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Master 2 Droits de l'homme

The role of the Security Council in the fight against terrorism and the violation of human rights by the anti-terrorism measures: *the case of the " Consolidated lists".*

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« Whoever fights monsters should see to it that in the process he does not become a monster. And if you gaze long enough into an abyss, the abyss will gaze back into you.»

« Quand on lutte contre des monstres, il faut prendre garde de ne pas devenir monstre soi-même. Si tu plonges longuement ton regard dans l'abîme, l'abîme finit par ancrer son regard en toi. »

Friedrich Wilhelm Nietzsche

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Abbreviations

CTM	Counter Terrorism Committee
CTED	Counter-Terrorism Committee Executive Directorate
CFI	Court of First Instance
ECJ	European Court of Justice
EU	European Union
ICJ	International Court of Justice
ICC	International Criminal Court
OAU	Organisation of African Union
OAS	Organisation of American States
OIC	Organisation of the Islamic Council
SC	Security Council
UNGA	United Nation General Assembly
UN	United Nations
UNC	United Nations Charter
UNDHR	United Nations Declaration for Human rights
UNHCHR	United Nations High Commissioner for Human rights
UNHCR	United Nations High Commissioner for Refugees

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Introduction

It is argued that the attacks of 9/11 changed the perception of international community concerning the phenomenon of terrorism. International community realized that terrorism had changed face both in the level of the causes but also in the level of the results. It became evident that terrorism is a transnational phenomenon that demands an international response.[1]

Although "terrorism" figures to almost any political agenda after the tragic events of 9/11, terrorism is not a new phenomenon. Political powers in Ancient Greece and during the Ptolemaic age used "terror" in order to achieve political and religious goals. However the term "terrorism" was first used in the political vocabulary by the Maximilien Robespierre Jacobin party when it imposed its Reign of Terror in 1793-1794. During that period, mass executions and extensive use of the guillotine paralyzed the population, and thus terrorism was firstly aligned with state's treatment to civilians. At the end of 19th century, the word "terrorism" was connected with the nihilistic movement in Russia and the anarchist movement in the rest of Europe. During that period terrorism was used to describe terrorist activities by private group of people; opponents of the established regimes. During the cold war terrorism was used as an instrument of both powers in order to achieve political goals beyond their territories; for example, CIA's activities in Latin America or KGB's involvement in Middle East. [2]

After the Cold War, terrorism changed radically. Nowadays, terrorism is characterized as an asymmetric threat more crucial and powerful than ever before. Specialists argue the possibilities that the new technologies, as well as the existence of chemical and biochemical weapons, offer terrorists the means to make the threat more dangerous than ever before. The fact that the terrorist network is very difficult to be identified and controlled makes this phenomenon crueler and totally irrational. [3] Except terrorists related to Al Qaida and other fighters for Islam, states have to

[1] Even if it is extremely difficult to define this complex phenomenon and certainly it is no the purpose of this paper to argue in favor of one or an other definition it is necessary, although, for reasons of clarity to mention that we consider terrorism as: "…any deliberate and systematic attacks by state or non-state actors upon civilians or non-combatants with the intent to create a generalized state of terror in order to further an ideological cause." Richard Wilson, Human rights in the "War on Terror", Cambridge University Press, 2005, note 2, p. 2

[2] During that period notion such as states sponsored terrorism was particularly developed since states was supporting terrorist activities of private or paramilitary groups in order to achieve political goals. See, for instance, James M. Lutz and Brenda J. Lutz, "Global Terrorism", Routledge, 2004, p. 45-63.

[3] For a complete approach we have to analyze the main causes of this change and what kind of political, social and economical factors created the grounds for such an evolution in the international scene. It is clear that the policy of the western countries, notably USA and its supporters, in the Middle East made the gap

deal with another kind of terrorism. In Europe for example, we can refer terrorist groups that have political motives such as the independence, or the secession of a region (IRA in Ireland, ETA in Spain or Tchetchenian terrorist groups acting in Russia), or other smaller groups that oppose to the government or to the established system as a whole.

Undoubtedly, the tragic events of September 11 have led to an intensive mobilization and adoptions of counter-terrorism measures both at the international, regional and national level. In the years that followed 9/11, Security Council acted in a manner that seemed to be somehow "frenetic" by comparison to its previous behavior. It adopted almost twenty resolutions on the topic by framing an international response to terrorist attacks. It is important to say that Security Council's Resolutions – which were adopted under Chapter VII of the UN Charter - placed legal obligations on Member States that went beyond the conclusion of an international convention; something indicative of the broad role that the organ of United Nations adopted.

Regional organizations also put the struggle against terrorism at the very core of their activities. They adopted normative or quasi –normative instruments such as Conventions, Protocols, Planes of Action, often recalling relevant Security Council's counter terrorism resolutions as the main "trigger mechanisms" for their action. It is important to notice that European Union adopted its own strategy against terrorism[4], and also other organizations such as OSCE and the Council of Europe had an important contribution.[5]

Undoubtedly, here is a consensus on the need to fight terror but there is still much controversy regarding the best way to conduct this fight in order to avoid jeopardizing human rights standards in the name of countering - terrorism. Some of the adopted measures both in international, regional and national level violate human rights[6]. To be more precise, the need to fight terrorism has made some countries introduce laws that abolish basic human rights values or minimize human rights standards. It is also noticed by NGO and independent bodies that states permitted practices that violate even non-derogable rights, such as the prohibition of torture and cruel or degrading treatment. That happened despite all UN General Assembly Resolutions and Council of Europe guidelines designed to ensure the protection of human rights and the respect of the principle of proportionality while countering terrorism.

It is evident that international community faces a dilemma. The sensible balance between respect of human rights and effective measures against terrorism

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between the West and East bigger giving the opportunity to fundamentalist groups to gain supporters that are ready to sacrifice their lives in the name of their ideals taking with them hundreds of innocent people.

[4] For more information see D. Mahncke and J. Monar International Terrorism- A European response ti a Global Threat, P.I.E Peter Lang, College of Europe, 2006, and http://www.euractiv.com/en/security/anti-terrorism-policy/article-136674

[5] Various pragmatic initiatives were adopted at the regional level, mainly to better define the crime of terrorism, the conditions for the exercise of criminal jurisdiction by States and regional judicial bodies, and the instruments of intergovernmental coordination and cooperation. Special emphasis was given, in some cases, to the need for respect for human rights in the fight against terrorism.

[6] Andrew Hudson, "Not a great asset: the UN Security Council's Counter-terrorism regime: violating human rights", Journal of International law, volume 25 (2), 2007, p. 203-227.

constitutes a major source of consideration and has led me to examine the question of the compatibility of Security Council's measures with the obligations of the states issued by human rights law. By the vast range of measures adopted in the name of the "fight against terrorism" we will particularly examine the violations provoked by the "black listing" procedure that has introduced by the Resolution 1267 (1999). In order to develop this question we will elaborate, in a first place the general framework of international law implemented while countering terrorism while in a second place we will examine the violations provoked by the blacklisting regime as well as other relevant questions concerning the implementation of SC sanctions by the European Union.
First of all, we consider necessary to underline the problem of the absence of a generally accepted definition of terrorism in international law. Despite the significant progress, states do not seem to reach an agreement since important political issues, such as the fight of "liberating movements" is still on the table of negotiations. The problem of the definition of terrorism is of major significance in anti terrorism policy since it is intimately related to the identification and the effective punishment of terrorist activities. The absence of a definition is also related to the violations of human rights since the vague definitions or the large margin of appreciation of the national authorities can lead to violation of fundamental freedoms.

Nevertheless, even without a definition the subjective conditions especially after 9/11 led SC to take immediate action. Before 9/11 SC had adopted measures related to terrorist attacks in the case of Libya (1992), Sudan (1996) and Afghanistan (1999). Some hours after 9/11 attacks SC adopted the famous resolution 1368 which condemns the attacks and call states to fight against terrorism using any means; a resolution that is under serious criticism. Another resolution of significant importance is the resolution 1373 (2001) that generates obligations to all member states of the international community to adopt precise measures in order to fight terrorism. Both resolutions 1267 and 1373 develop monitoring bodies, the so called Sanction Committee (Resolution 1267) and the Counter Terrorism Committee (CTC) (Resolution 1373). SC became subject of serious criticism because of the broad role intending to play by engaging states to adopt specific measures in order to fight terrorism.

As already mentioned antiterrorism measures have frequently interfered with human rights obligations of the states. Some of the most frequent violations concern the principle of non-discrimination, the rights of the asylum seekers, principle of *non-refoulement,* fair trial rights, detention conditions etc. Particular attention will be given to violations concerning non-derogable rights such as the absolute prohibition of torture and inhuman and degrading treatment. Even if states have the right to declare a situation of emergency under certain circumstances, they still have to obey to international norms and human rights standards and they can not under any circumstances derogate from non –derogable rights.

Nevertheless, except of the general sanctions that states have to adopt and implement according to resolution 1373, SC has also called states to impose sanctions to specific persons; this is the case of the Consolidated list. Consolidated lists are part of the general concept of targeted sanctions that vise to eliminate the cost for the population of a state by sanctioning specific persons. This question has a significant interest for two reasons that will be exhaustively examined in the second part. Initially, it is interesting to examine if sanctions imposed to black listed persons interferes with human rights law as it is established both by international and regional jurisdiction and secondly, if this is true, in which way such a decision can be

challenged and by whom, considering that United Nations enjoy immunity. This last question will be treated through the examination of the Kadi case and its contribution concerning the protection of human rights while countering terrorism.

I. The response of the international community to terrorism and its compatibility with human rights law

Who can define terrorism? Who can distinguish a terrorist from a freedom –fighter? What is the role of the state in the fight against terrorism before and after 9/11? What is the role of human rights in this fight? These are some of the questions that will help us analyze and understand the reaction of the international community against this phenomenon which has taken huge dimensions after 9/11. It is important to examine how "terrorism" has "change faces" over the years and how difficult is for states to conclude to a common definition which is in our opinion a necessary element for a global effective solution. Nowadays, more than 100 of definitions of terrorism can be found in the doctrine, nevertheless it seems that none of them can compromise political interest of states in order to achieve the desirable purpose; a Comprehensive Convention on International Terrorism. On the other hand, the lack of definition has not block international community's reaction against such crimes. United Nations has adopted 16 Convention dealing with the several dimensions of the phenomenon while SC has adopted some of the most important resolutions in its history, providing a new broader role as the guardian of the international peace and security. Even if measures against terrorism are necessary that does not mean that any kind of measures are acceptable especially by democratic states.[7] The misuse of SC Resolutions has lead to huge and continuing violations of human rights and this is a serious issue that international community has to deal with by finding the right balance between effective solutions and human rights protection.

A. The response of the international community against terrorism.

In this chapter it is examined how international community has reacted to terrorism and what measures it has adopted in order to protect nations from this menace. In a first place we examine the efforts made by the international community, and in particular, the efforts of the United Nations, to define international terrorism from the 20s until today while in a second place we focus on the Security Councils measures against terrorism. We briefly recall some of the difficulties among states in reaching consensus on this issue as they are still reflected in the negotiations for the United Nations Draft

[7] Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 845. http://www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorirm_law.pdf

Comprehensive Convention on International Terrorism in the Sixth Committee of the General Assembly (UNGA).

1. Defining international terrorism: the big "absence".

The idea to criminalize terrorism as an international offence came about first in the 1920s[8], and for that purpose a definition was necessary but the negotiations during that period did not conclude to a comprehensive definition. The problem is that 90 years later a clear and generally accepted definition remains a goal to be achieved.

a. A historical overview of the efforts made by the international community to define terrorism.

At the time of writing, the United Nations had adopted 16 international counter-terrorism related legal instruments[9]. In parallel, regional organizations, such as the European Union (EU), the Organisation of the Islamic Council (OIC), the League of Arab States, the Organisation of American States (OAS) and the Organisation of African States (OAU) have adopted relevant conventions. [10] However, none of them gives a specific definition of "terrorism". Instead, many of the treaties require states to prohibit and punish in domestic law certain terrorist related acts – such as hostage taking or hijacking – without requiring, as an element of the offence, a political motive or intention to terrorize civilians behind the act.

The first attempt to reach a common definition of terrorism was in the drafting of the Convention on the Prevention and Punishment of Terrorist Activities of 1937 which defined terrorism as "any act intended to cause death or grievous bodily harm or loss of liberty to (a) heads of States, persons exercising the prerogatives of heads of States and their hereditary or designated successors, (b) wives and husbands of the above-mentioned persons, (c) persons charged with public functions or holding public positions when the act is directed against them in their public capacity".[11] Triggered by alleged activities of Yugoslav terrorists in Hungary, the assassination of King Alexander of Yugoslavia in France in 1934, and the appeal of Yugoslavia to the League of Nations in 1934, the Council came to the conclusion that the rules of international law concerning the repression of terrorist activity were not sufficiently precise to guarantee efficient international cooperation in this matter[12].

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[8] The idea of systematically defining terrorism as an international criminal offence first lanced , in 1926, Romania asked the League of Nations to consider drafting a "convention to render terrorism universally punishable" but the request was not acted on. Ben Saul, Attempts to define terrorism in international law, Netherlands International Law Review, vol 52, 2005, p 80

[9] Term which is used by the official site of United Nations and the Counter Terrorism Committee, http://www.un.org/sc/ctc/index.html

[10] For an analytic record of the 23 international and regional conventions recognized by United Nations see Gerhard Hafner "The definition of the crime of Terrorism" p. 33-34 in International Cooperation in Counter –Terrorism, The United Nations and Regional Organizations in the Fight against terrorism, Ashgate 2006 and the site of the CTC http://www.un.org/sc/ctc/laws.html#t16
The international and regional treaties are available at: http://untreaty.un.org/English/Terrorism.asp

[11] Moreover, "terrorism" covered willful acts of damaging public property, endangering lives as well as manufacturing machines with a view towards committing such acts anywhere. Article X, Convention on the Prevention and Punishment of Terrorist Activities of 1937.

[12] Ben Saul**,** Attempts to define terrorism in international law, Netherlands International Law Review, vol 52, 2005, p. 68-69, 72-73.

Unfortunately, the Convention on the Prevention and Punishment of Terrorist activities failed to take effect because of lack of signatures.

In 1954, the International Law Commission while drafting its 1954 Draft Code of Offences against Peace and Security of Mankind (Part 1), considered terrorism as an offence against peace and security without providing a legal definition[13] and the General Assembly postponed further consideration of the Draft Code.[14] In 1991, the ILC came up with a new proposal incorporating the 1937 League definition and also added the notions of "organizing", "assisting" and "financing" terrorist activities.[15] After several drafting in1990-1995, ILC Draft Code Part II was adopted in 1996, however it was never adopted as such in a Convention; we can only say that it constitutes a soft law document.

As a response to the terrorist attacks on Israeli athletes at the Munich Olympics in September 1972, the United States (US) presented to the UN General Assembly a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism. The Convention referred to offences of "international significance" (and not offences of "terrorism") as unlawful killing, causing serious bodily harm, or kidnapping, where such acts had an international dimension, and are "intended to damage the interests of or obtain a concession from a State or an international organization (Article 1 of the Draft Convention). The Convention was designed to focus on individual terrorist acts, rather than state support for terrorist activity.

However the definition in the Draft Convention was over-inclusive such that acts committed by non-state forces in the course of military hostilities were not excluded from the Convention, and guerilla actions, or legitimate national liberation or self-determination forces could be punished as terrorists in some circumstances.[16] In this context, Arab and African countries as well as China opposed to the US proposal to convene a conference in order to adopt the Convention because, influenced by the politic and ideological divide of the period, they believed that the Convention was an attempt to criminalize self-determination movements.[17]

Between 1960 and 1990 some positive developments took place in the sphere of the United Nations: the 1963 Tokyo Convention, the 1970 Hague Convention, the Montreal Convention did much to enhance the protection of civil aviation against terrorist attacks. In the nuclear field, the 1980 Convention on the Physical Protection

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[13] R. Higgins exercise a severe critique to the definition provided in the Article 2 of the 1954 Draft Code of the ILC in R. Higgins "The General International Law of Terrorism", in R. Higgins and M. Flory, eds., Terrorism and International Law (London, Routledge 1997) p. 13 at pp. 26-27

[14] 1954 ILC Draft Code of Offences against the Peace and Security of Mankind (Part I), in ILC 6th Session Report (3 June-28 July 1954), UN Doc. A/2693, as requested by UNGA Res. 177(II) (1947).

[15] 1991 ILC Draft Code, based on Article 2(6) of the 1954 Draft Code, 101 proposed an offence where a state agent or representative commits or orders the following: "undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public". ILC Yearbook (1990) p. 336

[16] Ben Saul**,** Attempts to define terrorism in international law, Netherlands International Law Review, vol 52, 2005.

[17] For the relation between self determination and terrorism see Sabine von Schorlemer, Human Rights: Substantive and Institutional Implications of the war against terrorism, EJIL, volume 14, no 2, April 2003. p272

of Nuclear Material sought to cover to the broadest extent the possible targets of acts of nuclear terrorism.[18]

More recently, further efforts were made to achieve a common definition in Article 5 of the 1998 Draft Rome Statute which included "crimes of terrorism" comprising three distinct offences. The first offence was: "Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them."[19] The second offence comprised the offence included in six sectoral treaties concerning hostage, hijacking, protection of diplomatic agents etc that had been adopted since then.[20] The third offence involved "the use of fire arms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups or persons or populations or serious damage to property".

The participants in the negotiations did not manage to come to an agreement. As a result terrorism was not included as an offence. There were a number of reasons for this: the legal novelty of the offence and lack of prior definition, disagreement about national liberation violence and a fear that it would politicize the International Criminal Court (ICC). More pragmatically, some states felt that terrorism was better suited to prosecution before national courts, due to investigative complexities and the need for immunities.[21]

In addition, the Rome Conference responded to terrorism in a different sense. In Article 7(2)(a) of the Rome Statute, crimes against humanity require the "multiple commission of acts … pursuant to or in furtherance of a State or organizational policy to commit such attack". The reference to "organizations" was "intended to include such groups as terrorist organizations", although express reference to terrorism as a crime against humanity was not adopted. Thus terrorist groups which commit acts constituting crimes against humanity could be prosecuted. This would include acts carried out in armed conflict or peace time, as long as the conduct is "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Such attacks need not be both widespread and systematic; either is sufficient.[22]

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[18] Obette Jankowitsch –Prevor " United Nations Measures against Terrorism- Introductory remarks", p . 37 in Alice Yotopoulos-Marangopoulos, Wolfgang Benedek, Anti-terrorist measures and human rights, Nijhoff, 2004

[19] This first offence resembles the 1991 ILC Draft Code and was not limited to armed conflict (as in the1996 ILC Draft Code). It also shares elements of the 1937 League definition and a 1994 General Assembly working definition. Attempts to define "Terrorism" in international law", Ben Saul, Netherlands International law review, vol 52, 2005

[20] 1971 Montreal Convention; 1970 Hague Convention; 1973 Protected Persons Convention; 1979 Hostages Convention; 1988 Rome Convention and 1988 Rome Protocol.

[21] Ben Saul, Attempts to define terrorism in international law, Netherlands International Law Review, volume 52, 2005, p.74

[22] M. Arsanjani, "The 1998 Rome Statute of the International Criminal Court", 93 AJIL (1999) p. 22 at p.31

In 1997, the Ad Hoc Committee established by General Assembly the previous year[23] successfully drafted the 1997 International Convention for the Suppression of Terrorist Bombing and the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations 0n 1999. The same Committee was responsible for the drafting of the International Convention for the suppression of acts of nuclear terrorism (Nuclear Convention,) which was finally adopted in 2005 and for the Draft Comprehensive Convention on international terrorism (Draft Comprehensive Convention).[24]

The Terrorist Bombing Convention excludes from its provisions the activities of armed forces during armed conflicts as well as the state military forces exercising their official duties.

The Terrorist Financing Convention contains, for the first time, an embryonic definition of international terrorism. Article 2 (1) (b) gives the following definition:

> "Any [...] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act"[25].

The Financing Convention expressly excludes reference to political motives as a justification for terrorist acts and thus clearly states that even noble causes can not justify the use of terrorist means. However the Convention does not address the issue of the "state terrorist".[26]

After almost five years of negotiations the International Convention for the Suppression of Acts of Nuclear Terrorism was adopted in New York on 13 April 2005. It is interesting that until 2003 the scope of the application of the Convention was an unsolved problem. Finally, and after several debates and compromises, the Convention includes a broad range of activities which could be considered nuclear terrorism punishable under the Convention.[27]

The definition given by Article 2 establishes objective offences where a person unlawfully and intentionally possesses or uses radioactive material or devices with the intent to cause death or serious bodily injury, or to cause substantial damage to property or the environment. It creates the further offences of using radioactive material or devices, or using or damaging a nuclear facility, with the intent to compel

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[23] UNGA Res 51/210 (1996), para 1

[24] For information regarding the work of the Add hoc Committee at http://www.un.org/law/terrorism/index.html

[25] In 2004, the High –level Panel on Threats, Challenges and Change will adopt a definition based almost verbatim on the definition provided by the 1999 Convention on the financing of terrorism. That definition is included to the Secretary General's report entitled "A more secure world: our shared responsibility". H. Neuhold, " International Terrorism, Definition, Challenges and Responses", p24 in D. Mahncke and J. Monar International Terrorism- A European response ti a Global Threat, P.I.E Peter Lang, College of Europe, 2006

[26] Christian Walter, Terrorism as a Challenge for National and International Law: Security Versus Liberty?, Springer, 2004, p.34

[27] H. Corell, "The International Instruments against Terrorism", Paper at Symposium on Combating International Terrorism: The Contribution of the UN, Vienna, 3-4 June 2002, p. 12.

a natural or legal person, an international organization or a state to do or refrain from doing an act. 146 States Parties are obliged to enact legislation punishing these acts, "in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons".[28]

b. The endless negotiations for the adoption of the Draft Comprehensive Convention on international terrorism and the current disagreements.

As mentioned above, the preparation of the Draft Comprehensive Convention on International Terrorism started in 2000 by the Ad hoc Committee of the General Assembly. Nine years later, the international community has not concluded a universally accepted legal definition of international terrorism. Nevertheless, according to the recent report of the Working Group for the Draft Convention, over the past few years there seems to have been remarkable progress in the negotiations. [29]

Based on the definition given by the 1999 Convention on the Financing of Terrorism, Article 2 of the Draft Comprehensive Convention on International Terrorism defines "terrorism" as follows:

> "serious offences against persons or heavy damage to private or public property qualify as offences within the meaning of the Convention "when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act". [30]

The Draft Comprehensive Convention on International Terrorism, which includes a generic definition, has not progressed further than the drafting stage: the most important issues in contention are the exclusion from the definition, struggles for self-determination; the application of the Convention to state armed forces; and situations of foreign occupation. Some states insist, that the Draft Comprehensive Convention should include provisions relating to military activities not covered by international humanitarian law, and apply to individuals in a position to control or direct such military activities.[31]

It is obvious that although states generally agree on the importance of eradicating international terrorism (*a fortiori* after the 2001 attack on the World Trade Centre and the 2005 attacks in London), there are still important disagreements on certain issues, which have thus far prevented them from taking a comprehensive approach.

The principal difficulty in reaching an agreement on a generally accepted definition of terrorism results from the old saying that "one state's terrorist is another state's

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[28] Article 4 proposes to exclude the "activities of armed forces during an armed conflict" which are "governed" by IHL. It further excludes the "activities" of state military forces "in the exercise of their official duties, inasmuch as they are governed by other rules of international law".

[29] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 Twelfth session (25 and 26 February and 6 March 2008) General Assembly Official Records Sixty-third Session Supplement No. 37 (A/63/37)

[30] Although the word "terrorism" is used only in the title and in the preamble of the draft, the definition in Article 2 is clearly meant to be a definition of international terrorism.

[31] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 Twelfth session (March 2008), 7

freedom-fighter". The main difficulties that States have to overcome include: the exception of the "state sponsored terrorism" from the legal definition, the relationship between terrorism and anti-colonial and national liberation movements; and the activities of States' armed forces in armed conflicts and in exercise of their official duties.

During the negotiations of the last few years[32] many Arab countries and members of the OIC insisted that terrorism must be clearly distinguished from acts of legitimate self-defense by national liberation movements. In 1970, Algeria and other Arab countries as well as the non-allied countries argued that it would be appropriate first to discuss the root causes of terrorism before suggesting repressive measures. During the Ad Hoc Committee the Algerian delegation not only pinpointed certain root causes of international terrorism, but also suggested that terrorism could be justified in certain circumstances.[33]

Even during the current negotiations for the Comprehensive Convention on terrorism the OIC member states demanded that "people's struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony aimed at liberation and self –determination in accordance with the principles of international law"[34] be excepted from the definition of terrorist crimes. According to the arguments of western countries, the undoubtedly legitimate people's struggle could not be carried out by whatever means available[35] but had to remain subject to the rules of humanitarian law, so that there was no need to refer to this matter in the comprehensive convention.

Another disagreement is related to the "state terrorism" or "state-sponsored terrorism"[36] issue. Arab countries believe that state terrorism is the most harmful and deadly format of terrorism and fuelled their desire for it to be included in the definition. Over the last few years, the exclusion of state terrorism has become negotiable under the condition that political violence by liberation movements be exempted as well. [37]

According to Professor Brownlie, state sponsored terrorism is governed by existing international law principles including, e.g. the prohibition of use of force, the doctrine of establishment of state responsibility for the acts of individuals, the self defense

[32] JO¨ RG Friedrichs, Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism**,** *Leiden Journal of International Law*, 19 (2006), p.74

[33] "Violence becomes terrorism, when situations which lead to violence are exacerbated." UN Doc. A/9028 (1973): report of the Ad Hoc Committee, annex 7b.

[34] For the right of "self –determination" see Antonio Cassece, Self-Determination of Peoples: A legal Appraisal, Cambridge, 1995, see also Michla Pomerence, Self Determination in Law and Practice, Nijhoff, Hague, 1982.

[35] "A terrorist activity remained a terrorist activity whether or not it was carried out in the exercise of the right of self-determination" the obvious point had been made that self-determination was already governed by existing law, including obligations to comply with IHL in Protocol I.174

[36] For analyses on the differences of the terms see T.J. Badey " Defining International Terrorism" p. 99-100, in Alan O" Day Greyfriors, Dimensions of terrorism, University of Oxford, United Kingdom, Ashgate, 2004

[37] According to OIC the exemption of state terrorism is acceptable but should be expanded to cover all parties in an armed conflict whether regular forces or national liberation movements. p.75 JO¨ RG Friedrichs, Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism**,** *Leiden Journal of International Law*, 19 (2006)

doctrine.[38] On the other hand, Professor V.S. Mani argues that what we call terrorism today is in fact very much state sponsored as a result of the prohibition in Article 2(4) of the United Nations Charter of the use of force in relations between states (which would nonetheless attract individual responsibility for such acts). Mani concludes that states were given every incentive to mask armed solutions to international issues through state sponsored terrorism. [39]

The most divisive issue between the two groups of states during the Draft Comprehensive Convention has been the draft Article 18 (now Article 20) which attempts to exempt "armed forces" from the definition of terrorism. Two proposals were on the table. The first one issued by the Coordinator proposed the exception of the activities of armed forces but it remained unclear as to whether this would cover the activities of parties to a conflict other than regular troops. On the other hand, the OIC countries proposed that the "parties" – both regular troops and irregular groups- during an armed conflict including in situations of foreign occupation were to be exempt from the provisions of the convention.[40] For the members of the OIC, maintaining the distinction between freedom fighters and terrorists was a strategic objective that superseded earlier efforts at delegitimizing so-called state terrorism. Due to the uncompromising stance of both sides, the two conflicting versions of Article 18 (recently renamed as article 20, and complemented by a new preamble paragraph) were still the main problem after a consolidated version of the draft was transmitted, in August 2005, to the 60th General Assembly of the United Nations.[41] According to the last report presented to the 63rd General Assembly, states stress the need for a comprehensive definition with a clear distinction between acts of terrorism covered by the Convention and the legitimate struggle of peoples in the exercise of their right to self-determination or against foreign occupation. Furthermore, some delegations considered that the Draft Comprehensive Convention should include provisions relating to military activities not covered by international humanitarian law, and apply to individuals in a position to control or direct such military activities. With regard to draft article 18, some delegations stated that the latest draft proposal by the Coordinator could be a sound basis for negotiating and reaching a consensus on the text.[42]

There seems to be considerable progress in comparison with the situation in 1970. However, there is no denying that the discussion illustrates once more how difficult it is to agree on the conceptual boundaries of terrorism, putting aside political interest

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[38] "There is no category of the law of terrorism and the problems must be characterized in accordance with the applicable sectors of public international law: jurisdiction, international criminal justice state responsibility and so forth" Ian Browlie, Principles of Public International Law, Oxford University Press, 2004, 713

[39] C.L. Lim " The question of a generic definition of terrorism under general international law" p 37-40 V.S Mani "International terrorism and the Quest for legal controls" in V.V. Ramraj, M. Hor, K. Roach, Global anti terrorism law and policy, Cambridge, 2005

[40] Christian Walter, Max-Planck, Terrorism as a Challenge for National and International Law: Security Versus Liberty?, Springer, 2004 p.38

[41] UN Doc. A/59/894 (12 Aug. 2005): letter containing Draft Comprehensive Convention on International Terrorism; cf. A/C.6/60/L.6 (14 Oct. 2005): report of the Working Group; for the predictably negative OIC reaction see UN Docs. A/C.6/60/3 (5 Oct. 2005) and A/C.6/60/SR.3 (24 Oct. 2005), 6; for recent amendments proposed by the Friends of the Chairman see UN Docs. A/C.6/60/INF/1 (20 Oct 2005); A/C.6/INF/2 (20 Oct. 2005); A/C.6/60/SR.10 (31 Oct. 2005).

[42] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 Twelfth session (March 2008),p.6

and alliances, in order to reach a legal definition of the terrorism. Many scholars argue that there is no need for a definition since we can confront terrorism as common crime using existing criminal law. According to the writer's opinion, a common definition is necessary and indispensable to any serious attempt to counter terrorism. As stated by the League of Nations Council; "Without such a definition a coordinated fight against international terrorism can never really get anywhere." [43] Furthermore, we do need a universally accepted definition not only in order to fully understand terrorism which is a phenomenon with international impact but also in order to fashion effective counter terrorism measures and policies with full respect to human rights standards and fundamental freedoms [44].

2. Confronting terrorism: the Security Council's anti-terrorism measures.

The attacks of 11 September served to mobilize the international community to take precise action against terrorism.[45] It was not the first time that the international community had to answer to terrorist acts; it was, however, the first time that SC recognized terrorism as a threat to international peace and security[46] with the Resolution 1269 (1999) and legitimized with future resolutions the fight against terrorism with "any means" (resolution 1373-2001). In this chapter the Security Council's response to terrorist activities is examined. For reasons of space, only the most important of the many SC Resolutions adopted are discussed; 1267[47] and 1373[48] by giving attention to the new "legislative role" Security Council intend to play in the international scene.[49]

a. Security Council's instruments to the fight against terrorism.

The UN Security Council has placed international terrorism high on its agenda since the early 1990s. In March 1992, the Security Council adopted for the first time mandatory actions against Libya which was accused of involvement in the terrorist bombing of two commercial airlines. SC also imposed sanctions against Sudan, in 1996 with resolution 1054, because it refused to extradite three suspects in the

[43] G. Hafner, "The definition of the crime of terrorism", p. 35 in G. Nesi, International cooperation in Counter-terrorism, Ashgate 2006

[44] Jean –Marc Sorel, "Some questions about the definition of terrorism and the fight against its financing", Symposium "A war against terrorism" European journal of international law, volume4, n.2 April 2003

[45] As Professor Cassese note there are two types of response that international community has given to terrorist activities. The first type of response is the "peaceful" one and the second the "coercive"[45]. The basis of the distinction is whether the response involves use of force in the territory of another state. In the first group we can classify the various International and regional Conventions related to terrorism while in the second group of response we place military action taken by states in order to punish or prevent specific terrorist actions. Antonio Cassese, "The International community's legal response to terrorism", ICLQ, volume 38, issue 3, July 1989

[46] See, Dr. Rosa Giles-Carnero, "Terrorist Acts as Threats to International Peace and Security", in Pablo Antonio Fernández-Sánchez, International Legal Dimension of Terrorism, M. Nijhoff publishers, 2009.

[47] S/RES/1267(1999)

[48] S/RES/1363(2001)

[49] Resolution 1540 is also of relevance but given the limited extension of this paper it is not included. We can briefly say that resolution 1540 encourages states to take domestic measures in order to confront the risk that non -state actors may acquire, develop, traffic in or use nuclear, chemical and biological weapons. (Article 2)

assassination attempt against the Egyptian President on June 26, 1995. The third time sanctions were imposed by Security Council in 1999 to the Taliban regime in Afghanistan because of Taliban's support to Al Qaida. Osama Bin Laden was accused by US as being responsible for the bombing of US embassies in Nairobi, Kenya and Dar es Salaam.

During that period, the Security Council's main policy against terrorism was based on economic sanctions. Both resolutions 748[50] (against Libya) and 1054[51](against Sudan) forecast economic restrictions under Chapter VII of the UN Charter. In the case of Libya all flights were prohibited, arms embargo were imposed, reduction of personnel was required etc. Similarly in Sudan, the SC imposed restrictions aimed at the reduction of personnel abroad and restrictions on the travel of Sudanese officials. Until 1996 Libya's support for terrorism had reduced substantially so no further sanctions could be justified. In September 2002, resolution 1372 lifted the sanctions against Sudan in return for cooperation in the so-called "war against terrorism".

In 1999, following pressure from Washington, the Security Council imposed mandatory aviation and financial sanctions against the Taliban regime in Afghanistan where Osama Bin Laden, according to the US investigative services, was hiding after his involvement in the bombing of the US embassies. Resolution 1267[52] adopted in 15 October 1999, invoked Chapter VII of UN Charter and demanded that the Taliban stop its support for international terrorists and extradite Bin Laden to justice. It further relied on specific sanctions[53] such as an arms embargo, travel ban and freezing of funds directed against individuals and entities enumerated on a comprehensive list (which is frequently updated).[54] The primary responsibility for the implementation of the sanctions measures rests with Member States and effective implementation is mandatory. Nevertheless, resolution 1267 established the "1267 Committee" or "Al Qaeda and Taliban Sanctions Committee" in order to monitor the implementation of the provisions. The Committee is supported by the Analytical Support and Sanctions Monitoring Team which is composed of independent experts, appointed by the Secretary-General.[55] The main role of the Committee is to oversee States' implementation of the sanctions and to add, delete or except for humanitarian reasons persons or entities from the list. It reports on an annual basis

[50] UN Doc. S/RES/748 (1992). A strengthened sanctions package in resolution 883 was adopted in November 1993.
[51] UN Doc. S/RES/1054 (1995)
[52] The sanctions regime has been modified and strengthened by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008), http://www.un.org/sc/committees/1267/index.shtml

[53] The sanctions specifically include: freezing without delay of the funds and other financial assets or economic resources of designated individuals and entities, prevention of the entry into or transit through their territories by designated individuals and prevention of the direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types, spare parts, and technical advice, assistance, or training related to military activities, to designated individuals and entities.http://www.un.org/sc/committees/1267/index.shtml

[54] The last updating was in 20 April 2009, the list is on the site http://www.un.org/sc/committees/1267/consolist.shtml
[55] For more information about the work of both the 1267 Committee and the Analytical Support and Sanctions Monitoring Team see at the website http://www.un.org/sc/committees/1267/information.shtml

about its activities and makes recommendations to the Security Council in purpose to improve the sanction regime.

In 1999, resolution 1269[56] recognized international terrorism as a threat to international peace and security and strongly condemned all such acts. Since then the fight against terrorism became one of the priorities of the United Nations Agenda.

Following the 11 September terrorist attacks, the Security Council took a number of important initiatives in the fight against terrorism. The most important action in this area was the adoption of the resolution 1368 (September 12, 2001)[57] , which condemned attacks and legitimized militarized action against terrorism and resolution 1373 (September 28, 2001) which broadened the scope of international responses by imposing binding obligations to all UN Member States. [58]

With resolution 1368, the SC recognized the terrorist attacks as a threat to international peace and security but it did not require collective action to be taken by states. In contrast, SC recognized unanimously the right of states to individual and collective self-defense in response to terrorist acts. The relevant part of the resolution reads as follows:

> "[The Security Council], recognizing the inherent right of individual or collective self-defense in accordance with the Charter,
>
> 1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks, [….], like any act of international terrorism, as a threat to international peace and security."

It is worth mentioning that resolution 1368 provoked many controversies both among governments and academics. Many authors and governments have considered resolution 1368 as a "blank check" in legitimizing the unilateral use of force in response to terrorist acts. [59] Even if use of force in prohibited under Article 2(4)[60] of the UN Charter, countries such as US (with its alliances and "coalition of the willing"[61]) and Israel have already used armed force in their "war against terrorism"

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[56] "Responsibility of the Security Council in the Maintenance of International Peace and Security", Security Council Resolution 1269, October 19,1999 see also UN Doc. S/RES/1269 (19 Oct. 1999): " unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed and calls upon all States to take…appropriate steps… to deny those who plan, finance, or commit terrorist acts and save heavens".

[57] UN Doc. S/RES/1368, (2001)

[58] Resolution 1373 was adopted under Chapter VII of the UN Charter which provides that Security Council has as its main functions the responsibility to settle disputes peacefully (Chapter VI) and to meet threats to or breaches of the peace with concerted actions by the Organizations (Chapter VII).

[59] Thomas George Weiss, Military-civilian interactions: humanitarian crises and the responsibility to protect, Rowman & Littlefield, 2004, p.161 and Chantal de Jonge Oudraat, "The role of the Security Council,p.164 in J. Boulden, Thomas G. Weiss, Terrorism and the UN, Before and after September 11, Indiana University Press, 2003

[60] Article 2.4 reads "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The Charter allows the use of force only in exception; for the purpose of self defense and when the use of force is authorized by the Security Council in order to maintain or restore international peace and security. (Article 42 of the UN Charter)

[61] The term coalition of the willing is a post-1990 political phrase used to describe military or military/humanitarian interventions for which the United Nations Security Council cannot agree to mount a

by invoking their right to self defense.[62] Once again in the recent past and after the adoption of resolution 1368 in the US" letter to the Security Council concerning its actions against Al Qaeda and the Taliban, the US hinted that actions might be taken against other targets: "Our inquiry is in its early stages. We may find that our self-defense requires further action with respect to other organizations and other states."[63] It seems that international practice [64]–or at least some countries- tend to adopt a broad interpretation of the notion of the right of self defense and resolution 1368 privileges this new "philosophy". Nevertheless many academics seriously criticize this behavior by arguing that terrorist acts can be considered as "attacks" under specific circumstances which does not always justify the use of force by states as the exercise of their right to self defense. They further argue that the principles of proportionality and necessity must be respected always and under any circumstances.

Two weeks after the September 11 attacks, the US presented a Draft Resolution to the Security Council that strengthened and broadened the fight against terrorism. Resolution 1373, which was adopted on 28 September 2001, obliged all members to take steps to combat terrorism[65]. It creates uniform obligations for all 193 Member States of the UN, thus going beyond the existing counter-terrorism Conventions and Protocols which bind only those that have ratified them.

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full UN peacekeeping operation. It has existed in the political science/international relations literature at least since UN peacekeeping operations began to run into deep trouble in 1993-94, and alternatives began to be considered. See, for instance, Thomas G. Weiss, Don Hubert, Gareth J. Evans, International Development Research Centre (Canada), Mohamed Sahnoun, " The responsibility to protect: research, bibliography, background", Supplementary volume to the report of the international commission on intervention and state sovereignty, ICSS, International Development Research Center, December 2001.

[62] Against Libya in 1986, in retaliation for the involvement in the Bombing of a night club in Berlin frequented by US soldiers, against Iraq in 1993, in retaliation for its attempt to assassinate former US president G. H.W. Bush and the emir of Kuwait, against Afghanistan and Sudan in 1998 in retaliation for the bombing of the US embassies in Kenya and Tanzania and again against Afghanistan in 2001 in retaliation for the September 11 attacks in USA. Chantal de Jonge Oudraat, "The role of the Security Council,p.154 in J. Boulden, Thomas G. Weiss, Terrorism and the UN, Before and after September 11, Indiana University Press, 2003

[63] Chantal de Jonge Oudraat, "the role of the Security Council,p.164 in J. Boulden, Thomas G. Weiss, Terrorism and the UN, Before and after September 11, Indiana University Press, 2003, p164

[64] One year after the adoption of1368, Russian President Vladimir Putin invoked the resolution and its right to individual and collective self-defense when he justified Russia"s right to military intervention against Chechen rebels operating in Georgia see "Russia writes U.N., OSCE invoking the right to self defense" UN Wire, Sept 12, 2002 at http:// www.unwire.org/UNWire/20020912/28865_story.asp

[65] In contrast with the past (resolutions 748 for Libya, 1054 for Sudan and 1267 for Taliban), here SC took unprecedented measures not against a specific state or group of people but against "acts of terrorism" throughout the world. It is clear that the absence of a definition can lead to several problems concerning the implementation of the resolution. As it is mentioned by Andrea Bianchi, some states can rely to a broad definition while others to a more restrictive one. Andrea Bianchi, Yasmin Naqvi, Enforcing international law norms against terrorism, Hart Publishing, 2004, p 401

Resolution 1373 obliged all member states to take a wide range of measures[66] by upgrading or changing their domestic legislation in order to fully implement the resolution. Some of the legal obligations imposed by the resolution overlap with those contained in the International Convention for the Suppression of the Financing of Terrorism (1999) and in some respects they go beyond the ambit of those obligations[67]. In particular, resolution 1373 directed states to criminalize terrorist acts including the support and financing of terrorism and to deny safe haven or any other support such as arms supplies to terrorists. It further directed states to improve their broader security situation and control arms traffic, and to cooperate and exchange information with other states in the implementation of these measures. More generally, it required all member states to review their domestic legislation and practices in a way to ensure that terrorists cannot find financial support or save haven for their networks or their operations on state territory.

b. Monitoring bodies and the difficulties issued by the implementation of the Security Council's regimes.

Resolution 1373 established a monitoring body, the Counter Terrorism Committee (CTC) in order to monitor the implementation of the resolution. CTC's purpose is to help governments to increase their capacity both in legislative as well as in executive level to fight terrorism and to create a network of cooperation among state parties and other international organizations which also fights against terrorism. The first chairman of the CTC, the UK representative Jeremy Greenstock guided CTC to adopt principles such as transparency and working methods including the use of dialogue and consensus. In one of his speeches, Greenstock emphasized the technical nature of the CTC by saying that the functions of the CTC "were to monitor, to be analytical and to report facts to the Security Council for consideration".[68]

The CTC has established a dialogue between Security Council and states through a reporting procedure. [69] It is true that the CTC has guided many states to ratify international treaties regarding counter terrorism, to develop and implement international action plans and to modify and upgrade national legislations concerning terrorism. In the process of analyzing States reports[70], CTC identifies the specific

[66] Many of the specific measures in the resolution were present in two important conventions adopted by the General Assembly in the late "90s; the 1997 Convention for the Suppression of Terrorist Bombing, which entered into force in May 2001, and the 1999 Convention on the Suppression of Financing of terrorism which entered into force in 10 April 2002. In fact Security Council has taken provisions by the 1999 Convention which hadn't the universal support and incorporated them to a resolution binding for every state. I. Bantekas in "Current Development: The international Law of Terrorist Financing", 2003 97 AJIL, 326 notes that Resolution 1373 imposed measures on States that "would not have agrees to be bound by treaty". See also, Gilbert Guillaume, "Terrorism and international law", International and Comparative Law Quarterly, Volume 53, issue 3 July 2004, p. 543.

[67] C. Fijnaut, j. Wouters and F. Naert, Legal Instruments in the Fight against International Terrorism – A transatlantic Dialogue, Nijhoff, 2004, p 194

[68] Chantal de Jonge Oudraat, " The role of the Security Council", Jane Boulden, Thomas George Weiss, Terrorism and the UN: before and after September 11, Indiana University Press, 2004, p. 161

[69] By the end of May 2003 all 191 (now 193) UN Member States had submitted a first report. It was the first time that a sanctions regime had achieved 100%reporting response. Until today (April 2009) more than half of the states are proceeding to the forth report. http://www.un.org/sc/ctc/countryreports/Creports.shtml see also Alexander Marschik, "The Security Council "s role", p 74 in Giuseppe Nesi, International Cooperation in Counter Terrorism, University of Trento Italy, Ashgate, 2006

[70] All reports are available to the website, http://www.un.org/Docs/sc/committees/1373/

gaps in counter terrorism policies and provides states with technical assistance in order to reach an effective and complete implementation of the resolution. In March 2005 the CTC began its country visits, in cooperation with the country in question, in order to evaluate the nature and the level of technical assistance a specific country needs. In addition to the provision of technical assistance, the CTC has played the role of the coordinator among different organizations acting in the same field of counter terrorism. The Committee has also promoted international and regional cooperation between states, organizations and other international actors in order to facilitate and improve the implementation of counter terrorism measures. CTC works very closely with Financial Action Task Force (FATF) which focuses exclusively on the promotion of international action to combat money laundering and to facilitate the confiscation of the proceeds of crime. [71]

Even if the Security Council's sanction regime is frequently updated and improved by additional measures, resolutions[72] or practices it is uncontestable that both counter terrorism regimes are confronted with many difficulties concerning the implementation and the monitoring procedure of the resolutions. Some problems can be considered as administrative -technical problems while others are either related to the nature of the resolution or they have political roots.

On of the first notable problems, with the implementation of the resolutions, was that many states lacked the legislative and administrative capacity to do so. For example through the analysis of state reports, the CTC identified that some states either lack necessary authority to freeze the financial assets or economic resources of terrorists "without delay" as it is required by resolution 1373, or that such authority is often limited to the freezing of financial assets only of those individuals and entities included in the consolidated lists of the resolution 1273, or both. Secondly, monitoring the financial activities of terrorists was extremely difficult for some countries since interconnected world trade does not permit deep involvement of the state.

Additionally, in some countries, the financing of terrorist activities was often equated with money-laundering although not all terrorist activities are financed by illegal resources.[73] Furthermore, the safe haven provisions of resolution 1373 had similar implementation problems. Boarder controls are weak in some countries[74] while some

[71] FATF is an inter-governmental, policy making body which was created in 1989 by the G-7 Summit and includes G-7 member states, European Commission and eight other countries. The work of the FATF focuses on three principal areas: (1) Setting standards for national anti-money laundering and counter terrorist financing programmes; (2) evaluating the degree to which countries have implemented measures that meet those standards; and (3) identifying and studying money laundering and terrorist financing methods and trends.
http://www.fatfgafi.org/document/63/0,3343,en_32250379_32236836_34432255_1_1_1_1,00.html

[72] An additional counter terrorism regime is that provided by resolution 1540 concerning the non proliferation of weapons of mass destruction which was unanimously adopted in 28 April of 2004. The resolution forecast the establishment of the 1540 Committee charged with the monitoring of the provisions. For more information see Morten Bremer Mærli, Sverre Lodgaard, Nuclear proliferation and international security, Routledge, 2007.

[73] Monica Serano, "The political economy of terrorism", Jane Boulden, Thomas George Weiss, Terrorism and the UN: before and after September 11, Indiana University Press, 2004, p.215

[74] European Union is a specific occasion where Schengen Agreement does not allow any control to European Union travelers. Nevertheless, after UK and Madrid attacks European Union has adopted an Antiterrorist Strategy among with the antiterrorist action plan which include empowerment of the Schengen

others do not have effective control over large swaths of their territory with result to be used as base of operation from terrorist organizations. Another problem concerning the implementation of resolution 1267 is that without the minimum information identification required (name, date and place of birth, nationality etc) the targeted sanctions adopted by the 1267 Resolution[75] be effectively implemented by many states. Particularly, European Union member states that are also parties to the Schengen Agreement have difficulties in implementing the travel ban due to the lifting of internal borders and lack of control.

Gaps in capacity are not only faced by States, the Security Council's monitoring system experiences the same. The lack of resources at the UN, archaic working methods and structures guaranteed insufficient monitoring. More precisely, CTC had to confront serious problems concerning reporting obligations since it accepted hundreds of reports each year but it was impossible to sufficiently accomplish its duty to examine all reports. Aware of the structural difficulties of the UN in this regard, the Council has tried to improve monitoring capabilities by adopting in its 2004 resolution 1535 which established the Counter-Terrorism Committee Executive Directorate (CTED) which is mandated to provide CTC with expert opinions and strengthen its work. On the other hand, the 1267 Committee had other problems to deal with; in comparison with the correspondence that States had with the CTC regime, here the resolution 1267 Committee observed lack of political will and reporting fatigue among states. A further reason why states do not carry out their reporting requirement is that much information is deemed to be confidential. In early 2004, the 1373 Monitoring group was replaced by the "Analytical Support and Sanctions Monitoring Team" in order to more effectively monitor implementation.

However, the most important problems were those related to political disagreements between member states such as the definition of terrorism and problems related to the violations of human rights by the implementation of the resolutions. [76]First of all, despite the general agreement as to the common fight of terrorist threats, states continue to have widely divergent views on the exact nature of the threats and who or which organisations should be labeled as a "terrorist" –as opposed to a freedom fighter.

Resolution 1373 does not include a single definition of "terrorism"; rather it allows each Member State to define the phenomenon under its domestic system. In other words, it allowed each State to determine against whom this provision is applied.[77]

Information System, new biometric data on passports and visas, establishment of an External Boarder Agency. A proposal for a corps of external border guards is under consideration. The Commission has also put forward proposals to extend police powers of surveillance and pursuit of suspects in border areas. See D. Keohane, "Implementing the EU's Counter –terrorism Strategy. Intelligence, Emergencies, and Foreign Policy., in D. Mancke and J. Monar, International terrorism, A European response to a global threat, P.I.E Peter Lang, Brussels, 2006 and Colin Warbrick, "The European Response to Terrorism in an Age of Human Rights", The European Journal of International Law, EJIL (2004), Vol. 15 No. 5, 989–1018.

[75] See Part II of this paper.

[76] For example, some resolutions require measures which would otherwise be violations of human rights e.g. internment in Iraq would otherwise breach the right to freedom of liberty and security of the person. See *Al-Jedda v. the UK* pending the European Court of Human Rights.

[77] According to E.Rosand this is one of the reasons that CTC has such a broad support of the States. If it starts to broaden its focus from building technical capacity to monitor laws concerning terrorism it will be engaged to the same debate that General Assembly is involved and then it will loose the States" support. E.Rosand, "Security Council Resolution 1373 and the Counter Terrorism Committee" p. 626, in Cyrille

The different interpretation of terrorism as between member states has resulted in serious problems in national legislation and regional antiterrorism treaties, as well as problems in international cooperation efforts. Further concerns have been raised by the Secretary General and many NGOs that resolution 1373 leaves significant freedom of interpretation and application to States. That can lead to abstract application of the resolution or discriminates against ethnic groups or minorities and other domestic "trouble makers" who can be branded as "terrorists".[78] The absence of a clear definition and the general prohibitions of the resolutions often lead to several human rights violations.[79]

The CTC was repeatedly pressed by NGOs, UN agencies and many states to ensure human rights protection by appointing a Human rights expert. The UN High Commissioner for Human rights, Viera de Mello even offered to provide the CTC with such an expert. On the other hand, CTC have denied that offer by arguing that the task of monitoring adherence to human rights obligations in the fight against terrorism falls outside its mandate.

The main focus regarding resolution 1373 is the misuse of the obligations to target individuals for political reasons that the have nothing to do with terrorist attacks or terrorism in general. However, similar concerns arise with respect to resolution 1267, especially as regards to the lack of the right to appeal decisions to include individuals and entities on the comprehensive list. Whenever the 1267 Committee places a person on the list the state is obliged to apply the sanctions. There are no procedural safeguards or right to appeal the inclusion in the list. Under increasing pressure the 1267 Committee decided to adopt a de-listing procedure enabling States of residence or citizenship to ask the review of the inclusion of a person in the list. Furthermore the Committee can exclude a person or an entity for humanitarian reasons.

Violations of human rights caused as a result of the antiterrorist measures taken by the Security Council will be exhaustibly analyzed in the chapter that follows. In the present moment we only add some positive steps by the part of the Security Council. Since the adoption of resolution 1456 (2003), the Security Council requires that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law. Furthermore, the CTED which is working with CTC, has a senior human rights advisor in order to examine whether or not the implementation of provisions of resolution 1373 is in conformity with human rights standards.

Another issue for consideration is that, States have not decided what to do with those amongst them that do not comply with resolutions. In paragraph 8 of resolution 1373, the Council "expresses its determination to take all necessary steps

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Fijnaut, Jan Wouters, Frederik Naert ,Legal Instruments in the Fight Against International Terrorism: A Transatlantic Dialogue, Nijhoff, 2004

[78] Alexander Marschik, "The Security Council role", p. 73 Giuseppe Nesi, International Cooperation in Counter Terrorism, University of Trento Italy, Ashgate, 2006

[79] The report of International Amnesty "Security and Human rights: Counter terrorism and United Nations characteristically notes: "[…] its lack of emphasis on the need to ensure that human rights must be protected in the process, and the absence of a definition on terrorism in resolution 1373 are likely to have contributed to the passing, by a number of states, of broadly phrased anti-terrorist laws since 2001 which have harmed human rights protection and fall far short of states" obligations under international human rights law." p. 8

in order to ensure the full implementation of the resolution…"[80] However these measures are not spelt out. Theoretically, the Security Council has an entire rang of instruments in order to deal with non-compliance but in practice there is a danger that the response to non-compliance will be taken by individual states notwithstanding the existence of the Council.[81] The US and Russia believes that the authority to determinate whether or not a state is complying with its obligations belongs largely, but not exclusively, to the Council itself. They have argued that non-compliance with resolution 1373 would allow them to exercise their right to self defense. In his letter to the Security Council and the OSCE related to the "glaring violation by Tbilisi of counter terrorism resolution 1373 of the UN", President Putin has stated: "In this situation we must ensure that Georgia fully complies with its obligations to the international community" and he concluded by saying, "In this connection Russia may be forced to use the inalienable right to individual or collective defense in accordance with the Charter, stipulated in resolution 1368 of the UN Security Council".[82] This response simply mirrors that taken by the Bush Administration as regards the invasion of Iraq which shows just how far-reaching the consequences of that action and its legitimization process may be.

It is worth mentioning that regardless of the problems concerning the implementation of the resolutions discussed, the Security Council regime constitute one of the two pylons of the UN counter terrorism strategy as established during the late 90s, upgraded subsequent after to September 11[83] and remains in force until today. However, UN counter terrorism resolutions as well as relevant national legislation have provoked a strong criticism regarding human rights protection afforded by states to individuals while countering terrorism. The compatibility of antiterrorist measures with human rights law is the questions addressed in the next chapter.

B. The impact of antiterrorist measures on Human Rights protection. The question of "Security or Liberty"?

After the September 11 attacks governments adopted a series of domestic measures in order to confront this phenomenon which had taken such dimensions.[84] As we have seen in the previous chapter, even if the international community had not concluded to a comprehensive definition of "terrorism", it had decided to confront terrorism by adopting a series of measures determined by the Security Council at

[80] S/RES/1373 (2001), §8

[81] in a televised statement Putin warned Georgia "that Russia would defend itself in line with the United Nations Charter and its resolutions if the Georgian government fails to end rebel raids into Chechnya across the border" Chantal de Jonge Oudraat, "The role of the Security Council,p.164 in J. Boulden, Thomas G. Weiss, Terrorism and the UN, Before and after September 11, Indiana University Press, 2003 p 163

[82] Supra, p.165

[83] Special notice must be given to the results of the World Summit on 2005 where the leaders of States adopted the Global Strategy against terrorism and strongly condemned all kind of terrorism and adopted a series of initiations in order to fight effectively against it. For more information see, http://www.un.org/terrorism/.

[84] On September 11, 2001, four U.S. planes hijacked by terrorists crashed into the World Trade Center, the Pentagon and a field in Pennsylvania killing nearly 3,000 people in a matter of hours.

international level and by other organizations at regional level.[85] Nevertheless these measures interferes with human rights standards and poses serious questions concerning the effectiveness of such policies.

1. The effects of antiterrorist legislations to the asylum seekers and the violations to other fundamental liberties.

Since 2001, many states have either upgraded their legislation or adopted new laws in order to effectively implement antiterrorist measures decided by the Security Council in resolutions 1267(1999), 1373(2001), 1540(2004). In this chapter we mainly refer the violations raised by the implementation of the resolution 1373. Nevertheless similar analyses could also apply to resolution 1540. Because of its different nature and scope, Resolution 1267 will be addressed separately to the second part of this paper.[86]

a. The violations related to derogable rights.

Security Council Resolution 1373 asks States, *inter alia*, to freeze the funds of entities owned or controlled directly or indirectly by persons who commit or attempt to commit terrorist acts; prohibit entities within their territories from making any funds available, directly or indirectly, for the benefit of persons who commit, attempt to commit or facilitate or participate in the commission of terrorist acts of entities owned or controlled, directly or indirectly, by such persons and associated entities; refrain from providing any support to entities involved in terrorist acts, including suppressing recruitment of members of terrorist groups; and prevent the movement of terrorist groups.[87]

The basic issue raised by the implementation of resolution 1373 is that the duty of states to respect international law, in particular human rights and humanitarian law[88] while counter terrorism is not explicitly mentioned. The impact of this lack of

[85] For example, European Union has established a new strategy against terrorism. For more information visit the official site http://ec.europa.eu/justice_home/fsj/terrorism/strategies/fsj_terrorism_strategies_counter_en.htm and see also D. Mancke and J. Monar, International terrorism, A European response to a global threat, P.I.E Peter Lang, Brussels, 2006

[86] All three resolutions were adopted under Chapter VII of the Charter and as a consequence they are all binding towards all member states of the United Nations. Nevertheless, Resolution 1267 differs because it includes measures addressed to specific individuals referred to a list.

[87] This paragraph is mainly issued by Security Council Resolution 1373, 2001 article 1, 2, and 3. Resolution 1540(2004) has the same nature but it asks States to take domestic measures in order to eliminate the threat of nuclear terrorism and the risk that non-State actors may acquire, develop, traffic in or use nuclear, chemical and biological weapons.

[88] Nevertheless, we have to mention that after 2003 a significant progress has been made. Security Council included to its resolutions that "all States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." Further CTC has adopted to its communication a paragraph that urges States to respect international law, human rights law and humanitarian law. This progress is worth mentioned but it is not enough to solve the problem raised by the implementation of anti terrorist measures.

qualification must be examined under a broader prism. First of all, the Security Council does not define "terrorism" or "terrorists" against whom these measures are addressed. Secondly, its effects are not limited to a specific country; resolution 1373 is addressed to terrorism all over the world and thirdly, there is no time limitation on the implementation of the resolution. Because of the lack of definition and guidance concerning the implementation there is a danger that the resolution will be misused and lead to serious human rights violations.[89]

There is no doubt that states are under a duty to protect their civilians from violent acts such as terrorism.[90] Nevertheless, international law puts limits on the possibilities of States to react. As the European Court of Human Rights (ECtHR) has said: "Contracting States, may not in the name of the struggle against terrorism, adopt whatever measures deem appropriate."[91] They have to find the right balance between human rights protection and effective counter terrorism measures. Despite this clear message, and as the UN Special Rapporteur on the Promotion and Protection of Human Rights, Ms. Koufa, noticed, the responses to terrorism at the international and domestic levels, have been "dramatic, sometimes undertaken with the sense of panic or emergency"[92]. States overreacted when faced the possible danger for a future terrorist attack and misused the provisions of the SC's resolution in a way which violated their obligations under human rights treaties.

UN monitoring bodies and NGOs reacted by stating that counter terrorism measures, adopted by States, have violated human rights such as the right to association, the right to freedom of thought and expression, the right to free movement, the right to fair trial, the right to seek asylum as well as the prohibition of torture and discrimination. Governments have rushed through problematic laws formulating new and often vaguely-defined crimes, banning organizations and freezing their assets without due process, undermining fair trial standards. Some countries allowed unlawful or prolonged incommunicado detention and other practices which facilitate torture or other ill treatment. At the same time crucial safeguards such as access to courts or even to lawyers have been suspended. People suspected of supporting terrorism and the members of their families have become victims of arbitrary detention, forced disappearances, extra-ordinary rendition, unlawful prisoner transfer and selected group of people have been victims of discrimination.

Furthermore, vague definition of "terrorism" in resolution 1373 has led to broad interpretation by the domestic legislator. As a result, even lawful acts such as the political opposition has been criminalized and civil liberties of groups of people that

[89] The United Nations High Commissioner has emphasized "serious human rights concerns …could arise from the misapplication of resolution 1373 (2001)" Report of the High Commissioner for human rights submitted pursuant to General Assembly 48/14, "Human rights : a uniting framework" E/CN.4/2002/18), para.31.

[90] According to the European Court of human rights, States have the positive obligation to protect lives of those within their jurisdiction and the primary duty to secure the right to life by putting in place effective criminal –law provision. ECtHR, Osman v. United Kingdom, 28 October 1998, Rep., 1998-VIII, p.3159, §59, P. Lemmens, "Respecting Human rights in the Fight against Terrorism", Giuseppe Nesi, International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism, Ashgate, 2006

[91] ECtHR, Klass v. Germany, 6 September 1978, Publ. Court, Series A, No28, p.23 §49.

[92] K.K. Koufa, Terrorism and Human Rights. Second Progress report, UN Doc. E/CN.4/Sub.2/2002/35, §59

have nothing to do with terrorism have been restricted because they arbitrarily considered as a terrorist threat.[93]

A characteristic example is the definition provided by the European Union in the decision –framework of 13 June 2002 related with the fight against terrorism can be largely interpreted. In article 1(d) it says that States must take measures, inter alia, against people:

> "causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss"[94].

In the same sense the USA Patriot Act (2001) fails to provide a clear definition of terrorism. In contrast, it defines domestic terrorism as comprising of activities that intend "to influence the policy of a government by intimidation or coercion".[95] A broad interpretation of definitions provided above could include social or political groups that have nothing to do with terrorist activities. However these groups could fall within the notion of terrorism as elaborated by these articles and they might become victims of arbitrary accusations and human rights restrictions.[96] By such broad definitions, political opponents[97], activists, journalists, professors,

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[93] In contrast, definitional problems it is not an issue for the implementation of the resolution 1267 because the measures decided by Security Council addressed to specific individuals and entities which are all mentioned to a catalogue (consolidated list) which frequently reviewed.

[94] Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA). Article1§1 says: 1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of:- seriously intimidating a population, or- unduly compelling a Government or international organization to perform or abstain from performing any act, or- seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization shall be deemed to be terrorist offences:(a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;(e) seizure of aircraft, ships or other means of public or goods transport;(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;(i) threatening to commit any of the acts listed in (a) to (h).

[95] See USA Patriot Act section 802, 5b(ii)

[96] The UN Working Group on Arbitrary Detention has recalled "that it is still concerned at the extremely vague and broad definitions of terrorism in national legislation. On several occasions it has noted that " either per se or in their application, (these definitions) bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention, disproportionately reducing the level of guarantees enjoyed by ordinary persons in normal circumstances [citation omitted]."

[97] The Former Deputy Prime Minister of India in November 2001 called for the passage of a new Prevention of terrorist act and stated that "If the opposition opposes the ordinance they will be wittingly or unwittingly helping terrorists" Neil Hicks, "The impact of counter terrorism on the promotion and

researchers[98] and even Human rights defenders have been victims of arbitrary accusations, imprison or exile because they have been considered as supporters of terrorism or as involved in terrorist-related activities.[99]

The rights of expression, association and assembly are often in question in the presence of a terrorist threat especially as it is related to human rights defenders.[100] It is a common practice to prohibit expression of the opponents of the government or those speaking for human rights protection or proscribing certain organizations or forms of collective and political activity for the ruling power to achieve political gain. Human rights law emphasizes the importance of such rights to the proper functioning of the democratic system and to the liberty of people.[101] Relevant human rights bodies urge governments to adopt all necessary measures to ensure the full respect of these rights.

States may derogate from certain freedoms in times of emergency that threaten the life of the nation, provided that they follow the specific requirements pertaining to declaration of the emergency (it will be analyzed to the next chapter). They may also limit these freedoms when national security[102] or public order is in danger or in case of respect of the rights of others. These restrictions must be provided by a clear and accessible law and must be necessary and proportionate to the legitimate aim they serve.[103]

As a matter of fact, in the effort to prevent and eliminate terrorism both the right of expression and the right of association are extremely vulnerable and susceptible to

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protection of human rights : a Global perspective.", Richard Wilson, Human rights in the "War on Terror", Contributor Richard Wilson, Cambridge University Press, 2005 p 211

[98] A PHD student at an English University studying Islamic Studies photocopied the Koran as part of his research. He was arrested with terrorism-related offences and subject to a deportation order. At the same University a 22 years old student, studingt Politics and International relations, was arrested under Terrorist act of 200 after downloading edited version of the Al-Qaeda handbook from a US government website. http://www.nearinternational.org/alert-detail.asp?alertid=449

[99] Neil Hicks, "The impact of counter terrorism on the promotion and protection of human rights : a Global perspective.", Richard Wilson, Human rights in the "War on Terror", Contributor Richard Wilson, Cambridge University Press, 2005, p 210-211

[100] The Special Representative of the Secretary-General on Human Rights Defenders submitted a major study to the General Assembly focusing on the use of security legislation against human rights defenders and the role and situation of human rights defenders in emergencies, particularly in the post-September 11 climate. Among her findings, she stated: "Despite protection under international and regional human rights instruments and national constitutions, the right to freedom of expression has suffered the most severe adverse impact of restrictions imposed by national security or anti-terrorism laws". Report of the Special Representative of the Secretary-General on Human Rights Defenders to the General Assembly (A/58/380), para.17.

[101] The ACtHR has noted for the freedom of expression that "[F]reedom of expression is a cornerstone upon which the very existence of a democratic society rests…. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free." I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, November 13, 1985 (paras. 50, 70).

[102] Conor Gearty, "Rethinking civil liberties in a counter-terrorism world", European Human Rights Law Review, volume 2007, no 2, p. 113.

[103] See Article 19 (2) and 21 of ICCPR ,Article 10(2) and 11(2) of the ECHR and Article 13(2) and 16(2)(3) of ACHR.

unwarranted restrictions.[104] For instance, in Uganda a journalist found guilty "because of publishing information deemed to promote terrorism".[105] Similarly, in Jordan journalists are prosecuted because of the publication of "information that can undermine national unity or the country's reputation" or "undermine the king's dignity". [106]

Further violations concern the implementation of resolutions 1373 and 1267 as regards the right to property and the freezing of individuals" accounts without trial and without the right to remedy. (This issue is addressed to the second part of this paper)

b. The principle of non –discrimination and the impact on the asylum seekers rights.

Many measures adopted in the aftermath of the September 11 attacks, have targeted non-citizens, and specific groups such as immigrants and people coming from Muslim countries in North Africa, the Middle East and South Asia.[107] International and regional human rights bodies have highlighted this risk[108] and underlined that it is of particular importance that States:

> "ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or in effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizen are not subjected to racial or ethnic profiling or stereotyping"[109].

Nevertheless, the principle of non-discrimination has been violated several times by domestic legislation despite it being considered a jus cogens norm[110]. Some of the most clear examples of discrimination on the base of race, religion, nationality, color are: selective denial of fair trial rights to non citizens, selective exposure to trial by an ad hoc military commission, particular exposure to enforcement measures such as arrest, irregular rendition, pretextual or opportunistic criminal charges, administrative detention, asset seizure and selective admission, deportation and prosecution of persons fitting a specific ethnic or religion profile is a common

[104]Report of the Special Rapporteur on the right to freedom of opinion and expression (E/CN.4/2004/62), para.84. See also Report of the Special Rapporteur on the human rights and fundamental freedoms of indigenous people (E/CN.4/2004/80), paras 44-53.

[105] Helen Duffy, The "war on Terror" and the Framework of International Law, Cambridge University Press, 2005, p.365

[106] Country Reports on Human Rights Practices, 4 March 2002, available at http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8266.htm

[107] See Human rights Watch Submission to the UN Committee on the Elimination of Racial Discrimination, 13 February 2004, at http://www.hrw.org/en/news/2004/03/24/rights-non-citizens-0

[108] On 10 December 2001, on the occasion of the Human rights Day, 17 special rapporteurs and experts of the Commission of Human Rights, expressed their concerns over antiterrorist legislations that have targeted particular groups such as migrants, rights defenders, asylum seekers and refugees. Alice Yotopoulos-Marangopoulos, Wolfgang Benedek, Anti-terrorist measures and human rights, Nijhoff Publishers, 2004, Anexx II, p.211

[109]UN Committee on the Elimination of Racial Discrimination, general recommendation 30 on discrimination against non-citizens (2004), paragraph 10.

[110] United Nations Digest of jurisprudence of the UN and other regional organizations on the protection of human rights while countering terrorism. p76

phenomenon.[111] Such practices have even formed part of state policies, including "ethnic profiling" and have had a devastating impact on the whole population, with the spread of xenophobic and Islamophobic attitudes.

According to human rights treaties and the jurisprudence of international and regional human rights bodies, a difference in treatment on the basis of criterions such as race, ethnicity, national origin or religion will only be compatible with the principle of non-discrimination if it is supported by objective and reasonable grounds.[112] However, the practice reveals that States fail to prove that differential treatment among nationals and non-nationals is proportionate or necessary while countering terrorism and especially when we are dealing with rights such as fair trial or the principle of non-retroactivity of criminal punishments or the presumption of innocence – provisions that have been considered as non-derogable in democratic societies.

Discrimination especially between nationals and non-nationals poses a particular danger for refugees and asylum seekers.Unjustifiable links between asylum seekers and the threat of terrorism have led to extremely strict measures concerning migration control and expulsion procedures that have broadly affected refugee's law.[113]

Article 14 of the Universal Declaration of Human Rights (UDHR) as well as the 1951 Geneva Convention Relating to the Status of Refugees provides that everyone has the right to seek and enjoy in other countries asylum from persecution. According to the UDHR and the Geneva Convention of 1951, this right may not be invoked in the case of persecution genuinely arising from non-political crimes or from acts which are contrary to the purposes and principles of the United Nations or for crime against peace, war crime and crime against humanity.[114]

It is clear that all persons enjoy the right to seek asylum, including "terrorists" or "suspected terrorists". However, "terrorism" has been considered, by Security Council, as a threat to international peace and security and certainly it is contrary to the purposes and principles of United Nations. As a consequence a person suspected of terrorism would commonly fall within the exclusion of refugee status clause provided in article1F of the Geneva Convention so "terrorists" can not be subject of "refugee status". This opinion can be reaffirmed by Security Council's resolution that requires States to deny "refugee status" to persons who has participated or planned terrorist acts.

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[111] Joan Fitzpatrick, "Speaking law to power: The war against terrorism and human rights", EJIL, volume 14, no2, April 2003, p 255

[112] As "objective and reasonable justification" is considered the justification that is based to a legitimate scope and respect the principles of necessity and proportionality between the measures applied and the scope. F. Sudre, J.P Marguenaud, J. Andriantsimbazovina, A. Gouttenoire, M. Levinet, « Les grands arrêts de la Cour Européenne des Droits de l"Homme », collection THEMIS, 4ieme édition, Presses Universitaires de France, 2007, p. 91

[113] A characteristic example of this paranoia is that most of the persons administrative detained by the authorities of the United Kingdom after September 11 were either refugees or asylum seekers. Amnesty International, United Kingdom: Rights Denied: the UK"s response to 11 September 2001. AI Index: EUR/45/016/2002 (2002) p 5.

[114] Article 14 Universal declaration of human rights available at http://www.un.org/en/documents/udhr/ and article F 1 of the Geneva Convention for refugees.

Furthermore, under the threat of a future terrorist attack and the need for preventive measures refugees' protection can be seriously affected. First of all as we have seen, the lack of definition can lead to broad interpretations and finally to violation of asylum seekers rights. Secondly, governments can use their own criteria to identify terrorism as a "non political crime" even if terrorist attacks are usually motivated by political aims. As a result they use the flexibility provided by both UNDHR and Geneva Conventions for refugees to expel asylum seekers without properly examining their claims for international protection.[115] The Committee has also expressed its concerns about cases of expulsion of foreigners suspected of terrorism without an opportunity for them to legally challenge such measures. Such expulsions are, furthermore, apparently decided on without taking into account the risks to the physical integrity and lives of the persons concerned in the country of destination (arts. 6 and 7). [116]

The Geneva Convention for Refugees sets out the principle of *non-refoulement* in Article 33: Article 33 of the Convention of the status of refugees states "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion", However the situation of return to a country of origin of those persons whose claims for refugee protection have failed but nevertheless face serious human rights violations such as torture or death penalty is a serious issue that has arisen many times in after September 11. Human rights treaties[117], in particular, the Convention Against Torture (UNCAT) , the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights[118] (ECHR) state that persons, regardless of the heinousness or undesirability of their conduct, including terrorists (suspected or convicted) should never be sent to countries where there are substantial reasons for believing they would face a "real risk" of torture or other flagrant human rights violation such as the death penalty or an unfair trial.[119] The Human Rights Committee has noted in its General Comment No. 20 on article 7 of the ICCPR that: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*." [120] The principle of *"non-refoulement"* applies to everyone regardless her/his conduct or the crime may she/he accused, including terrorist acts.[121] As a consequence, even if a Security Council resolution asks states to deny refugees status to a suspected terrorist, this is in contradiction with the obligation of

[115] It is worth mentioned that even if the several definitions that have been proposed both by the academic community the political aspect of terrorist acts, most of the international instruments as well as the resolution 1373 and the Draft Comprehensive Convention for terrorism, underlines the non-political character of terrorist acts and the possibility of all terrorist to be expulsed.
[116] CCPR/CO/75/YEM, para. 18 (2002).
[117] The Convention against torture clearly states at article 3: "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture".
[118] See also, Egbert Myjer, " The European convention on human rights, the fight against terrorism and the ticking bomb situation", p, 379 in Marcelo G. Kohen, La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international, Liber Amicorum Lucius Caflisch, Graduate Institute of International studies Geneva, M. Nijhoff publishers, 2007.
[119] See ECtHR, Soering v. United Kingdom, 7 July 1989, Publ. Court, Series A, No. 161, p 35 §88
[120] General Comment No. 20, para. 9 (1992).
[121] See MBB v. Sweden, 104/98, Decision of the Committee against Torture, 5 May 1999

states concerning the principle of *non-refoulement* when suspects may face serious violations of their rights such as torture, death penalty etc.

Since September 11, states have had increasing resort to "diplomatic assurances" as a means of extraditing suspected terrorists. States have sought to argue that diplomatic assurances are sufficient to reduce the "real risk" that a person, if extradited would be tortured or subject to the death penalty following an unfair trial. Only in very specific circumstances will an extradition based on diplomatic assurances be permitted – usually because the requesting State has a well-documented proven track record of upholding human rights and specific requirements relating to the assurance itself are met (e.g. it is from an identifiable source, binding on the prosecuting authorities etc).[122] The UN Human rights Committee has underlined that State is not only obliged to receive the assurances but they are also obligated to observe the compliance with the guaranties.[123] However, where the opposite is true, diplomatic assurances do not reduce the real risk of torture or ill-treatment which the person would face if extradited and as such state reliance on them would result in a violation of the human rights treaty in question [124]

Human Rights Watch and some NGOs go further stating that diplomatic assurances should never be used. Amnesty International has expressed its concerns that many countries breach their obligations of *non-refoulement* by sending suspects of terrorist acts to countries where they can face serious risk to torture and other ill-treatment. Diplomatic assurances sent by requesting countries can not eliminate the real risk faced by people returned to countries that violation human rights and disrespect of human dignity is a common phenomenon. Diplomatic assurances are unenforceable promises; a country that breaches them is unlikely to experience any serious consequences if the assurances are violated. In many instances, moreover, it is practically impossible to ascertain whether a breach has occurred. Torture is carried out in secret places and victims often do not complain for fear of reprisals against them or their families, the practice is hard to investigate, and easy to deny.

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[122] ECtHR, *Nivette v France,* Application No 44190/98, 3 July 2001

[123] When a State party expels a person to another State on the basis of assurances as to that person"s treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion. CCPR/C/74/SWE, para. 12 (2002).

[124] ECtHR, *Saadi v. Italy*, Appl. No. 37201/06, , 28 February 2008 confirmed in *Ismoilov* and Others *v. Russia*, 2947/06, 24 April 2008 and *Ryabikin v. Russia*, Appl. No. 8320/04, 19 June 2008

United Kingdom[125], France[126] as well as Italy[127] have been accused because they forcibly returned detainees held in connection with terrorism to countries where they risked becoming victims of torture or ill treatment. Canada also has been warned by Human Rights Committee for possible violation of Article 7 of the ICCPR because of deportations to a country where there would be risk of torture.[128] In 2003, Saudi Arabia handed over dozens of Yemenis to their government as part of a security bilateral agreement to "fight terrorism".[129] The Russian Federation and China have also used the rationale of the "war on terror" either to return "terrorist suspect" to countries that are well-known to practice torture and other abuses or to put pressure on other countries to return their nationals without giving any sufficient guarantees as to their safety.

The Human Rights Committee has expressed its concerns about the impact of new legislation on the asylum seekers and foreigners and has addressed the question of "*non refoulement"* regarding the obligations raised by article 3 of the Convention against Torture. The Human Rights Committee has urged State Parties "to ensure that measures taken to implement Security Council Resolution 1373 are in full conformity with the Covenant" and that States fully respect the principle of "*non-refoulement*" while countering terrorism.[130]

2. The protection of human rights under the state of emergency[131]

States have the right to derogate from some human rights obligations when they declare state of emergency. Nevertheless even this situation is observed by

[125] Human Rights Watch, Not the Way Forward: The UK"s Dangerous Reliance on Diplomatic Assurances, 2008. It is also interested to notice that the first time that UK was accused for sending a person suspected to terrorism to his country of origin was in Chahal case (*Chahal v. United Kingdom*, 15 November 1996) where a "suspect terrorist" would transferred to India. ECtHR had underlined the absolute prohibition of returns in countries where there is a risk of torture and hasn"t accepted that diplomatic assurances where sufficient. In contrast, in a recent case, *A. and others v. United Kingdom*, no. 3455/05, 19 February 2008, the ECtHR has accepted that a "suspect terrorist" can be returned if the requested State provide "diplomatic assurances".

[126] In May 2007, the UN Committee against Torture found that France had violated the obligation of non – refoulement in Article 3 of the Convention of Torture in a case concerning forced repatriation of a Tunisian back to his country. *Adel Tebourski v. France*. CAT/C/38/D/300/2006 available at http://www.unhcr.org/refworld/docid/47975b0421.html

[127] ECtHR, *Saadi v. Italy*, *no. 37201/06*, 28 February 2008

[128] Human rights Committee noticed that "No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where s/he runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law."CCPR/C/CAN/CO/5, para 15

[129] Amnesty International report, supra, p. 33

[130] CCPR/CO/75/NZL, para. 11 (2002).

[131] For a more theoretical approach see David Dyzenhaus, "The State of emergency in legal theory", p65-89, V.V. Ramraj, M. Hor, K. Roach, Global anti terrorism law and policy, Cambridge, 2005. See also, Milena Costas-Trascasas, "Terrorism, State of Emergency, and Derogation from Judicial Guarantees", in Pablo Antonio Fernández-Sánchez, International Legal Dimension of Terrorism, M. Nijhoff Publishers, 2009.

international law and states have to obey to international norms concerning non derogable rights such as the interdiction of torture and other ill treatment.

a. The absolute prohibition of torture and other ill-treatment.

States may under specific circumstances derogate from their obligations under human rights treaties.[132] This provision is included in article 4 of the ICCPR, article 15 of the ECHR and article 27 of the ACHR and permits derogations -in time of war- or "public emergency" threatening the life of the nation.[133] The ECtHR has held that terrorism may create such a "public emergency" and thus allow the States to derogate from some of its obligations under Human rights treaties.[134] The ECtHR has also emphasized that State parties have a large margin of appreciation when adopting emergency measures, as the national executive is considered better placed to determine what is best for the people than an international tribunal. However this margin is not unlimited and the Court retains supervisory jurisdiction.

Specific conditions must be fulfilled in order to ensure transparency, proportionality and necessity of the measures taken.[135] The State must give concrete reasons that explain the need to adopt emergency measures and must assure that these measures are strictly proportionate to the exigencies of the situation. Emergency measures must be of an exceptional and temporary character and it is the task of the international and national control organs to monitor the provisions of law that govern such proclamations of emergency. Further, states in emergency situation must notify other states though the Secretary General about the derogation from specific obligations. This allows the treaty body and the international community to monitor the extent to which the derogating state complies with its human rights obligations in an emergency situation. According to the Human rights Committee States have to guarantee that constitutional and legal provisions should ensure that compliance with article 4 of the Covenant can be monitored by the courts.[136]

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[132] As Human rights Committee has clarified in its General Comment 29: "Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant". General Comment No. 29 on Article 4, International Covenant on Civil and Political Right, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001. For derogations in normal situations see par example articles 12§3 and 19§3 of the ICCPR.

[133] According to the ECHR the term "state of emergency threatening the life of the nation" refers to "an exceptional situation of crisis of emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed". ECtHR, Lawless v. Ireland, 1 July 1961, Publ. Court, Series A, No.3, p.56, §28 A more recent decision makes clear that the emergency need not affect the whole population it does nevertheless be serious enough for the organized lifeof the community. See ECtHR, Irlande v. United Kingdom (Appl. No. 5310/71), 18 January 1978, series A, No. 25, §207

[134] See for instance ECtHR Lawless v. Ireland, 1 July 1961, Publ. Court, Series A, No.3, p.56, §28, ECtHR, Brannigan and Mc Bride v. United Kingdom, 26 May 1993, Publ. Court , Series A, No 258-B, p. 50, §47 and ECtHR, Aksoy v. Turkey, supra note 47, p. 2281, §70. P. Lemmens, " Respecting Human Rights in the Fight against Terrorism", in Cyrille Fijnaut, Jan Wouters, Frederik Naert ,Legal Instruments in the Fight Against International Terrorism: A Transatlantic Dialogue, Nijhoff, 2004.

[135] These conditions are included to the relevant articles of the Human rights treaties as noted above and they are enriched by the Human rights Committee General Comment No.29, State of emergency.

[136] CCPR/C/79/Add.76, para. 38 (1997).

Nevertheless, there are some rights –as specified by the different international and regional conventions- that have an absolute character and which can not be subject of any derogation in any circumstances included the state of emergency or the case of war. Non-derogable rights may different from one treaty to another[137] but rights as the right to life, the prohibition of torture and other degrading treatment and punishment, the prohibition of slavery and the respect of *nullum poene sine lege* are common to all human rights Conventions. Further, the Human rights Committee has underline the absolute and non derogable character of the right to fair trial since it is necessary for the protection of other non-derogable rights and at the same time it has emphasize that there elements of the right to non-discrimination that cannot be derogated from in to any circumstances.[138]

In fact after September 11 only the United Kingdom derogated from its rights under article 9 of the ICCPR and article 5 (1) of the ECHR [139], despite the fact that during that time it had not itself fallen victim to terrorist attacks. [140] The UK justified itself on the basis that it was a close ally of the US, The fact that no other state felt the need to declare state of emergency raises serious doubts about the derogations. On the other hand, US even if it has been victim of terrorist attacks on September 11 with thousands of victims has never official declared "state of emergency"[141] it has nevertheless derogate from its obligations several times as it has been noticed in this paper.

It is worth mentioned that in the past States have been under state of emergency for decades without any legitimate clarification. Human rights Committee has expressed its concerns about the long and unjustified period of state of emergency and has underlined that derogations must be of limited duration.[142] It is underlined that because of the undefined duration of the "threat of terrorism" there is a risk of a perception of "permanent emergency" and then the exception will become the norm.

Nevertheless, it must always be borne in mind that the respect of human rights is the rule and the derogation is the exception.

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[137] Non –derogable rights are included in the ICCPR article 4(2), ECHR article 15(2) and ACHR article 27(2).

[138] General Comment 29, § 13, 14, 15.

[139] UK "s Anti –Terrorism, Crime and Security Act 2001 permit the arrest and extended detention of a foreign national something that it is inconsistent with the provisions under ICPPR and ECHR. One of the most controversial provisions, provide that Home Secretary could authorized the arrest of a "suspect international terrorist" without trial and in case of non-citizens without charge or the right of appeal for an undetermined period. These provisions were against article 9 of the ICCPR and article 5 of ECHR. As a result, UK declared to derogate from these articles as long as the threat from international terrorism would exist in the country or more information. For the statement sent by UK to the Council of Europe and the Secretary of the Human right Committee see http://www.opsi.gov.uk/si/si2001/20013644.htm. Nevertheless the necessity and proportionality of these derogations have been seriously criticized.

[140] In 7 July 2005, UK experienced a series of four coordinated suicide bomb attacks on London"s public transport system with 56 deaths (including the perpetrators) and 700 injured.

[141] After " 9/11 attacks", President Bush declared a state of national emergency but the US has never notified the state of emergency to the Secretary General of the competent organs of the human rights treaties to which it is party. p 347

[142] See for instance relevant comments of Human rights Committee concerning the state of emergency in Egypt "The Committee is disturbed by the fact that the state of emergency proclaimed … in 1981 is still in effect, meaning that the State party has been in a semi-permanent state of emergency ever since. The State party should consider reviewing the need to maintain the state of emergency. CCPR/CO/76/EGY, para. 6 (2002).

The right to freedom from torture and from cruel, inhuman or degrading treatment is, under both the universal and regional systems, absolute and non-derogable under all circumstances even in situations of emergency.[143] Torture among with other treaties provisions such as genocide, slavery and the principle of non-discrimination may be regarded as having entering into the category of costmary law and they are considered as *jus cogens*. [144]

Torture and inhuman or degrading treatment or punishment are prohibited in absolute terms, even in the most difficult circumstances, war or threat of war, emergency or threat of emergency including the fight against terrorism and organized crime.[145] There are no exceptions to that prohibition, including those based on an order from a superior officer or public authority.[146] The conduct of the person mistreated is entirely irrelevant to the prohibition and confession or evidence obtained under these circumstances can not be used in any judicial process, as reflected explicitly in article 15 of the Convention Against Torture.[147] States have not only the obligation to refrain from such acts but they also have the duty to prevent torture and other ill-treatment and investigate such allegations as well as punish those who use such methods.[148] Furthermore, the detainee has the right to be assisted by a counsel or a lawyer during the interrogations especially as the ECtHR has noticed where the interrogation takes place in an "intimidating atmosphere especially devised to sap the will of the suspect and make him confess to his interrogators".[149]

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[143] Article 7 ICCPR, Article 3 ECHR, Article 5 ACHR

[144] See for instance M.N. Shaw, International Law, 4th ed., Cambridge, Cambridge University Press, 1997, p. 202. and Francisco Forrest Martin, Rights International, Stephen J. Schnably, Richard Wilson, Jonathan Simon, Mark Tushnet, International human rights and humanitarian law: treaties, cases and analysis, Cambridge University Press, 2006, p 157

[145] Labita v. Italy, 6 April 2000, para. 119. See also Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, para. 163; Soering v. the United Kingdom, 7 July 1989, Series A no. 161, para. 88; Chahal v. the United Kingdom, 15 November 1996, para. 79; Aksoy v. Turkey, 18 December 1996, para. 62; Aydin v. Turkey, 25 September 1997, para. 81; Assenov and Others v. Bulgaria, 28 October 1998, para. 93; Selmouni v. France, 28 July 1999, para. 95., taken by Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers" Deputies note 54, p.38

[146] Human Rights Committee *General Comment No. 20, 10/3/1992 (para 3).*

[147] Under Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, any statement made as a result of torture cannot be invoked as evidence in any proceeding, except against a person accused of torture as evidence that the statement was made. See also ECtHR, Tomasi v. France, 27 August 1992, p.42, §115 and IACtHR, Loayza Tamayo v. Peru, 17 September 1997, §57

[148] According to F. Sudre "l" obligation procédurale issue de l "article 3 est celle de procéder a une enquête officielle approfondie et effective…en vue de l"identification et la punition des responsables chaque fois qu "il y des motifs raisonnables de croire que des traitements contraire a l" article 3 ont été commis par des agents de l"Etat sur des personnes prives de liberté (Selmouni c. France, 28 juillet 1999)…, détenues en prison(Labita c. Italie, 6 avril 2000) , ou placées en rétention administrative…(Slimani c. France, 27 juillet 2004). Frédéric Sudre, « Droit européen et international des droits de l" homme », Collection Droits Fondamental, Presses Universitaires de France(puf), 2008

[149] ECtHR, Magee v. United Kingdom, 8 February 2000

Resolution 1373 of the Security Council reaffirms the need to combat the threats caused by antiterrorist acts "by all means". As the UN Committee against torture urges, it must be read in the light of the absolute character of non –derogable rights such as terrorism and degrading treatment.

Images of tortures inflicted on prisoners in Iraq by US soldiers have provided the most graphic and disturbing evidence of violation of human rights committed in the name of the "war on terror". US have been several times accused of adopting a permissive policy towards torture.[150] The Human rights Committee as well as the UN Committee against torture has expressed its concerns about interrogation methods including stress positions, isolation, sensory deprivation and "waterboarding" that have been authorized by US administration[151]. US government has been repeatedly urged to ensure full investigations into such acts. [152]

Not only US but other governments too have permitted interrogation and detention practices that have deliberately and systematically breached the absolute ban on torture and ill-treatment inscribed in international treaties. States have used mental and physical violence on detainees using methods long prohibited by international law. The Russian Federation, for instance, has been accused of enforced disappearances, torture and other ill-treatment and arbitrary-incommunicado detention. The ECtHR has even developed the concept that a person is "presumed dead" where a person is taken into custody and not seen again.[153] Egypt as well is accused for mass arrests, combination of incommunicado and secret detention and torture practices in detention centers across the country.[154]

Nevertheless, States can be accused for violations of their obligation under international and regional law concerning the prohibition of torture and other ill-treatment not only if they have allowed such practices but also if they have not taken positive steps tot prevent them. This rises usually among with the question of the *non refoulement*; the obligation of States not to return people in countries where they will face serious violations of human rights.

[150] The previous US administration even attempted to redefine the universal prohibition of torture as "robust interrogation" or any practice falling short of organ failure or death.

[151] See Human Rights Committee, United States of America: Concluding observations (CCPR/C/USA/Q/3/CRP.4) paras 13-17 and Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, see paras 14-26.

[152] US failed to fully investigate the complaints of torture and ill-treatment arising from detentions in Guandanamo, Iraq and Afghanistan. Despite numerous credible reports of torture abuses by U.S. officials associated with the "war against terrorism," including the U.S. government's practice of "rendition to torture," no U.S. government official has been prosecuted or even investigated for these crimes. http://www.humanrightsusa.org/index.php?option=com_content&task=view&id=49&Itemid=76

[153] Abuyov v. Russia

[154] Islamist groups are more affected by these practices and evidences extracted under torture have been accepted by the national court. See Amnesty International report: Egypt: Systematic abuses in the name of security of April 2007 available at http://www.amnesty.org/en/library/info/MDE12/001/2007

b. The rights of detainees[155] and the fair trial procedures

On the other hand, the right to liberty it is not a non-derogable right as such. Certain states have derogated from human rights obligations in order to detain persons perceived as posing a terrorist threat other than pursuant normal criminal procedure. Derogations might be lawful in regard as regards preventive or administrative detention, [156] however, there are some aspects concerning detention that states may never derogate. For example detention must not be arbitrary; it must be subject to legal regulation and judicial review. According to the Human right Committee other non derogable rights must be protected as the prohibition of "unacknowledged or incommunicado detention" or the arbitrarily prolonged detention which have been considered as "jus cogens" norm.

Under international Human rights treaties,[157] people can be detained on grounds and procedures established by law. In order for an arrest to be lawful, it has to be based on a reasonable suspicion of the person concerned having committed an offense. The authorities have to prove the reasonableness of their suspicion by establishing facts and information that justify that the person may have committed an offence. Anyone who is arrested[158] has the right to be told the reasons for her/his detention and have access to legal counsel. Furthermore, she/he must be held in a recognized place of detention and not be transferred anywhere there is a risk that she/he will be subjected to torture or other ill-treatment. During her/his detention must be treated humanly and must be charged with a recognizable crime and fairly tried without undue delay[159] or be released. Moreover, any detained has the right to challenge the legality of her/his detention.[160] In the context of the fight against terrorism, all of these rights have been flouted by governments' antiterrorist policies.

One of the most well known centers of detention which has several times been involved to human rights violations is Guantanamo Bay. Guantanamo has been at the heart of the US" unlawful and coercive detention regime and remains at the center of legal challenges today, not just in the US, but in domestic proceedings else where too.[161] According to NGOs – the naval facility reported receiving "war on

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[155] See, David Feldman, "Deprivation of liberty in anti-terrorism law", Cambridge Law Journal, 67(1), 4-8, 2008.

[156] Helen Duffy, The "war on Terror" and the Framework of International Law, supra, p.315

[157] Concerning the rights of persons related to arrest and detention see Article 9 ICCHR, Article 5 ECHR and Article 7 ACHR.

[158] The police officers or security agencies are allowed to use force during the arrest as long as the use of force is limited to the "absolute necessary" in order to effect the arrest. Article 2 §2(a) and (b) of the ECHR..

[159] The ECourtHR has decided that the period of more than four days can not be acceptable. ECtHR, *Brogan v. United Kingdom*, 29 November 1988, p.33-34, §62

[160] Detention must not be arbitrary but must be subject to legal regulation and judicial review. Helen Duffy, The "war on Terror" and the Framework of International Law, Cambridge University Press, 2005 Chapter 8, para. 8B4.

[161] Obama, the new US President has promised to close Guantanamo within a year from his election. Until today (May 2009) nothing has changed. In contrast, new questions such as where are the detainees will be transferred have risen and none –neither European countries- seems to be able to give an effective solution. See also, « Barack Obama va fermer Guantanamo, les détenus dangereux seront transférés aux Etats-Unis », "Le Monde" electronic version of 21/05/2009,

terror" detainees in January 2002 it has held some 800 people in indefinite military detention without charge or trial. (In June 2008, the Supreme Court ruled that attempts by US administration and Congress to strip detainees of their right to challenge the lawfulness of their detention were unconstitutional.[162])

Many arrested have been victims of the practice of "rendition" in which people suspected of supporting, planning or committing acts of terror have been unlawfully detained and transferred outside any judicial process from one state to another. Investigations of the Council of Europe have revealed that between 2003 and 2005 Poland and Romania had secret prisons financed by CIA where prisoners held in conditions of torture or other cruel, inhuman or degrading treatment. Other European countries have also support CIA's "rendition" network by offering their airports for transportation of the detainees or by failing to prevent and to investigate violations carried out by their nationals or on their territory. [163]

Secret detention and enforced disappearance which accompany the use of secret incommunicado detention have also broadly used by governments after September 11. These practices constitute a direct violation of human rights and humanitarian law. The Human rights Committee has expressed concerns over *incommunicado* detention and has asked states to ensure their compliance with article 9 of the ICCPR

[162] The judgment delivered on 12 June 2008 by the United States (US) Supreme Court in *Boumediene v. Bush* and *al Odah v. United States* ("*Boumediene"*) squarely affirmed that foreign nationals held at Guantánamo Bay are entitled, under the US Constitution, to effective means and procedures to challenge the legality of their detention before an independent and impartial court that has the power to order their release: the centuries old writ of *habeas corpus.* The Court resoundingly rejected the arguments put forth by the US administration that non-US nationals held outside the sovereign territory of the USA, are beyond the reach of this fundamental legal protection. The Supreme Court declared as unconstitutional attempts by the administration and Congress (through the 2006 Military Commissions Act) to strip the detainees of their right to *habeas corpus*. The Court also dismissed as deficient the substitute scheme established by the administration and Congress to replace *habeas corpus* proceedings. That scheme consists of "Combatant Status Review Tribunals" (CSRTs), panels of three military officers empowered to review the detainee"s "enemy combatant" status, with extremely limited judicial review of final CSRT decisions under the 2005 Detainee Treatment Act (DTA). The first CSRTs were not held until more than two years after the detentions began. No judicial review of CSRT decisions had been undertaken at the time of the *Boumediene* decision. http://www.amnesty.no/web.nsf/pages/40129D1243DCBE11C1257467003CE115

[163] According to the 2007 Parliamentary Assembly of the Council of Europe (PACE) report many governments had an uncooperative attitude with the representatives of the PACE and they "have done everything to disguise the true nature and extent of their activities". It also lists Sweden, Bosnia-Hercegovina, Britain, Italy, FYROM, Germany and Turkey as countries "responsible, at varying degrees... for violations of the rights of specific persons." Seven other countries "could be held responsible for collusion - active or passive": Cyprus, Greece, Ireland, Poland, Romania and Spain. Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE). "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, 11 June 2007. See also, Amnesty International report Europe: Partners in crime: Europe's role in US renditions, 13 June 2006. See also, Nuria Arenas-Hidalgo, "The International Responsibility of EU in US 'Extraordinary Renditions' of Suspected Terrorists", in Pablo Antonio Fernández-Sánchez, International Legal Dimension of Terrorism, M. Nijhoff Publishers, 2009. and Silvia Borelli, "Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Co-operation", Leiden Journal of International Law, 16 (2003), pp. 803–820

and end enforced disappearance.[164] The Committee against torture has expressed similar concerns and has emphasized that the *incommunicado* regime, regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment."[165]
Nevertheless, on September 2006 US President G. W. Bush acknowledged the secret CIA detention program by emphasizing that it is a crucial instrument in the fight against terrorism.[166] Several NGOs have published information about dozens of people, believed to have been held in the CIA program and whose fate remain unconfirmed.[167]
Practices like these must be prohibited and in the case that have been occurred they must be investigated and the perpetrators must be punished.

Human rights Committee have also expressed concerns about the use of administrative detention frequently imposed without trial and stress the need for access to judicial review in all circumstances. [168] The Committee is also concerned that the existence of antiterrorist legislation such as the USA Patriot Act in USA, the Anti-Terrorism, Crime and Security Act in United Kingdom[169], the Prevention Terrorist Act in India and Sri Lanka or the Anti-terrorist Act (no2) in Australia as well as other similar practices adopted by states allow arrests without a warrant and permits extended detention on the basis of an administrative order[170]not in conformity with the international human rights obligations of states .[171]

Article 14 of the ICCPR, and provisions found in regional conventions (e.g. ECHR article 5), set out the guarantees of the fair trial.[172] Nevertheless in the context of the "war on terror" many of these guarantees are unreasonable violated.

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[164] Concluding observations of the Human Rights Committee: United Kingdom and the Overseas Territories (CCPR/CO/73/UK and CCPR/CO/73/UKOT), para.19.
[165]Concluding observations of the Committee against Torture: Spain (CAT/C/CR/29/3), para.10.

[166] Jane Mayer, The Black Sites .A rare look inside the C.I.A."s secret interrogation program**.** Available at http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer

[167] The Syrian-born Canadian citizen, Maher Arar, is the only person who has been compensated for his suffering in torture during his detention, not from the US Government, but the Canadian government. His case represents the tip of the iceberghttp://www.icj.org/news.php3?id_article=4156&lang=en Amnesty International, "Security and Human Rights, Counter –terrorism and United Nations", 2008, p.37
[168] CCPR/C/79/Add.93, para. 21 (1998). Furthermore the ECtHR has said that "where a detained person has to wait for a period to challenge the lawfulness of his custody, there may be a breach of Article 5 § 4. Having regard to the conclusion it reached with regard to Article 5 § 3 … the Court considers that the period in question [seven days] sits ill with the notion of "speedily" under Article 5 § 4 of the Convention". Igdeli v. Turkey, ECHR, 20 June 2002 (paras. 34-*35)*.
[169] See, ECtHR, *A and others v. United Kingdom*, App. No. 3455/05, 20 February 2009.
[170] The mere administrative detention of a person, for the sole purpose of gathering information , e.g on the group to which he belongs, would be unlawful. ECtHR, Brogan v. United Kingdom note 19 p.29-30 §53. the same applies to administrative detentions of persons who do not personally threaten State security, but are kept as "bargaining chips" in order to promote negotiations with the group to which they belong. CCPR/C/79/Add.93, paras. 19, 21 (1998), United Nations Digest of jurisprudence of the UN and other regional organizations on the protection of human rights while countering terrorism
[171] Amnesty International report, supra, p. 38
[172] Article 6 of ECHR, Article 8 of ACHR

Even if the right to fair trial it is not included in the catalogue of the non derogable rights provided in article 4 of the ICCPR the Human rights Committee has several times underlined the absolute character of some of the guarantees and the importance of the right of fair trial in the protection of other non derogable rights. The Human Rights Committee has stated that even in cases of emergency Sates must not derogate from obligations related to fair trail guarantees such as the presumption of innocence[173], the right to be trialed by an independent and impartial court and the respect of the principles of *nullum crimen sine lege* and *nulla poene sine lege.*

In the "war on terror" many fair trial guarantees have been abused. Some states have created special courts, others have lead civilians accused for involvement in terrorist activities in front of military commissions, or other countries have adopted procedures which otherwise fail to meet international standards for fair trial. For example, the previous US administration sought to deny protections and legal safeguards of the US Constitution and of international human rights law to what it called "unlawful enemy combatants" including fair trial standards enshrined in the ICCPR. The vast majority of those held in Guantánamo have not been charged, although two have been tried and convicted, and about 20 more face charges under the Military Commissions Act (MCA) of 2006. Other countries have used similar practices violating the fair trial standards as well.[174] Another example comes from United Kingdom's "Anti Terrorism Crime and Security Act 2001" that establishes catalogues with names of groups that they are considered as terrorist groups. Any individual figure on one of this list can be considered as terrorist only because of his/her membership to the group.[175] The ECtHR has considered this provision as a violation of article 5 of the European Convention of Human rights.[176]

Military Courts and other similar bodies have been accused as inappropriate for the trial of criminal offences involving civilian suspects. Further these Courts are mostly

[173] Human rights Committee has stated : "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected." General Comment No. 29,CCPR/C/21/Rev.1/Add.11, paras. 11, 16 (2001). See also General Comment No. 13 (on article 14 of the Covenant).

[174] Other countries have brought terrorism suspects to trial in courts that also do not meet international standards for fair trial. In Egypt, for instance, a parallel system of emergency justice, involving specially constituted "emergency courts" and the trial of civilians before military courts, has been established for cases deemed to affect national security. Under this system, safeguards for fair trial, such as equality before the law, prompt access to lawyers and the ban on using evidence extracted under torture, have been routinely violated. After such grossly unfair trials some defendants have been sentenced to death and executed.

[175] See for instance Article 2 of the "Anti Terrorism Crime and Security Act 2001"

[176] According to the Court, article 5 can not legitimize the arrest of person only because of its participant to a dangerous group or because of its intention to commit criminal acts. ECtHR, Guizzardi v. Italy, 6 November 1980, No 39, §92. see also, ECtHR, *A and others v. United Kingdom*, App. No. 3455/05, 20 February 2009.

composed by military officers and they lack both independence and impartiality.[177] Human rights Committee has expressed its concern regarding the fact that this bodies have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts" independence and their decisions are not subject to appeal before a higher court (article 14 of the Covenant).[178]

Further, the Human Rights Committee recognizes that the reason for the establishment of such bodies is to facilitate procedures that are not in conformity with normal standards of justice.[179] In the same sense, "faceless judges" that have been broadly used by Latin American countries don't meet the fair trial standards provided by ICCPR and the ACHR neither to the level of impartiality nor to this of independence.[180] Human rights Committee noticed : [the] system of trial by "faceless judges", in which the defendants do not know who are the judges trying them and are denied public trials, and which places serious impediments, in law and in fact, to the possibility for defendants to prepare their defense and communicate with their lawyers.[181]

Other rights that could be in question by new antiterrorist legislation are the fundamental principles of *nullum crimen sine lege* and *nulla poene sine lege*. The first principle attempts to prohibit prosecution for conduct that was not criminal at the time carried out and the second one ensures that a heavier punishment than the punishment exciting in the time of the criminal act can not be imposed. The ECtHR has noted that no derogation is permitted from this right under article 15 in time of war or other public emergency. Nevertheless, the Human rights Committee has found, inter alia, violations of Article 15 in respect of convictions for terrorist offences under legislations which did not exist at the time of the alleged offences, even when the law in force at the time criminalized other similar conducts to which similar penalties applied. [182]

International fair trial provisions also specifically provide a certain "minimum" procedural guarantees such as the right to be informed in detail of the nature and the cause of the charge, the right to prepare a defense, the right to lawyer or legal counsel[183] and confidential communication with him/her. As regards access to

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[177] the Committee expresses its deep concern that persons accused of treason are being tried by the same military force that detained and charged them, that the members of the military courts are active duty officers, that most of them have not received any legal training and that, moreover, there is no provision for sentences to be reviewed by a higher tribunal. These shortcomings raise serious doubts about the independence and impartiality of the judges of military courts. CCPR/C/79/Add.67, para. 350 (1996). See also G. Robertson, "Fair Trials for terrorists ?", Richard Wilson, Human rights in the "War on Terror", Cambridge University Press, 2005 p.175

[178] CCPR/CO/76/EGY, para. 16 (2002).

[179] Human rights Committee, General Comment No13 : Equality before the law (article 14) 1984, UNDoc.HRI/GEN/1/Rev.6 (2003) at 136, para 4

[180] See Polay Campos v. Peru, Case No. 577/1994, Views adopted on 6 November 1997 (para. 8.8); see also Gutierrez v. Peru, Case No. 678/1996, Views adopted on 26 March 2002. United Nations Digest of jurisprudence of the UN and other regional organizations on the protection of human rights while countering terrorism.

[181] CCPR/C/79/Add.67, para. 350 (1996).

[182] Gomez Casafranca v. Peru No 981/2001. Views of 19 September 2003, UNDoc. CCPR/C/78/D/981/2001.

[183] France limits terror suspects to restricted access to lawyers (once after 96 hours and once after 120 hours), thus undermining the right to counsel and facilitating ill-treatment in custody. The Human Rights

independent legal counsel, the Human Rights Committee has stressed that it is an important safeguard against torture and other ill-treatment and essential in giving effect to the right to challenge the legality of detention.

Broad implementation of counter terrorism policies is usually accompanied by serious violations of human rights since some measures are not neither necessary nor proportionate. Serious questions rise concerning the effectiveness and the real scope of those measures. For instance, torture or other cruel and inhuman treatment during the interrogation of suspects that have relation with terrorist activities can lead to false confession that will make arrests of the real perpetrators even more difficult. As the former Secretary General, Kofi Anan, has emphasized addressing to the Commission in April 2002, "we can not achieve security by sacrificing human rights. To try and do so would hand the terrorists a victory beyond their dreams" by proving that States have failed to protect the base of their construction which the human rights, the rule of law and the democratic values. States must find the right balance in order to assure that the fight against terrorism doesn't affect human rights standards." In contrast, human rights protection must be the motif and the measure to fight terrorism.

II. The Security Council's "consolidated lists" and international Human Rights law.

In the first part of this paper we briefly examined the inability of international community to reach a comprehensive definition for terrorism and how the absence of such can affect both the effective "fight against terrorism" as well as the protection of human rights. Further we examine how the misapplication of Security Councils resolutions affects human rights, even non-derogable rights that according to human rights law can not be subject to restriction even in a "state of emergency".

As we have mentioned before the Security Council has adopted a broader "legislative" role in order to face the threat of terrorism. In the same context, the Security Council has launched lists with persons against whom it implements individual sanctions [184] in order to fight the terrorist threat all over the world. We have already seen that in the case of secret detention and unlawful transfers of detainees, torture etc, the need to combat terrorism can not justify resort to any means especially it infringes the fundamental principles of respect for human rights and the rule of law. In this part we examine the role of the consolidated list in the fight against terrorism and the human rights violations acquired especially in relation with the right of fair trial and the right to an effective remedy as well as the right to

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Committee raised concerns in a recent report about these provisions and recommended that France "should ensure that anyone arrested on a criminal charge, including persons suspected of terrorism, are brought promptly before a judge, in accordance with the provisions of Article 9 of the Covenant." CCPR/C/FRA/CO/4, para 14. Amnesty International, "Security and Human Rights, Counter –terrorism and United Nations", 2008, p 40.

[184] Concerning the broad role of the SC as legislator and "world judge" regarding the implementation of individual sanction see Simon Chesterman, New York University Public Law and Legal Theory Working Papers, The UN SC and the Rule of Law, 2008, Paper 103.

private and family life, the right to reputation and the right to liberty and freedom of movement. Further we examine the problem of "challenging blacklisting" as it was dealt by the EJC in the joined case of *Yassin Abdullah Kadi and Al Baraakat v. Council of the European Union and Commission of the European Communities*.[185]

A. Consolidated lists; an ineffective instrument in the fight against terrorism

Following the end of the Cold war and the devastating impact of the comprehensive sanctions against Iraq (1990), the Security Council adopted a new concept of sanctions; the targeted or smart sanction.[186] Targeted sanctions were considered to be more effective and to reduce the negative consequences on the population since this new type of sanction does not target the state but selected persons. Nonetheless, targeted sanctions as adopted by the SC's Resolution 1267 interfere with human rights standards and raised doubts about the respect of fundamental rights and the rule of law while countering terrorism.

1. The concept and the application of Consolidated Lists.

Since 1998, Security Council has adopted a number of target sanctions under Chapter VII of the Charter that according to article 25 of the Charter all States had to implement. Target sanctions usually implement travel bans, arms embargoes, and financial sanctions such as the freezing of accounts and denial of access to whatever property, targets may have.[187] Until recently, targeted sanctions addressed to government members or entities which controlled at the time a specific territory.[188] Resolution 1267 (15 October 1999) was addressed to the government of Afghanistan; and the Taliban' regime.[189] Like all targeted sanctions, it asked states to freeze funds controlled directly or indirectly by Taliban and to deny the Taliban's aircrafts to land or operate on their territory. It also established a Sanctions Committee with task to control the implementation of the resolution. Resolution 1267 (1999) was supplemented by Resolution 1333 (2000) which was directing both against "Bin Laden and his associates".[190] It was the first time that Security Council

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[185] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities.*

[186] For the development of the targeted financial sanctions see Vera Gowlland-Debbas, Djacoba Liva Tehindrazanarivelo, National implementation of United Nations sanctions: a comparative study, Martinus Nijhoff Publishers, 2004, note 11, p. 17, Larissa van den Herik, The SC's Targeted Sanctions Regimes: In Need of Better Protection of the Individual, Leiden Journal of International Law, 20 (2007), p. 798, 799.

[187] It is obvious that the argument of targeted sanctions is that terrorism needs money and guns so by freezing the property SC prevent terrorism activities. The effectiveness of this strategy will be examined below.

[188] Under Chapter VII of the United Nations Charter, targeted sanctions have been applied against UNITA in Angola and the Sierra Leone rebels, including a ban on their main source of funding -- illicit diamonds. Diamond sanctions have also been applied against Liberia. See also, I. Cameron "European Union anti-terrorist Blacklisting", Human rights Law review, Volume 3, number 2, 2003, note 12, p. 226

[189] Afghanistan authorities denied to surrender to USA, Osama bin Laden who was accused for the explosion to the US"s embassies in Nairobi and Dar –es-Salem.

[190] Article 8c, S/RES/1333 (2000), adopted in 19 December 2000

addressed a group of people who had not the control of any geographical region. In fact, Al- Qaida in constituted by huge network of people with interfaces all over the world. Resolution 1390 (2002) renewed the list and extended the arms embargo to the listed persons.[191] Finally, Resolution 1455 (2003) required the submission of state reports concerning the implementation of the resolution.[192]

A large number of people and entities have been listed during the subsequent years. At the moment, (15 June 2009), the names of 142 individuals associated with the Taliban, 225 individuals associated with Al-Qaida and 111 entities or other groups associated with Al-Qaida figure on the site of the "Al- Qaida/Taliban Committee. As we have noticed before, it is the Sanctions Committee that determines the list, in other words, the executive body takes the decision. Over the years, the listing procedure has been modified because it has been subject of criticism several times.[193] Nevertheless, even after the modifications not much has changed in respect of the listing procedure.

According to article 16(b) of the Resolution 1333 the "list" is based "on information provided by States and regional organizations, of individuals and entities designated as being associated with Osama bin Laden". It is true that there are not many details concerning the procedure that lead to the placement of a person's name on the list. Furthermore, the term "being associated with Bin Laden" is extremely vague that can not be considered as possessing sufficient legal certainty. Nevertheless, the Committee has adopted guidelines[194] (2002) in order to provide some rules on the basis of "relevant information" concerning the listing and delisting procedures, which will be examined later on.

As Professor I. Cameron noticed the information comes mainly by states that have special interests in the matter and they have also capable intelligent services and sources. States have the right to keep the information "classified" because of security reasons. That means that neither the Committee nor the other Member States are in position to examine the evidential basis on which a person has been blacklisted.[195] Even where there is an acknowledged doubt concerning suspect's

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[191] This is the first resolution that extends SC's resolutions to individuals without territorial connection. I. Cameron, "European Union anti-terrorist blacklisting", HRLR, volume 3, number 2, 2003, p. 227.

[192] States reports at http://www.un.org/sc/committees/1267/memstatesreports.shtml

[193] See for instance the studies elaborating the problem that were brought to the attention of the SC and the General Assembly.

-The ECHR, due process and UN SC counter-terrorism sanctions, Report prepared by Iain Cameron; Council of Europe, Restricted Document, 6 February 2006;

- Targeted Sanctions and Due Process. The responsibility of the UN SC to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter. By Bardo Fassbender, Institute of Public International Law at the Humboldt University Berlin. Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006;

- Strengthening Targeted Sanctions through Fair and Clear Procedures. White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006.

[194] Guidelines of the Committee for the conduct of its work, Adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, and 9 December 2008. They are available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

[195] Obviously in such procedures states have the opportunity to place on the list people not by being motivated by the national security or the international peace by their own interests concerning political opponents or other contra with the official regime groups. Julia Hoffmann, "Terrorism Blacklisting: Putting European Human rights Guarantees to the test", Constellation, Volume 15, numero 4, 2008 p. 546

identity, the Sanctions Committee's monitoring team recommends that the measures be imposed on the person concerned until his or her true identity is confirmed.[196] Furthermore, it is worth mentioning that since a name is placed on the list it is very difficult to be de-placed; because of the consensus acquired in order to include someone on the list, any state can block with veto any de-listing effort. In addition, during that process the individual does not have any access to the information and he is not even informed about it. Consequently, s/he has no right to defend him or hefself neither before nor, paradoxically, after the placement of his name on the black list. To sum up, the individual does not enjoy any of the judicial guarantees such as the right to fair trial or to an effective remedy under this process.

Nevertheless, because of the adverse effects that the sanction of freezing of accounts, for instance, can have on targeted persons and their families, resolution 1452(2002) provided an exception to freezing accounts for "humanitarian reasons"[197]. The same year, and due to the guidelines adopted by the Committee, a de-listing procedure was established.[198] The state of nationality or citizenship, after consulting the state that asked to put someone on the list, can ask the Committee to remove a name from the list. If no state objects, the name is removed. No reasons need to be given for either requesting removal, or opposing it.

Although there have been several occasions where this procedure was followed successfully,[199] there are also some others that de-listing procedure failed to provide individuals with proper protection (see the case of *Sayadi and Vinck*). First of all, to be delisted requires the willingness of the state of residence or nationality to act on behalf of the person and entities listed. It is obvious that this is a form of protection which is not available to all persons and entities listed. Furthermore, even if a state is willing to take action on behalf of a listed person or entity, what follows is a political procedure and not a judicial procedure before an independent body. The case of *Sayadi and Vinck v. l'Etat Belge* [200] illustrates that it is very difficult to evaluate this political procedure. Even if Belgium reacted demanding the removal of

[196] The monitoring team concedes that this places a considerable burden on innocent people but maintains that this "inconvenience" is justified by the more important legal objective of preventing terrorism. AS/Jur (2007) 14, 19 March 2007, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights "UN SC black lists" Introductory memorandum, Rapporteur: Mr Dick Marty, Switzerland, ALDE, §6.

[197] 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" . However, humanitarian exemptions can only be requested through states, not directly, and the guidelines for what constitutes a "humanitarian exemption" are not always clear. COE Report, United Nations SC and European Union blacklists Committee on Legal Affairs and Human Rights, Rapporteur: Mr Dick MARTY, Switzerland, Alliance of Liberals and Democrats for Europe, 16 November 2007, § 38.

[198] Guidelines, §7, p.6

[199] This was the case of three Swedish citizens from Somalia who have been delisted after the intervention of Sweden. One of them was Yusuf who reached the CFI whose decision will examine below.

[200] Decision of the Tribunal de première instance de Bruxelles, *Sayadi & Vinck v. l"Etat Belge*, 18 February 2005. See also Mielle Bulterman, Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities. LJIL, 19, 2006, 756-757.

the couple from the list it seems that Belgium diplomacy proved unable to convince other Member States that these people must be delisted since both *Sayadi and Vinck* are - until the last update of the Consolidated lists on April 2009 - still listed.

Since the adoption of Resolution 1730 the Secretary-General of the United Nations has established the so-called Focal Point, petitioners are allowed to submit a request to the Sanctions Committee or to their government for removal from the list but the problem still exist since the processing of that request is purely a matter of willing of the State of nationality /citizenship and intergovernmental consultation. In fact, there is no obligation on the Sanctions Committee to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list.

After severe criticism [201] some progress has been also noticed as regards the lack of evidence. Resolution 1526 (2004) asked states to provide "identifying information and background information to the greatest extend possible". In addition, Resolution 1671 (2005), has a particular importance since it provides a (non- exhaustive) definition of the term "association with Al- Qaida"[202] and asks states to provide a "statement of case"[203] every time they propose a new name on the list. With the resolution 1735, the Security Council asked states to inform their civilian about the designation.[204] And with the last Resolution 1822 (2008) the Sanctions Committee has been authorized to publish narrative summaries of reasons for listing of the individuals, groups, undertakings and entities included in the Consolidated List.[205] It is still questionable whether these new provisions have resolved all difficulties concerning the scope of the UN financial sanctions regime of Resolution 1267 at least they can help to the reduction of the erroneous listing with all the suffering this involves for innocent citizens and entities.

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[201] See, for instance, UN General Assembly resolution on the 2005 World Summit Outcome: "We also call upon the SC, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individual and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions." UN Doc. A/RES/60/1, 24 October 2005, as well as Council of Europe, Parliamentary Assembly, Resolution 1597 (2008) and Recommendation 1824 (2008), both adopted 23 January 2008 and based on the Report (Doc. 11454) of the Committee on Legal Affairs and Human Rights (Rapporteur D. Marty, Switzerland) entitled "United Nations SC and European Union blacklists" .

[202] Resolution 1617, adopted on 29 July 2005, in article 2 notices that : acts or activities indicating that an individual, group, undertaking or entity is "associated with" Al-Qaida, Usama bin Laden, or the Taliban include:
– participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
– supplying, selling or transferring arms and related material to;
– recruiting for; or
– otherwise supporting acts or activities of:
Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.
S/RES/1671, 29 July 2005

[203] Ibid, Article 4,

[204] S/RES/1735, 22 December 2006, Article 11

[205] The importance of such information will be examined later on, for more information about resolution 1822 an the narrative summaries of the reasons of listing individuals visit the site of the "Al-Qaida and Taliban Sanctions Committee" at http://www.un.org/sc/committees/1267/narrative.shtml

Nevertheless, despite the progress mentioned above there are still doubts concerning the protection of fundamental rights of listed persons. First of all, it is underlined that lack of evidence and more precisely lack of judicial examination of evidence can lead to erroneous listing. Secondly, the fact that individuals are not informed about the reasons of being listed violates both their right to a fear hearing before an independent court and their right to an effective remedy.

While the rights of fair trial and effective remedy are violated, targeted sanctions affect also other civil and political human rights.[206] For instance, travel bans interfere with the freedom of movement and even the right to life if the person needs healthcare abroad etc.[207] Financial sanctions reveal questions concerning the property rights as well as the right to private and family life. Additionally these violations must be examined against the test of proportionality and necessity and the lack of the right to judicial remedy since it is impossible to challenge the measures due to the impunity of United Nations.[208]

Before examining how the blacklisting procedure violates human rights we consider necessary to examine if Security Council's has any obligation under human rights law.

The United Nations constitutes a collective security system that gives the Security Council the primary role to maintain international peace and security. Under Chapter VII, Security Council has broad powers[209] in order to be able to react promptly and effectively when it is necessary. The maintenance of the peace could allow the adoption of special measures[210] however the rule of law remains the standards under which possible derogations might be considered legitimate. Whilst not a human rights body per se, the Security Council can not act without limits[211] and is bound by general international law rules[212] including the United Nations Charter and the United Nations Declarations of Human rights (UNDHR).

Firstly, the whole United Nations system is based on the respect for international law including human rights and humanitarian law. Further, UNC, the cornerstone of the

[206] The Parliamentary Assembly has several times concluded in its resolutions that targeted sanctions (such as travel restrictions and freezing of assets) have a direct impact on individual human rights such as freedom of movement and the protection of property. See, PACE Resolution 1597 (2008).
[207] Iain Cameron, UN targeted sanctions, legal safeguards and the European Convention of Human rights, NJIL, 2003,p167
[208] Article 105 of the UN Charter. In the international system, there is no superior mechanism for actions which violates human rights which are attributed to the UN.
[209] Chapter VII, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, "The SC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 39 of the Charter
[210] See how SC can act in analogy with the "state of emergency" in Andrea Bianchi, " Assessing the Effectiveness of the UN SC's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion,", EJIL, 2007, p. 891.
[211] See, Susan Lamb, " Legal limits on SC action under Chapter VII of the UN Charter", p.366, in Ian Brownlie, Guy S. Goodwin-Gill, Stefan Talmon, Robert Jennings, The reality of international law: essays in honour of Ian Brownlie, Oxford University Press, 1999.
[212] As I. Cameron underlines "The SC is bound by its mandate and by general international law in particular humanitarian law and human rights law". I. Cameron, "UN targeted sanctions, legal safeguards and the European Convention of Human rights", supra, p. 179.

UN system, recalls several times the principles of human rights in numerous Articles.[213] Article 24 (2) receives special importance because it is referred to the obligation of the Security Council to "act in accordance with purposes and principles of the United Nations." As purposes and principles we consider the respect of international law including human rights and fundamental freedoms. In addition to the importance of human rights in the UN Charter, Security Council should be bound by UNDHR both because of its importance as a political document which enjoys the full support of all 193 UN member states as well as its contribution to the respect and protection of the dignity of the human being[214]. Last but not least, international legal doctrines recognizes that international organizations are bound by customary law[215] especially by jus cogens human rights norms, as it is underlined by CFI in the case Yusuf and Kadi decisions.[216] (These cases will be further examined to the next chapter).

Secondly, Security Council is a UN organ that consists of Member States, many of which, have ratified Human Rights treaties both in international and regional level and are bound by them even when they are acting collectively within the Security Council. In other words, when states are implementing Security Council's decision remain bound by whatever human rights obligations they have issued by both constitutional or international and regional treaties.[217] That means that neither states" competence to delegate power to Security Council nor Security Council's actions as such-even for the purpose of fulfilling its mandate- are not unlimited. The protection of collective security could allow special measures but not any measures. In the case of targeted sanctions it seems that the Security Council "blacklisting"of people violates the organisations obligations as regards human rights fundamental principles and is contrary to states obligations under human rights treaties.

2. Consolidated lists and human rights protection.

In this chapter we examine how the measure of "blacklisting" disregards fundamental rights such as the right of access to a court/the right to fair trial and the right to an effective remedy . We look also at the effect of anti-terrorism lists on other civil and political rights under the prism of the immunity of Security Council's decisions.

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[213] For instance, Article 1(1) and (3): Actions taken under the Charter must be "in conformity with the principles of justice and international law." and one of the purposes of the UN is to promote and encourage respect of human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. See also Article 13(1), 55(c), 56, 62(1), 76 (c) of the Charter.

[214] See also, I. Cameron, "UN targeted sanctions, legal safeguards and the European Convention of Human rights", supra p. 167

[215]See, Michael Bothe, SC's targeted sanctions against presumed terrorists: the need to comply with human rights standards, supra, p 542, see also, E.Roukounas, "International Law", volume 1, publishing Sakoulas, 2004, p.76.(in greek)

[216] See, Mielle Bulterman, Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities. LJIL, 19, 2006, p.768, Case T-306/01 Yusuf and Al Barakaat v Council and Commission (2005), Case T-315/01 Yassin Abdullah Kadi v. Council of the European Union and Commission (2005).

[217] See, Clémentine Olivier, Human rights law and the International Fight Against Terrorism: How do SC Resolutions Impact on States" Obligations Under International Human rights Law? NJIL, 73, 2004, p. 413

a. Judicial safeguards; the right to fair hearing and the effective remedy.

Both the right to be heard and the right to effective judicial review constitute fundamental rights that are part of the general principles of international law[218] and they are also included in human rights treaties both in international and regional level as well as to the UNDHR. They are further considered as "a solid body of customary human rights law."[219]

According to human rights law all individuals must enjoy some judicial safeguards that can be summarized as follows[220]:

(i) There must be a general normative standard for any measure affecting individual rights;

(ii) Such measures must be based on reliable evidence;

(iii) The individual must have an effective remedy against such measure, which implies:

(a) The measure must be notified in an understandable way;

(b) The individual must have an opportunity to appeal a negative decision;

(c) In the last resort, an independent and impartial body must be able to review the measure;

(d) The body charged to review must play a really decisive, not merely advisory role.

In fact, any limitation of the right or freedom of an individual must be determined by law and only for the purpose of respect of the rights and freedoms of others, for the reasons of mortality, public order or general welfare in a democratic society. Under international human rights law, "determined by law" means that there is a law clear and precise enough that permits to individuals to know when and under which circumstances a derogation of their rights might be occurred. Furthermore, the principle of equality demands that everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. This means that if an individual is prosecuted for a criminal offence it must be by way of a fair trial, guaranteeing all rights of defense leading either to the conviction or acquittal of the accused. A fair trial involves, *inter alia*, at the appropriate evidential requirements, an impartial, independent and competent court, the respect of the principle of presumption of innocence, etc.

For reasons of transparency and the principle of equality of arms between the parties, the person affected must have a hearing before the penalizing measure is taken. Further he/she must be informed about the measure that has been taken against him/her. For that purpose, the publication of the *Consolidated lists* on the

[218] Article 14 ICCPR, Article 6 ECHR, Article 10 UDHR and Article 25 ACHR.

[219] See Michael Bothe, SC's targeted sanctions against presumed terrorists: the need to comply with human rights standards, J.I.C.J, volume 6, (3), 2008, p. 549.

[220] See, Michael Bothe, SC's targeted sanctions against presumed terrorists: the need to comply with human rights standards, J.I.C.J. Journal of International Criminal Justice, 6(3), 2008, p. 548. See also, Michael Bothe, Targeted Sanctions and Due Process Initiative, discussion paper, on supplementary guidelines for the review of sanctions committees" listing decisions explanatory memorandum, p. 3, and Jessica Almqvist, A Human rights critique of European judicial review: countering terrorism sanctions, ICLQ, 57, 2008, p. 308.

internet by the Security Council is not enough. Therefore, a formal notification will have to be sent to the individual either by the Sanctions Committee or by the state of the citizenship. That notification provides legal certainty and would constitute a reasonable basis for any review procedure. Therefore the notification must be in a language that the individual can read in order to be able to understand the reasons of the decision; that is the evidence on which it is based and the factual and legal evaluation.

There is one fundamental balancing problem involved in this requirement, namely the treatment of information which is confidential for legitimate reasons of public interest. The basic rule should be that the person affected or his/her attorney must have access to any information which is essential for the decision. He/she must be able to evaluate or refute that evidence. If this is not possible, the information must at least have been scrutinized by an impartial and independent third party, e.g. a judge. Therefore, a regulation for Security Council listing decisions must contain appropriate rules on the treatment of confidential information. Evidence which cannot be scrutinized by the affected individual may not be used against him/her. [221]

Last but not least, everyone has a right to an effective and judicial remedy. This right has an autonomous character but it is usually used in combination with other fundamental rights. The core of the right to an effective remedy is the judicial review of the decision taken by an executive or administrative authority. In the case of the international organizations that is a difficult matter. It is almost impossible for the SC to establish an independent Court to review its decisions. Nevertheless, an alternative solution which would guarantee the transparency of the listing procedure and the review of list decisions providing essential guarantees of fairness, review request etc, must be found.

In the course of the political debate in the framework of the UN, it has been argued that such procedures would underestimate the binding nature of the SC decisions and the effectiveness of such measures. We find, however, such arguments unfound since the possibility of challenging SC decisions is only elaborating the limitation of the powers of SC which are already inherent in the Charter and, *inter alia*, adhere to the principle of the rule of law. [222]

It is true that human rights treaties as well as the UNDHR are formulated to address states. However, because of the continuing development of the relation between international organizations and individuals we argue that it is essential that international organization's decision applying to individuals provide an equivalent protection. It is true that the Security Council "listing sanctions" does not fit with the traditional trial procedures in national level and it doesn't offers any judicial guarantees to the listed persons and any discretionary "benefits" are obviously unsatisfactory. The listing criteria are interpreted and applied by the political body which devised them, the Sanctions Committee.[223]

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[221] Michael Bothe, SC's targeted sanctions against presumed terrorists: the need to comply with human rights standards, J.I.C.J. Journal of International Criminal Justice, 6(3), 2008, p. 549.

[222] See Paul James Cardwell, Duncan French, Nigel White, Case Comment Kadi v Council of the European Union (C-402/05 P), ICLQ, 58, 2009.

[223] We could argue, here, that SC act as legislative –executive- and judicial power notwithstanding the traditional model of the separation of powers presented as the idea of the *Rechtsstaat* ("Etat de loi", "state

Regarding the delisting procedure, there is no judicial body which reviews the decision.[224] The delisting procedure is similarly a purely political mechanism. The delisting procedure can, so far not be initiated by the individual. Even if after 2006 the individual can ask to its government to the Focal Point (see above) to be delisted it does not participate to the proceedings and has no right of appearance, representation or even of leading written evidence.[225] The procedure instead still relies on the right of diplomatic protection of nationals. But the state of nationality or residence may not be interested in intervening. And the delisting procedure contains no possibility for the petitioning state to compel the production of sufficient information, or any information whatsoever, justifying the blacklisting of one of its nationals or residents. The designating state can refuse to provide any information, and continue to block the removal from the list and the petitioning state cannot force a determination of the issue before some objective body. Further even if the blacklisting procedure has encounter serious criticism because of the vagueness of the criteria and the mistakes that can be acquired, no judicial remedy is possible. The problem of challenging Security Council's decisions raised ones again by creating new questions about the lawfulness of adopted measures.

The necessity of the review under a judicial authority and the right to effective remedy must also be examined in relation with the effect of Security Council's targeted sanctions on other substantial human rights such as the freedom of movement, the right to private and family life, reputation issues and property rights.

b. *'Black listing'* interferes with other fundamental rights.

Travel sanctions and freedom of movement

Under human rights law everyone has the rights to liberty of movement and to leave any country, including his own.[226]

States have the right to impose restrictions or specific conditions to the entrance of strangers to their territory, such restrictions could be, for example, special licenses for entrance-visas. Travel bans, which operate at both the point of entrance and exit, can interfere with the liberty of movement if a person subject to a ban is attempting

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of law") in CoE report, "The European Convention on Human Rights, Due Process and United Nations SC Counter-Terrorism Sanctions" by Professor Iain Cameron, p.9 Further, ECtHR has found that in cases of concurrence of the legislature with the executive power there might be a violation of the right of access to the Court. See, e.g. Anagnostopoulos and others v. Greece, No. 39374/98, 7 November 2000 and Kutic v. Croatia, No. 48778/99, 1 March 2002. See also, Jessica Almqvist, A Human rights critique of European judicial review: countering terrorism sanctions, ICLQ, 57, 2008, p. 316.

[224] Resolution 1390 (2002) provide a reviewing procedure every 12 months in order to delist persons that SC judge as unnecessary to implement sanctions. Nevertheless, and as the report of the Monitoring Team of the Sanctions Committee reveals this procedure does not work effectively only one person has been delisted through this process almost since the adoption of the resolution. On the review mechanism see Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2007/677, 29 November 2007, § 39-47.

[225] COE Report, United Nations SC and European Union blacklists Committee on Legal Affairs and Human Rights, Rapporteur: Mr Dick Marty §39.

[226] Article 12 ICCPR, Article 2 Protocol 4 ECHR, Article 22 ACHR, Article 13 UNDHR

to enter his/her state of nationality and he/she is refused. Even in these circumstances, states could impose restrictions for the purpose of national security or public order as long as these measures are proportionate and necessary and they addressed to the correct person.[227] However, as it is mentioned above the lack of review mechanism constitutes a violation of the liberty of movement since there is no judicial to examine neither if the travel ban to the specific individual is proportionate and necessary nor if sanction was implemented to the correct person.

Travel sanctions can also interfere with the right of life or the prohibitions of torture when an individual is denied traveling when seeking for instance, asylum or he/she needs medical treatment abroad. However, these occasions have been already handled with the adoption of the resolution 1452 (2002) concerning the exceptions for humanitarian reasons.[228]

Travel sanctions have also affect the right to family life[229]. When, for example, a blacklisted person's family lives abroad, and the person is denied traveling there he/she can not enjoy the right to have a family life and everything that includes. Additionally the prohibition of visiting immovable property in European States can be raised according to the European Court of Human Rights'(ECtHR) jurisprudence questions under Article 8 of the of the Convention.[230]

Reputation and access to court

It is recognized under human rights law[231] that the right to reputation is a civil right and that everyone is protected by law against interferences with the honor or his/her reputation. In that case "protected by the law" means that any suspect can addressed to the court and ask for an effective remedy in case of defamation.

It is also accepted that accusation for participation to criminal acts such as terrorism consist an attack to someone's reputation. Nevertheless, at national level, financial or travel restrictions do not constitute defamation, as such, because such measures will be implemented only for a short term. The issue of guilt or innocence will be sooner or later dealt by the national judge and the decision of the Court will resolve any doubts.

[227] The Monitoring team to its last report noticed that travel bans have been imposed to wrong persons because of "mistaken identities." Generally, terrorist suspects use false travel papers and it is difficult to find them and stop them in the borders. Ninth report of the Analytical Support and Sanctions Monitoring Team, submitted pursuant to resolution 1822 (2008) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2009/245, 13 May 2009.

[228] S/RES/1452 (2002), 20 December 2002, Article 1.

[229] Mr Marty goes further and notes to its report issued for the PACE that "The comprehensive travel restrictions found in the blacklist regimes potentially violate individuals" rights to life, to health, to private and family life, to reputation, to freedom of movement and to freedom of religion. Supra , §10.

[230] Iain Cameron, UN targeted sanctions, legal safeguards and the European Convention of Human rights, supra, p. 187

[231] Article 17 (ICCPR), Article 8 (ECHR), Article 11 (ACHR).

With "black lists" the situation differs. First of all, because the same organ- the Security Council- decides and implements the sanction without the intervention of any judicial body to examine the evidence and decide on the guilt or innocence. Secondly, because the measures adopted by Security Council tend to become permanent[232] and finally because there is no right to challenge international organizations' decisions before a Court and the review procedure is not available. According to the report of the Monitoring Body of the Sanction Committee, the Secretariat circulated to the Committee in March 2007 a list of 115 names that had not been updated for four or more years. Very few were selected for review and ultimately, after all the procedures outlined in the Committee Guidelines had been completed, including efforts to obtain information from other relevant States, the review ended without any changes to the List. [233]

In a case connected with the Security Council's targeted sanction to members of UNITA, *Zollmann v. United Kingdom*[234] alleged before of the ECtHR , the Court decided that the case was inadmissible because of the immunity of the British Parliament so the applicant could not challenge its decision. If the Parliament did not enjoy immunity then it was possible for the Court to consider that the "blacklisting" consists an attack to a person's reputation. It is not the competence of the Court to decide if a person was defamed by the charges or not. Nevertheless, the Court can decide that a person accused for participating in criminal offences such as terrorism has the right for an appeal before national courts in order to start defamed process otherwise a violation of article 8 is occurred. The national court will ask for evidence or reasonable grounds for believing the accusation. If national authorities provide sufficient evidence the suspect will convinced and there will not be further issue of defamation. However the situation with black lists differs since it is the UN Security Council which is attacking individuals' reputation, but, problematically, the UN as an organization is entitled to immunity.

Private and family life

Targeted sanctions, such as freezing accounts, raise concerns in regards with the right to private and family life as it is included in human rights treaties and the UNDHR.[235] It is argued that the freezing of accounts has only a minor impact on the financing terrorism since terrorism is mainly financed by illegal activities and non-official or secret accounts. Nevertheless, financial sanction has devastating affects to the private and family life of the targeted individual since it is impossible to finance the basic needs of his/her family. If someone loses control of his or her bank accounts or other income or assets he or she will not be able to pay for the living cost of the family including education for the children, food, medical treatment etc. It is important to point out, however, that with resolution 1390 (2002) the living costs

[232] Consolidated lists do not have any time limitation so persons" reputation is attacked by the long lasting stay on the list. Theoretically, people will be on the list as long as they are considered as threat to international peace and security. CoE PACE in its Resolution 1597 of 23 January 2008 has clearly stated that: "The "blacklisting" procedure should be limited in time. It is unacceptable that persons remain on the blacklist for years, whilst the prosecuting authorities, even after a long investigation, have not found any evidence against them." §5.3

[233] Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to SC resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities.

[234] ECtHR, Zollmann v. United Kingdom, no. 62902/00

[235] Article 17 (ICCPR), Article 8 (ECHR), Article 11 (ACHR). Article 12 (UNDHR).

and financing of other basic needs were excluded from the sanction if "humanitarian reasons" could be shown.[236]

Property rights

Under human rights law states may legitimately deprive a person of his/her property for if it is in the public interest or for reasons of national security and of course in accordance within reasonable grounds.[237] National authorities might be asked to justify such measures and demonstrate their proportionality and necessity. Dick Marty's report for the Parliamentary Assembly of the Council of Europe has revealed that 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).[238]

The ECtHR has specified in its jurisprudence that a confiscation of property used in crime, is not a denial/deprivation of property but rather a "control on use".[239] That means that a simple freezing will not likely be seen as a deprivation of property. Nevertheless, taking into account that there is no time limit on Resolution 1390, the freezing can be of unlimited duration, and that will presumably lead to a deprivation. [240]

But even if we assume that the measure applied is not of excessive lenght, in order to examine the compliance of freezing accounts sanctions with the right of property, we have to examine the necessity and proportionality of the measures in relation to the aim; the maintenance of the peace and security. It is evident that in that case the balance between the temporary freezing of accounts and the international peace and security is coming down on the side of the aim that has a superior importance for general good.

This approach could lead to useless conclusions. It seems more logical, nevertheless, to examine whether there is sufficient proof of involvement in terrorism justifying the measure. This demands an independent body applying a specific, concrete test of proportionality. This means that is necessary to examine whether the specific measures directed against the named individuals are necessary in the circumstances to advance international peace and security, and if so, whether the gain to international peace and security by freezing these particular persons" assets is proportionate to the infringement of their property rights.

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[236] Nevertheless, the humanitarian exception depends on the reflex of the national authorities to act as soon as possible in order to permit targeted person to be able to finance their basic needs.

[237] Further sates can deprive from people property even for reasons of contributions or penalties but as in national level individuals have the right to appeal the national courts can examine the legitimacy of the purpose of the deprivation as well as the necessity and proportionality of the measure. Article 1Protocol 1 of the ECHR.

[238] COE Report, United Nations SC and European Union blacklists Committee on Legal Affairs and Human Rights, Rapporteur: Mr Dick MARTY,§11

[239] AGOSI v. UK, 24 October 1986, A/108. One question is whether tougher standards ought nonetheless to apply as regards freezing the property of family members: is this property being frozen because it is suspected that the main target could otherwise easily circumvent the sanctions, or is this property being frozen to punish the family member for being a family member? p. 15

[240] "The longer the freezing continues, the more the measure should be seen as a denial/deprivation of property." COE report, "The European Convention on Human Rights, Due Process and United Nations SC Counter-Terrorism Sanctions", by Professor Iain Cameron, p. 16

This would not involve questioning the determination of the Security Council that there is a threat to international peace and security: only the proportionality and necessity of a measure adopted by a subordinate body, the Sanctions Committee, against a particular individual. The proportionality test also requires posing the questions as to whether the means chosen are effective and can lead to the achievement of the goal (preventing, or making more difficult terrorist financing) as well as whether these means are proportionate to the aim to be achieved.

Having said this, there are many doubts as to whether the sanctions have any significant effect on terrorist financing.[241] Even the Sanctions Committee admitted in one of its reports that the freezing sanctions had only a "limited or no effect" on fighting the financing of terrorism because of the changing nature of Al-Qaida and the rigidity of the list and the travel ban had also "little or no effect" on terrorist activities.[242]

On the other hand academics and independent bodies argue that blacklisting is ineffective in terms of stopping terrorist attacks.[243] In the long term, curtailing the financing of terrorism can only be achieved by identifying the participants in terrorist networks and monitoring financial flows. Terrorist attacks are relatively cheap to perpetrate. However, money is undoubtedly needed for training camps and maintaining terrorist groups. But blacklisting will not facilitate the identification of the networks financing such groups and the means by which this is done. On the contrary, blacklisting will usually make the process of detection much more difficult[244]. In any case that which must firstly be achieved is a lasting peace in Middle East and then fight the roots of terrorism. Otherwise, "charity" will continue to finance terrorist groups since it seems that no one is willing to control or monitor its purposes.[245] Because of the lack of control of Islamic Charity, and other terrorist flows the UN sanctions are, as Professor Cameron noticed, "value for money".[246]

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[241] See for an evaluation on financial sanctions on terrorists, Thomas J. Biersteker, Sue E. Eckert, Nikos Passas, Countering the financing of terrorism, Taylor & Francis, 2007, p. 225

[242] S/2004/1039, § 24 p.6,7, see also, "The fact remains, though, that terrorist financing follows no clear pattern, particularly for local cells which are raising money to support their own activities. Such cells are as likely to use their own money, legally acquired, as they are to make fraudulent transactions. Even among these, it is hard to spot a terrorist intent rather than a mere desire to make money. If banks are too proscriptive in deciding what to examine as a possible case of terrorist financing, they are just as likely to miss the use of new methods as they are to discover the use of old ones. Terrorists and their financiers will employ whatever method seems the easiest and most secure to raise, move and store their money, according to their circumstances." S/2008/324, 34 Mai 2008, §53, p20

[243] See for instance, A Bianchi, "Assessing the Effectiveness of the UN SC's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion" (2006) 17 EJIL 915-916; I. Cameron report for the CoE, "The European Convention on Human Rights, Due Process and United Nations SC Counter-Terrorism Sanctions", supra, p. 18; Walter Perkel, Money Laundering and Terrorism: Informal Value Transfer Systems, American Criminal Law Review, Vol. 41, 2003, p.13

[244] I. Cameron, Ibid, p. 18 and I. Cameron, "UN targeted sanctions, legal safeguards and the European Convention of Human rights", p. 185

[245] J. Gunning, Terrorism, charities and diasporas: contrasting the fundraising practices of Hamas and Al – Qaeda among Muslims in Europe, p. 23 in Thomas J. Biersteker, Sue E. Eckert, Nikos Passas, Countering the financing of terrorism Taylor & Francis, 2007

[246] Ibid, p. 18

As we have seen at international level there is no provision to appeal to the court or for effective remedy against the UN Sanctions regime. International organizations enjoy immunity and for the moment scenarios concerning the challenging of international organization's decision in front of an international court like the ICJ or any relevant judicial international authority doesn't seem to be the cases. The absence of any legal protection at UN level puts pressure on national and regional courts to offer legal assurances to those affected by UN targeted sanctions even if that means that by claiming jurisdiction over questions concerning the lawfulness of the UN financial sanctions regime they may endanger the effectiveness and the supremacy of the UN system.

B. The "black lists" under judicial scrutiny.

While, it seems difficult in a regional context –if not impossible- for supranational courts such as the European Court of Justice (ECJ) to challenge Security Council resolutions directly, it may be possible to review Community Regulations that implement SC's resolutions at national or EU level. In fact, the Court of First Instance failed to assume the responsibility to examine the compliance of Community Regulations with community human rights standards in the Yusuf and Kadi's cases. Three years later, the ECJ annulled the decision of the CFI and concludes that the sanction imposed by the Council's Regulation, which implements SC Resolution, violates the human rights of the applicants.

1. Yusuf and Kadi "challenging" Security Council sanctions; the background

Mr. Yusuf, a Somali living in Sweden, and the association Al Baraakat were listed by the Sanction Committee on 2000. Mr. Kadi, a Saudi Arabian businessman was also listed by the Sanctions Committee in 2001. At Community level the sanctions were implemented by the Community Regulation 881/2002, which was challenged before the CFI and ECJ. Before the examination of the cases we elaborate how Security Council's Resolutions against Taliban, Bin Laden and his associated have been implemented by European Union.

a. The implementation of the Security Council sanctions in European jurisdiction.

The Council of the European Union issued a set of regulations and decisions implementing the UNSC sanctions regimes. The EU acted under both second and third Pillar and under the European Community Treaty, the first Pillar. The European Council adopted implementing acts as early as November 1999, and then regularly

adopted updates in order to follow the 1267 Committee's updates.[247] The European measures include the freezing of funds and of other financial assets of Osama bin Laden and individuals and entities associated with him, as designated by the 1267 Committee. UN sanctions were further implemented by the European Council with *Regulation* (EC) No 467/2001. On 27 May 2002, in order to implement Security Council Resolution 1390 (2002) the European Council adopted Common Position 2002/402/CFSP, concerning restrictive measures against Osama bin Laden, members of the Al Qaida organization, the Taliban and other individuals, groups, undertakings and entities associated with them.[248] On the same day, the European Council adopted *Regulation* (EC) No 881/2002[249], repealing its previous regulations on the subject.

At the same time, in the context of the implementation of SC financial sanctions, the EU also adopted Common Positions 2001/930/CFSP and 2001/931/CFSP and Regulation 2580/2001 in order to implement the 1373 SC Resolution. Even if that last resolution does not provide any list, it leaves to member states the right to identify terrorists and apply the sanctions. In regional level this is the job of the Council to establish its own list in order to implement financial sanctions as these are provided in SC Resolutions.[250]

The EU regulations implementing UNSC resolutions apply procedures very similar to those found in the UN documents, making the above discussion of the content of the

[247] In order to impose the sanctions established under SC Resolution 1267, the Council adopted on 15 November 1999 Common Position 1999/727/CFSP, concerning restrictive measures against the Taliban. The measures were subsequently defined by the Council in Regulation (EC) No 337/2000 concerning a flight ban and the freezing of funds and other financial resources in respect of the Taliban of Afghanistan. In February 2001, the Council adopted Common Position 2001/154/CFSP, which implemented UN SC Resolution 1333 (2000). Steve Peers, "EU responses to terrorism", International Comparative Law Quarterly, volume 52, January 2003, p. 237.

[248] Council Common Position 2002/402/CFSP of 29 May 2002 concerning restrictive measures against Osama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP *[2002] OJ* L 139/4. Art 3 of the common position prescribed the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with SC resolutions 1267 (1999) and 1333 (2000). In accordance with para 3 of Resolution 1390 (2002), the measures adopted must be maintained and then reviewed by the SC 12 months after their adoption, at the end of which period the Council must either allow those measures to continue or decide to improve them.

[249] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation 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 *[2002] OJ L 139/9.*

[250] 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. CoE PACE, Marty's report § 6.

text of UN sanctions applicable to the EU as well.[251] Whilst it does not fall within the scope of this paper to compare the implementation of the sanctions by different bodies, we have to underline that initially, EU lists provided more judicial safeguards than UN lists. In fact, the Common Position 2001/931 provided criteria for being in the list such as that it should be a decision from a judicial or equivalent competent authority and the Regulation 2580/2001 provided a reviewing provision. After subsequent changes concerning the information needed for being listed (statement, information summaries etc) and the de-listing procedure (establishment of the Focal Point with Resolution 1735) it seems that UN processes protect in a more sufficient way human rights than EU procedures.[252]

At this point it is necessary to refer that within the EU list an important distinction is occurred. The suspects are distinguished as "endogenous" and "exogenous"[253]. The first category included terrorists who are acting into the borders of the Union such as ETA (the Basque nationalist organization Euzkadi TaAskatasuna) activists and the Northern Ireland terrorists[254] . The second category includes terrorists operating outside EU. Only exogenous terrorists are subjected to the regime of Regulation 2580/2001 (concerning the implementation of the 1373 SC Resolution). "Endogenous" terrorists, fall outside the scope of this regulation and they are subjected to financial sanction measures adopted directly by the individual EU member states.[255] This distinction has further consequences to judicial protection of suspects. Endogenous suspects can only addressed their national courts and challenge the measures taken by their authorities in order to apply European position.[256] Further, they can address the ECtHR challenging the lawfulness of the measures adopted by their authorities. "Exogenous" suspects can address European Union Council's decisions before the European Courts (CFI and ECJ)[257] and they can also bring action against the national authorities that have implemented the

[251] For more information about the implementation of UNSC Resolutions in the European jurisdiction see. I. Cameron, "European Union anti-terrorist blacklisting", HRLR, volume 3, number 2, 2003, p. 225-256. Mehrdad Payandeh and Heiko Sauer, European Union: UN sanctions and EU fundamental rights, IJCL, International Journal of Constitutional law,Volume 7, Number 2, pp. 306 – 315, 2009.

[252] EU has not further developed de-listing procedures. See PACE, Marty's report, supra, §41-44.

[253] The terms are used by Julia Hoffmann in "Terrorism Blacklisting: Putting European guarantees to the test", supra p. 548. An alternative term is used by Mielle Bulterman in Fundamental Rights and the United Nations Financial Sanction Regime; the term is referred to "intra EU" and "extra EU" terrorists.

[254] All endogenous suspects are marked with an asterisk (*) in the Annex to the Common position 2001/931/CSFP.

[255] To be clearer, terrorists from the European perspective can be subject of two different regimes and that depends from their characterization as endogenous or exogenous terrorist. The first regime is implemented through instruments under the First Pillar which results in financial sanctions of exogenous suspects and the secord regime is implemented by means of instruments under the Third Pillar demanding states to take specific measures and cooperate concerning endogenous suspects.

[256] Since financial sanctions against "intra-EU" terrorists are not implemented through a regulation (under first pillar) but directly by the EU member states (under third pillar), these persons and entities do not have any right to bring a direct action before the CFI. They can only challenge the national measures implementing the Common Position before a national court. That was also clear with the decision of the CFI in Sagi's case where the CFI clearly argued that there is no effective remedy under the community jurisdiction even if Segi was part of the EU list. See Case T-338/02. §33-34. See also, case Segi and others v. Council and Commission, C-355/04, § 51-56.

[257] The Decisions concerning the exogenous terrorist have been adopted under the Fist Pillar which gives the widest judicial protection to individuals; since they are directly and individually affected they can bring direct action before the European Courts under Article 230 (4) of the EC Treaty. See J. Hoffmann, supra, p.545

Community regulations concerning relevant sanction. It raises here another controversial debate concerning the supremacy of community law and states obligations under the European Convention of Human rights (ECHR), the solution to this problem has been addressed, therefore, by the ECHR in the *Bosphorus case* even if it has been subject of criticism.[258] Even if this is an important issue[259] we focus in this paper only to question of the violation of human rights by *the black listing* and how this was challenged before a regional court in the case of *Kadi v. Council and Commission*[260] and *Kadi and Al Barakaat v. Council* and Commission.[261]

b. The difficult questions posed to the CFI in Yusuf and Kadi cases.

Mr. Yusuf and the Al Barakaat International Foundation were listed among two others Somalians on 9 November 2000 by Committee 1267. All three persons were living in Sweden. Al Barakaat is an association which facilitates money transferring from Sweden to Somalia. The financial sanctions against them were effected within the EU by means of the adoption of Regulation 2199/2001.30 This Regulation was challenged by the targeted persons and entity before the CFI. As they were later included in the sanctions list annexed to Regulation 881/2002, the latter Regulation (the contested regulation) became the subject of the case before the CFI. In the meantime, while this case was pending before the CFI, the Swedish authorities intervened for the removal of the applicants from the UN list. On 26 August 2002 Committee 1267 decided to delist two of the subjects. On the request of these applicants their names were removed from the register of the case before the CFI. In the mean time and while *Yusuf* case was pending before the CFI a similar action was brought by Mr. Kadi on 18 December 2001.

Kadi is a Saudi Arabian businessman who was put on the UN sanctions list by Committee 1267 on 19 October 2001. In European level, the financial sanctions imposed up on him with EC Regulation 2062/2001. While he was then listed to the annex of the Regulation 881/2002, this last regulation became the subject of the review before CFI.

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[258] This was the case in the famous affair Bosphorus v. Ireland, no. 45036/98, 30 June of 2005. The Court in its judgment accepted that the system of fundamental rights protection in the Community is equivalent to that under the European Convention and further accepted that Ireland needed to act in accordance with its Community law obligations. For further analysis on the issue and critic on the decision of the Court see, S. Peers, "European Court of Human rights. Limited responsibility of European Union Member States for Actions within the Scope of Community Law", 2, European Constitutional Law Review, 2006, p. 443-456.

[259] For an analyses concerning the *Black lists* and the obligations of states under ECHR see , COE report, "The European Convention on Human Rights, Due Process and United Nations SC Counter-Terrorism Sanctions" by Professor Iain Cameron. Iain Cameron, UN targeted sanctions, legal safeguards and the European Convention of Human rights, NJIL, Nordic Journal of International Law, 159-214, 2003. Julia Hoffmann, "Terrorism Blacklisting: Putting European Human rights Guarantees to the test", Constellation, Volume 15, number 4, 2008. S. Peers, "European Court of Human rights. Limited responsibility of European Union Member States for Actions within the Scope of Community Law", 2 European Constitutional Law Review, 2006, p. 443-456.

[260] Case T- 253/02.

[261] Joined Cases C-402/05 P and C-415/05 P

Applications in both *Yusuf* and *Kadi* were launched at the end of 2001. It thus took the CFI four years to deliver a judgment. During that period the Swedish authorities were providing social assistance to the applicants. It did not matter in that respect that the social assistance so provided was illegal under the Swedish and Community law measures implementing the UN financial sanctions regime. As regards the non-material damage, that is, the harm to the applicants" reputation, honor and dignity, the president held that suspension of the contested regulation might remedy this non-material damage, but no more than would annulment of that regulation in the main action.

The applicants sought the annulment of the regulation by claiming that the Community measures imposed on them were invalid and that they violated their fundamental rights of property and of fair hearing. Nevertheless, their appeal before CFI led the Court to examine other questions until reaching the decision. Firstly, CFI had to face two important issues; one to determine whether there was a Community competence to adopt the measures implementing the UN sanctions[262] and then to decide on a rather delicate issue, concerning the supremacy of the obligations deriving from the UN Charter over any other international obligation such as community norms. Secondly, the CFI had to decide on the issue concerning the protection of fundamental rights in the context of the Community legal order. The applicants claimed that the financial sanctions imposed upon them infringed their fundamental rights. According to established case law fundamental rights form part of the general principles of Community law, the observance of which the Court of Justice of the European Communities (ECJ) and the CFI ensure.

In order to determine to what extent it is competent to review the lawfulness of the contested regulation, the CFI examined first the relationship between the international legal order under the UN Charter and the Community legal order. The CFI recognized the binding nature of the obligations deriving from the UN Charter for the European Community. It observed that from an international law perspective the obligations of the UN member states under the UN Charter prevail over every other obligation of domestic law, or of international treaty law, including the obligations under the European Convention on Human Rights (ECHR) and under the EC Treaty. The Community itself, however, is not a party to the UN Charter. According to the CFI, the EC is not bound by the Charter under general international law, but by virtue of the EC Treaty itself.[263] Further, EC is obliged not to contravene its member states' obligations under the Charter. The CFI came to this conclusion applying the principles formulated by the ECJ in the celebrated *International Fruit Company* case[264] concerning the obligations of the Community under the GATT.[265]

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[262] This was not self-evident as there is no provision in the EC Treaty which explicitly allows the Community to adopt financial measures against specific persons and entities.

[263] The Court 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" See, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities,* supra, § 243, 253 and *Kadi v. Foundation v. Council of the European Union and Commission of the European Communities.* T-315/01, § 182-190.

[264] *International Fruit Company NV, Kooy Rotterdam NV, Velleman en Tas NV and Jan Van den Brink"s Im- en Exporthandel NV v Produktschap voor Groenten en Fruit,* joined cases 21 to 24/72, 12 December 1972.

Having established that the European Community is bound by the obligations of the EU member states under the UN Charter, the CFI examined if it has the jurisdiction to judge the legality of the Community regulation implementing the financial sanctions imposed by the UN against the applicants. The Court would judge, indirectly, if the Security Council's measures as adopted by the European Regulation and implemented in the European jurisdiction, infringe the fundamental rights of individuals, as protected by the Community legal order. In order to avoid that, the CFI concluded that it has no jurisdiction to review the lawfulness of the Regulation on grounds of general principles of human rights as protected in the EC legal order but it did not stopped there. It considers itself to be competent to check, indirectly, the lawfulness of the resolutions from the perspective of *jus cogens*, "understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible. The CFI after reviewing the arguments of the applicants concerning the right to property, the right to be heard and the right to effective remedy, concluded that there is no violation of *jus cogens*.[266]

The CFI used the supremacy of international law under community principles in order to avoid examining the compatibility of SC decisions with the human rights protection in Community level. As a consequence, Mr Kadi and the foundation Al Barakaat brought appeals against those judgments before the Court of Justice in 15 and 21 November 2005. Mr. Yusuf had been delisted after strong negotiations between Sweden and USA who had asked for the placement of Mr. Yusuf to the list.

In January of 2008 and while the case was pending before the ECJ, Advocate General Maduro issued a rather devastating opinion as regards the UNSC[267] concerning Kadi's appeal to the ECJ. He clearly disagreed with the decision of the CFI that it has limited jurisdiction to review the EC Regulation implementing the UNSC Resolution since international law can take effect to the constitutional principles of the Community including human rights principles. He found that the Regulation interfered with the human rights of the applicant and asked ECJ to annul the CFI's decision.

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[265] In that case the ECJ held that the EEC – although not a contracting party – was bound by the obligations under the GATT. Nevertheless, the analysis provided by Mehrdad Payandeh and Heiko Sauer reveals that the GATT reasoning was based on the blanket transfer of the member states " powers concerning international trade to the Community under the TEC. Such a transfer of powers has not occurred with respect to the fight against terrorism. As a result in the case of fighting terrorism EC is not directly bound by UN Charter since Union Members States haven"t transfer their obligations under UN Charter to the Community. Mehrdad Payandeh and Heiko Sauer, European Union: UN sanctions and EU fundamental rights, IJCL,Volume 7, Number 2, 2009, p.311

[266] Concerning the arguments used by the Court in order to conclude that there is no violation of *jus cogens* see, Piet Eeckhout, Community Terrorism Listings, Fundamental Rights,
and UN SC Resolutions. In Search of the Right Fit, supra p.187 and Mielle Bulterman, Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities, supra, p. 771.

[267] Available at
http://curia.europa.eu/jurisp/cgibin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=Kadi+v+Council+and+Commission&domaine=&mots=&resmax=100&Submit=Submit

2. The joined cases of Kadi and Al Baraakat v. European Council and European Commission and beyond.

After the failure of the CFI to challenge even indirectly the compatibility of SC sanction with human rights standards as they are protected by European law, Kadi and Yusuf made an appeal on the same grounds to the ECJ. While the case was pending, Yusuf delisted thanks to the hard pressure exercised by the Sweden government to US administration. ECJ with its decision on 3 September 2008 on the joined cases of Kadi and Al Baraakat annulled the previous decision of the CFI.

a. The innovative decision of the European Court of Justice

While the ECJ concurred, in principle, with the CFI's ruling that the Council was competent to adopt the contested regulation,[268] it vigorously objected to the CFI's conclusions with regard to the regulation's compatibility with EU fundamental rights.

The ECJ underlined the autonomous character of the Community legal system and the fact that no international agreement can be contrary to the constitutional values of this system. Regardless the primacy of international law, Security Council resolutions might, in the hierarchy of norms within the Community legal order,[269] prevail over acts of secondary Community law. However, they could not prevail over primary law such as general principles, including fundamental rights.[270]

Further, it argued that the Community is based on the rule of law and neither its Member states nor its organs can avoid the review of the conformity of their acts with the Treaty. ECJ concluded that the Community courts must ensure the review of the lawfulness of all Community acts[271] in the light of the fundamental rights which constitute an integral part of the general principles of the Community law and must be respected by any Regulation even those designed to give effect to resolutions adopted by the Security Council.[272] Consequently, the Court sets aside the judgments of the CFI that says that the CFI it has no jurisdiction to review the Regulation 881/2002.

Next, the Court examined the claims of the applicants concerning the violations of their rights. It concluded that, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities whose funds are to be frozen, it must be held that the rights of the defense, in particular the right

[268] Joined Cases C-402 & C-415/05 P, Kadi v. Council of the European Union, and Al Barakaat Int'l Found. v. Council of the European Union, 2008 E.C.R. 299, § 158 – 236.
[269] See the Treaty of the European Community, 10 November 1999, article 300.6-300.7
[270] Joined Cases C-402 & C-415/05 P, Kadi v. Council of the European Union, and Al Barakaat Int'l Found. v. Council of the European Union, , § 305 – 309
[271] It is not for the Community judicature, under the exclusive jurisdiction provided by article 220 EC, to review the lawfulness of such a resolution adopted by an international body but rather to review the lawfulness of the implementing Community measures. Ibid §286-288.
[272] Ibid, 326

to be heard, and the right to effective judicial review of those rights, were patently not respected.[273]

The ECJ decided that the right of defense, in particular the right to be heard, had not been respected since neither the Regulation nor the Common Position (2002/402) provide a procedure for communication of the evidence justifying the inclusion of the names of the persons concerned in the list either the time of the inclusion or later.[274] Furthermore, the Council did not communicate the applicants the evidence used against them to justify the measures imposed on them. Given that the applicants had not been informed about the evidence against them and taking into consideration the relation between the right of the defense and the right of the effective remedy, they have also been unable to prepare their defense with regard with the evidence before the Community judicature and they have been unable to undertake the review of the lawfulness of that regulation in so far as it concerns those persons and entities, with the result that their right to an effective legal remedy has also been infringed[275].

The Court further concludes that taking into account the "public interest as fundamental to the international community" in accordance with the Charter of UN, against the threats to international peace and security, the restriction of the right of the property of specific individuals could be justified. The Court considers, however, that the regulation in question was adopted without furnishing any guarantee enabling Mr Kadi to put his case to the competent authorities. Such a guarantee was, however, necessary in order to ensure respect for his right to property, having regard to the general application and continuation of the freezing measures affecting him. Under these circumstances the measures imposed to the applicant, constituted an unjustified restriction of his right to property.[276] In consequence, as far as it concerns the applicants the Court annulled the Council regulation.

Nonetheless, the Court recognized that the annulment of the regulation would have immediate effect on effectiveness of the restrictive measures, because in the period before the regulation is replaced, the person and entity concerned might take steps to prevent the implementation of the measures on them. Finally, the Court decided to maintain the effects of the regulation for a period of no more than three months running from the date of delivering the judgment (3 September 2008), in order to allow the Council to remedy the infringements found.[277]

b. A critical assessment of the judgment; a positive contribution to the protection of human rights.

The Kadi and Al Baraakat case reveals the question concerning the implementation of the Security Councils sanctions in the European jurisdiction since the SC's measures interferes with the constitutional principles of the community law including human rights and the rule of law. One of the main contributions of this judgment is

[273] Ibid, 341-342
[274] Ibid, 345-348
[275] Ibid, § 349-351
[276] Ibid, § 363, 368-370
[277] Ibid, §375,376

the recognition by the ECJ of the autonomy of European law and the high standards of human rights protection existing in the European jurisdiction even when it is necessary to implement UN sanctions.[278]

The decision of the ECJ on Kadi's case is the first and so far the only decision concerning a UN listed person. Nevertheless it is not the only case before the European Court[279] which concerns violations of human rights by the listing procedures of the European Union. Other relevant cases, concern persons listed directly by the Council of the European Union and not included to the Sanctions Committee lists. That was the case, for instance, of *The People's Mojahedin Organization of Iran* (PMOI)[280] funds which were frozen since May 2002. The CFI found that the statement of reasons (provided by the Home Secretariat of the United Kingdom as evidence for the inclusion of the organization in the EU's list), was not sufficient to provide legal justification for the continuing to freeze the PMOI's funds. In two other similar cases of *Sison*[281] and *Stichting Al-Aqsa*[282] the CFI found that certain fundamental rights and safeguards, especially the rights of the defense and the right to effective judicial protection, and also the obligation to state reasons were not respected by the Council's Regulation and as a result the Regulation was annulled by the Court. In contrast, in the case of the Basque youth organization *Segi*[283] (allegedly linked to ETA-an endogenous suspect) the CFI has initially argued that the applicant had no right to bring action against a Common Position adopted under the third pillar. ECJ, on the other hand, recognized the right of the applicant to proceed to an appeal but it found that since the applicant could reach the national courts and raises the issue of the validity or interpretation of a Common Position adopted in the context of the third pillar, the applicants were not deprived their right to judicial protection. In further, in the case *Mollendorf*,[284] the ECJ dealt for the first time with the rights of third parties, which may be jeopardized by the application of freezing measures.

All these cases certainly reveal the lack of judicial or equivalent control in international level of the SC sanction and the relevant problems concerning the implementation of these sanctions in regional level as regards with the respect of the fundamental right and the rule of law. At least the recent decisions of the ECJ over passed the argument about the supremacy of the SC's decisions by underlining the need for judicial guarantees within the Community.[285]

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[278] Paul James Cardwell, Duncan French, Nigel White, Case Comment Kadi v Council of the European Union (C-402/05 P), ICLQ, International & Comparative Law Quarterly, 58, 2009, p. 229-240

[279] Juan Manuel Rodríguez-Cárcamo, "Suppressing the Financing of Terrorism: Some Cases Pending before the Court of Justice of the European Communities", in Pablo Antonio Fernández-Sánchez, International Legal Dimension of Terrorism, M. Nijhoff publishers, 2009.

[280] See, *People"s Mojahedin Organization of Iran v Council of the European Union,* Case T-284/08, Case T-256/07, Case T-228/02, OJ 2002, C 247/20.

[281] See, *Jose Maria Sison* v *Council of the European Union,* Case T-47/03.

[282] See, Stichting Al-Aqsa v Council of the European Union, Case T-327/03.

[283] See, *Segi v. Council of European Union*, Case C-355/04 P, Case T-338/02.

[284] See, *Mollendorf v. Council of European Union*, C-117/06

[285] EU is not directly and officially bound by UN Charter and even if it was even indirectly as the CFI in Kadi's decision argues, international law might only prevail over secondary community law and not over primary community law as the general principles of EC Treaty including human rights principles. See,

In fact, the supremacy of the Security Council would not be in question if Council's acts were in harmony with international human rights standards without necessarily risking the effectiveness of the measures against terrorism. Academicians[286] and independent bodies[287] have several times repeated the need for an independent review mechanism as a last stage of the Security Council decision-making about listing. As we have already mentioned above some argue that the review mechanism of the World Bank could be a good example. [288]

The changes to the listing and review process, as introduced by Security Council Regulation 1822 are welcome, but they are not enough. The *black listed* individuals have the right to know why their names are on the list, to be informed about the evidence, to be heard within a reasonable time by an independent mechanism, to be counseled by a lawyer and lastly, they have the right to an effective remedy. The position of the Court appears that SC's regime does not provide for even a minimum standard of human rights protection for alleged terrorists and their supporters. If international law as implemented by UN organs (at least some of them) can not provide individuals with such standards, regional legal system such as of the EU and national authorities should do it. As the UN Special Rapporteur Martin Scheinin notes, under international human rights law, the absence of international review does not relieve courts of their obligations to perform review over targeted sanctions, not least given their serious impact on individual freedom and well-being. According to him, "if there is no proper or adequate international review available national review procedures—even for international lists—are necessary. These should be available in the States that apply the sanctions.[289]

In any case and without violating international law, the Union has to provide it's the persons acting in its jurisdiction the judicial guarantees as reflected to its

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Mehrdad Payandeh and Heiko Sauer, European Union: UN sanctions and EU fundamental rights, IJCL, Volume 7, Number 2, 2009, p. 313.

[286] Professor Cameron refers to the possibility of the establishment by the SC of a judicial or quasi-judicial body in order to review SC sanctions, another alternative could also be the intervention of the ICJ or the establishment of an external review body, See, I. Cameron, "UN targeted sanctions, legal safeguards and the European Convention of Human rights", supra, p. 183-185.

[287] The UN Special Rapporteur on human rights and terrorism has also argued that a quasi-judicial body composed by classified experts, serving in an independent capacity, would possibly be recognized by national courts, the Luxembourg Court, and regional human rights courts as a sufficient response to the requirement of the right to due process. See, European commissioner for human rights, Mr. Thomas Hammarberg, viewpoint, on 01December 2009, "Arbitrary procedures for terrorist black-listing must now be changed",

[288] Professor Boeth argues that a review process using the advisory procedure of the ICJ statute is not recommended. Nevertheless, he provides the example of the "inspection panels" established by the World Bank as alternative to an international review mechanism. See, Michael Bothe, Targeted Sanctions and Due Process Initiative, discussion paper, on supplementary guidelines for the review of sanctions committees" listing decisions explanatory memorandum. See also, Michael Bothe, SC's targeted sanctions against presumed terrorists: the need to comply with human rights standards, J.I.C.J. Journal of International Criminal Justice, 6(3), 2008, p.550.

[289] See Report of Martin Scheinin, Special Rapporteur on the Promotion and protection of human rights and fundamental freedoms while countering terrorism (A/61/267) (August 2006), § 39

Constitution.[290] Furthermore, the annulment of an EC Regulation, which gives effect to a SC's resolution, because of breach with human rights as protected in the EC does not necessarily mean conflict with the binding force of the UN Charter under which SC is acting in order to protect international peace and security. First of all because the Union Courts apply the standards of the European Convention of Human rights which are comparable with the Universal Declaration of Human rights and the International Convention of Civil and Political Rights, two of the main UN instruments. Secondly, as the ECJ argued in the Kadi and Al Baraakat case, "The Charter of the United Nations leaves the Member States of the United Nations a free choice among the various possible models for transposition of those resolutions into domestic legal order"[291], if we extend this argument we could argue that EU also can give effect to a SC Resolution adopted under Chapter VII of the Charter of the United Nations by adopting measures that respect fundamental rights and rule of law.[292]

The Court refrained from either undertaking a direct review of the Security Council resolution or declaring it to be inapplicable within the European legal order. Its contribution, nevertheless, was that it made it clear to the Community organs as well as EC member states that obligations under international law do not justify a total disregard of legal standards guaranteed under European law. It thereby opened the way for the EU to find a means of implementing the directives given by the Security Council while complying with European law. It is now for the EU organs to find a way to guarantee human rights standards when it comes to the preventive freezing of assets of alleged terrorists and their supporters. As long as centralized standards are not established at the international level, the EU — and as a consequence, also its member states — are barred from implementing the UN terrorist lists without procedural guarantees. Last but not least, and with a dose of optimism we claim that ECJ may encourage with its position the development of legal protections for listed persons within the UN sanctions regime.[293]

It is true that ECJ "decision on Kadi's case did not lead to the de-listing of the individual neither from the UN lists nor from the EU list. Kadi brought action again before the European Courts[294], this time against the Commission's Regulation 1190/2008 (28 November 2008) which amended Council's Regulation 881/2002 (the one that was annulled by the ECJ on 3 September 2008) following the end of a three month period. In this new appeal, Kadi claims, inter alia, that there is lack of legal base for the new regulation since there were no previous amendment of the UN list, he also argues that the implemented sanctions violate his right to defense, effective

[290] According to Article 6 (1) of the EU Treaty, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Under Article 6 (2), the Union is bound to respect fundamental rights as guaranteed by the *European Convention on Human Rights* and as they derive from the constitutional traditions common to the member states, as general principles of Community law., It has correctly been noted that, although no human rights treaty is directly binding upon the EU and its institutions, the CFI and the ECJ normally rely on the ECHR when reconstructing general principles in the field of human rights.

[291] Joined case Kadi and Al Baraakat, supra §298.

[292] "The international and European human rights obligations of the latter are considerable and firmly established, and their legal orders do not necessarily regard SC resolutions as having "direct effect", but permit discretion in the application of the sanctions." See, Jessica Almqvist, A Human rights critique of European judicial review: countering terrorism sanctions, supra, p. 316.

[293] Angus Johnson, Case and Comment: Frozen in time the ECJ finally rules on the Kadi appeal, Cambridge Law Journal, 68(1), March 2009, p 43.

[294] The appeal was brought on 26 February 2009 and it hasn't been yet ruled.

hearing and judicial protection and the restriction on the right on property is disproportionate.[295]

Concluding remarks, what the future brings…

Terrorism is a complex phenomenon that has its roots to serious political, social, economical and historical problems. No matter the raisons, no attack to civilians neither by state nor by private groups can be considered as legitimate one. Terrorism demands a serious and effective answer both in global, regional and national level, which should not interfere with the fundamental values that must be in the center of our collective functioning. SC must react in a cohesive and effective way by showing that international society can not be threatened by any fundamental ideologist that tends to target civilians. Instead of that, during the last decades, SC has been subject of criticism concerning its role in human rights violations by "opening the hunting season on terrorism"[296], by asking the criminalization of terrorism acts without giving a definition or guidance about its nature or scope.

Even the efforts made by international organs such as the General Assembly, the Special Rapporteur on human rights while countering terrorism and the Council of Europe, counter-terrorism measures continue to violate human rights in many countries. Abuses include: prolonged, incommunicado detention without judicial review; torture and cruel, inhuman, and degrading treatment of detainees; extradition, and expulsion of persons at risk of being subjected to torture or ill treatment; adoption of security measures that curtail the right to freedom of association and movement and breach the principle of non-discrimination etc. Guantanamo bay which is still open[297] is one of thousands examples that human rights are still in question. It's time for the international community to share the responsibility and guarantee fair trial procedures for all detainees.

States have to deal with the question how to safeguard security whilst preserving the human rights, which are essential to democratic government. Mainstream human rights approach answers the question by standing that in national level this is possible if states find the 'fair balance' between human rights and security[298] through the paradigm of state of emergency. States must have in mind that even in situation of emergency they have to follow international law norms and that they are not authorized to derogate by absolute rights such as the prohibition of torture and ill treatment.[299] Furthermore, national legislation must not target special groups of

[295] See Kadi v Commission (Case T-85/09).

[296] Phrased bored by Helen Duffy, The "war on Terror" and the Framework of International Law, Cambridge University Press, 2005 p 351

[297] According to ICRC sources, in Guantanamo bay there are about 200 persons, both "war prisoners" from Afghanistan and "civilians", with at least one refugee among them.

[298] Michael Freeman, "Order, Rights and Threats: Terrorism and Global Justice", p 45 Richard Wilson, Human rights in the 'War on Terror', Cambridge University Press, 2005.

[299] As absolute right could also consider the right to life nevertheless it doesn't have exactly the same character as the prohibition of torture since the ECHR does not consider as violation of the right to life the deprivation of a life "when it results from the use of force which is no more than absolutely necessary:" ECHR Article 2 §2.

people such as refugees, immigrants etc. The principle of non discrimination must be always respected. In addition, they have to assure that or all judicial process are open and accessible for any individual who wants to challenge decisions of the authorities taken even in a situation of emergency. But what happens in international level especially when SC starts legislating in order to defeat terrorism world wide?

Security Council is the "guardian of the international peace and security". However, that it can act notwithstanding international law, human rights principles and international humanitarian law. It is authorized to adopt any measures it considers necessary as long as they serve the purposes of United Nations. Nevertheless, since there is no organ or authority that has the right to control or review the decisions of the SC we can say that the interpretation of what can be considered as a threat to international peace and security is provided by the 15 Members States of the SC. At this point, we consider that a question of legitimacy of SC Resolutions raises, especially in the respect of the fight against terrorism; a notion that hasn't been defined yet. Further, we find that SC has adopted a broad role regarding the measures that states have to adopt since SC sanctions go further than the Conventions concerning terrorism foresee. I think that the problem becomes more complicated when SC Resolutions interfere with human rights standards. The practice of "Consolidated lists" constitutes a violation of human rights as it was recognized by the ECJ in the Kadi's case. It is impossible however, to review SC Resolutions as long as UN has the privilege of the immunity.

Under this prism, it is interesting to take into consideration the role of the regional Courts such as the ECJ and ECtHR as well as other quasi judicial mechanisms such as the UN Human rights Committee. Certainly, they can not decide the legality or legitimacy of SC Resolution. However, they might examine the legality of measures taken by member states (or by the European Union, in European level) in order to implement SC Resolutions. In the case of Kadi examined by the ECJ, we saw that a regional body condemned the European Regulation adopted to apply SC sanction regime. In a similar way the European Court of Human rights judges cases [300]of alleged violations of the ECHR issued by national measures that implemented SC or EU sanctions. Some authors argue that such possibilities could make SC sanction ineffective and useless. Nevertheless, we strongly believe that SC risk to loose its effectiveness if it looses its legitimacy as the "guardian of international peace and security". As long as SC is reacting notwithstanding international law principles, including human rights principles, it risks being subject of severe criticism.

Fundamental human rights standards must be guaranteed and if this is not possible in international level[301] due to the lack of an independent body or mechanism of reviewing, it must be possible in regional or national level. It seems that the more realistic solution would be the examination of SC Resolution by national and regional authorities before implemented in order to guarantee with the best possible way human rights protection for all individuals. In the case of black lists the establishment of judicial mechanisms that individuals could address in order to ask

[300] See for instance the recent decision to the case *A. and others v. United Kingdom*, Application number 3455/05, 19 February 2009.

[301] It does not seem very realistic because of lack of political will for SC to establish an independent judicial or quasi judicial authority to review its decisions maybe such a proposition would be more possible if it had the general consensus of the General Assembly.

for the review of the decision and they could exercise the right to an effective remedy[302], is absolutely necessary.
The Council of Europe has recently called national courts to examine the UN Security Council's resolutions before they are applied to individual citizens. Furthermore, the Helsinki Committee considers that it is possible to combine the Security Council's decisions with a court judgment at national or EU level.

The answers are not easy but they exist. It is on the international community to decide the next step. There are no doubts that the decision of the ECJ opened the way for more appeals to the European courts something that can bring inspiration for significant changes to SC regimes. In my opinion that prevails "state's security" is people's security and people will never be safe if their rights are in danger.

Anti-terrorism measures that jeopardize human rights standards and fundamental freedoms must be prohibited and condemned. Now more than ever before, international community needs to protect and promote human rights while countering terrorism using them as a buckler and an answer to the cruelty of terrorism. Otherwise we not only risk shaking the pillars of the democratic societies that painstakingly emerged from World War II; we also risk feeding terrorism or increasing the understanding and support of terrorism. It is in a situation of crisis, such as brought about by terrorism, that the respect for human rights becomes even more important with even greater vigilance called for.

[302] See also PACE, Resolution 1597 (2008), §8 "The Assembly invites all member states of the Council of Europe as well as the European Union to establish appropriate national and European 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."

Résumé (en français)

Le rôle du Conseil de Sécurité dans la lutte contre le terrorisme et les violations des droits de l'homme par les mesures antiterroristes ; le cas de « *Consolitaded lists* ».

Introduction

Après l'attaque du 11/09, la communauté internationale a changé sa conception en ce qui concerne le terrorisme. Elle a réalisé que le terrorisme était devenu une des menaces les plus fortes qui appelait une solution effective et durable.

La communauté internationale à travers les Nations Unies, a réagi et plus particulièrement le Conseil de Sécurité qui a adopté dès 2001 et jusqu'à aujourd'hui plus de 20 résolutions concernant le terrorisme. Néanmoins, le Conseil de Sécurité a été plusieurs fois l'objet de critiques strictes par rapport à son rôle vis à vis des violations des droits de l'Homme engendrées par des mesures anti- terroristes.

Dans ce contexte, la question sur laquelle nous nous sommes concentrés sur la compatibilité des mesures anti-terroristes prises par le Conseil de Sécurité avec les valeurs fondamentales et les droits de l'homme. Nous analyserons ce sujet en présentant, en premier lieu, le cadre international législatif par rapport aux mesures que le Conseil de Sécurité a adopté et les effets de celles-ci sur les droits de l'homme. En deuxième lieu, nous nous concentrerons plus particulièrement sur une des mesures adoptées par le Conseil de Sécurité, celle des *'listes noires'*. Les sanctions afférentes au fait de figurer sur ces listes attirent particulièrement notre intérêt en ce qu'elles constituent une pratique qui viole les garanties judiciaires et les droits de l'homme tant au niveau international qu'au niveau européen comme défini par la Cour de la justice des Communautés Européens.(CJE)

I. La réponse de la communauté internationale à la lutte contre le terrorisme et la compatibilité avec les droits de l'homme.

Dans la première partie, nous avons tout d'abord examiné la réaction de la communauté internationale envers les phénomènes de terrorisme. Ensuite, nous avons trouvé important d'examiner comment ces mesures interférent avec les droits de l'homme reconnus par le droit international.

A. La réponse de la communauté internationale.

Avant tout, il est nécessaire de voir comment la communauté internationale définit cette menace. Jusqu'à aujourd'hui, les Nations Unies ont adopté 16 instruments légaux qui traitent de la problématique du terrorisme. Aucun d'entre eux ne fournit une définition générale de cette notion. La plupart des conventions criminalisent des actes de terrorisme tels que le détournement d'avion (hijacking) ou la prise d'otage sans donner une définition précise du terrorisme.

1. La définition international du terrorisme ; la grande absence.

Les efforts les plus importants de la communauté internationale afin d'établir une définition ont eu lieu en 1937, dans le cadre de la Convention de la prévention et la punition des activités terroristes. Cependant, cet instrument n'est jamais entré en vigueur faute d'un nombre suffisant de signatures. En 1954, la Comité de droit International des Nations Unies a fait des efforts importants en vue de la détermination de la notion de terrorisme mais sans beaucoup de succès. En 1972, sur base d'une proposition des Etats-Unis, l'ONU a commencé à préparer une Convention sur le terrorisme. Néanmoins, les négociations n'ont pas aboutit à un *consensus*, notamment parce que certains états arabes, africains mais aussi la Chine ne voulaient pas risquer la caractérisation de mouvements d'autodétermination comme des actions terroristes. Pendant les années 1990, on a constaté des évolutions considérables. En 1997, la Convention internationale pour la répression des attentats terroristes à l'explosif a été signée et la Convention Internationale pour la répression du financement du terrorisme le fut en 1999. La Convention la plus récente est la Convention Internationale pour la suppression des actes de terrorisme nucléaire de 2005.

Ce qui est notable dans toutes ces conventions c'est qu'elles ne définissent pas le terme de terrorisme en soi mais uniquement dans le cadre de leur champ d'application. Devant cette absence de définition généralement reconnue par la communauté internationale, l'Assemblée Générale des Nations Unies a chargé le Comité Ad hoc de préparer une Convention générale définissant ce phénomène.

Dès 2000, le Comité Ad hoc de l'Assemblée Générale des Nations Unies s'est donc chargé de la préparation de la Convention Internationale sur le terrorisme. La définition donnée dans le projet de cette Convention est basée sur l'article 2 de la Convention susmentionnée de 1999. Néanmoins, il existe encore des différents entre les états et leurs intérêts politiques qui ne leur permettent pas de s'accorder sur une définition. Les sujets les plus contradictoires dans le cadre de la négociation internationale sur la Convention sur le terrorisme sont les suivants :
a) l'exclusion de la définition légale du terrorisme sponsorisé par l'état et
b) la distinction entre le terrorisme et les mouvements nationaux de libération.

Cependant, nous constatons que malgré les différents répertoriés ci-dessus, l'adoption d'une définition internationale est d'importance primordiale étant donné que son manque conduit à des problèmes concernant l'application des Résolutions du Conseil de Sécurité et notamment par rapport au respect de la protection des droits de l'homme.

2. « *Countering* » terrorisme ; Les mesures antiterroristes Conseil de Sécurité

Malgré les désaccords sur la définition du terrorisme, le Conseil de Sécurité a, depuis les années 90, adopté des mesures assez strictes dans le but de lutter contre ce phénomène. En 1992, le Conseil de Sécurité a imposé des sanctions à la Libye et trois ans après au Soudan pour des raisons associées au terrorisme. En 1999, le Conseil de Sécurité a également adopté des sanctions contre le régime des Talibans qui avait, à l'époque, le pouvoir en Afghanistan, parce qu'il refusait d'extrader Ben Laden vers les Etats-Unis, celui-ci étant accusé d'actes terroristes.

Ces sanctions, prises à travers la Résolution 1267 du Conseil de Sécurité de 1999, incluaient des restrictions économiques, des interdictions de voyager (travel bans) et des mesures d'embargo sur les armes. Suite à cette résolution, les états ont été obligé d'appliquer ces sanctions aux personnes préalablement identifiées dans une liste établie par le Comité des sanction comme soutenant le terrorisme. Ce comité était prévu par la Résolution 1267 pour superviser l'application de la Résolution aux états-membres.

La Résolution 1368 de 2001 qui a suivi les attaques aux Etats Unis, a été l'objet des critiques et de dissensions importantes au sein de la communauté internationale. D'après la doctrine, cette résolution a d'une part reconnu que les attaques terroristes constituent des menaces contre la paix et la sécurité internationale (Chapitre VII de la Charte des Nations Unies) et permit d'autre part aux états de prendre des mesures unilatérales comme l'usage de la force pour des raisons de défense. Une interprétation extensive de cette clause a notamment conduit à concevoir une invasion militaire sur un territoire étranger comme un moyen légitime d'auto-défense.[303]

Ensuite, le 28 septembre 2001, le Conseil de Sécurité a adopté la fameuse Résolution 1373. Trois remarques peuvent être formulées par rapport à cette Résolution. Premièrement, la Résolution 1373 ne fait aucune référence à l'obligation des états de garantir la protection des droits de l'homme dans l'application des mesures anti-terroristes. Deuxièmement, il faut souligner que la Résolution, qui engage les 193 états membres des Nations Unies à prendre des mesures beaucoup plus larges que celles adoptées dans les conventions passées (telles que la Convention pour la suppression du financement du terrorisme), n'a pas fait l'objet d'une acceptation par ces mêmes pays ; le Conseil de Sécurité étant composé de 15 états membres. Enfin, il est également important de noter que, tout comme la Résolution 1267, la Résolution 1373 établi un mécanisme de

[303] Par exemple l'invasion des Etats-Unis en territoire Afghan ou les propos de Vladimir Poutine concernant la possibilité d'ingérence de la part de la Russie dans le cadre de la lutte contre les terroriste Tchetchènes.

contrôle, en l'espèce à travers le Comité contre le terrorisme (CCT) chargée du *monitoring* de l'application des mesures au niveau national.

Malgré la contribution significative de ces mécanismes à la lutte contre le terrorisme, surtout en ce qui concerne l'augmentation de la capacité des états à appliquer les mesures adoptées par le Conseil de Sécurité, il faut relever que le régime de sanction prévu par le Conseil de Sécurité comporte des difficultés tant au niveau administratif qu'au niveau légal. Il est généralement accepté que le manque de surveillance et de contrôle des droits de l'homme et des valeurs fondamentales dans l'adoption des mesures anti-terroristes tant au niveau national qu'au niveau régional et international donnent lieu à de graves violations de ceux-ci.

B. L'impact des mesures antiterroristes a la protection de droits de l'homme ; la question de sécurité ou liberté.

Dès 2000, la plupart des états membres des Nations Unies ont changé leur législation interne en faveur d'une application effective des mesures adoptées par le Conseil de Sécurité, notamment les mesures prévues par la Résolution 1373. Les problèmes qui relèvent de cette implémentation sont multiples.

1. Les effets négatifs de la législation antiterroriste aux demandeurs d'asile et autres violations de droits fondamentaux.

Nous souhaitons attirer l'attention sur trois aspects particulièrement importants. Premièrement, le terrorisme n'est pas une notion définie. Par conséquence, la résolution ne dispose pas d'un champ d'application précis. Deuxièmement, les effets de la résolution ne comportent pas de limite au niveau géographique, comme en témoigne les sanctions prises à l'égard de la Lybie ou du Soudan. Et troisièmement, la résolution ne prévoit pas de limitation par rapport à la durée de l'application de ces mesures.

Tous ces éléments nous amènent à la conclusion que l'ampleur du champ d'application de ces mesures comporte un risque grave de violation des droits de l'homme. Plus particulièrement, on constate que l'interprétation large du terrorisme faite par quelques états abouti à la criminalisation d'actes tout a fait légitimes comme l'opposition politique ou la participation à un groupe spécifique, par conséquent, le droit à la liberté d'expression ainsi que le droit d'association sont souvent fragilisés.

Un autre aspect assez important est que les états utilisent parfois les législations anti-terroristes pour attaquer des groupes spécifiques tels que les non-citoyens ou les demandeurs d'asile. Dans ce cas là, le principe de la prohibition de la discrimination n'est pas respecté. Notons par exemple les discriminations graves imposées aux demandeurs d'asile. S'il est vrai que l'état a le droit de refuser le statut de refugiés aux personnes accusées de participer à des actes de terrorisme, l'utilisation excessive de cette

provision de la loi, peut engendrer l'expulsion des personnes qui risquent de subir la torture, d'autres traitements inhumains et dégradants ou d'autre infractions graves aux droits de l'homme.

2. La protection des droits de l'homme en « état d'urgence ».

Il est essentiel de souligner que d'après le droit international des droits de l'homme, l'état peut, dans quelques conditions explicitement indiquées dans les conventions internationales et régionales, déroger à certaines obligations en cas d'urgence ou de menace contre la sécurité étatique. Il est nécessaire, néanmoins, que les conditions, sous lesquelles ces dérogations ont été effectuées, soient bien expliquées et répondent aux questions de nécessité et proportionnalité.

Il y a, au contraire, quelques droits qui ne peuvent pas faire l'objet des dérogations à cause de leur caractère absolu. Un de ces droits à caractère absolu, commun à la plupart des traités des droits de l'homme (PIDCP, CCT, CEDH, CADH), est la prohibition de la torture et du traitement inhumain et dégradant.

D'autres droits qui sont aussi violés sont les droits concernant les conditions d'arrestation et de détention ainsi que le procès équitable et le droit au recours effectif. Malgré le fait qu'ils ne sont pas reconnus comme des droits absolus, l'interprétation faite par le Comité de Droits de l'homme montre qu'il s'agit de droits d'une importance significative parce qu'ils offrent des garanties pour la non-violation de droits non-dérogeables.

Plusieurs ONGs ont souvent accusé des pays tels que les Etats-Unis, le Royaume-Unis, le Yémen, la Turquie et d'autres concernant des détentions arbitraires, des déplacements forcés, des disparitions de personnes sans la mise en œuvre d'une enquête profonde et effective, des '*incommunicado detentions*', des délais déraisonnables de porter des accusations, etc. ; pratiques qui favorisent la torture et le comportement inhumain et viole les valeurs fondamentales.

Pour finir, le droit à un procès équitable et à un recours effectif sont également violé par des pays qui ont établi des cours militaires pour juger y compris des membres de la population civile. Ces cours manquent d'impartialité et s'opposent aux obligations des états en vertu de l'article 14 de la PIDCP, l'article 5 CEDH et l'article 8 CADH.

II. Les listes noires du Conseil de Sécurité et le droit international des droits de l'homme.

Après avoir examiné l'interférence entre les mesures antiterroristes et les droits de l'homme, nous avons examiné la problématique de « *listes noires* » (*black lists ou Consolidated lists*) inclues dans la Résolution 1267. Plus particulièrement, dans la

deuxième Partie nous avons examiné l'infraction de la procédure de « *listes noires* » sur les droits de l'homme, surtout en ce qui concerne le droit à un procès équitable et le droit d'accès à un recours effectif.

A. « *Listes noires* »; un instrument ineffectif dans la lutte contre le terrorisme.

Les « *listes noires* » font partie du régime des sanctions ciblées (*targeted sanctions*) des Nations Unies qui a été développé en 1990 dans le but d'éliminer les effets des sanctions sur la population. Néanmoins, cette procédure viole de droits fondamentaux de la personne sanctionnée.

1. Le concept et l'application des « *listes noires* »

La Résolution 1267 a été adressée aux personnes du gouvernement des Talibans tandis que la Résolution 1333(2000) applique les sanctions aux personnes qui n'ont aucune relation avec les Talibans mais elles sont « associées avec le terrorisme ». Comme nous avons déjà mentionné, les sanctions concernent surtout des restrictions économiques, restrictions de déplacement et gel des avoirs. Elles s'imposent aux personnes qui figurent sur les listes publiées par la Comité de Sanction après la proposition des états. Les états membres se basent surtout sur des informations reçues pas leurs services secrets afin de justifier l'inscription de l'individu sur la liste. Deux ans plus tard, la Résolution 1452 (2002) prévoit une exception concernant les restrictions économiques pour des « raisons humanitaires ».[304]
Il est important de souligner que le régime du Conseil de Sécurité prévoit une procédure de radiation. L'état de nationalité ou de résidence habituelle peut demander l'exclusion d'une personne de la liste. Si tous les états se mettent d'accord, la personne est exclue, si non, un débat politique commence entre les états pour qu'ils décident si l'exclusion est possible ou non.

A cause de fortes critiques, le Conseil de Sécurité a essayé d'améliorer la procédure d'inscription et radiation de la liste noire. Néanmoins, jusqu'à aujourd'hui les problèmes principaux ne sont pas résolus. Par exemple, la Résolution 1671 (2005) fourni une définition, qui n'est pas exhaustive, sur la notion «associées avec le terrorisme » et elle invite tous les états à soumettre plus d'informations et de preuves sur les personnes accusées alliées aux actes terroristes.

D'autre part, en ce qui concerne le réexamen, en 2006, la Résolution 1730 du CSNU a demandé la création d'un « point focal » chargé de recevoir les demandes de radiation. Les parties inscrites sur la liste peuvent maintenant demander leur radiation soit par le

[304] Les exemptions humanitaires concernent généralement les fonds « nécessaires pour des dépenses de base, y compris celles qui sont consacrées à des vivres, des loyers ou des remboursements de prêts hypothécaires, des médicaments et des frais médicaux etc.

biais de ce point focal, qui n'autorise pas, néanmoins, un accès direct des personnes à la procédure lorsque le déroulement de réexamen dépend toujours de la volonté de son gouvernement.

2. « *Listes noires* » et protection de droits de l'homme.

Il est évident que ni la procédure d'inclusion, ni celle d'exclusion, offre à l'individu les garanties juridiques nécessaires. Les personnes accusées n'ont pas accès aux informations données par les états. De plus, elles n'ont pas le droit de préparer une défense ni de demander un recours effectif. Par conséquence, nous constatons que les droits de l'homme tels qu'ils sont garantis dans les conventions de droits de l'homme ont été bafoués à cause de la procédure des listes noires. Plus particulièrement, le principe de la présomption d'innocence, le droit de la personne accusée d'être informée sur la nature et la cause de l'accusation, le droit de préparer une défense et de demander l'accès à un recours effectif (articles 6, 13 CEDH, articles 14 PIDCP, article10 DUDH), ne sont pas respectés.

De surcroît, cette procédure interfère avec des autres droits fondamentaux, comme la liberté de mouvement, le droit à la propriété, le droit d'avoir une vie privée et familiale. Tous ces droits peuvent être sujets de dérogations mais seulement si la dérogation est nécessaire et proportionnelle. Au niveau national, les Cours nationales contrôlent la nécessité et la proportionnalité mais au niveau international ce contrôle est impossible à cause de l'immunité des organes de Nations Unies.

B. Les « *listes noires* » devant un examen juridique.

1. Yusuf et Kadi contestant les sanctions de Conseil de Sécurité.

Ce problème a été soulevé au niveau européen aussi, parce que l'Union Européenne applique aussi les sanctions prévues dans les Résolutions 1267 et 1373.[305] L'Union applique les sanctions aux personnes qui figurent dans la liste de la Comité des Sanctions mais elle a aussi développé ses propres listes. Les problèmes liés aux violations de droits de l'homme par cette procédure ont été soulevés devant le Tribunal de premier Instance, dans le cas de Yusuf et Kadi, personnes qui avaient été sanctionnées parce que leurs noms figuraient dans la liste du Comité de Sanction qui a été adoptée par l'Union.

En 2001 Yusuf et Kadi, se sont adressés au TPI en demandant l'annulation du règlement européen qui viole leurs droits à la propriété et au procès équitable. Le Tribunal, après

[305] La Résolution 1267 a été appliquée dans la juridiction européen avec la Régulation 467/2001 et la Position commune 2002/402/CFSP et la Résolution 1373 avec la régulation Européen 2580/2001 et la Position commune 2001/930/CFSP et 2001/931/CFSP.

avoir examiné le cas, a conclu avoir la compétence de juger sur l'applicabilité du règlement qui fait usage du régime du Conseil de Sécurité seulement en se qui concerne les violations de *jus cogens*. Dans ce cas là, le Tribunal n'a pas trouvé des violations des normes *jus cogens.*

2. Les cas joints de Kadi et Al Baraakat c. le Conseil Européen et la Commission des Communautés européennes.

Après cette décision, Kadi s'est adressé à la Cour de justice des Communautés européennes. La Cour a examiné le cas de Kadi et Al Baraakat, et elle a conclu que la juridiction européenne a un caractère autonome et qu'aucun accord international ne peut s'opposer aux valeurs constitutionnelles de l'Union. En ce qui concerne l'hiérarchie du droit, la Cour a trouvé que les décisions du Conseil de Sécurité prévalent seulement sur les actes secondaires du droit communautaires et pas sur les principes généraux, incluant les droits de l'homme. En plus, elle a souligné que les Cours européennes doivent examiner si les actes des organes européens tels que les règlements qui appliquent les régimes internationaux, sont en conformité avec les valeurs européennes telles que les droits de l'homme. Finalement, la Cour a examiné les demandes des requérants et elle a conclu que le règlement qui applique les sanctions du Conseil de Sécurité viole les droits à la propriété et à un procès équitable des requérants, mais pour des raisons d'effectivité des sanctions adoptées par le Conseil de Sécurité, elle a permis l'application du règlement pour encore 3 mois. [306]

Conclusion, le défit pour le futur…

La décision de la CJE est très importante parce qu'elle ouvre la porte pour le jugement d'autres cas qui attendent devant les cours européennes. Tous ces cas soulèvent le problème de l'absence au niveau international d'une autorité juridique ou quasi juridique qui examine la compatibilité des décisions du Conseil de Sécurité avec les droits de l'homme. Néanmoins, l'absence d'une procédure de révision au niveau international n'empêche pas les cours nationales et internationales de garantir le respect des droits de l'homme même pour les personnes qui figurent dans les listes internationales. Comme souligne le Rapporteur Spécial des Nations Unies, un recours effectif pour les personnes sanctionnées doit être disponible dans les états qui appliquent les sanctions.

Pour conclure, le terrorisme est un phénomène complexe qui demande une réponse universelle et effective. Néanmoins, la réponse de la communauté internationale doit respecter et protéger les sans des droits de l'homme, autrement on risque non seulement de fragiliser les piliers des sociétés démocratiques mais aussi d'augmenter le soutien du terrorisme. Dans des situations de crise telle que le terrorisme international, les droits de l'homme doivent être la réponse contre la cruauté des violences indiscrètes qui résultent des actes terroristes.

[306] La Régulation a été remplacée par une nouvelle Régulation ; l'examen de la quelle attende devant le TPI.

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« The fear of barbarian hordes is likely to make us more barbaric...»

« La peur des barbares est ce qui risque de nous rendre barbares... »

Tzvetan Todorov