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***Terrorist Designation with Regard to European and International Law:
The Case of the PMOI***

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Introduction

This Joint Opinion concerns the following questions: first, what is the significance in law of the word “terrorist”; second, how is it that an organization may find itself designated as “terrorist”; and third, what can the organization concerned do about it.

Our starting point is the remark made by Judge Rosalyn Higgins, of the International Court of Justice, in 1997:

“Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.”¹

The United Nations

Earlier this year, Judge Gilbert Guillaume, former President of the ICJ, was able, following his own attempt at a definition of terrorism, to add:

“... the international community has not yet been able to reach an agreement on such a definition of terrorism”.²

I will return to his attempt at a definition.

He points out, however, that since 1963 a series of conventions and decisions dealing with various aspects of “terrorism” have been adopted. These include the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft* of 23 September 1971; the *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* of 23 September 1971; the *New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*, of 14 December 1973; the *New York International Convention against the Taking of Hostages* of 17 December 1979; the *Supplementary Protocol to the Montreal Convention* of 24 February 1988; the *Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* of 10 March 1988, and its Protocol relating to the Safety of Fixed Platforms located on the Continental Shelf. This impressive list covers most aspects of “terrorism”, and the

¹ R Higgins “The General International Law of Terrorism” in R Higgins and M Flory (eds) *International Law and Terrorism* (London, Routledge, 1997) p.28

² G Guillaume “Terrorism and International Law” (2004) v.53 *International and Comparative Law Quarterly* pp.537-548, at p.541

conventions concerned have been ratified by most states. The 1970 Hague Convention has been ratified by over 180 states.

None of these use, much less define, the word “terrorism”.³

Between 1972 and 1979 the Ad Hoc Committee on International Terrorism set up by the UN General Assembly attempted to find a unanimously accepted definition of terrorism.⁴ It failed, for the reason that the members of the Group of 77, the formerly colonised states, repeatedly emphasised the legitimacy of actions by national liberation movements⁵, and demanded that such actions should in no way be confused with terrorism.⁶

Helena Kennedy QC, Chair of the British Council, makes a similar point to that made by Judge Guillaume:

“Can terrorism be defined? Different legislation in different jurisdictions has attempted the task but finding an acceptable definition is very difficult. Until there is an internationally recognised and sufficiently restrictive definition, it will be hard to have confidence that struggles for self-determination and other political activities will not be wrapped up in accusations of ‘terrorism’.”⁷

This reflection is of key importance to the PMOI, which sees itself as the wholly legitimate opposition to a brutally repressive regime, where the use of violent methods is no more criminal than the use of the same or very similar tactics by the ANC and PAC in South Africa, the PLO in Israel/Palestine, or FRELIMO in East Timor.

It is also notable that on 25 January 1977 the Council of Europe adopted the *European Convention on the Suppression of Terrorism*, which also failed to provide any definition of the term. The United Nations followed 20 years later with the *International Convention for the Suppression of Terrorist Bombings* adopted on 9 December 1999, but this too failed to define the word “terrorist”.

Furthermore, even following the events of 11 September 2001, the UN Security Council Resolutions 1368 of 12 September 2001 and 1373 of 28 September 2001 did not provide any definition or other clarification as to what was meant by terrorism.

Is there any possibility of an agreed definition?

According to Judge Guillaume, the adjective “terrorist” could be applied to “any criminal activity involving the use of violence in circumstances likely to cause bodily harm or a threat to human life, in connection with an enterprise whose aim is to provoke terror.” Thus, he proposes three conditions:

- 1) the perpetration of certain acts of violence capable of causing death or at least very severe physical injury

³ See also J-M Sorel “Some Questions About the Definition of Terrorism and the Fight Against Its Financing” (2003) v.14 n.2 *European Journal of International Law* pp.365-378

⁴ See UNGA Resolutions 40/61 and 42/159

⁵ See on this topic J Faundez “International laws and wars of national liberation: use of force and intervention” (1989) v.1 *African journal of international and comparative law* pp.85-98, text at <http://catalogue.ppl.nl/CHARSET=ISO-8859-1/DB=1/LNG=EN/LRSET=1/SET=1/SID=339afc3e-3/TTL=1/SHW?FRST=3>

⁶ Guillaume op cit p.539

⁷ H Kennedy *Just Law* (2004, Chatto & Windus, London) p.45

- 2) an individual or collective enterprise that is not simply improvised, in other words an organised operation or concerted plan reflected in coordinated efforts to achieve a specific goal
- 3) the pursuit of an objective: to create terror among certain predetermined persons, groups, or, more commonly, the public at large

This last point is of the greatest importance, if the term “terrorism is to have any legal significance whatsoever. It is missing from almost all subsequent attempts at national and EU level.

The problem of local legislation

Helena Kennedy also argues that:

“... what cannot be acceptable is the creation of *ad hoc* regimes, pieced together in the face of events... or the passing of anti-terrorist legislation against no backdrop of principle... After the UK and USA passed their recent legislation curtailing civil liberties and violating human rights Australia, Belarus, China, Egypt, India, Israel, Jordan, Kyrgyzstan, Macedonia, Malaysia, Russia, Syria, Uzbekistan and Zimbabwe all followed suit. In many of those countries the word ‘terrorism’ will be interpreted very liberally.”⁸

We therefore turn to the US and UK legislation⁹, which displays just the lack of principled foundations to which Kennedy refers, and which has plainly influenced the European response.¹⁰

The United States of America

Charles L Ruby points out¹¹ that since 1983 the US Department of State (DoS) has used Title 22 of the United States Code, section 2656f(d) to define terrorism. Each year the DoS publishes a report entitled *Patterns of Global Terrorism* which defines “terrorism”

“politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”

According to the United States Code:

- “1. the term “international terrorism” means activities that—
 - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
 - (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or

⁸ Kennedy op cit, p.45

⁹ For the Spanish legislation, see L Turano “Spain: Banning political parties as a response to Basque terrorism” (2003) v.1 n.4 *International Journal of Constitutional Law* pp.730-740

¹⁰ See also J Fitzpatrick “Speaking Law to Power: The War Against Terrorism and Human Rights” (2003) v.14 n.2 *European Journal of Human Rights* pp.241-264; M Byers “Terrorism, the Use of Force and International Law After 11 September” (2002) v.51 *International and Comparative Law Quarterly* pp.401-414; A Cassese “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law (2001) v.12 n.5 *European Journal of Human Rights* pp.993-1001

¹¹ C L Ruby “The Definition of Terrorism” (2002) *Analyses of Social Issues and Public Policy* pp.9-14

- (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;
2. the term “national of the United States” has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;
 3. the term “person” means any individual or entity capable of holding a legal or beneficial interest in property;
 4. the term “act of war” means any act occurring in the course of—
 - (A) declared war;
 - (B) armed conflict, whether or not war has been declared, between two or more nations; or
 - (C) armed conflict between military forces of any origin; and
 5. the term “domestic terrorism” means activities that—
 - (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
 - (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (C) occur primarily within the territorial jurisdiction of the United States.”¹²

It should be noted that in contrast to Judge Guillaume’s proposal, this definition makes no mention of terror.

The USA’s response to the 9/11 attacks was enactment of the USA PATRIOT Act (the acronym for United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act)¹³.

On 24 September 2001 the President issued an Executive Order (No. 13224) entitled “Presidential Order Blocking Transactions with Terrorists”. This is the list of 100 persons and entities, which it believes are connected with terrorism. All persons and entities within the US, primarily businesses, are banned from conducting any business with anyone or any entity on that list.¹⁴

The Mujahedin-e Khalq, known as the MEK, was designated a “foreign terrorist organisation” in 1997 under the Anti-Terrorism and Effective Death Penalty Act 1996, and again in 2001 pursuant to section 1(b) of Executive Order 13224. On 15 August 2003 the Secretary of State amended that designation, so as to add to the designation of, “to add to its aliases National Council of Resistance (NCR) and National Council of Resistance of Iran (NCRI), in addition to the alias Peoples Mujahedin of Iran (PMOI).¹⁵ The Report on *Patterns of Global Terrorism* for 2003, published on 29 April 2004, lists the MEK (PMOI) as a “terrorist organisation”¹⁶, continuing that, “the group’s worldwide campaign against the Iranian Government stresses propaganda and occasionally uses terrorism”. A series of incidents are described, and the allegation is repeated that, “Before

¹² http://assembler.law.cornell.edu/uscode/html/uscode18/uscode18_sec_18_00002331----000-.html

¹³ 2001, Pub. L. No. 107-56, 115 Stat. 272

¹⁴ C Joyner “The United Nations and Terrorism: Rethinking Legal Tensions Between National Security, Human Rights, and Civil Liberties” (2004) v.5 *International Studies Perspectives* pp.240-257, at p.248

¹⁵ See www.state.gov/r/pa/prs/ps/2003/23311pf.htm

¹⁶ See www.state.gov/s/ct/rls/pgtrpt/2003/31711.htm

Operation Iraqi Freedom, the group received all of its military assistance, and most of its financial support, from the former Iraqi regime.” These allegations are strongly refuted by the PMOI.

A number of cases concerning the PMOI and NCRI have been argued in United States Court of Appeals for the District of Columbia, *Peoples Mojahedin Organisation of Iran v Department of State and Madeleine Albright* decided on 25 June 1999¹⁷, *National Council of Resistance of Iran v Department of State* decided in 2001¹⁸, *Peoples Mojahedin Organisation of Iran v Department of State and Colin Powell*¹⁹, decided on 9 May 2003, and *National Council of Resistance of Iran v Department of State and Colin Powell*²⁰, decided on 9 July 2004.²¹

In the first PMOI case, the United States Court of Appeals for the District of Columbia Circuit decided that it could not set aside the designation of the PMOI despite saying that,

“We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subject to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organisations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received – something we have no way of judging.”

In the first NCRI case there was a partial victory for the plaintiff. The court found that the Secretary of State must afford due process to organisations before they are designated as Foreign Terrorist Organisations, such as notice that the designation is impending and an opportunity for the organisation to present evidence in its favour.

In the PMOI case decided on 9 May 2003, the PMOI sought review of the designation as a foreign terrorist organisation. This petition, which was PMOI’s third such, was denied. The Court recalled that in order to designate the foreign organisation as terrorist, the Secretary of State must make three findings:

- 1) the organisation is a foreign organisation
- 2) the organisation engages in terrorist activity
- 3) the terrorist activity or terrorism of the organisation threatens the security of United States nationals or the national security of the United States

At pages 9-10 of the judgment, the Court reviewed a number of actions which by its own admission the PMOI had taken – all attacks on the Iranian state and its armed forces – and held that “were there no classified information in the file, we could hardly find that the Secretary’s determination that the Petitioner engaged in terrorist activities is “lacking substantial support in the administrative record as a whole”. The Court refused to look at matters of foreign policy (p.10).

¹⁷ No. 97-1648

¹⁸ 251 F.3d 192 (D.C Cir 2001)

¹⁹ No. 01-1465 & No. 01-1476

²⁰ No. 01-1480

²¹ See Sean Murphy “International Law, the United States, and the Non-military ‘War’ against Terrorism” (2003) v.14 n.2 *European Journal of International Law* pp.347-364

In the second NCRI case, the petitioner sought to show that the Secretary of State had been wrong to consider the NCRI an alias of the MEK. The Court once again denied the petition, accepting a report by the FBI.

It is plain in our view that the US legislation is a recipe for arbitrary, secretive and unjust executive decision-making, shielded from the scrutiny of the courts, and equally removed from most public debate precisely because of the ‘chilling’ effect of the use of the term ‘terrorism’.

The United Kingdom

The Terrorism Act 2000 provided the broadest definition in UK history of “terrorism”, and, by an Order made on 29 March 2001 (Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001 (“the Order”)), the first under the Act, 21 organisations were proscribed through provisions which allow for the banning of organisations which the Home Secretary believes are involved in terrorism, or promote or encourage terrorism.²²

There are severe penalties for membership of or support for such proscribed organisations, although it is notable that no-one has been prosecuted for association with or support for the PMOI. On the contrary, numbers of members of the House of Commons and the House of Lords have demonstratively associated themselves with events protesting about the treatment of the PMOI.

The definition contained in the Act is as follows:

- “1. - (1) In this Act "terrorism" means the use or threat of action where-
- (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it-
- (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section-
- (a) "action" includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

²² See L Fekete “The Terrorism Act 2000: an interview with Gareth Peirce” (2001) v.43(2) *Race and Class* pp.93-103

- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.”

This definition has been subjected to fierce criticism. Statewatch said that the “New definition of “terrorism” can criminalise dissent and extra-parliamentary action.”²³ We also note that it fails to define what precisely it is about “terrorism” which adds anything to ordinary serious crimes. Influencing a government, or even intimidating the population cannot do the job. Otherwise “Age Concern” (which campaigns for the elderly) or football hooligans must be terrorists. In this way the term becomes completely meaningless.

How, we ask, can it then be possible to move to proscribe organisations with any degree of legal certainty, adherence to the rule of law, or proportionality?²⁴

The Order was debated in the House of Commons on 13 March 2001 and in the House of Lords on 27 March 2001. In the debate in the House of Commons, the then Home Secretary, Jack Straw stated that in considering which organisations should be proscribed, he took into account a number of factors including:-

- (1) the nature and scale of the organisation’s activities;
- (2) the specific threat that it poses to the United Kingdom;
- (3) the specific threat that it poses to British nationals overseas;
- (4) the extent of the organisation’s presence in the UK; and
- (5) the need to support other members of the international community in the global fight against terrorism.²⁵

It should be noted that the 21 proscribed organisations included Mujaheddin e Khalq. There are now 25 such organisations, including MEK.²⁶ In relation to the PMOI, the Order states as follows:

“The MeK is an Iranian dissident organisation based in Iraq. It claims to be seeking the establishment of a democratic, socialist, Islamic republic in Iran. The MeK has not attacked UK or Western interests. There is no acknowledged MeK presence in the UK, although its publication MOJAHED is in circulation here...”

During the two debates in Parliament, many MPs and Peers protested at the inclusion of the PMOI in the list of 21 organisations in the Order. There was also much concern at the inherent unfairness of 21 different organisations being placed in the Order, with little indication of the reasons for their selection, and MPs and Peers being asked to either accept or reject the entire list. The Liberal Democrat spokesman, Sir Menzies Campbell stated in the House of Commons debate:

"Does the Secretary of State understand the discomfort that some of us feel at the notion that 21 organisations should appear in the motion that we are debating, and that there has not been an opportunity to deal with each on an individual and separate basis?"²⁷

²³ <http://www.statewatch.org/news/2001/sep/15ukterr.htm>

²⁴ Professor Greenwood states with admirable clarity a position very close to that of the UK government, in C Greenwood “International law and the ‘war against terrorism’ (2002) 78 *International Affairs* pp.301-317

²⁵ Hansard, Tuesday 13 March 2001, Volume 364, No.50, 483 CD0050-PAG1/65 and 484 CD0050-PAG1/66

²⁶ See the Home Office web-site at <http://www.homeoffice.gov.uk/terrorism/threat/groups/>

²⁷ Hansard, Tuesday 13 March 2001, Volume 364, No.50, 484 CD0050-PAG1/66

Jeremy Corbyn, MP stated:

“This is a travesty of the way in which such an important and serious issue should be discussed. Debate is being limited to an hour and half, late at night, with a catch-all 21 different organisations that the Order proposes to ban. We have been given no opportunity to discuss those organisations in any detail, or to engage in any other form of parliamentary scrutiny of the legislation...The Home Secretary should also tell us...where the list came from. I am very well aware that the Indian government, the Turkish government, the Sri Lankan government, the Iranian government and undoubtedly many other governments have been constantly pressing the British government to close down political activity in this country by their opponents.”²⁸

With respect to the complaint about the unfairness of placing 21 organisations in a single list, the PMOI point to the fact that in September 2002 (after the PMOI had been proscribed), 331 MPs, a Commons majority, and 122 Peers declared in a statement, “We the undersigned, support the struggle of the people of Iran and the People’s Mojahedin Organisation to achieve democracy and human rights as an essential part of the defeat of terrorism at home and abroad.”²⁹

During the same debate in the House of Commons, Lord Corbett of Castle Vale, then an MP, stated:

“I should make it clear that I...share the dismay and disbelief of most of the UK’s Iranian community at the Mujaheddin being labelled a terrorist organisation...They are in this country and elsewhere in Europe not as terrorists and not because they support terrorism. They are in every sense of the word, the victims of terrorism. They are among the relatives of an estimated 30,000 – yes, 30,000 – political prisoners butchered by the regime in Iran in the single year of 1988...and of the 35 political opponents that the regime has murdered abroad.”

“What puzzles me about this is that the Home Secretary told the British Committee for Iran Freedom in his letter that the Mujaheddin is an “Iranian dissident organisation”. He went on to say that “it claims to be seeking the establishment of a democratic, socialist Islamic Republic.” He might more accurately have said that it leads a broad coalition that wants to establish a pluralist and secular regime that guarantees human rights and freedoms. What is it doing, therefore, on the list of proscribed organisations? It is the regime and not the resistance to it that belongs on the list.”³⁰

During the House of Lords’ debate, Lord Archer of Sandwell QC proposed an amendment to the Order with an insertion at the end as follows, “...but this House regrets that the Mujaheddin e Khalq have been included in the schedule of proscribed organisations contained in the Order and invites Her Majesty’s Government to lay a further order, removing the Mujaheddin e Khalq from the Schedule.”³¹

Lord Archer of Sandwell QC went on to state:

²⁸ Hansard, Tuesday 13 March 2001, Volume 364, No.50, 492 CD0050-PAG1/74

²⁹ The House Magazine, The Parliamentary Weekly, No. 1006, Vol. 27, 30 September 2002

³⁰ Hansard, Tuesday 13 March 2001, Volume 364, No.50, 490 CD0050-PAG1/72

³¹ Lords Hansard, 27 March 2001, Column 147

“I do not believe that a free society, where people can live together in peace, can best be brought about by violence. But I understand why the movement [PMOI] came to believe that there was no other way. If I believed that it used indiscriminate violence or risked the lives of civilians, I would have no time for it and I would not be addressing your Lordships today. I believe that it confined its targets specifically to military bases and to senior officials of the regime who have themselves committed crimes against humanity.”³²

Other members of the House of Lords voiced similar sentiments.

On 21 October 2002 a Government Minister, Baroness Symons, said, in answer to a parliamentary question: “My Lords, the noble Lord may possibly have misheard me. I said that the National Council of Resistance of Iran undertakes fundraising and propaganda activities on behalf of the Mojahedin-e Khalq - the MeK - and that the MeK is a terrorist organisation proscribed in the UK. We believe that it is proscribed for very good reasons: it publicly acknowledges its responsibility for terrorist actions against government buildings in Iran and carried out a series of mortar bomb attacks in central Tehran in 2000, which resulted in death and injury. It is not the NCRI but the MeK that is proscribed.”³³

The Terrorism Act 2000 was followed by the Anti-terrorism, Crime and Security Act 2001, which introduced indefinite detention without trial for foreign nationals.

On 17 April 2002 the High Court (Mr Justice Richards) gave judgment in an application to apply for judicial review by the PKK, PMOI, Nisar Ahmed and others against the Home Secretary.³⁴ The applicants challenged the proscription of organisations under the Terrorism Act 2000, and the compatibility of the 2000 Act with the Human Rights Act 1998. The power to add an organisation to the list was given in Section 3 (3-5) of the 2000 Act, and “an organisation is concerned in terrorism if it

- (a) commits or participates in acts of terrorism
- (b) prepares for terrorism
- (c) promotes or encourages terrorism, or
- (d) is otherwise concerned in terrorism.

The Act provides for an application to the Home Secretary to remove an organisation from the list. If that application is refused, the applicant may appeal to the Proscribed Organisations Appeal Commission (“POAC”). According to the judgment, an application for deproscription of the PMOI was made on 4 June 2001, and was refused on 31 August 2001. The refusal was appealed to the POAC. Paragraphs 23 to 36 of the judgment set out in detail the PMOI complaints against the proscription of “Mujaheddin e Khalq”, Lord Lester QC and Rabinder Singh QC, representing the PMOI, took a number of HRA points:

- (i) infringement of the right to freedom of expression (article 10)
- (ii) infringement of the right to freedom of peaceful assembly and freedom of association (article 11)

³² Lords Hansard, 27 March 2001, Column 150

³³ <http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds02/text/21021-03.htm>

³⁴ Case Nos. CO/2587/2001, CO/4039/2001 and CO/878/2002, transcript at <http://hei.unige.ch/~clapham/HRClass2002/NationalDecisions/UK/pkk.doc>

- (iii) interference with the right to a good reputation pursuant to article 8
- (iv) arbitrary and discriminatory treatment (article 14)
- (v) lack of due process and procedural unfairness
- (vi) lack of proportionality, and
- (vii) failure to comply with the requirements of legal certainty and “prescribed by law”.

The Court’s decision was that the application for leave should be refused, on the grounds that the applicants, especially the PMOI, should complete their appeal to POAC. However, Mr Justice Richards stated that in his view the submissions made by the Secretary of State did not meet the real thrust of the challenge to the regime of penalties under the Terrorism Act and that the claims made by the PMOI, as set out above, were arguable.

In the end the POAC proceedings were withdrawn, after the UK and US decision to bomb the PMOI camps on the Iranian border in April 2003. The PMOI state that this was despite their having taken a series of steps to ensure that they did not become a party to the war.

Nevertheless, with respect to the PMOI and their advisers, we consider that it would have been preferable to have pursued the POAC proceedings, not least because of the possibility of appeal to the higher courts of the UK, and, ultimately, the European Court of Human Rights. The – doubtless inadequate - mechanisms provided by the 2000 Act ought to be tested in the most rigorous manner.

Human rights standards: the Council of Europe

On 15 July 2002 the Council of Europe promulgated “Guidelines on Human Rights and the Fight against Terrorism”³⁵, adopted by the Committee of Ministers on 11 July 2002. The Guidelines³⁶ reaffirm the obligation on States to protect everyone against terrorism, but go on to reiterate the obligation to avoid arbitrariness, the requirement that all measures taken by States to combat terrorism must be lawful, and the absolute prohibition of torture. They also set out a framework which particularly concerns the collecting and processing of personal data and for measures which interfere with privacy, arrest, police custody and pre-trial detention, legal proceedings, extradition and compensation of victims. Professor von Schorlemer recommends that “... other regional organisation would be well advised to examine the Guidelines with a view to adopting similar provisions in the context of implementing resolution 1373 and upholding their human rights obligations.”³⁷

Further steps are being taken in the context of the Council of Europe. The Steering Committee on Human Rights (CDDH) is planning to hold a seminar in 2005 in order to assess the extent to which the Council of Europe Guidelines on human rights and the fight against terrorism are applied in member states three years after their adoption by the Committee of Ministers. This seminar would bring together national anti-terrorism and human rights experts. According to the outcome of the seminar, the CDDH will decide whether to issue a recommendation encouraging member states to comply with the guidelines.

³⁵ [http://press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm)

³⁶ For their text, see

http://www.iap.nl.com/speeches_annual_conference_2003_washington/guidelines%20council%20of%20europe.html

³⁷ See S von Schorlemer “Human Rights: Substantive and Institutional Implications of the War Against Terrorism” (2003) v.14 n.2 *European Journal of International Law* pp.265-282, at p.278

This same topic will be tackled during the third roundtable of European National Institutions' with the Council of Europe (which is to be held in Berlin in November 2004). NHRIs will therefore present their recommendations on this subject to the CDDH and will be involved in the seminar.³⁸

We note that although the Guidelines are in many ways admirable, they do not deal with problems of proscription or blacklisting, such as affect the PMOI. However, it is clear that the measures adopted by the UK appear to be incompatible with guidelines II and III

“II. Prohibition of arbitrariness

All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III. Lawfulness of anti-terrorist measures

1. All measures taken by states to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.”

The provisions of the Terrorism Act 2000 lack precise definition, and are devoid of appropriate (which must mean effective) supervision.

The European Union

The meeting of the European Council at Tampere in October 1999 agreed a list of measures to be adopted to develop the EU's ‘Area of Freedom, Security and Justice’.³⁹ Following the events of 9/11, the EU accelerated its work programme, and, following UN Security Council Resolution 1373 of 28 September 2001, adopted under Chapter VII, the General Affairs Council of the EU decided to respond by way of a coordinated response, based on Article 11, 15 and 29 of the Treaty on European Union (TEU) and Articles 60, 301 and 308 of the EC Treaty. Article 15 of TEU envisages Common Positions on matters of concern. Thus, UNSC Resolution 1373 was implemented by two Common Positions of 27 December 2001, 2001/930/CFSP⁴⁰ on combating terrorism, and 2001/931/CFSP on the application of specific measures to combat terrorism.⁴¹

Article 1(3) of the Common Position 2001/931/CFSP defined “terrorist act” as

- “3. For the purposes of this Common Position, ‘terrorist act’ shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:
 - (i) seriously intimidating a population, or
 - (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
 - (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
 - (a) attacks upon a person's life which may cause death;
 - (b) attacks upon the physical integrity of a person;

³⁸ See http://www.commission-droits-homme.fr/MiniSites/MiniSite.cfm?site_id=2&texte_id=116

³⁹ See S Peers “EU Responses to Terrorism” (2003) v.52 *International and Comparative Law Quarterly* pp.207-243

⁴⁰ Common Foreign and Security Policy

⁴¹ [2001] OJ L 344/90

- (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, explosions or floods 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 under (a) to (h);
- (j) directing a terrorist group;
- (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, ‘terrorist group’ shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. ‘Structured group’ means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”

The ‘flagship’ measure was the Council Framework Decision of 13 June 2002⁴², setting out a definition of terrorism⁴³, closely followed by the Framework Decision on the European Arrest Warrant⁴⁴. These measures have been accompanied by the creation and implementation of EU ‘blacklists’ of suspected terrorists and terrorist groups, designed to freeze the assets of the targets, and to criminalise financial support to them.⁴⁵

Article 1(1) of the Framework Decision sets out the definition of terrorism.⁴⁶

“Terrorist offences and fundamental rights and principles

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 organisation where committed with the aim of:
 - seriously intimidating a population, or
 - unduly compelling a Government or international organisation to perform or abstain from performing any act, or
 - seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,
 shall be deemed to be terrorist offences:

⁴² at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf

⁴³ [2002] OJ L 164/3

⁴⁴ [2002] OJ L 190/1

⁴⁵ See I Cameron *European Union Anti-Terrorist Blacklisting* (2003) v.3 n.2 *Human Rights Law Review* pp.225-256

⁴⁶ See the Leuven University terrorism website at <http://www.law.kuleuven.ac.be/iir/eng/Terrorism.html>

- (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).
2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.”

Article 2 defines “terrorist group”.

“Offences relating to a terrorist group

1. For the purposes of this Framework Decision, ‘terrorist group’ shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.
2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:
 - (a) directing a terrorist group;
 - (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.”

The latest version of the blacklist is Council Common Position 2004/500/CFSP of 17 May 2004, updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2004/309/CFSP. Part II of the Annex to this documents contains the list of groups under Common Position 2001/931/CFSP.

No 23. is “Mujahedin-e Khalq Organisation (MEK or MKO) [minus the ‘National Council of Resistance of Iran’ (NCRI)] (a.k.a. The National Liberation Army of Iran (NLA, the militant wing of the MEK), the People's Mujahidin of Iran (PMOI), Muslim Iranian Student's Society)”⁴⁷

⁴⁷ See <http://www.statewatch.org/news/2004/jun/terr-list-eu.pdf>

Iain Cameron has analysed the way in which individuals and groups may be included in the list: “In concrete terms, one or other state, or group of states, takes the initiative to propose a particular person or group for inclusion.”⁴⁸

He identifies a number of problems with the blacklisting criteria.⁴⁹

- 1) There is no requirement that the group has *recently* committed acts of terrorism – for example, the decision to include the PKK in May 2002 several years after it had renounced violence.
- 2) There is no requirement that the terrorist act be directed against a non-military target, as is the case with the International Convention for the Suppression of the Financing of Terrorism.
- 3) There is no requirement that the acts be directed against a *democratic* government.⁵⁰

On or around 15 April 2003, and following the bombing of the PMOI bases, the US/Coalition forces signed an ‘Agreement of Mutual Understanding and Coordination’ with the PMOI/NLA. This agreement allowed the PMOI/NLA to keep their weapons in order to defend themselves from attacks by the Iranian regime and its agents.⁵¹

On 10 May 2003, it was announced that the parties had reached an agreement whereby the PMOI and NLA would “disarm and consolidate”. Announcing the agreement, General Ray Odierno, commander of the US Army’s Fourth Infantry Division, stated, “I would say that any organisation that has given up their equipment to the Coalition clearly is cooperation with us, and I believe that should lead to a review of whether they are still a terrorist organisation or not.”⁵²

The present position with the PMOI/NLA personnel in Iraq, as reported by the New York Times on 27 July 2004, is that they have been granted ‘protected persons’ status under the Fourth Geneva Convention. It reported senior American officials as stating that after a 16 month thorough investigation, which included extensive interviews of the PMOI/NLA personnel by the State Department and the FBI, they had found no upon which to bring any charges against the group.⁵³

Challenging EU blacklisting

As we have shown in part one, above, the absence of a clear or agreed definition of “terrorism”, “terrorist”, “terrorist act” or “terrorist group”, etc., means that there is uncertainty in the application of any law centring on these terms, and a manifest risk of arbitrary, in particularly politically motivated abuse of such law.

Three clear dangers stand out. First, that organisations are blacklisted which use force, but where the use of force in question is legitimate under international law. Second, that organisations and individuals are blacklisted which do not use force, or indeed engage in any serious criminal activity, merely because they are associated (often tenuously or tendentiously) with groups that do use force. And third, that laws of this kind, which are passed to address the most serious acts of atrocious violence, are extended to apply to peaceful demonstrations and other political-, or even non-

⁴⁸ Cameron op cit, p.234

⁴⁹ Cameron op cit, p.236

⁵⁰ Cameron notes that the UK definition in section 1(5) of the Terrorism Act does not impose such a requirement either.

⁵¹ The New York Times, 29 April 2003

⁵² Agence France Presse, 10 May 2004

⁵³ Douglas Jehl, ‘US Sees No Basis to Prosecute Iranian Opposition ‘Terror’ Group Being Held in Iraq’, The New York Times, 27 July 2004

political acts (e.g., by anti-globalisation campaigners or Greenpeace, or even football hooligans) which may cause damage to property but which could not reasonably be regarded as terrorism (however defined).

The first issue raises the question of when the use of force by non-state actors is lawful under international law. There is no clear answer to this question - but that merely underscores the need for caution.

The second issue raises the question of what can be said to constitute “support” for a terrorist organisation. Very often, in countries in which there are serious political tensions, or serious repression, there will both be organisations using violence which claim that their use of violence is legitimate, and political groups which espouse similar aims to the violent groups, but which deny that they are in hock with those groups. Here too the lines are difficult to draw: many groups, for instance, collect money “to support the families” of people imprisoned for taking part in a violent struggle, while denying that this money is used to support the violent groups to which the prisoners belong as such.

The third issue is a general, age-old problem. As Langbein has put it (with regard to the creeping extension of the use of torture in the Middle Ages from, first, heretics, to, later, all deemed unworthy of the full protection of the law):

“resistance to procedural innovation is diminished when its objects are conceived as standing apart from the community; such lines blur, once the new institutions have been allowed to arise.”⁵⁴

There is a long history of even supposedly democratic, Western States over-reacting and attacking peaceful protest under the guise of fighting unlawful politically-motivated violence - from the criminalisation of “the wearing of the green” by Irish nationalists in the 1800s, to the violent suppression of peaceful civil rights marchers in the USA and Northern Ireland in the 1960s, to the prosecution under anti-terrorist legislation of non-violent political activists in 1970s Germany for calling for better treatment of “Red Army Faction” prisoners.

This makes it essential that there are strong safeguards in place to check, in all senses of the word, the way in which national and international authorities use the power to blacklist organisations and individuals.

In this part of our opinion, we will first briefly note, at 2, the general effects of blacklisting on an organisation. We will then, at 3, discuss the substantive and procedural human rights issues which this raises under the *European Convention on Human Rights* (ECHR). At 4, we will address the implications of international blacklists, with reference to relevant general principles of international law (whereby we will re-visit the Council of Europe *Guidelines on Human Rights and the Fight Against Terrorism* and note the correspondence between these guidelines and the Convention requirements). Finally, at 5, we will submit an early evaluation of the situation, based on these international and European standards; briefly discuss the remedies which are (or may be) actually available to PMOI in national and international proceedings; and set out some tentative recommendations.

The general effects on organisations of being blacklisted

The placing of an organisation on a UN- or EU blacklist of suspected terrorist groups has two main effects:

⁵⁴ Quoted in Malise Ruthven, *Torture, the Grand Conspiracy*, London, 1978, p. 52.

- its assets must be frozen under a “freezing order” to be issued by the UN-, respectively EU-Member States;
- providing financial support to the organisation must be criminalised by those States.

As Cameron notes, as far as an individual placed on the list are concerned:

“The effect[s] of a freezing order, if it is effectively implemented, are devastating for the target, as he or she cannot use any of his or her assets, or receive pay or even, legally speaking, social security.”⁵⁵

Cameron points out that Resolution 1452 of 20 December 2002 provides for the possibility of releasing frozen assets for humanitarian reasons, such as providing living expenses for individuals. However, this only allows for the release of some minimum funds for personal survival: it does not change the “devastating” effects of an order on wider - in particular, political - activities of individuals, and it does not benefit organisations or groups. For the latter, being placed on a blacklist is indeed devastating - and intended to be devastating: the very purpose of the list is to stop the organisations or groups from operating *in any way*.

The rights and freedoms of blacklisted organisations under the ECHR

Clearly, being placed on a terrorist blacklist deeply affects an organisation. The question arises however of whether it affects the organisation’s “human” rights and fundamental freedoms, i.e. whether groups and organisations can, as such, actually enjoy such rights, or whether human rights are limited to living individuals (such as the members of such organisations).

It is clear from the case-law of the European Commission and Court of Human Rights that while some rights (such as the right to life and the right not to be subjected to torture) are by their nature limited to “natural persons” (i.e. living individuals), many of the rights guaranteed by the European Convention on Human Rights also apply to organisations, associations, groups and even companies, and that such entities can invoke the Convention in respect of matters affecting their rights and interests, and to defend the common rights and interests of their members. Rights that have successfully been invoked by such entities include, in particular: the rights to freedom of assembly and association (Art. 11 ECHR), freedom of expression (Art. 10), and freedom of religion (Art. 9). The Convention furthermore expressly stipulates that “legal person[s]” are also entitled (like natural persons) to “the peaceful enjoyment of [their] possessions”, i.e. to the right to property (Art. 1 of the First Protocol to the Convention).

To the extent that legal entities are entitled to the protection of the substantive provisions of the Convention, and Arts. 9 – 11 in particular, they are furthermore also entitled to invoke the right to an effective remedy (Art. 13) and freedom from discrimination (Art. 14). More specifically, and as further discussed below in relation to the freezing of assets, because any interference with property rights by its very nature affects the “civil rights and obligations” (*droits de caractère civil*) of the rights owners or -holders, the latter are entitled to a fair trial in any “determination” of these matters (Art. 6(1)).

There can be no doubt that the blacklisting of an organisation and the “devastation” this causes for it, seriously interferes with the above-mentioned substantive rights. In particular, it severely limits - indeed, seeks to prevent altogether - the exercise, by the organisation, of that organisation’s right to freedom of association and assembly, and its right to the peaceful enjoyment of its possessions. In addition, it will make it difficult if not impossible for the organisation to effectively exercise its

⁵⁵ Iain Cameron, *European Union Anti-Terrorist Blacklisting*, in: *Human Rights Law Review*, Vol. 3, No. 2 of 2003, p. 225 ff, at 227.

right to freedom of expression: it will not be able, for instance, to finance a magazine, or a leaflet, or a meeting of its members and supporters.

In the sub-sections below, we will briefly examine the Convention requirements in relation, first, to the rights to freedom of association and expression of a blacklisted organisation, and then, to the right to the peaceful enjoyment of its possessions of such an organisation. We will then turn to the (as will be seen, closely related) procedural requirements of the Convention, which are the focus of this part of the opinion. In the final sub-section, we will note the close correspondence (not surprisingly) between the Convention requirements and the standards set out in the Council of Europe *Guidelines on Human Rights and the Fight Against Terrorism*.

ECHR standards to be applied to restrictions on the substantive rights to freedom of association and expression of a blacklisted organisation

As noted above, the rights to freedom of association and freedom of expression are set out in Arts. 10 and 11 of the ECHR. These articles are similarly structured: they set out, in their first paragraph, the right to be protected; and they then clarify, in their second paragraph, how, and to what extent, the right in question may be limited.

The European Court of Human Rights has developed a consistent, standard approach to the application of these provisions (and to Arts. 8 and 9, which are similarly structured). Here, it may suffice to note that if a certain matter comes within the ambit of one of the provisions concerned (i.e., here, of Arts. 10 or 11), and if it can be shown that the right that is protected by the provision in question is “interfered” with, that then the State that causes the interference in question must justify the interference. As noted above, there is no doubt that the blacklisting of an organisation interferes with (limits, indeed largely destroys) the right of the organisation to freedom of association and expression.

This means that any State blacklisting an organisation must prove the following if its action is to be compatible with the Convention:

- that the measure in question (the blacklisting) was based on “law”;
- that the measure served a “legitimate aim” in a democratic society - such as national security or public safety; and
- that the measure (even if it served such an aim) was “necessary” to that end, i.e. that it corresponded to a “pressing social need” and that (the effect of) the measure was “proportionate” to the aim in question.

The first issue is not as simple or straight-forward as it seems: the requirement that an interference is based on “law” has been given a substantive (rather than a mere formal) meaning. It signifies adherence to the wider principle of the “rule of law”. Specifically, a State interfering with a Convention right must show that the measure was authorised in accessible (published) legal rules which are formulated with sufficient clarity and precision to (i) enable any organisation which may be affected by them to regulate its conduct in such a way as to conform to the rules, and (ii) prevent the arbitrary use of the legal powers in question. As we have seen in the first part of this Opinion, this can often be said not to be the case with regard to the rules relating to “terrorism” and blacklisting - with even the term “terrorism” (etc.) being so ill-defined as to make it impossible to predict what activities exactly are, and are not, covered by it.

As for the second requirement of a “legitimate aim”, the second paragraphs of Arts. 10 and 11 set out the aims concerned in fairly broad terms, such as national security, public safety or the prevention of disorder or crime. It can be argued that a State should be more specific in the imposition of any particular measure, such as the freezing of assets; that merely claiming that the action is aimed at fighting “terrorism”, without clarifying the more specific purpose of a freezing order, can be said to be insufficient. In practice, the Court is likely to accept such claims, at least initially, and focus its assessment on the “necessity” and “proportionality” of the measure in the particular case. In manifest cases of abuse, a challenge could however be made to a claim that a freezing order, or criminalisation of support for a blacklisted organisation, serves any legitimate aim.

In assessing whether a State has discharged the onus of proof in the last respect (i.e. that a measure was “necessary in a democratic society”), the Court grants States a so-called “margin of appreciation”, a measure of discretion, in that it leaves it up to the States to make the first assessment of what is “necessary” and “proportionate” in a particular case. However, this “margin of appreciation” goes hand in hand with European supervision: States must exercise their political judgment within a certain range. The width or narrowness of this range varies, depending on the more or less “objective” or “subjective” nature of the issue at hand and the existence of other international rules or -guidelines - such as, on the one hand, the Security Council Resolutions and European Common Positions discussed in part one of this Opinion and, on the other, the *Guidelines on Human Rights and the Fight Against Terrorism*.

ECHR standards to be applied to the freezing of the assets of a blacklisted organisation

The right to “the peaceful enjoyment of [one’s] possessions” is set out in Article 1 of the First Protocol (FP) to the European Convention on Human Rights. This provision is structured somewhat differently from Arts. 8 – 11 - but in practice, the Commission and Court have adopted a very similar approach to their assessment of cases under this article. Specifically, under Art. 1 FP, as under those other rights, the first, preliminary question that arises is whether the right at issue in any particular case falls within the ambit of the right. After that, the question must again be addressed whether the right in question has been interfered with (i.e. whether someone was “deprived” of his property or whether such property was subjected to measures of “control”). And finally, if so, the question is whether the interference was justified.

As far as the preliminary question is concerned, the European Court of Human Rights has said in the *Marckx* case:

“Article 1 [of the First Protocol] is in substance guaranteeing the right to property.”⁵⁶

The scope of Article 1 First Protocol is therefore wide. For the purpose of the present Opinion, it suffices to note that, in view of the case-law of the organs of the Convention, title to assets held in bank accounts undoubtedly constitutes a “property right” in the sense of Article 1 First Protocol.

The question then arises as to when this right may be restricted. The text of Article 1 First Protocol speaks of “depriv[ation] of ... possessions” and “control [of] the use of property”. However, the organs of the Convention have discerned in the text a series of more general “rules”. As the Court put it in the case of *Sporrong and Lönnroth v Sweden*:

“.. [Article 1 of the First Protocol] comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of general nature and enunciates the principle of peaceful

⁵⁶ *Marckx v. Belgium*, Judgment of 13 June 1979, para. 63, emphasis added.

enjoyment of property; the second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions; and the third rule, stated in the second paragraph, recognises the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not ‘distinct’ in the sense of being unconnected: the second and third rules are concerned with particular instances of interferences with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule ...”⁵⁷

Perhaps not surprisingly, this approach to Article 1 First Protocol is markedly similar to the general approach by the Strasbourg organs to the other substantive provisions of the Convention - as described in the previous sub-section with reference to Arts. 10 and 11: first, one has to establish whether there has been an “interference”; and then, whether the interference was justified.

In assessing whether an interference with a property right is compatible with the Convention, the Convention organs apply the so-called “fair balance” test, first set out in the *Sporrong and Lönnroth* case in the following terms:

“For the purposes of [the first sentence of Article 1 First Protocol] ... the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 [of the First Protocol].”⁵⁸

In fact, although the text of Article 1 First Protocol allows for much more complex (not to say convoluted) distinctions:

“The clear tendency in the jurisprudence has ... been to assimilate the assessment of all interferences with the peaceful enjoyment of possessions under the single principle of fair balance set out in the *Sporrong and Lönnroth* case, this despite the language of Article 1 of the First Protocol suggesting different standards for measures which deprive a person of his property and measures which seek to control property. ...”⁵⁹

The “fair balance” test is very similar to the “necessity” and “proportionality” test applied under Article 8 – 11 of the Convention, as discussed with reference to Arts. 10 and 11, above. However, there are some special features. First of all, States are granted a very wide “margin of appreciation” with regard to the imposition of restrictions on property rights. Generally speaking, this margin is wider than the margin applied under other Convention articles. Indeed, the main question in this regard is often whether the measure in question is provided for in domestic law, and whether that law allows the right kind of considerations to be taken into account.⁶⁰ The wide “margin of appreciation”, in other words, is not unlimited. The Strasbourg organs will generally accept a State’s assessment of the various factors to be taken into account - but an assessment there must have been, a “balancing” must have taken place.

For the purpose of the present Opinion, it is of crucial importance to note that a legal rule, or an administrative practice, which does not allow for a balancing of public and private interests, but which imposes restrictions on the property rights of certain organisations without any consideration of the interests of the private persons or entities vested with those rights, is incompatible with the Convention.

⁵⁷ *Sporrong and Lönnroth v Sweden*, Judgment of 23 September 1982, para. 61.

⁵⁸ *Idem*, para. 69.

⁵⁹ Harris, O’Boyle & Warbrick, *o.c.* (*supra*, footnote 8), p. 525.

⁶⁰ *Idem*, p. 525, emphasis added, footnotes omitted.

Procedural guarantees

Moreover, and this brings us to the central issue in this part of our Opinion, the assessment by the national authorities of the need for an interference with a property right must be subject to procedural guarantees: there must be an avenue of appeal from the decision of a national authority to interfere with someone's property rights. While the procedural protection of rights is also a separate issue under the Convention, discussed with reference to the present case in the next sub-section, it is important to note the particularly close link between the availability of such remedies and appeals over interferences with property rights and the question of whether or not the interference was justified:

“The applicants succeeded in the *Sporrong and Lönnroth* case because there was no procedure by which they could challenge the long-continued application of the expropriation permits which were blighting their property nor were they entitled to any compensation for the loss that this situation had brought about.”⁶¹

By contrast:

“One of the factors which counted against the applicant in [the case of] *Katte Klitsche de la Grange v Italy* ... was that he had not used a procedure available to him.”⁶²

Often the “process” in question will involve the “determination of a civil right”, in which case the procedure should comply with the requirements of Article 6(1) of the Convention, as further discussed in the next sub-section. We may add that in any case the process must, moreover, be “effective”, as required by Art. 13 of the Convention, also discussed below.

As just noted, in particular as concerns Article 1 of the First Protocol, the European Court of Human Rights often includes the question of the procedural protection of a right in its assessment of whether the substance of that right is adequately ensured. Procedural issues can also relate closely to the so-called “margin of appreciation” doctrine. In particular, the Convention organs do not want to become a “fourth instance” (“*quatrième instance*”) of appeal from national judicial decisions.⁶³ Basically, while the width of the margin of appreciation varies from case to case and context to context,⁶⁴ and while some matters are subjected to closer review than others, the Court will be loath to intervene with domestic decisions concerning the justification of interferences with Convention rights, if these decisions were reached or substantively reviewed in judicial proceedings in which all the relevant matters were fully considered and given their proper weight. Conversely, an absence of procedural protection will lend credence to a claim that an interference is not justified - or at least, the Respondent Government will find it difficult to show that the various interests were indeed carefully balanced.

Moreover, the Convention lays down express requirements concerning the procedural protection of the rights enshrined in it, in two ways. First of all, and at the most basic level, Article 13 stipulates that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”. Secondly, Article 6(1) requires, more specifically, that “in the determination of his civil rights and obligations or on any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁶⁵

⁶¹ Harris, O’Boyle & Warbrick, *o.c.* (*supra*, footnote 8), p. 526, emphasis added.

⁶² *Idem*, p. 525, footnote 17, with reference to para. 46 of the judgment in the case mentioned, emphasis added.

⁶³ *Idem*, pp. 12 – 15.

⁶⁴ Cf. D Korff, *o.c.* (*supra*, footnote 8), p. 147.

⁶⁵ For the text of Arts. 6 and 13, see again the Attachment to this Opinion.

To the extent that blacklisting of an organisation interferes with (indeed, effectively renders impossible) the exercise of the rights to freedom of association and expression of the organisation in question (as discussed above), the organisation is thus entitled to the procedural protection of Art. 13. The European Court of Human Rights has summarised the main principles it applies in this regard as follows:

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

It follows from the last-mentioned principle that the application of Article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 directly to secure to anyone within its jurisdiction the rights and freedoms set out in section I (...).”⁶⁶

The first principle is of particular importance; it includes a number of more specific requirements. First of all, it is clear that the Court considers a *judicial* remedy to be the best option. States should show why a judicial remedy is not made available. If a State does not provide a full judicial remedy, the alternative must be as close as possible to it; the remedy must have some of the crucial trappings of a court. The arbiters, if they are not judges, should at least be impartial and, if not granted full judicial independence, should still be manifestly free from influence by the executive. The procedure should be fair and allow a victim an effective opportunity to challenge the interference in question.

It also follows from the first principle that the authority in question must be able to review the substance of the case.⁶⁷ It must be able to review the legality and the necessity of any interference, to decide on the adequacy or otherwise of the reasoning underpinning the interference, and to review the factual basis for the interference.

As far as the present issue is concerned, this means in our opinion that the decision to include an organisation on a blacklist must be subject to full remedial proceedings: the organisation must be able to challenge the designation of it as a “terrorist organisation”, and the factual basis for that designation, in effective and fair proceedings (preferably a court). The *dictum* of the Court in respect of Art. 6 (discussed below) that “a determination on questions of both fact and law cannot be displaced by the *ipse dixit* of the executive”, in our view also applies to remedies under Art. 13.

⁶⁶ *Silver and others v. the UK*, Judgment of 25 March 1983, para. 113. References to other cases in which the principles mentioned were first adduced (indicated by brackets) omitted.

⁶⁷ Cf. *Vilvarajah v. the UK*, Judgment of 30 October 1991, para. 122: “[The effect of Art. 13] is thus to require the provision of a domestic remedy allowing the competent ‘national authority’ both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.”

Finally, the review body must be able to grant “appropriate relief”.⁶⁸ its rulings should be binding on the State (subject to relevant appeal proceedings). A merely advisory body cannot provide an “effective remedy”.

More importantly, any “deprivation of possessions” or “control [of] the use of property” by a State must be challengeable in judicial proceedings fully conforming to the “fair trial” requirements of Art. 6 ECHR. As Harris, O’Boyle and Warbrick put it, with reference to the case-law:

“... the right to a fair trial in Article 6 applies to the determination of ‘civil rights and obligations’. This is a term with an autonomous Convention meaning that has been interpreted as including pecuniary rights. The coherence of the Convention as a whole demands that the autonomous concept of ‘possessions’ in Article 1 of the First Protocol be no less a category than the concept of pecuniary rights for the purposes of Article 6: the reasoning about the essence of the interest measured by its nature and importance to an individual should apply to its formal protection (Article 6(1)) and its substance (Article 1, First Protocol) alike. The minimum in each case is that the applicant shows that he is entitled to some real, if yet unattributed, economic benefit.”⁶⁹

For the present case, it suffices that “freezing orders” undoubtedly affect the property rights, and thus the civil rights (*droits de caractère civil*), of the blacklisted organisations concerned - and that these must therefore be able to challenge such orders in proper courts, in full and fair judicial proceedings in which the relevant matters can be argued in substance.⁷⁰ Specifically, the courts must be regular courts, and the judges regular, independent and impartial judges; and the procedure must ensure “equality of arms” to the parties.⁷¹

Crucially, moreover, in proceedings covered by Art. 6(1), the court must be able to address the full substance of the issue. In the present context, this means that the court must be able to assess the lawfulness (in a Convention sense), as well the factual basis and reasonableness of the designation of a particular organisation as “terrorist”. Although certain modifications may be made to trial proceedings involving national security or terrorist matters, States can not fully “hide” the purported evidence in support of a freezing order behind the veil of national security or the need to protect sources or intelligence.⁷²

This is made clear in the case of *Tinnelly & Sons Ltd. and others and McElduff and others v. the UK*.⁷³ The case concerned decisions by the Northern Ireland Electricity Services (NIE) not to grant work to certain firms in the province on the basis of security considerations, and the limitations placed on the Fair Employment Agency’s and the courts’ reviews of these decisions. These limitations resulted from a certificate issued by the Secretary of State for Northern Ireland which, by law, constituted “conclusive evidence” of the fact that the refusal to grant the work was “done for the purpose of safeguarding national security or of protecting

⁶⁸ Cf. the quote in the previous footnote.

⁶⁹ Harris, O’Boyle & Warbrick, *o.c.* (*supra*, footnote 8), p. 518, with reference, in particular, to the cases of *Feldbrugge v the Netherlands* and *Deumeland v FRG*, and to further academic opinion.

⁷⁰ Note that it does not matter whether one qualifies the effect of a freezing order as “deprivation of possessions” or “control of property”: as Harris, O’Boyle and Warbrick make clear in the passage quoted in the text, in either case, Art. 6(1) applies. At most, the difference could affect the question of proportionality, but even then the issue is the actual, practical effect of a freezing order on a particular organisation, rather than the formal classification of that effect.

⁷¹ Under Art. 15 ECHR, States can derogate from the right to a fair trial in a “public emergency threatening the life of the nation”, but no State Party to the Convention has invoked this provision in relation to blacklisting. The UK has derogated from Art. 5 in order to allow detention without trial of foreign nationals suspected of involvement in terrorism, but it has not extended the derogation to Art. 1 First Protocol or Art. 6 in relation to civil trials.

⁷² In section 5, below, we will argue that the State can also not hide behind determinations of this kind made at the international level.

⁷³ Judgment of 10 July 1998.

public safety or public order”. The Court found that that the issue by the Secretary of State of [conclusive] certificates constituted a disproportionate restriction on the applicants’ right of access to a court or tribunal, and that there had been a breach of Article 6 § 1 of the Convention. The detail of the Court’s decision is well worth studying.

In our opinion, blacklisting an organisation and freezing its assets, without granting the organisation the right to challenge this blacklisting and freezing, in a court fully satisfying the requirements of Art. 6(1) ECHR, in proceedings in which the factual and legal basis for the blacklisting and freezing is properly and fully, judicially examined, violates the right of access to court as guaranteed by that provision of the Convention.

The Council of Europe *Guidelines on Human Rights and the Fight Against Terrorism*

Before ending this section on the requirements of the European Convention on Human Rights, it is useful to point out that these requirements are clearly and expressly reflected in the Council of Europe *Guidelines of the Committee of Ministers on Human Rights and the Fight Against Terrorism*,⁷⁴ already mentioned.

First of all, in line with the remark of the Court that safeguarding national security concerns need not involve a denial of justice, the Committee of Ministers:

“[recalls] that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;” and

“[reaffirms] states’ obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the protection of Human Rights and Fundamental Freedoms [i.e. the ECHR] and the case-law of the European Court of Human Rights”

(Preambles (d) and (i))

More specifically, the Guidelines stipulate the following basic principles of direct relevance to this Opinion:⁷⁵

II **Prohibition of arbitrariness**

All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III **Lawfulness of anti-terrorist measures**

1. All measures taken by states to combat terrorism must be lawful.

⁷⁴ Appendix 3 to the Decisions of the Committee of Ministers, adopted at their 804th meeting on 11 July 2002, CM/Del/Dec(2002)804 of 15 July 2002, <https://wcm.coe.int/ViewDoc.jsp?id=296009&Lang=en>.

⁷⁵ The Guidelines also contain a paragraph (Paragraph XV) concerning derogations for “[w]hen the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation”, i.e. for when Art. 15 of the Convention applies (and is formally invoked: the Guidelines expressly note the duty to notify the competent authorities [in the case of the Convention, the Secretary-General of the Council of Europe - DK]). However, as noted in footnote 30, above, we are considering the current situation, in which organisations are blacklisted but in which Art. 15 has not been invoked (or at least, as concerns the UK, not in respect of Art. 1 First Protocol and Art. 6 of the Convention).

2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

XIV Right to property

The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.

These principles clearly echo the Convention and the case-law of the European Court of Human Rights in relation both to the substantive articles (Arts. 10 and 11 of the Convention and Art. 1 of the First Protocol) and the articles requiring procedural protection (Art. 6 and 13 of the Convention), discussed above. In particular, they recall the requirements relating to “law” which seek to counter arbitrariness, and those requiring that all restrictions on fundamental rights are “necessary” and “proportionate” to a clearly-defined “legitimate aim”. They also expressly affirm that it must be possible to challenge freezing before a court.

The applicability of the Convention standards and -procedures to international blacklists

As noted in the first part of this Opinion, the freezing orders and other measures imposed on the PMOI were issued not on the mere whim of national governments, but in response to - indeed, those governments would argue, in fulfilling a duty to implement - resolutions of the Security Council and Common Positions adopted by the EU Council. The first question that arises is whether this affects the application of the standards derived from the European Convention on Human Rights, set out in the previous section. A second issue is who should apply those standards: national courts, the European Court of Justice in Luxembourg, and/or the European Court of Human Rights in Strasbourg, and in what kind of proceedings?

It is important to keep these matters clearly separated and we will therefore discuss them separately below. As to the possible policy choices this leaves affected organisations in general, and the PMOI in particular, we will address those in the final section (section 5) of this part of our opinion.

On the first point, the answer is absolutely clear: the Convention requirements, set out above, apply to the blacklisting of organisations and the issuing of freezing orders by Member States of the EU, irrespective of the fact that (those States would argue) they were required to do so by virtue of the Common Positions and the UN Security Council Resolutions. No-one - not the European Commission, nor as far as we know any of the EU Member States - disputes this point.

To the extent that some argue that the Strasbourg Court should decline jurisdiction in some matters dealt with under EC- or EU law (as discussed under the next heading), they do so on the basis that (they claim) the EC/EU system provides “equivalent protection” to the Convention because the Convention is, effectively, part of the Community- and Union legal orders. They accept that the standards of the Convention, as developed by the European Court of Human Rights, must be respected by the EC/EU institutions and the Member States when acting in the implementation of EC- or EU law and, where relevant, applied in full by European Court of Justice (including the Court of First Instance).

An organisation such as PMOI is thus without doubt entitled to be treated, by the EC, the EU, and the Member States, in full accordance with the standards we have adduced. The only complication

that arises - and it is a serious complication, albeit not one of principle - is who has jurisdiction in this regard.

Jurisdiction of the national courts of the EU Member States

We have shown that the Convention requires that there be a judicial process in the States that are Party to the Convention in which the blacklisting of an organisation and the freezing of its assets can be challenged, and that such proceedings must not just offer some marginal review of the legality and necessity of these measures, but must address both the question of whether the rules on which the measures are based are “law” in the Convention sense (i.e. not too vague and open to arbitrary use, as we feel they are), and the underlying factual reasons for these measures. It is clear from the *Tinelly* judgment that States can (by law) modify the normal judicial process to take account of the special features of terrorism - but such modification must be proportionate to the aims served and, crucially, they may not “restrict or reduce the access [to a proper judicial process] left to the individual [or organisations] in such a way or to such an extent that the very essence of the right is impaired.” (para. 73).

In some countries, such as the UK, the State has provided a specific remedy - *in casu*, the Proscribed Organisations Appeals Commission (POAC), established by the *Terrorism Act 2000*. In other countries, organisations may be able to turn to the ordinary courts (which will often be the ordinary administrative courts).

There are two issues here. First of all, if the avenue of redress provided is not the normal, full judicial process (as in the UK, which leaves these matters to POAC, subject to review by the ordinary courts), the question arises of whether the departures from the normal rules of judicial review of executive decisions are proportionate to the aim of protecting national security/fighting terrorism. Doubts could be raised, in particular, about the independence and impartiality of the adjudicators. The second issue can arise both in respect of proceedings in special commissions and in the ordinary (administrative or other) courts. This is that the review performed by the tribunal in question is only marginal, and (largely) leaves untested the assertions (*ipse dixit*) of the executive. This could occur on two grounds. It can be that a national tribunal or court feels that it cannot look behind the reasons for the measures because they are required by a binding Common Position (and/or Security Council Resolutions). Or it can be that such bodies give excessive credence to such assertions by the executive because the matters touch on national security and terrorism.

The latter is exactly what happened in the case in which the PMOI sought to challenge the fact that it was designated as a “foreign terrorist organization” by the US Secretary of State under Section 302 of the *Antiterrorism and Effective Death Penalty Act* (AEDPA). In that case, the US (Federal) Court of Appeals denied the petitions for judicial review because it felt it could not examine the factual basis for the Secretary of State’s designation:

“At this point in a judicial opinion, appellate courts often lay out the ‘facts.’ We will not, cannot, do so in these cases. What follows in the next two subsections may or may not be the facts. The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.

...

We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true ... [T]he record consists entirely of hearsay, none of it was subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. [The

Secretary of State's] conclusion might be mistaken, but that depends on the quality of the information in the reports she received - something we have no way of judging."⁷⁶

We submit that, by contrast to the position taken by the US Court of Appeals, in Europe the Convention demands that national courts (or if needs be and if provided for by law, special, but still judicial, tribunals or commissions) *do* examine the "law" and the underlying facts. In our view, in EU Member States in which the Convention is directly applicable (which is almost all of them), and especially in those in which the Convention is accorded constitutional, quasi-constitutional or even supra-constitutional status (as in the Netherlands and some other countries), and in countries in which the national constitution provides for similarly strong judicial protection against executive *diktat* (such as Germany, where there is also historical judicial opposition to the idea that the EC or the EU can override the national constitutional requirements), the blacklisting and freezing orders issued under the EU Common Positions should be challenged vigourously in domestic courts (tribunals or commissions) on the basis that they contravene the Convention standards discussed above, and in particular the requirement of "law" and non-arbitrariness.

If a national court were to refuse to apply these Convention standards, and adopted a minimalist approach on the US Court of Appeals lines, or decline jurisdiction in the matter altogether, that in itself would be a violation of Art. 6(1) by the States in which this occurred (it being an undisputed fact that States are responsible for violations of their Convention obligations even if these arise out of actions of their courts or judges over which the governments of those States have no control).

As discussed under the next heading, in our opinion this would open the possibility for a challenge of such rulings, and thus of the blacklisting and freezing orders, to the European Court of Human Rights under Art. 34 of the Convention.

Jurisdiction of the European Court of Human Rights

The simple answer to the second question, whether the European Court has jurisdiction to assess the blacklisting of organisations and the freezing of their assets under the Convention, even though that blacklisting and freezing is required by an EU Common Position, is "Yes". Specifically, the Court held in the *Matthews* case that States Party to the Convention remain responsible for guaranteeing the rights in the Convention even when they have (voluntarily) transferred competence for the relevant matter to an international organisation, *in casu* the EU, by treaty.⁷⁷ To do otherwise would create a clear "escape hole" from the Convention which the Court is not prepared to accept: it recalled its *dictum* (repeated in several cases) that "the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective."⁷⁸ In implementing even a binding Common Position (such as the one on Specific Measures), States must still put their Convention obligations first. Furthermore, the Court held in that case that it had jurisdiction in the matter.

We submit that the same applies here: that the only body that can ultimately determine whether a measure adopted by a State Party to the Convention (on its own motion or because of its EC- or EU obligations) is in accordance with the Convention, and/or whether the State provides for appropriate (Convention-conform) procedural protection in the relevant matter, is the European Court of Human Rights.

⁷⁶ *People's Mojahedin Organization of Iran v. United States Department of State*, 182 F.3d 17, U.S. Court of Appeals, D.C. District, June 25, 1999, quoted in Derek P. Jinks' note on the case in 94 *AJIL* 396 (2000). The Court's decision rested to a large extent on a distinction it made between "substantial support" and "substantial evidence": since the former term was used, the Court felt it had little or no room for judicial review. Jinks is highly critical of this view and calls the case a "squandered" opportunity.

⁷⁷ *Matthews v. the UK*, Judgment of 18 February 1999. See in particular paras. 34 – 35.

⁷⁸ *Idem*, para. 34.

The Legal Service of the Commission of the European Communities argued against this view in a third-party intervention in a case still pending before the European Court of Human Rights, the case of *Bosphorus Airways v. Ireland*.⁷⁹ This case concerns the impounding of an aircraft on the basis of a binding EC Council Regulation implementing an equally binding Security Council Resolution, and thus raises similar issues to the ones discussed in this Opinion. In its submission, the Commission rejected the idea that the Strasbourg Court should have jurisdiction in this matter. It claimed that “equivalent protection” to the Convention standards is ensured in the Community- and Union legal orders, and that the European Court of Justice “takes over the substantive standards of the Convention, as minimum standards, *as they are*, without reservation and following closely the case-law of [the European Court of Human Rights].”⁸⁰ The European Court of Justice therefore (in the Commission’s view) ensures in effect the same as the European Court of Human Rights would:

“‘[e]quivalent protection’ is a concept relating to the *means* of control, *not* to its *result*.”⁸¹

The Commission therefore believes that:

“[T]he member States of the European Community are responsible for acts of Community institutions and in particular for the procedure followed in the ECJ [only] in the sense that they must ensure that provision is made for equivalent protection of fundamental rights in that court. So long as such protection exists *in general* ... the Member States cannot be held responsible in individual cases for such acts, and in particular not for the manner in which the ECJ assesses and decides issues of fundamental rights in individual cases.”⁸²

We emphatically reject this line of argument. The fallacy of it can be easily demonstrated by hypothetically replacing the ECJ with national courts that may be called upon to rule on fundamental rights in general, and the application of Convention standards in particular, including national highest or constitutional courts. These too generally “take over the substantive standards of the Convention, as minimum standards, *as they are*, without reserve and following closely the case law of [the European Court of Human Rights].” Yet no-one argues that individuals or entities should not be able to take their cases to Strasbourg because these domestic courts already ensure the required result “in general”. The latter qualification furthermore gives the game away: the Luxembourg Court does *not* always fully apply the Convention standards, and of course especially may not always know how to apply the Convention standards on issues which have not been fully clarified in the Strasbourg case-law. There have been several cases in which rulings of the Luxembourg Court have fallen short of subsequent judgments by the Strasbourg Court. There is also a matter of principle at stake: as we said earlier, only the European Court of Human Rights can be the final judge on how to apply the European convention on Human Rights.

Our arguments have particular force with regard to second- and third-pillar EU matters (although we submit the principle also applies to the first pillar of the EU). As the European Court of Human Rights said in its admissibility decision in the *Segi* case:⁸³

“The Union’s actions in the field of the CFSP and JHA have a strongly intergovernmental character. The instruments through which the CFSP is mediated are joint actions and common positions.

⁷⁹ Case No. 45036/98, Admissibility Decision of 13 September 2001.

⁸⁰ Commission of the European Communities’ Legal Service, Written Observations ... in Case no. 45036/98 *Bosphorus Airways v Ireland*, JURM(2004)6026, Brussels, 30.06.2004, para. 23.

⁸¹ *idem*, original italics, with reference to *Tulkens and Callewaert*.

⁸² *Idem*, para. 35; “[only]” added, “however” omitted and replaced by dots; emphasis added.

⁸³ *Segi and Gestoras Pro-Amnistía v. Germany and Others*, Appl. No. 6422/02, Adm. Dec. of 23 May 2002.

Common positions ... are therefore not directly applicable, as such, in the member States, and their implementation requires the adoption by each member State of concrete domestic provisions in the appropriate legal form.

Decisions taken by the States' representatives under the CFSP are not subject to judicial review within the European Union, since by virtue of Article 46 of the EU Treaty the Court of Justice of the European Communities is not empowered to review the lawfulness of decisions taken in the field of the CFSP.

A Justice and Home Affairs issue may not be referred to the Court of Justice except in the form of a request for a preliminary ruling under the conditions laid down in Article 35 of the EU Treaty."

(p. 4, under the heading "*Legal nature and judicial review of common positions*")

To argue in such a context that the ECJ offers "equivalent protection" to the Strasbourg Court in terms of both substance and effective redress is, we submit, misleading at least.

We believe that the same can be said with regard to the Security Council Resolutions, even though they were adopted under Chapter VII of the Charter. They may be binding in terms of that instrument (which is of course also a treaty), but that can again not absolve a State from complying with its Convention obligations. We feel this view is supported by the fact that the right to a remedy is equally enshrined in Art. 2(3) of the main human rights treaty of the United Nations, the *International Covenant on Civil and Political Rights*, in terms similar to the ones used in the Convention. In particular, we submit that it cannot have been the intention of the Security Council to set aside this basic principle of the rule of law, and that, if that had been intended, the Security Council would be acting *ultra vires*. *A fortiori*, we submit that the UN Charter cannot be read in such a way as to preclude jurisdiction by the most advanced judicial system of human rights protection in the world simply because a matter was decided by the Security Council (in what is, moreover, a highly political process).

In our opinion, the European Court has full jurisdiction to assess the compatibility with the Convention of blacklists and freezing orders issued by European States, irrespective of the legal basis of such measures.

There is of course one qualification to this: the Court cannot adjudicate on a matter until and unless an applicant has exhausted all (available and effective) "domestic remedies" (Art. 35(1) ECHR), except in cases of an "administrative practice" against which national remedies are presumed to be ineffective. This reinforces our conclusion in the previous sub-section, that domestic remedies should be used urgently and forcefully.

One question remains, however. This is whether the EC/EU legal rules provide blacklisted organisations and individuals with an effective remedy, or indeed perhaps several effective remedies, against the blacklisting, and if so, whether this remedy (or these remedies) are "domestic remedies" in the sense of Art. 35 ECHR. We will therefore now briefly examine those remedies, and set out our conclusions on this question thereafter.

Jurisdiction of the European Court of Justice and the Court of First Instance

The main theoretical avenues of redress for an organisation affected by the Common Position on Specific Measures (2001/931/CFSP) and Council Regulation 2580/2001 are set out by Cameron, with comment as to their actual availability in practice, as follows (with some notes added, as indicated):

“Neither the Common Position on Specific Measures nor Regulation 2580 make any provision for remedies available for the *incorrect* freezing of assets as a result of erroneously being included in the relevant lists. Thus, it is necessary to examine whether general principles of EU/EC law provide legal remedies. There are two methods formally available at the EU level [and several other avenues are conceivably open which commence with national litigation.]⁸⁴

First, a Council decision can be challenged by an annulment action according to Article 230 TEC. The procedural problem of standing usually encountered by ‘non-privileged’ claimants does not arise in the case of challenges to decisions which are addressed to the claimants.⁸⁵

An alternative (or additional) route of legal recourse against incorrect freezing of assets might lie in the extra-contractual liability avenue opened by Article 288 EC. According to this provision damages may be sought from the Community institutions if there is harm as a result of their unlawful acts. The unlawful act for EU external blacklisted people and groups would be the freezing of their assets, whereas EU internal blacklisted people and groups would probably only be able to complain about damage to reputation.⁸⁶

There are two pending applications before the Court of First Instance (CFI) regarding the anti-terrorist blacklisting of the PKK, based on these two articles.⁸⁷

...⁸⁸

A fourth method of challenging, which is also rather unlikely in practice is where a blacklisted ‘EU external’ person or entity has assets (for example, a bank account) within an EU state. These assets are now frozen. It is possible that the person or entity might bring an action under national law for breach of national law (for example, contract law) against the entity (the bank) for refusing to allow access to the asset (the account). The bank in turn will defend its action by reference to the regulation. The national court would then have to decide the issue of the lawfulness of the regulation, in turn (usually) requiring a request to the ECJ for a preliminary ruling under Article 234.

...

⁸⁴ Words in square brackets added. Cameron’s numbering of various avenues is somewhat confusing unless one is aware of what is said in that clarification. [DK]

⁸⁵ Note that the CFI has in any case recently held, in a case concerning the application of general measures in a Council Regulation to a specific applicant, that: “*the strict interpretation, applied until now, of the notion of a person individually concerned according to the fourth paragraph of Article 230 EC, must be reconsidered. ... [i]n order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.*”: *Jégo-Quéré et Cie SA v. the Commission*, Case No. T-177/01, judgment (on admissibility) of 3 May 2002, paras. 50 – 51. The issues of substance (merits) are still pending before the CFI. [DK]

⁸⁶ The text in square brackets is taken from a footnote in Cameron’s text in this place. [DK]

⁸⁷ See the Sison application, [Case T-47/03 R: *Jose Maria Sison v. Council of the EU*, [2003] OJ C 101/41] and *Osman Ocalan on behalf of Kurdistan Workers Party (PKK) and Serif Vanly on behalf of Kurdistan National Congress v Council of the European Union*, Case T-229/02 regarding Council Decision 2002/334 of 2 May 2002 and the further implementing decision of 17 June 2002. ... [original footnote; reference for the Sison case added; further references to Al-Qaida sanctions cases omitted].

⁸⁸ Cameron here discusses a “third method of challenging”, in which an organisation would challenge under national law the decision of the ‘competent national authority’ involved in the drawing up of the blacklist. However, as he points out, once a list has been adopted at EU level, even a successful challenge of this kind at the national level “will not lead automatically to the Council decision being declared invalid. As unanimous consent is necessary to get onto the list, unanimous consent is necessary to get off it again.” (p. 244). This is therefore not an “effective remedy” in the ECHR sense. [DK]

Thirdly,⁸⁹ it is possible to argue before the CFI on the basis of the Borelli principle that the Council decision is invalid because there is no *valid and correct decision* by a national *competent authority justifying* a blacklisting. Under EC case law, national decisions must be motivated by reference to objective and reviewable criteria, including where this is relevant, expert opinions and recommendations.⁹⁰ Alternatively, one can challenge whether the considerations by the Council justifying the blacklisting decision are *reasonable* and *proportional*.

Fourthly and finally, one can argue that the preparatory decisions of the competent national authority and/or the Council decision violate fundamental rights. Even though the Charter on Fundamental Rights⁹¹ does not (yet) have a binding legal status, according to the well-established case-law of the ECJ and Article 6 TEU, the EC is bound to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.⁹²

(Iain Cameron, *o.c.*, [footnote 2, above], pp. 243 – 246, original italics)

Cameron notes that:

“[W]here, as is likely, there is no realistic means of challenging the decision of the national ‘competent authority’ [especially once a Common Position has been adopted],⁹³ then it is the Council decision which must be challenged. And (outside of the context of interim proceedings), the principle of supremacy of EC law requires challenging the Council decision at the EC level, that is, before the CFI.” (p. 248)

In effect, for external (not EU-based) groups - such as the PMOI - the Court of First Instance is the *only* avenue of judicial redress they have outside the Convention system.⁹⁴

Cameron clearly doubts whether the CFI, or the full ECJ for that matter, can be an effective court in this respect. He feels that:

“a proper level of judicial control - proper in the sense of the requirements set by ECtHR case law - would require looking at the reliability of such intelligence material and the appropriateness/proportionality of the discretionary targeting decision. This in turn requires expert knowledge from a court, in particular, familiarity with dealing with such material, and special in camera procedures which balance the rights of the defence with the need to maintain legitimate secrecy. This is a large subject. Suffice to say that the CFI, the ECJ and the ECtHR do not have such expert knowledge or such security sensitive procedures, and their composition and function as international courts makes them inappropriate for such matters.”

(Cameron, *o.c.*, [footnote 2, above], p. 249, footnote omitted)

⁸⁹ Cameron is here apparently reverting to his original numbering: the first two methods he discussed are provided for in the TEC; the next alternative were “more theoretical than real”; and he now continues with a discussion of real avenues. [DK]

⁹⁰ C-424/99, *Commission of the European Communities v Republic of Austria*, [2001] ECR I-9285. [original footnote].

⁹¹ [2000] OJ C 364/1. Little need be said about the Charter. In addition to the articles equivalent to ECHR rights, freezing sanctions may violate *inter alia* the freedom to conduct a business (Article 16), to an effective remedy before the courts (Article 47) and to the requirement of proportionate penalties (Article 49). [original footnote].

⁹² See for example, C-29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECR 107; 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*; [1970] ECR 235; C-4/73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491. [original footnote; references to the wider discussion on the rule of law in the EU omitted].

⁹³ Words in square brackets added: see footnote 49, above. [DK]

⁹⁴ Other (EU-based) groups “will have ‘access’ to court if and when they are charged with criminal offences.”: Cameron, *o.c.* (footnote 2, above), p. 248.

Cameron's inclusion of the European Court of Human Rights in the above is, in our view, wrong, for reasons we will discuss in the next (and last) sub-section in this section. Here, it may suffice to say that we agree with Cameron that the EC/EU legal system does not provide an "effective" remedy to organisations such as the PMOI against their blacklisting or the freezing of their assets.

Exhaustion of remedies

In our opinion, PMOI and organisations in a similar position are not required to exhaust the EC/EU remedies, noted in the previous sub-section, before being able to submit an application to the European Court of Human Rights under Art. 34 of the European Convention on Human Rights.

First of all, this is because (as Cameron points out) the CFI and the ECJ are not equipped to deal with the underlying matters relating to blacklisting and the freezing of assets: they lack the expertise and special procedures that are required to adequately deal with such intelligence-related issues, and would thus be likely to adopt an unduly minimalist approach to any review they carried out, on the US Court of Appeals lines. Contrary to Cameron's claim, we feel this cannot be said of the European Court of Human Rights itself. This is because the Strasbourg Court would not necessarily be called upon to assess these underlying matters. Rather, as discussed earlier, the Court would have to decide whether the *States* have made available avenues of redress which can effectively deal with such matters. We feel that that matter is manifest if (as Cameron suggests) national courts are effectively barred from considering the issues, and only the CFI and the ECJ can be called upon. The Court could, in our view, rule on the question of whether the concept of a "terrorist organisation" is sufficiently defined in the Common Positions and the Regulation to constitute "law" in the Convention sense. It can certainly find - indeed, we submit, cannot but find - that if not the EC and the EU, then certainly the States must make an "effective" remedy available to organisation such as the PMOI through which they can challenge the facts supposedly underpinning their designation as a "terrorist organisation".

We feel that there is a second line of argument against requiring blacklisted organisations to first pursue the matter in proceedings before the CFI and the ECJ. As Cameron notes, the proceedings in these courts would be directed at the EC/EU rules; they would not really concern the national measures implementing them. In such proceedings, the CFI and the ECJ would moreover be asked to rule on the compatibility of those rules with the ECHR. In this context, the CFI and the ECJ can therefore not be said to constitute "domestic remedies" in the sense of Art. 35 of the Convention. Rather (as again Cameron also holds), the CFI and the ECJ must be regarded as international courts. This means that the proceedings in those *fora* constitute "another procedure of international investigation or settlement" in the sense of Art. 35. Applications to the European Court of Human Rights by organisations which did first pursue proceedings in the CFI and the ECJ in the present context could therefore be ruled inadmissible on that basis (Art. 35(2)(b) ECHR). It cannot have been the intention of the authors of the latter Convention that applicants would be *required* to pursue a remedy under Art. 35(1) which would then *ipse facto* rob them of their right to pursue their case before the Strasbourg Court.

Therefore, in our opinion, PMOI should exhaust all domestic remedies against their blacklisting and the freezing of their assets (where these are available in the EU Member States), but it is not required to pursue the issues in the CFI or the ECJ before it can avail itself of the right to submit an application to the European Court of Human Rights. If a domestic court refuses jurisdiction over these issues because it feels that they are determined by EC/EU law without any discretion being left to the Member State in question, PMOI can (we believe) submit an application directly to the European Court of Human Rights, irrespective of whether the matter is, or is not, referred to the CFI or the ECJ. And of course (as already mentioned) if a domestic court *does* feel it has jurisdiction, but subjects the measures to minimal judicial review only, PMOI can also take the case to Strasbourg.

Conclusions, Available Remedies and Tentative Recommendations

Conclusions

In this second part of our Opinion, we have reached the following conclusions:

- the blacklisting of an organisation and the “devastation” this causes to it, seriously interferes with the organisation’s (and its members’) right to freedom of association and assembly, and its right to the peaceful enjoyment of its possessions - all of which are protected by the European Convention on Human Rights; in addition, it will make it difficult if not impossible for the organisation to effectively exercise its right to freedom of expression, which is equally protected;
- the absence of a clear or agreed definition of “terrorism”, “terrorist”, “terrorist act” or “terrorist group”, etc., means that there is uncertainty in the application of any law centering on these terms, and a manifest risk of arbitrary, in particularly politically motivated abuse of such law;
- this makes it essential that there are strong safeguards in place to check, in all senses of the word, the way in which national and international authorities use the power to blacklist organisations and individuals;
- specifically, blacklisting an organisation and freezing its assets, without granting the organisation the right to challenge this blacklisting and freezing, in a court fully satisfying the requirements of Art. 6(1) ECHR, in proceedings in which the factual and legal basis for the blacklisting and freezing is properly, and fully, judicially examined, violates the right of access to court as guaranteed by that provision of the Convention;
- the above principles do not only apply in “ordinary” circumstances, to “ordinary” organisations: they are expressly affirmed in the Council of Europe *Guidelines on Human Rights and the Fight Against Terrorism*;
- the EU Member States must implement the requirements of the Security Council Resolutions and of the EU Common Positions on terrorism in such a way as to conform to the Convention requirements noted above; they should, in particular, provide blacklisted organisations that have their assets frozen with a full judicial remedy, as discussed in the previous section - and if a court were to rule that the blacklisting of a particular organisation is not warranted, they should remove that organisation from the list, whatever the Security Council or the EU Council has decreed.

Available Remedies

- PMOI is required under the ECHR to exhaust all domestic remedies against their blacklisting and the freezing of their assets, in all EU Member States in which such remedies are available; this includes both special proceedings (such as those in POAC in the UK) and ordinary (administrative or other) court proceedings, as well as (where available and effective) proceedings in constitutional courts;

however, in our opinion:

- PMOI is not required to pursue the issues in the CFI or the ECJ before it can avail itself of the right to submit an application to the European Court of Human Rights: if a domestic court refuses jurisdiction over these issues because it feels that they are determined by EC/EU law without any discretion being left to the Member State in question, PMOI can (we believe) submit an application directly to the European Court of Human Rights, irrespective of whether the matter is, or is not, referred to the CFI or the ECJ; and

- if a domestic court *does* feel it has jurisdiction, but subjects the measures to minimal judicial review only, PMOI can also take the case to Strasbourg.

Tentative Recommendations

The considerations which we have set out above should help to provide organisations, including PMOI, which find themselves subject to blacklisting to decide what remedies to pursue. This is of course a matter for the organisation in question. However, we would (tentatively) recommend the following:

- that legal challenges are pursued with vigour at the national level, first of all in countries in which it is likely that the courts will decline jurisdiction on the basis that the issue is entirely determined by EC/EU law: this would allow for an immediate submission thereafter of an application to the European Court of Human Rights; and
- secondly, that an organisation pursue challenges in countries in which it has a good chance of the domestic courts being willing to hold (either on the basis of the ECHR, where the Convention is directly applicable and given a high status, or on the basis of the national constitution) that they should be granted full “access to court”, with the (domestic) court in question being able to assess the underlying matters of law and fact in full

We would urge caution over pursuing cases through the CFI and the ECJ: as we argue above (and as also concluded by Cameron), these courts are ill-equipped to deal with the matters in question and are likely to adopt a minimalist approach to any judicial review they may carry out of the Common Positions and Regulations concerned - which would (we feel) set a bad precedent for any Strasbourg adjudication on the matter.