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 on 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. The purpose of this policy paper is to highlight the role of the judiciary in reconciling counter-terrorism strategies with human rights. Judicial scrutiny of 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-terrorism 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 and 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 procedures to guarantee respect for human rights. The implementation of UN anti-terror sanctions creates particular concern for 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 resolutions UnResolution 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 (Talibani or Al-Qa’ida 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 UNAlTA members to ensure compliance of political leaderships without affecting whole civil populations. However, the use of individual sanctions in anti-terrorism 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-Qa’ida and Talibani 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 deleted, 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 of 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 complaint (under UN Security Council’s resolution 1333 (2000)) with the UN Security Council’s Secretariat. This administrative structure, established rather than framed by the UN Charter, is subject to the strictures of the UN Secretariat. This administrative structure, established rather than framed by the UN Charter, is subject to the strictures of the UN Secretariat, and is 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 procedures to guarantee respect for human rights. The implementation of UN anti-terror sanctions creates particular concern for the access of terrorist suspects to justice and due process.

Applicability of international human rights law

The Security Council itself has recognized the need to reconcile counter-terrorism with human rights obligations. In Resolution 1458 (2003) and later resolutions, the Security Council has stated that states must ensure that any measures taken to combat terrorism comply with all their obligations under international law, including international human rights, refugee, and humanitarian law. Access to justice is a widely accepted human right, enshrined in many international 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). As the UN High Commissioner on Human Rights stated, the “fundamental rights of persons suspected of association with terrorism as a threat to international peace and security are guaranteed by international human rights law, in particular international human rights instruments, as the prohibition of torture. However, rule of law can be undermined by allowing a range of rights to 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 abuses.

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 of no legal value and does not comply with their obligation to secure due process rights, and if domestic avenues of appeal are properly designed, it is of no legal value. This suggests that it is unlikely 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 provision 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, Nabi Sayadi and Patricia Vinck, 2005; Tribunal of Milan, Nasco Business Residence SAS, 2003).
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; Sakel v. Greece, 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 incunabula evidence and challenge it in the case of EU autonomous sanctions, as established by the Court of First Instance (OMPL, 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 right same 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:

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.

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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.