

6. The Milan prosecutor's office had also opened an investigation concerning Mr Youssef Nada. On the application of the prosecutor himself, the Court of Milan decided, on 14 August 2007, to close the investigation. The prosecutorial authorities of two countries have thus investigated the so-called activities of Mr Nada in favour of terrorist movements; they arrive at the same conclusion: no case to be answered. Mr Nada has nevertheless remained on the black list for more than six years.

7. I should not be surprised, indeed, to see this case taken further before the European Court of Human Rights, which will have to rule at last instance on the conflict between the UN member states' duty to comply with the resolutions of the Security Council, including those of its Sanctions Committee, and their duty to protect individuals' fundamental rights under the ECHR.

## ii. *The PMOI/Iranian People's Mujahedin case*

8. The PMOI case is also cited in the November 2007 report as an example of the disastrous effects of the blacklists – in this case, those of the EU. As we know, the PMOI was successful before the Court of First Instance of the European Communities (CFIEC).<sup>7</sup> Nonetheless, the Council of the European Union refused to de-list it, arguing that the CFIEC's judgment applied only to procedural defects, which it claimed to have remedied – a claim which we already contested in November.

9. The PMOI is also on Britain's "national" blacklist. Unlike the "international" lists, the British machinery provides for appeal to an independent judicial authority – the POAC<sup>8</sup>. On 30 November 2007, the latter ruled that the British Government's blacklisting of the PMOI was unlawful. Unlike the CFIEC judgment, this decision does not simply identify procedural defects, but gives a ruling on the merits, having reviewed in detail the arguments and evidence presented by both sides. The result is sensational: the POAC, chaired by Sir Harry Ognall, a former judge, terms the Government's decision to blacklist the PMOI as "perverse" – coming from a British court, a real slap in the face for HM Government. Moreover, on 14 December 2007, the High Court refused, in unequivocal terms, to grant leave to appeal against the POAC's decision.

10. The case was brought before the POAC by 35 British parliamentarians, including a former Home Secretary, Lord Waddington, the former Solicitor-General, Lord Archer, and a retired judge in the House of Lords, Lord Slynn. The Commission concluded that the PMOI's "military" action against military and security targets in Iran had ceased for good in 2001, that the group had voluntarily disarmed in 2003, and that it had made no attempt to rearm. There were questions in the British press as to why the British Government, which also appeared to be behind the blacklisting of the PMOI at European level, was so resolutely antagonistic to this group, which was campaigning for replacement of the Mullahs' regime by a secular democracy, and had drawn the world's attention to Iran's nuclear programme in 2002<sup>9</sup>.

11. Since the Council of the European Union, in a decision dated 20 December 2007, has kept the PMOI on the blacklist, regardless of the CFIEC's judgment in its favour<sup>10</sup>, and again on the basis of the British

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<sup>5</sup> Following publication of the November report, a German student drew my attention to another decision in which a national court refused to apply a sanction decreed by the Security Council's Sanctions Committee. This was a decision given by the 10th division of the Turkish Council of State on 04.07.2006 in the Yasin al-Qadi case (referred to in the Sixth Report of the Analytical Support and Sanctions Monitoring Team established under Resolutions 1526 (2007) and 1617 (2005) of 08.03.007, S/2007/132). However, this decision was set aside on appeal in February 2007 by the Administrative Law Division of the Turkish Supreme Court, after a hesitation waltz, in which the Turkish Prime Minister himself reportedly guaranteed Mr Al-Qadi's innocence (cf. Andrew Cochran, Turkish Administrative Court freezes Yasin Al-Qadi's Assets, in : Counterterrorism Blog, 23.02.2007, 9 :19 pm).

<sup>6</sup> Cf. § 3 of the draft Resolution.

<sup>7</sup> See Doc. 11454, §§ 54-58.

<sup>8</sup> Proscribed Organisations Appeal Commission.

<sup>9</sup> Cf. Clare Dyer, "Government ordered to end 'perverse' terror listing of Iran opposition", in: The Guardian, 01.12.2007; Christopher Booker, "Brown under fire for illegal ban on dissidents", in: The Sunday Telegraph, 23.12.2007

<sup>10</sup> Council decision of 20.12.2007 (OJ L 340/100 of 22.12.2007).

listing which had already been repudiated by the PMOI, the case will end up again before the Community judges, who will have to rule on the scope of judicial supervision of the Council's blacklists, and will this time find it hard to avoid answering the basic question – in the light of the evidence collected by the British POAC – is the PMOI a "terrorist" organisation or not?

### iii. *The Kadi case*

12. In the Kadi case, the judgment of the CFIEC<sup>11</sup>, which was very reticent regarding the opening of a judicial remedy before the European Community courts for persons blacklisted by the UNSC, was appealed. The Advocate General at the ECJ, Mr Poirares Maduro, delivered his conclusions on 16 January 2008<sup>12</sup>. He recommends to the ECJ to set aside the judgment of the CFIEC and to annul the litigious Council regulations<sup>13</sup>. His conclusions are clear and convincing: the complete absence of procedural protections at the level of the UN Security Council obliges the European courts to be especially vigilant, and the thesis of the supremacy of the resolutions of the UN Security Council does not exonerate the European judges from ensuring that acts of the European institutions do not violate the legal order of the Community. *"Both the right to be heard and the right to effective judicial review constitute fundamental rights that form part of the general principles of Community law."*<sup>14</sup> I can only subscribe wholeheartedly also to the following words of the Advocate General: *"The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law. [...] Especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure the political necessities of today do not become the legal realities of tomorrow."*<sup>15</sup>

### iv. *The Sayadi-Vinck case*

13. A "blacklist" case has also landed on the desk of the UN Human Rights Committee; in a similar situation as that of Mr Nada, the Saydi-Vinck couple have lodged a complaint against Belgium, which continues to execute sanctions decreed against them by the UN despite the fact that an enquiry by the Belgian prosecutor's office has not given rise to any charges.<sup>16</sup> The complaint was declared admissible in March 2007.

## III. Conclusions

14. The developments in the Nada and PMOI cases cast no doubt on the draft resolution and recommendation adopted by the Committee on Legal Affairs in November or the explanatory memorandum. On the contrary, they illustrate the drastic consequences which the flawed procedures still current in the United Nations Security Council and the Council of the European Union can have for innocent parties, who face almost insurmountable difficulties in securing the most basic of their rights.

15. Indeed, the effects of including an individual or legal person on a "terrorist blacklist" are even more far-reaching than we said in the November 2007 report – and probably more far-reaching than the list-keepers themselves could have foreseen. The ECJ judgment in the *Möllendorf*<sup>17</sup> case, for example, prohibits land registry offices from registering a blacklisted person as the owner of a building. The result in that case was a Kafkaesque situation, since the person in question had paid the purchase price before he was blacklisted, and was prevented from obtaining a refund by the fact that his accounts had been frozen in the meantime. If the Security Council resolutions were taken seriously – and they normally should be – then blacklisted persons would no longer be able even to shop in supermarkets, draw their wages or collect rent from tenants<sup>18</sup>. In criminal law, inclusion on a "blacklist" is one of the factors considered in ordering a suspect's detention on remand or refusing him compensation for wrongful detention. The German welfare

<sup>11</sup> Cf. November 2007 report (Doc. 11454), §§ 46 pp.

<sup>12</sup> Case no. C-402/05 P, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, available under <http://curia.europa.eu>

<sup>13</sup> In particular, Regulation No. 881/2002.

<sup>14</sup> Opinion of the Advocate General (*supra* note 11), § 49.

<sup>15</sup> Opinion (*supra* note 11), § 45.

<sup>16</sup> Decision of the "counsel chamber" of the Brussels Court of First Instance of 19.12.2005; application registered by the Human Rights Committee on 10.05.2006 (cf. <http://www.leclea.be/pages/couple-belge.html> and <http://www.montki.be/content/view/1594/101>), following the procedure foreseen in the Optional Protocol of the International Covenant on Civil and Political Rights of 1966.

<sup>17</sup> Decision of 11.10.2007, Rs. C-117/06.

<sup>18</sup> Article by Frank Meyer and Julia Macke (researchers at the Max Planck Institute for Foreign and International Criminal Law, Freiburg), *"Rechtliche Auswirkungen der Terroristenlisten im deutschen Recht"*, in: HRRS 12/2007, pp. 447-466.

authorities reportedly refused to pay a "listed" person unemployment benefit, and even withheld social assistance from the German wife of another person suspected of funding terrorism. Precisely because of their support for the PMOI, the organisation recently declared harmless by the British POAC, several Iranian exiles in Germany have lost the political refugee status granted them years ago. Other PMOI supporters have been refused German nationality because of their membership of this blacklisted organisation<sup>19</sup>. Several PMOI members have told me of criminal proceedings in Iran, in which the fact of its being recognised as a "terrorist" organisation by the EU has been used as an argument in demanding the death penalty.

16. These examples – by no means the only ones! – show the extremely serious consequences of including individuals or organisations on the various "blacklists", and thus the importance of our demands in the draft resolution concerning the minimum conditions which must be respected regarding the procedure and merits in such cases, and concerning the need for effective remedies against inclusion on such lists. I accordingly welcome Switzerland's recent initiative for the establishment of an independent board of appeal to review the list at regular intervals and process applications for de-listing.<sup>20</sup>

17. Blacklists, as we said, can be acceptable, for a time, as a weapon to fight terrorism and its supporters. Such a measure, which has severe consequences, must however be well targeted, following a serious procedure. This is not at all the case today. Let us say it clearly: the current blacklisting practice is scandalous and blemishes the honour of the institutions making use of it in such a way. Blacklisting without respecting the most elementary rights puts into the question the credibility of the fight against terrorism and thus reduces its effectiveness. Effective prevention and rigorous prosecution of crime involving terror whilst respecting the fundamental principles of the ECHR is possible; respecting these principles is even indispensable in order for all citizens to support and to identify with this fight. Injustice is an important ally of the terrorists: let us therefore fight it, too. This is precisely what the texts submitted to the Assembly by the Committee on Legal Affairs intend to do.

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<sup>19</sup> See *Meyer and Macke*, *ibid.* (note 18), pp. 449-450.

<sup>20</sup> Cf. Peter Johannes Meier, *SonntagsZeitung*, 13.01.2008: "*Terrorliste:EDA macht Vorschlag*".