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Title: Trading Justice for Security? UN Anti-Terrorism, Due Process Rights, and the Role of the Judiciary: Lessons for policymakers

Year of publication: 2009

Citation: Draghici, C. (2009) 'Trading Justice for Security? UN Anti-Terrorism, Due Process Rights, and the Role of the Judiciary: Lessons for policymakers' *Centre on Human Rights in Conflict, Policy Paper No. 2*, May 2009

Link to published version:

<http://www.uel.ac.uk/chrc/publications/documents/TradingJusticeforSecurityReport2009.pdf>

TRADING JUSTICE FOR SECURITY? UN ANTI-TERRORISM, DUE PROCESS RIGHTS, AND THE ROLE OF THE JUDICIARY

Lessons for policymakers

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Centre on Human Rights in Conflict, Policy Paper no. 2, May 2009

Executive summary

- Policy-makers, domestically and in international fora, tend to address counter-terrorism and human-rights protection in terms of competitive goals.
- In the post-9/11 political climate dominated by security concerns, the suppression of the financing of terrorism is given priority over suspects' rights.
- The current procedures established by the UN Security Council for the freezing of funds of terrorist suspects encroach upon several individual rights.
- The most severe infringement upon the rights of persons targeted by the UN sanctions derives from the lack of a secure avenue of appeal.
- The denial of access to justice has been fostered for several years by the deference of national and regional courts to the UN Security Council.
- Recent developments at European Union level demonstrate that judicial decisions can shape counter-terrorism policies.

Introduction

The findings reported below emerge from a broader research project exploring human rights in the global war on terror, *The Search for a Fair Balance between the Imperative of National Security and the Protection of Human Rights in the Recent Caselaw of the European Courts concerning the 'Blacklists' of Alleged Terrorists*, a project financed by the Leverhulme Trust and carried out by the author at the Centre on Human Rights in Conflict (CHRC) of the University of East London, School of Law.¹

The purpose of this policy paper is to highlight the role of the judiciary in reconciling counter-terrorism strategies with human rights standards. Indeed, judicial assent to the excesses of policy-makers risks deepening the human rights crisis caused by the fight against apocalyptic terrorism. In the aftermath of the September 11, 2001 terrorist attacks against the United States, the political climate has been dominated by security concerns. The United States has invoked its right to self-defence and declared itself to be engaged in a "war" against terrorism of global reach. The condemnation by the UN Security Council of any act of terrorism as a threat to international peace and security has contributed to the prioritization of counter-terrorism strategies worldwide. In this context, the collision of anti-terrorist measures with human rights has not received the attention it deserves. This is particularly the case with regard to the extensive financial measures imposed by the UN Security Council against persons and organisations suspected of association with terrorism. By virtue of emergency powers pursuant to Chapter VII of the UN Charter, the Security Council has adopted unprecedented sanctions directly against specific individuals rather than against states. Such sanctions are in fact decided in the absence of any connection between the individuals and a political regime or territorial entity. This innovation has not been accompanied by the creation of adequate mechanisms to guarantee respect for human rights. The implementation of UN anti-terrorist sanctions creates particular concerns about the access of terrorist suspects to justice and due process.

Critical aspects of the UN sanctions procedures

Scant legal basis and risk of error in listing decisions

Persons suspected of involvement in terrorist activity are subject to very comprehensive financial sanctions, pursuant to Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), as subsequently amended. These resolutions place an obligation on states to freeze without delay any financial assets or economic resources of the suspects (Taliban or Al-Qaida members or supporters), including funds derived from property owned or controlled directly or indirectly. The Security Council had already used the "targeted sanctions" device starting from Resolution 1127 (1997) against UNITA members to ensure compliance of political leaderships without affecting

whole civil populations. However, the use of individual sanctions in anti-terror strategy creates the challenge of correctly identifying targets.

The list of individuals and corporate entities allegedly involved in terrorism is drawn up by the Security Council's "Al-Qaida and Taliban Sanctions Committee" (also known as the "Sanctions Committee 1267") following proposals by member states. No domestic criminal charge or conviction is required for listing proposals, and states have on occasion based findings of terrorist association on partially inaccurate intelligence information. Because the mechanism relies on the 'surprise effect', a prior hearing is not afforded to the suspects. Judgment errors inevitably occur: 38 individuals and corporations out of a total of 507 names have in fact been delisted, but many of them after no less than 5 years of proscription, drastically affecting their private and professional lives. The addressees of the targeted sanctions are not in a position to defend themselves, even after the UN listing decision has been given effect at domestic level.

Shortcomings of the re-examination procedure

Submission of new information by states informs the regular updating of the list by the Sanctions Committee. The committee does not engage in a systematic case-by-case re-examination at pre-determined intervals. Nor is there re-examination upon request. Indeed there is no guarantee that a case will be re-examined upon filing a delisting petition with the Focal point for delisting within the UN Secretariat. This administrative structure, established pursuant to Resolution 1730 (2006), merely forwards the petitions to the states directly concerned, and, in case of inaction by those states, to all other states in the Sanctions Committee. The cases are then discussed only in the event that a state in the committee decides to submit the issue to the committee itself.

Even so, any re-examination is then performed by the same body which originally imposed the sanction, and involves purely intergovernmental consultations; a petitioner is delisted if there are no objections from the members of the Sanctions Committee. Additionally, individuals only have access to a portion of their file that the designating state considers to be "publicly disclosable". At no time are they entitled to take part in the delisting procedures. The procedure thus fails to meet the international fair trial standards in terms of independence and impartiality. The Security Council has not envisaged the establishment of an independent non-political review body called to examine delisting requests. According to a report of the Committee's Analytical Support and Monitoring Team in May 2008, such reform is rather unlikely, insofar as it would be perceived as eroding the Council's authority.

¹ The author gratefully acknowledges the support provided by the Leverhulme Trust in 2008 to the realization of this research project.

The listing and delisting procedures collide with the fundamental rights of persons suspected of association with terrorism. As a report of the UN High Commissioner on Human Rights of July 2008 on *Human Rights, Terrorism and Counter-terrorism* argued, “[m]easures should be taken to ensure a transparent listing and de-listing process, based on clear criteria, [...] as well as an effective, accessible and independent mechanism of review for the individuals and States concerned”. The infringement of the rights of few individuals might be viewed as a small price to pay for international security, especially since financial sanctions do not involve the violation of peremptory norms, such as the prohibition of torture. However, rule of law can be undermined by allowing a range of rights be completely overridden by governmental security claims. In particular, the suppression of judicial guarantees, which have a bearing on the enforcement of all other rights, can enable abuse.

Applicability of international human rights law

The Security Council itself has recognized the need to reconcile counter-terrorism with human rights obligations. In Resolution 1456 (2003) and later resolutions, the Security Council has stressed that states must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee, and humanitarian law. Access to justice is a widely accepted human right, enshrined in many human rights instruments (Article 14 of the International Covenant on Civil and Political Rights, Article 6 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights, Article 47 of the Charter of Fundamental Rights of the European Union, etc.). As the European Court of Human Rights acknowledged in *Waite and Kennedy v. Germany* (1999), the attribution of mandatory powers to international organisations cannot absolve states of responsibility for human rights violations. More generally, states remain internationally responsible for acts in breach of their obligations committed by international organisations which they provide with mandatory powers, a norm codified by the Draft Articles of the International Law Commission on the Responsibility of International Organisations (Article 28). Arguably, implementing Security Council resolutions under Chapter VII may entail derogations from international due process

standards. Derogations are indeed permitted by human rights treaties in a time of public emergency to the extent strictly required by the situation. However, the virtually permanent state of terrorist alert cannot be viewed as an exceptional situation threatening the life of the nation. Further, a sanctions regime of an indefinite duration cannot constitute an emergency measure. There is increasing support for the view that Security Council resolutions cannot require full derogation from the enforcement of the right to a fair hearing. Authoritative international jurisprudence suggests that the core of due process rights might have attained the status of peremptory norms (Human Rights Committee, General Comment no. 29, 2001; European Court of Human Rights, *Mamatkulov v. Turkey*, 2007). This claim is further supported by the fact that basic elements of fair trial rights are guaranteed even in conflict situations (common Article 3 of the 1949 Geneva Conventions).

The assent of national and regional tribunals to the restriction of rights

Since the UN mechanism does not provide for guaranteed and independent re-examination, it is essential to establish how states can comply with their obligation to secure due process rights, and if domestic avenues of appeal are properly afforded. This amounts to enquiring whether the national implementation acts seeking to give effect to UN resolutions can be challenged in a court of law. There is, in fact, no such prohibition inherent in the resolutions of the Security Council. However, so far the experience of domestic lawsuits—approximately 26 cases of past and current litigation, according to the reports of the Analytical Support and Monitoring Team—suggests that the claimants’ prospects for success are very limited. National tribunals tend to find that they lack jurisdiction to hear cases dealing with state incorporation of Security Council resolutions; alternatively courts may find that the Sanctions Committee enjoys exclusive competence over the inclusion and removal of the names from the list (Brussels Court of First Instance, *Nabil Sayadi and Patricia Vinck*, 2005, Tribunal of Milan, *Nasco Business Residence Center SAS*, 2003).

Similarly, The Court of First Instance of the European Communities has declined to review European Community acts implementing the UN sanctions. The Court of First Instance found that the EC acts lawfully pursued compliance with UN Charter obligations, which prevail over any other obligations of EU states. The court also found that EU institutions did not have the discretion to alter the contents of the UN Security Council resolutions; and further that review of such resolutions falls outside the court's jurisdiction (*Yusuf and Al-Barakaat*, 2005, *Kadi*, 2005, *Ayadi*, 2006, *Hassan* 2006). The court held that its power of review could be exercised only if *jus cogens* violations were at stake, insofar as peremptory norms bind on all subjects of international law, including the bodies of the United Nations. The court acknowledged that there is no judicial remedy available to the applicants. Nonetheless, it found that this lacuna in the judicial protection of suspects is not contrary to *jus cogens*, and that their interest to have their case heard was outweighed by the essential public interest in the maintenance of international peace and security.

Recent developments: prospects for judicial oversight on UN sanctions

Judicial self-restraint and the unconditional primacy of UN resolutions appear less tenable after the *Kadi* appeal judgment of the European Court of Justice of 3 September 2008. The court found that the EC judicature is competent to review any piece of Community legislation, including acts aimed at adapting the EC legal system to international obligations. It maintained that the autonomy of the EC legal order entails that the allocation of powers amongst institutions (in particular judicial control over EC decision-making bodies) cannot be superseded by obligations derived from an international agreement such as the UN Charter. The court further found that when legislation is adopted in order to give effect to an international agreement, EC institutions must ensure that the basic constitutional values of the EC legal order—rule of law, human rights—are observed. In this sense the court found that the EC judicature acts as a 'constitutional' court. Thus the court established that it was possible to review regulations implementing UN Chapter VII resolutions, even though the resolutions

themselves prevail under international law over other treaty obligations (including the EC and human rights treaties), and in principle EU institutions are bound to enforce them. The court found that, while some derogations from EC and human rights treaties might be permissible, they were not permissible for non-derogable principles of EC law such as human rights protection. The court did not find that UN resolutions themselves could be reviewed, but rather EC implementing legislation, for which EC institutions have a certain margin of discretion. The court set aside the judgments of the Court of First Instance, and annulled the regulation challenged by the applicants in so far as it concerned them.

The European Commission has, in response to the *Kadi* appeal ruling, provided the litigants with the UN Sanctions Committee's narrative summaries of reasons for their inclusion on the list, and examined their comments. Through the passage of Regulation 1190/2008 of 28 November 2008, the Commission gives an account of these developments and reconfirms the inclusion of *Kadi* and *Al-Barakaat* foundation on the list. These events nonetheless demonstrate that judicial intervention may compel the adjustment of executive proceedings (increased transparency and opportunity for individuals to argue their case). The European Commission on 30 December 2008 also published a notice for the attention of the persons and entities added to the list by the latest EC Regulations (announcement 2008/C 330/09) to advise such persons and entities that they may make a request for the grounds for their listing to the Commission, and challenge the regulations concerned before the Court of First Instance. Thus Regulation 1190/2008 may be challenged before the Court of First Instance, whose power of review of the factual basis for listing is now confirmed by the interpretation offered by the ECJ judgment, and by the December 2008 notice of the European Commission. If the court is not satisfied that the statement of the case was sufficiently supported by evidence, it may decide that the regulation has to be annulled.

Several policy insights and recommendations for future litigation can be drawn in the light of these rulings, as courts may better address the pitfalls of the UN sanctions regime.

Policy insights

The case against judicial self-restraint

Domestic and regional courts should acknowledge their own jurisdiction over measures implementing UN decisions, instead of acting as passive spectators of policy-making. The wide margin of appreciation afforded to executive authorities in addressing the terrorist emergency in a multilateral framework should not mean a complete absence of oversight. It is inherent in the concept of checks and balances that executive action must be at all times monitored and adjusted by judicial supervision.

Further, domestic and regional courts need not attempt to solve a greater problem than the one submitted to their judgment. When the courts are asked to decide over the legitimacy of the domestic measures, they are requested to apply the criteria of the legal system of which they are guardians to those specific acts. They are not requested to assess the lawfulness of Security Council resolutions, and possibly invalidate them. Further, the incidental assessment of the lawfulness of UN resolutions does not imply asserting jurisdiction over such resolutions. Jurisdiction presupposes power to quash an act, a contention not raised by litigants. The effects of the court's decision would be limited to the specific case, and would not affect the validity of the resolution itself.

Depoliticizing judicial deliberation

Judges should not undertake the political task of assessing the diplomatic implications of the annulment of a domestic measure. If a court rules that a national/EC measure is to be annulled, political institutions must consider the options available: enforce the sanctions despite a finding of illegitimacy, incur international responsibility for non-compliance with the UN decision, or seek political negotiation at UN level in order to reach an agreement on the case that is compatible with their domestic constitutional expectations. It is not for the courts to take such political decisions; their adjudicatory role merely requires them to accurately establish whether an act is lawful, irrespective of the political consequences of the ruling. The 2008 decision of the European Court of Justice in *Kadi* to maintain the effects of the annulled regulation for three additional months illustrates this possibility: the court concedes to the political institutions the necessary time for them to decide the adequate course of action.

Proportionality as balancing criterion

Domestic courts should apply the proportionality test to measures related to international peace and security. The adoption of sanctions based on fragmentary intelligence material and without affording a hearing might be an acceptable tool in the fight against the financing of terrorism, provided that it is used as a preventive measure of short duration. The right of access to a judge is not an absolute one, but any restriction must remain proportional. Extensive international jurisprudence indicates that a fair balance must be struck between individual rights and security demands even in the presence of terrorist threats. The case-law of the European Court of Human Rights offers numerous such examples (*Fox, Campbell and Harley v. UK*, 1990; *Murray v. UK*, 1994, *Sakik and others v. Turkey*, 1997; *Brannigan and McBride v. UK*, 2003, *Ramirez Sanchez v. France*, 2006 etc.). It might be proportional to allow an affected individual only delayed access to an independent review body, or to allow proceedings with no public hearing, whereas the current sanctions mechanism completely impairs the substance of the right to due process.

The protracted maintenance of a name on the list and the denial of an opportunity for appeal at UN level are disproportionate, and domestic judges should take this into account when assessing the implementation measures. It is also not "necessary" to deny re-examination by an independent body after the initial enforcement of the freezing measures: indeed it cannot be seen how affording an avenue of appeal would undermine the fight against the financing of terrorism, since review is performed *ex post facto*. Furthermore, if security reasons actually rendered secrecy necessary after the implementation phase, this would appear to be at odds with the acknowledgment of the right to view inculpatory evidence and challenge it in the case of EU autonomous sanctions, as established by the Court of First Instance (*OMPI*, 2006, *Sison*, 2007, *Sichting*, 2007). In fact the access to a court to appeal against a UN-derived measure cannot impair security more than the exercise of the same right in connection to a EU measure.

Conclusion

Terrorism is one of the major security threats of our times, and needs to be properly addressed, but not at the expense of the basic values of the international community. Courts have the responsibility to prevent political decision-makers from compromising human rights to an unacceptable extent in the fight against terrorism. Their reaction should guide and stimulate reform of UN and domestic procedures, with a view to enhancing transparency and access to justice. It is therefore essential that domestic and supranational tribunals do not abdicate their role in shaping international counter-terrorism policy in such a way as to ensure its consistency with human rights standards.

Key recommendations: a summary

National and regional judges should:

- Acknowledge their competence to review any measures impairing fundamental human rights, including measures giving effect to Security Council Chapter VII resolutions
- Avoid focusing on the political outcome of their decisions and shaping judicial reasoning accordingly
- Assess the legitimacy of the challenged measures in the specific case before them, rather than considering international security objectives as a catch-all justification
- Employ uniform criteria such as the proportionality test in analysing terrorism measures, irrespective of whether measures originate from UN resolutions

Source list:

Guidelines of the [Sanctions] Committee for the Conduct of Its Work (Adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006 and 12 February 2007):

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

Consolidated List established by the UN Sanctions Committee 1267 (last updated on 10 December 2008):

www.un.org/sc/committees/1267/consolist.shtml.

Reports of the Analytical Support and Monitoring Team of the Sanctions Committee, including references to domestic case-law:

www.un.org/sc/committees/1267/monitoringteam.shtml

UN High Commissioner on Human Rights Fact sheet 32, *Human Rights, Terrorism and Counter-terrorism*:

www.ohchr.org/Documents/Publications/Factsheet32EN.pdf

The case-law of the European Communities courts referred to can be found at:

curia.europa.eu/en/content/juris/index_form.htm

The case-law of the European Court of Human Rights referred to can be found at:
<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

About the CHRC:

The Centre on Human Rights in Conflict (CHRC) is an interdisciplinary centre promoting policy-relevant research and events aimed at developing greater knowledge about the relationship between human rights and conflict.

Our work in human rights and armed conflict addresses the complex interplay between human rights and armed conflict, including human rights violations as both cause and consequence of violent conflict, the dilemma of pursuing justice as well as peacebuilding, and the unique challenges for the protection of human rights posed by illegal armed groups and terrorist organizations. Specific research and events have been developed in three areas: Rule of Law in Post-Conflict Situations, Business and Human Rights in Conflict, and Accountability, Reconciliation and DDR in Post-Conflict Situations. Further information can be found at www.uel.ac.uk/chrc.

About the author:

Dr. Carmen Draghici received her PhD in International Law and Human Rights from the University of Rome 'Sapienza' in 2007 with a thesis on the international protection of family rights. Her academic and research experience is related to the fields of International Law, International Organisation, Diplomatic and Consular Law, and European Union Law. As a Leverhulme Visiting Post-doctoral Research Fellow at the Centre of Human Rights in Conflict, School of Law, University of East London, she has carried out research on counter-terrorism and human rights.

