

# *Situating International Human Rights Law in an Age of Counter-Terrorism*

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## I. INTRODUCTION

**Y**OUSSEF NADA IS a 77-year-old man, who lives in the tiny commune of Campione in Switzerland.<sup>1</sup> He is not allowed to leave this commune. Nor can he access his financial accounts, despite being a senior figure in the world of banking. The problem Mr Nada faces is that his bank, the Al Taqwa bank, is associated with the Moslem Brotherhood and that Mr Nada—an Egyptian by birth—is also connected with this organisation. Among his adversaries is the Egyptian Government of Hosni Mubarak, which desires to get him back to Cairo, where it is clear his safety could by no means be guaranteed. After the attacks of 11 September 2001, Mr Nada also incurred the enmity of the US Government. He found himself placed on a UN sanctions black-list—hence the restrictions on his movement and financial dealings.

In the years since 11 September, Mr Nada has sought in vain to flush out the basis for this action against him. On 1 June 2005, the Swiss criminal proceedings mounted against him, alleging links with Al-Qaida, were dropped for lack of evidence. The same fate befell the equivalent investigation that had been started in Milan—here even the prosecutor himself decided enough was enough and on 14 August 2007 decided to close his investigation. However, the sanctions remain—their validity upheld in proceedings before the Swiss Federal Court: the judges thought the situation an unsatisfactory one and they drew attention to the manifest deficiencies in the sanctions process, in the course

<sup>1</sup> This and the other stories of particular individuals that follow are drawn from ‘United Nations Security Council and European Union Blacklists: A report by Dick Marty, rapporteur to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe’, doc 11454 (16 November 2007) and the addendum to that report dated 22 January 2008: see <<http://assembly.coe.int/>> accessed 19 August 2008.

of their remarks calling upon the Swiss Government to support Mr Nada in his supplications to the UN to delist him. However, the judges said that they could do nothing in the face of the UN authority behind the measures adopted against Mr Nada. On the same day as this ruling, another Al Taqwa director, Ahmed Idris Nasreddin, was suddenly removed from the list. According to a statement of the US Treasury Department, the decision was taken because Mr Nasreddin 'no longer fits the criteria for designation' after he had submitted signed statements to the Office of Foreign Assets Control (OFAC) certifying that he has terminated any business relationships with Mr Nada, the Bank al Taqwa, 'and any other designated individuals and entities, and that he will have no such dealings in the future'. There was a sting in the tail of the concession, a warning shot fired by the retreating forces: 'In the event that Mr Nasreddin recommences his support for designated terrorist entities, OFAC will not hesitate to re-designate him', the Treasury statement reportedly said.<sup>2</sup>

Consider a second case, that of the People's Mojahadeen Organisation of Iran (PMOI). It was founded in order to replace the Shah with a democratic system of government. Naturally, it found the theocracy established under the Ayatollah Khomeini not at all to its taste and so went on to co-found the National Council of Resistance of Iran (NCR). Unsurprisingly, given this background, it has not been the target of American action, but it has annoyed the British. On 29 March 2001, the organisation was proscribed under the UK Terrorism Act 2000.<sup>3</sup> This executive decision was eventually overridden by the independent Proscribed Organisations Appeal Commission (POAC). In its ruling on 30 November 2007, the Commission (chaired by former High Court judge Sir Harry Ognall) described the continued refusal of the Secretary of State to delist as perverse,<sup>4</sup> and on 14 December 2007 leave to seek a review of this decision was refused by the High Court.<sup>5</sup> By now, however, the EU had got in on the act: the PMOI has been placed on the Union's own purpose-built (ie not UN-inspired) blacklists.<sup>6</sup> The procedure by which this was achieved has been condemned by the Court of First Instance of the European Union, which annulled the

<sup>2</sup> See <<http://www.treas.gov/offices/enforcement/ofac/actions/20071115.shtml>> accessed 19 August 2008. The direct quotations are drawn from <[http://jcb.blogs.com/jcb\\_blog/2007/11/swiss-supreme-c.html](http://jcb.blogs.com/jcb_blog/2007/11/swiss-supreme-c.html)> accessed 19 August 2008.

<sup>3</sup> The Terrorism Act (Proscribed Organisations) (Amendment) Order 2001 (SI 2001/1261), named there as Mujaheddin e Khalq.

<sup>4</sup> *Lord Alton of Liverpool (In the matter of the People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department* (PC/02/2006, 30 November 2007), para 360. See further, confirming that no appeal was possible, *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443.

<sup>5</sup> Although further grounds of appeal based on error of law are being pursued: see the debate on the issue at Hansard HC vol 472 cols 1718–25 (4 March 2008), especially the remarks of the Minister for Security, Counter-Terrorism, Crime and Policing, Tony McNulty, at cols 1723–5.

<sup>6</sup> 2005/930/EC, [2005] OJ L340/64.

relevant decision insofar as it concerned PMOI.<sup>7</sup> Remarkably, the Council has kept the organisation on the list despite this ruling, asserting<sup>8</sup> that all the objections to the old process have now been met: in particular, that now it has told the PMOI why it is on the list the procedural defects have been cured. The PMOI has had no chance to respond, no opportunity to show—as it could do before the British POAC—that they are a pro-democracy, anti-armed force movement and are concerned to achieve their goals by peaceful means. It is not that it has been unsuccessful in its submissions—it is that it has had no opportunity to make them.

A third example, a man designated by the US authorities as linked to terrorism<sup>9</sup> and in another, more lurid website as one of the ‘dirty dozen of leading terror financiers being investigated by the CIA’,<sup>10</sup> is Yassin Abdullah Kadi. Mr Kadi is a resident in Saudi Arabia. On 19 October 2001, he was included in the list in annex 1 to Regulation 467/2001<sup>11</sup> as a person suspected of supporting terrorism. What this meant was that all of his funds and other financial resources in the Community were frozen. New regulations brought no relief: the later Council regulation (EC) 881/2002 also contained his name.<sup>12</sup> There will be a great deal more about Mr Kadi later.

And a final example, drawn this time from Germany. In *Möllendorf*,<sup>13</sup> blacklisting stopped a land registry office from registering an owner of a building, the person having been unlucky enough to pay the purchase price while not blacklisted, but then unable to secure a refund when the intervening listing made all financial transactions impossible. As Dick Marty has pointed out in the addendum to his report for the Parliamentary Assembly of the Council of Europe on this issue: ‘If the Security Council resolutions were taken seriously ... then blacklisted persons would no longer be able even to shop in supermarkets, draw their wages or collect rent from tenants.’<sup>14</sup> Marty goes on to voice his concerns about the process in forthright terms: ‘[T]he current blacklisting practice is scandalous and blemishes the honour of the institutions making use of it in such a way. Blacklisting without respecting

<sup>7</sup> Case T-228/02, *Organisation des Modjahedines du Peuple d’Iran v Council of the European Union* [2006] ECR II-4665. To similar effect is Case T-229/02, *Ocalan on behalf of the Kurdistan Workers’ Party (PKK) v Council of the European Union*, judgment of 3 April 2008.

<sup>8</sup> In a Council decision of 20 December 2007: [2007] OJ L340/100.

<sup>9</sup> Listed on 12 October 2001, issued under executive order 13224 (23 September 2001). See also s 411(a)(1)(G) of the USA Patriot Act.

<sup>10</sup> <<http://www.911review.org>> accessed 19 August 2008.

<sup>11</sup> The original list is to be found at [2001] OJ L67/1. Mr Kadi was added on 19 October 2001 by the Commission acting under powers set out in Art 10 of Reg 467/2001—Commission Regulation (EC) 2062/2001, [2001] OJ L277/25. The addition took effect at the same time as a decision by the UN sanctions committee to include Kadi on its list.

<sup>12</sup> [2002] OJ L139/9.

<sup>13</sup> Case C-117/06, *Möllendorf* [2007] ECR I-8361.

<sup>14</sup> *United Nations Security Council and European Union Blacklists*, addendum, above n 1, at para 15.

the most elementary rights puts into ... question the credibility of the fight against terrorism and thus reduces its effectiveness.<sup>15</sup>

In the first substantive part of this chapter, the origins of the system of blacklisting (some of the effects of which have been described above) are explored. The defects in the current procedures are examined from a human rights point of view, after which attention is turned to consideration of what the courts—regional and domestic—have been doing to seek to mitigate the worst effects of the process. It is not an exaggeration to say that the system of the blacklisting of individuals and associations has—from a standing start of total and obvious unacceptability just a few years ago—now reached the point where it threatens to turn international human rights into either a set of standards that can be disposed of entirely in a growing category of cases or else diluted to the point of effective oblivion where these situations arise—and no one is safe from being entrapped within them.

Nor is blacklisting alone in the challenge it poses to international human rights. The second part of this chapter is devoted to considering a further front that has been opened up which has engaged international human rights in a hitherto unprecedentedly aggressive way. This consists of the activities of the counter-terrorism committee of the Security Council and the various bureaucracies that service it. What is at issue here is the way in which states are being put under pressure to bring their laws and practices into line not with the embedded demands of human rights law, but with the new imperatives of counter-terrorism. These stories involve not individuals directly, but rather states: the governments that resist calls for compliance with human rights by praying in aid the exigencies of the counter-terrorist struggle in which another branch of the UN has demanded it be engaged; the state authorities that are being put under counter-terrorism pressure by the UN for seeking to resist some authoritarian turn that is required of them on the basis of the proposal's incompatibility with human rights—such examples can be multiplied and arguably have a greater (albeit more indirect) effect on a range of individuals than the blacklisting regimes which are the concern of part one.

It will be argued that in the developments described in this chapter, there are manifest dangers for the whole structure of our international system for the protection of human rights. Over the past 60 years, since agreement in 1948 on the celebrated Universal Declaration on Human Rights, and particularly since the end of the Cold War, scholars, UN and non-governmental organisation practitioners and others have become used to debating human rights in a way that has rather cosily assumed the inevitable and enduring centrality of their subject of study—questions such as those about the adequacy of their enforcement, the double-standards that damage their universality,

<sup>15</sup> *Ibid*, para 17.

what to do by way of a response to the challenge of cultural relativism, and so on, have become the common currency of a discourse that has been sure of its place at the high table of international law and practice. Now, as the implications of the construction of the world's response to the attacks of 11 September 2001 are gradually working their way on to that table, rivaling human rights for pride of place, the time for complacency is over.

## II. UN BLACKLISTING

The blacklisting regime has its origins in the emergence of sanctions as an important tool in the UN's response to international wrongdoing. These were infrequently invoked during the Cold War: the first such action (Resolution 217 of 1965<sup>16</sup>) was not taken under Chapter VII with its binding character, merely calling on states 'to do their utmost in order to break all economic relations with Southern Rhodesia [now Zimbabwe], including an embargo on oil and petroleum products'.<sup>17</sup> Further resolutions followed and eventually a specific reference to Chapter VII appeared (in Resolution 253<sup>18</sup>) and the Security Council's first committee tasked with monitoring the implementation of a sanctions regime was established.<sup>19</sup> The 1990s saw a vast increase in UN activity of this sort, encompassing action against Iraq (for its invasion and occupation of Kuwait: Resolution 661 [6 August 1990]), and a diverse set of governmental and quasi-governmental entities in Afghanistan, Haiti, Liberia, Rwanda, Sudan and the former Yugoslavia. Trade in certain commodities was banned (eg 'conflict diamonds') and sometimes countries found their diplomatic presence being forcibly scaled back (as happened with Sudan).<sup>20</sup> The idea of going after key personnel was present quite early on, with bans on air links or the travel of elites being imposed on Iraq, the former Yugoslavia, Libya, Haiti, Angola, Sudan, Sierra Leone, and Afghanistan and the financial assets of governments or particular individuals being targeted in Iraq, the former Yugoslavia, Libya, Haiti, Angola and Afghanistan. One typical resolution, Resolution 820 of 17 April 1993, providing that states should impound, inter alia, all aircraft in their territories 'in which a majority or controlling interest is held by a person or undertaking in or operating' from the Federal Republic of Yugoslavia,<sup>21</sup> was to draw Ireland into the fray and to give rise to the leading case on the

<sup>16</sup> 20 November 1965.

<sup>17</sup> *Ibid.*, para 8. See generally EC Luck, *UN Security Council: Practice and Promise* (London, Routledge, 2006) ch 6.

<sup>18</sup> 29 May 1968.

<sup>19</sup> S/RES/253, para 20.

<sup>20</sup> There is a useful broad overview in Luck, above n 17, ch 6.

<sup>21</sup> S/RES/820 (1993), para 24.

subject before the European Court of Human Rights: *Bosphorus Airways v Ireland*.<sup>22</sup> This decision will be considered further below.

As the 1990s proceeded, a degree of disillusionment with general sanctions regimes set in, with increased anxiety about their effect on the innocent (especially in Iraq, Haiti and the former Yugoslavia), so the idea of carefully targeted or 'smart' sanctions gradually came to the fore as a promising alternative to the blunderbuss of general sanctions. Over five years, from 1998 through to 2003, the Security Council took part in a series of engagements (the Interlaken, Bonn-Berlin and Stockholm processes) designed to develop effective means of implementing targeted sanctions.<sup>23</sup> The first such regime commenced on 15 October 1999, with Resolution 1267 providing for sanctions against the Taliban regime in Afghanistan. This initiative was quickly supplemented by a series of resolutions which expanded what was now becoming a growing list not of government entities or organisations, but rather of sanctioned individuals. Osama Bin Laden and his associates joined the Taliban on the list by means of Resolution 1333 (adopted 19 December 2000).<sup>24</sup> The attacks of 11 September provided a powerful impetus for the further expansion of the lists.<sup>25</sup> It also drew in the European Union: on 27 December 2001, the Council of the EU adopted (under Articles 15 and 34 of the Treaty on European Union) Common Positions 2001/930 CFSP<sup>26</sup> and 2001/931/CFSP<sup>27</sup> on specific sanctions to combat terrorism. The same day, Council Regulation (EC) 2580/2001 was adopted, dealing with specific restrictive measures directed against certain persons and entities with a view to combating terrorism.<sup>28</sup> Under this regulation, the Council assumed the power to create and maintain its own list of sanctioned individuals and entities additional to the Security Council lists (which had already been implemented under Regulation (EC) 467/2001<sup>29</sup>).

As the stories that opened this chapter have already indicated, the procedures under both the UN and EU schemes leave a very great deal to be

<sup>22</sup> (2005) 42 EHRR 1.

<sup>23</sup> Luck, above n 17, has the details.

<sup>24</sup> S/RES/1333 (2000), para 8(c).

<sup>25</sup> See S/RES/1373 (2001) with its stipulation in its first paragraph that 'all states shall ... (c) freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons or entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities'. Para 1(d) went on to deal with making funds and other financial resources available for such persons. Further relevant resolutions include: S/RES/1390 (2002); S/RES/1455 (2003); S/RES/1526 (2004); S/RES/1617 (2005); and S/RES/1735 (2006). There is a good overview of the whole procedure at <<http://www.un.org/sc/committees/1267/index.shtml>> accessed 19 August 2008.

<sup>26</sup> [2001] OJ L344/90.

<sup>27</sup> [2001] OJ L344/93.

<sup>28</sup> [2001] OJ L344/70.

<sup>29</sup> [2001] OJ L67/1.

desired from a human rights point of view. As far as the UN is concerned, the application of the Resolution 1267 process (which we may take as representative of much UN activity in the field) was initially extraordinarily opaque, with no clear methodology of listing and certainly no notification to listed individuals, much less opportunity to make a case as to why it should not apply: listed entities were not even allowed to communicate directly with the committee. There was also very little guidance on the range of the humanitarian exception to which the resolution referred. There have been some improvements over the years: states are now exhorted to provide information 'to the extent possible'<sup>30</sup> when proposing to add names, and Resolution 1617 goes so far as to talk about making a 'statement of case describing the basis of the proposal'.<sup>31</sup> Individuals and affected entities now have to be told they are on the lists, albeit there is still no requirement to supply reasons.<sup>32</sup> This last point is, of course, key: you might be on the list by mistake; you might be there because you have made powerful enemies within the international community; you might have friends who operate on the margins of legality. And getting off the list once on it takes the blacklisted individual into the realm of Kafka. Initially, a sanctioned individual had to just hope that one or other of the governments with someone on the committee would make the case and that no other state would object, but of course few applications were made and those that managed to get through were then often vetoed, almost as a matter of course. Under Resolution 1730 (19 December 2006), listed individuals can now petition directly for delisting, albeit the operation of the humanitarian exemption is still the preserve of state action.<sup>33</sup> Starting in 2007 (and intended to operate annually thereafter), the list of all those who have been blacklisted for four or more years is circulated to the Security Council Member States, with any member of the sanctions committee being able to take this opportunity to propose a review with a view to possible delisting. This is not exactly a process designed to induce any kind of adequate review; in March 2007, of the 100 plus names, only one was proposed for review.<sup>34</sup>

If anything, the EU procedure may now be even worse. The first regulation to create additional EU lists (2580/2001, mentioned above) did include a provision for review,<sup>35</sup> echoing in this regard the Common Position of 27 December 2001 which had spoken of review 'at regular intervals and at least once every six months',<sup>36</sup> but there has been no further fleshing out of

<sup>30</sup> S/RES/1617 (2005), para 5.

<sup>31</sup> *Ibid*, para 4.

<sup>32</sup> The discretion is set out *ibid*, para 6.

<sup>33</sup> See S/RES/1735 (2006). S/RES/1730 (2006) sets out the delisting procedure in an annex to the resolution.

<sup>34</sup> See Marty, above n 1, para 40 of the report.

<sup>35</sup> Art 11(2).

<sup>36</sup> 2001/931/CFSP, above n 27, para 6.

what this entails in the years that have passed since its enactment, and little evidence of the review process operating in practice. The regulation initially involved neither notice to affected parties nor the giving of any reasons as to why the listing had taken place. After the PMOI successfully challenged this in the proceedings mentioned earlier, the Council promised to issue a 'letter of notification' together with information about how to appeal, to parties whose assets have been frozen. On 29 June 2007, the Council published a notice informing listed persons that they could seek the reasons for their listing and make an application seeking a review of the listing.<sup>37</sup> A Council review offers little hope in this regard, however: it states that a complete assessment has already been carried out of all those who appear on the list.<sup>38</sup> As Dick Marty has observed, '[i]t remains nearly impossible *de facto* for an individual or entity to get oneself removed from a blacklist'.<sup>39</sup> He calls this situation 'unlawful and unacceptable'.<sup>40</sup>

The point is equally applicable to the UN framework. Professor Bardo Fassbender has observed, in a study commissioned by the United Nations Office of Legal Affairs, that '[i]t has been argued by leading scholars of international law that the present situation amounts to a "denial of legal remedies" for the individuals and entities concerned, and is untenable under principles of international human rights law'.<sup>41</sup> This is without taking into account the arguable breaches of substantive human rights law in both schemes, the travel restrictions that affect a range of basic rights and the financial actions that patently violate the right to property, and also the right of everyone to gain their living by work: International Covenant on Economic, Social and Cultural Rights, Article 6. In his report to the Council of Europe, Professor Iain Cameron took the position that '*either the adoption* by ECHR state parties acting in the Security Council of targeted anti-terrorist sanctions containing no equivalent safeguards *and/or the implementation* of ECHR state parties of these sanctions in their territories is contrary to general human rights principles as embodied in the ECHR'.<sup>42</sup> So, what are the courts doing to secure international human rights in the face of such a dramatic and apparently unequivocal series of attacks?

The depressingly necessary first response to this is, of course, to observe that there is *no* international court to which it is now possible to draw

<sup>37</sup> [2007] OJ C/144 (29 June 2007) 1.

<sup>38</sup> See 2007/868/EC, [2007] OJ L340/100, recitals 4 and 5 for the details.

<sup>39</sup> Above n 1, para 45.

<sup>40</sup> *Ibid.*

<sup>41</sup> 'Targeted Sanctions and Due Process. The Responsibility of the UN Security Council to Ensure that Fair and Clear Procedures are made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter' (Berlin, Humboldt University, 20 March 2006) 5.

<sup>42</sup> 'The European Convention on Human Rights, Due Process and the United Nations Security Council Counter-Terrorism Sanctions' (Strasbourg, Council of Europe, 6 February 2006) 3.



attention, analysing its assessment of the Security Council resolutions in the field, criticising this and applauding that in the normal scholarly way. No such court exists. The Security Council is able to adopt its resolutions, rulings that are then whisked around the world by regional and domestic legal systems, without any fear of judicial oversight. As Gerd Oberleitner observes in his excellent study, *Global Human Rights Institutions*,<sup>43</sup> the role of the pre-eminent judicial body in international law, the International Court of Justice, is 'restricted in a number of ways' so far as human rights are concerned.<sup>44</sup> Only states can be parties before the Court and even then consent is required. It is true that the advisory opinion route offers a potentially more flexible way of securing the court's attention, but this route also has its fair share of procedural hurdles, principal among which relates to the restricted categories of bodies that are able to refer matters to the court in this way (only the principal organs of the UN itself). In the absence of a world court of human rights, the primary judicial fora for human rights challenges to UN blacklisting have been regional and local. Domestic courts have been understandably reluctant to take on the UN.<sup>45</sup> Have our regional human rights courts done any better?

Pre-eminent in this category is the European Court of Human Rights (ECtHR). This is where the *Bosphorus* litigation already referred to becomes relevant. The applicant was an airline charter company incorporated in Turkey in March 1992. On 17 April 1992, it leased two airlines from Yugoslav Airlines (\$1 million per aircraft), the national carrier of the former Yugoslavia. These were the only planes the applicants had, and they had them for their exclusive use for two years (at \$150,000 rental per aircraft per month). In January 1993, *Bosphorus* decided to get their planes serviced in Dublin. While plans for this were being made, along came Resolution 820, coming into force on 28 April via EC Regulation 990/93. The Irish and Turkish Governments asked the UN sanctions committee what was to be done. Meanwhile, the first plane arrived at Dublin on 17 May and was serviced and—on payment of the \$250,000 charge—was released for departure by the authorities. However, on 28 May, while awaiting traffic control clearance to take off, the plane was stopped: the sanctions committee had spoken, the plane was to be held. This was a total financial disaster for *Bosphorus*, which, of course, had nothing to do with

<sup>43</sup> G Oberleitner, *Global Human Rights Institutions* (Cambridge, Polity, 2007).

<sup>44</sup> *Ibid.*, 152.

<sup>45</sup> See *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332. However, see the remarkable first instance decision of *A, K, M, Q and G v Her Majesty's Treasury* [2008] EWHC 869 (Admin), where Collins J was highly critical of the blacklisting system, insisting that the UN's demands in these cases be implemented in a more democratic way than through the kind of secondary legislation that was before the Court and suggesting (at para 36) that in appropriate cases there may be a legal obligation on the UK Government to pursue a delisting application before the Security Council.

the former Yugoslavia other than the dealings through which it had secured its planes. There then followed a round of litigation in Ireland, Luxembourg and (eventually) Strasbourg which would have tested the credulity even of Charles Dickens: the domestic simplicities of *Jarndyce v Jarndyce*<sup>46</sup> were, after all, the best that he could come up with.

When the matter eventually reached Strasbourg, the interference with property rights could hardly be denied. But neither could Ireland's obligation to do what the UN (and the EU) told it. The ECtHR reconciled these conflicting perspectives in the following way:

In the Court's view, State action taken in compliance with such [international] legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. By 'equivalent' the Court means 'comparable': any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a state has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights.<sup>47</sup>

Several points are of interest here. The Court is assessing the action of other international actors by reference to the degree to which these offer human rights protection broadly 'comparable' to that of the European Convention on Human Rights. Looking at the EU (rather than the UN), and in particular its long line of European Court of Justice (ECJ) cases on human rights, this allowed the Court to conclude in favour of the Union that its protection was sufficient enough for the presumption of compatibility to operate. Secondly, however, the Court was clear that the presumption could itself be rebutted in cases of manifest deficiency. So what we have here, thirdly, is a hierarchy of human rights protection: top of the tree are rights protected from direct state action and from interference by international organisations that offer no rights protection at all; well below these rights in the pecking order are rights whose interference is mandated by an

<sup>46</sup> C Dickens, *Bleak House* (London, Bradbury and Evans, 1853).

<sup>47</sup> *Bosphorus v Ireland*, above n 22, paras 155–6, citing *Loizidou v Turkey (preliminary objections)* (1995) 20 EHRR 99, para 75.

international organisation with equivalent protection—here only manifestly deficient protection will attract the attention of the Court. Human rights scholars are very used to ideas of hierarchies in rights protection, but here is a disturbingly novel kind of hierarchy, one that distinguishes between ordinary and really bad breaches of convention rights, or perhaps better put as ‘really bad and requiring action’ breaches and ‘not so bad and best ignored’ breaches.

The *Bosphorus* case could come down in favour of EU law because it was decided on 30 June 2005, nearly three months before the Court of First Instance of the European Union delivered its preliminary verdict on the blacklisting regime, in two cases decided on 21 September 2005, one of which involved no other than Mr Yassin Abdullah Kadi whose plight was the third of the examples with which this chapter began.<sup>48</sup> The equivalent protection argument would have been difficult to maintain in light of the way in which, in these cases, the Court of First Instance judges opted out of any proper scrutiny of UN and EU blacklisting. The Court considered that it had ‘no authority to call in question, even indirectly’ the lawfulness of the UN resolutions in light of Community law.<sup>49</sup> In particular:

If the Court were to annul the contested regulation ... although that regulation seems to be imposed by international law, on the ground that that act infringes their fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.<sup>50</sup>

The only chink in the UN’s armoury was the Court’s acknowledgement that resolutions in breach of the very basics of international law, reflected in *jus cogens*, would be potentially reviewable, although there was nothing so severe as that in this case.<sup>51</sup> Once again, as in *Bosphorus*, we see in this preliminary ruling in *Kadi* the emergence of a negative hierarchy of rights, with normal breaches, even only partly egregious ones, being insulated from review while a jurisdiction in the extreme case of *jus cogens* is preserved, the last of these almost purely notional, but with its existence covering up the true extent of the departure from international standards of the rule of law that has been achieved. If the post-1945 human rights

<sup>48</sup> Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union* [2005] ECR II-3649; and Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union* [2005] ECR II-3353.

<sup>49</sup> *Ibid*: *Yusuf*, para 276; and *Kadi*, para 225.

<sup>50</sup> *Ibid*: *Yusuf*, para 267; and *Kadi*, para 216.

<sup>51</sup> *Ibid*: *Yusuf*, paras 277–82; and *Kadi*, paras 22–32.

settlement is about to be dismantled, this is exactly the shape that such a demolition job would take: not a single great explosion into anarchy, rather a series of smart bombs disabling key parts of the structure until all that is left standing is an empty shell, designed to allow us to continue to believe that the house in fact still remains.

The *Kadi* decision was of course subject to a final ruling before the ECJ. As part of this process, on 16 January 2008 there was a dramatic intervention by Advocate General Poiares Maduro, to the effect that the Court should indeed annul the contested regulation so far as it applies to Mr Kadi.<sup>52</sup> In an even more remarkable development, in its ruling on 3 September 2008 the European Court of Justice agreed with the substance of Maduro's advice, annulling the European implementation of the UN resolutions for having transgressed EU human rights standards.<sup>53</sup> No doubt the ECtHR will be invited to do the same at some point in the future, having resisted a similar sort of invitation in a case arising out of the UN's presence in Kosovo in May 2007.<sup>54</sup> It is a brave regional tribunal that takes on the might of the UN on an issue so central to the concerns of some of its most powerful members. The implications of the ruling, in terms of the basic conflict of grundnorm (as between the EU and the UN) that it seems unavoidably to entail have yet to be thought through. Of course, the EU might react to any such judgment—whether at Luxembourg or Strasbourg—by opting out of the sanctions game altogether, leaving the question to be dealt with at local level. It is hardly likely that, where the European Court of Justice or the ECtHR have feared to tread, a state court would nevertheless bravely walk.<sup>55</sup> The optimum solution would lie in a re-negotiation of the UN blacklisting resolutions to make them easier to fit into the EU's (and it might be said, international law's) regime of human rights protection.

### III. THE COUNTER-TERRORISM COMMITTEE

We turn now to the second substantive area of concern of this chapter, the role of counter-terrorism as an international driving force for state action. The United Nations has long been involved in dealing with the sort of transnational wrongdoing that also easily attracts the 'terrorist' label. The

<sup>52</sup> Case C-402/05 P, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*.

<sup>53</sup> Joined Cases C-402/05 P & C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission*, judgment of 3 September 2008.

<sup>54</sup> See *Behrami and Behrami v France; Saramati v France, Germany and Norway* (App nos 71412/01 and 781/66/01) (2007) 22 BHRC 477 (ECHR).

<sup>55</sup> See *M v Her Majesty's Treasury* [2006] EWHC 2328 (Admin), [2007] EWCA Civ 173; and *R (Al-Jedda) v Secretary of State for Defence*, above n 45. The Swiss Courts have taken the same line in the *Nada* case: see Marty, addendum, above n 1, para 3. The one exception is *A, K, M, Q and G v Her Majesty's Treasury*, above n 45.

agreements in this area have tended to be reactive to particular problems or events and therefore quite focused in their remit. An early manifestation of terrorist activity was the series of aircraft hijackings with which renegade organisations announced themselves in the late 1960s and early 1970s, leading to the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971). Assassinations have been a favoured tool of subversives, stimulating an early effort at definitional exactitude from the League of Nations in the 1930s, and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents sought to address the problem in its contemporary form. The International Convention against the Taking of Hostages appeared in the same year as the Tehran US embassy siege (1979) and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation in 1985, following seizure of the ship the *Achille Lauro* by Palestinian radicals. Sometimes, international action has been directed against potential weapons rather than types of conduct, the Convention on the Making of Plastic Explosives for the Purpose of Detection in 1991 being one such example and those dealing with the protection of nuclear material (1979)<sup>56</sup> and ‘terrorist bombings’ (1997)<sup>57</sup> being others. The last of these shows a drift away from the particular and in the direction of the general category of ‘terrorist’ action: the notion of a bombing which is of a ‘terrorist’ as opposed to a ‘non-terrorist’ kind naturally puts the focus on the term ‘terrorist’ since it will be the breadth (or otherwise) of this qualifying descriptive term which determines whether or not conduct is prohibited within the meaning of the agreement. The International Convention for the Suppression of the Financing of Terrorism (1999) can hardly avoid tackling the term head on, since ‘financing’ (unlike ‘bombing’) does hardly any qualifying work at all. The solution adopted in 1999 was to designate as terrorist ‘[a]ny ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act’.<sup>58</sup>

We can see from this brief survey that even before the attacks on Washington and the World Trade Centre, the UN was moving in the direction of acting against ‘terrorism’ as such, rather than against particular manifestations of terrorism in the form of identifiable criminal acts. It is sometimes forgotten quite how much pressure there was on the UN to

<sup>56</sup> Convention on the Physical Protection of Nuclear Material.

<sup>57</sup> International Convention for the Suppression of Terrorist Bombings.

<sup>58</sup> *Ibid*, Art 2(1)(b).

take action against what important Member States saw as the problem of global terror *even before* 11 September 2001. Without such pressure having already been built up, the attacks of that day would not have wrought the long-term effects on the international order that they have achieved.

An important background fact for what follows is, however, an appreciation of something that the UN has been unable to do, either before or after the Al-Qaida attacks, namely agree a definition of terrorism for the purposes of international law. The General Assembly has been pirouetting about the subject since late 1996, with a draft of a new general convention having emerged, but without agreement on many of the key features without which a final agreed version will be impossible. The difficulties that have blocked emergence of such a final draft have withstood even the crisis atmosphere engendered by the 11 September attacks.<sup>59</sup> The problem with taking a generalised approach to the subject of terrorism (rather than focusing on particular methods of violence, or places in the world) is that it flushes out, in a way that targeted agreements do not, the underlying but rarely articulated assumption of many state members, namely that subversive violence can in the right circumstances be a legitimate means of achieving political change or of resisting foreign occupation. Definitions of global terrorism are by definition largely insensitive to local circumstance, and their tendency to cover all eventualities invariably drags within the range of prohibited behaviour great varieties of illicit conduct, much of it easily identifiable as 'bad' to be sure, but some at least evocative of precisely the kind of military campaigning to which many Member States (and not just new ones) owe their existence. Continuing concerns over the military actions of certain states in Iraq and the Occupied Territories/Palestine have only served to fortify these opponents of a draft treaty with contemporary empirical data with which to support their theoretical objections.

The attacks of 11 September forced terrorism onto the centre of the Security Council agenda in a way which required action that was both speedier and easier than anything that could be mustered via the more formal avenue of the General Assembly and its associated committees. The Council had intervened in the field in the past, such as with its Resolution 1269 of 1999 calling upon states to meet their obligation to cooperate to prevent and suppress terrorist attacks and to bring perpetrators to justice. Now with Resolution 1373, adopted just three weeks after 11 September, the Council deepened its engagement in several important ways.<sup>60</sup> First, it set out a range of counter-terrorism actions that it required Member States to adopt. Secondly, it called on Member States to work more closely together to implement more effective counter-terrorism measures

<sup>59</sup> There is a useful, albeit not quite up-to-date, summary at <<http://cns.miiis.edu/pubs/inven/pdfs/intlterr.pdf>> accessed 19 August 2008.

<sup>60</sup> Above n 25.

at national level. Thirdly, it asked states to increase their commitment to the international conventions on terrorism already in place, drawing attention in particular to the International Convention for the Suppression of the Financing of Terrorism. However, what gave more than the usual bite to these various generalised demands for action was the establishment, fourthly, 'in accordance with rule 28 of its provisional rules of procedure' of 'a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise'.<sup>61</sup> The Security Council called upon 'all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution'.<sup>62</sup> Thus was born the Counter-Terrorism Committee of the Security Council (the CTC).

In these very early days, the role of human rights barely registered in the remit of the CTC, there being only one reference to the term in the whole of Resolution 1373 and that being in the highly specific context of deciding upon the refugee status of asylum seekers.<sup>63</sup> In its early incarnation, therefore, the CTC did not see itself as being obliged to take into account human rights considerations as it set about the task of ensuring that Member States did what was required of them in the name of counter-terrorism.<sup>64</sup> Gradually, however, as the CTC embedded itself into the organisational structure of the UN, the requirements of human rights began to make themselves felt.<sup>65</sup> In 2004, the Security Council established a CTC executive directorate (CTCED) made up of a committee of experts to assist the Committee in its task of monitoring implementation of Resolution 1373.<sup>66</sup> The CTCED does include human rights specialists and has a liaison role

<sup>61</sup> *Ibid*, para 6.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*, para 3(f).

<sup>64</sup> In a briefing to the Security Council on 18 January 2002, the first chair of the CTC, Jeremy Greenstock, had this perspective on the work of the Committee: 'The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate ... It is, of course, open to other organisations to study States' reports and take up their content in other forums': <<http://www.un.org/sc/ctc/humanrights.shtml>> accessed 19 August 2008.

<sup>65</sup> See Office of the United Nations Commissioner for Human Rights, 'Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures' (September 2002): <http://www.un.org/sc/ctc/documents/ohchr1.htm>. Address by the United Nations High Commissioner for Human Rights Sergio Vieira de Mello to the Counter-Terrorism Committee, 21 October 2002: [www.un.org/Docs/ctc/humanrights.shtml](http://www.un.org/Docs/ctc/humanrights.shtml) <http://www.un.org/Docs/ctc/humanrights.shtml>.

<sup>66</sup> S/RES/1535 (2004) (26 March 2004). The resolution established the CTCED to operate until December 2007. Its period was extended to 31 March 2008 by S/RES/1787 (2007) and has since been further extended: see below n 90.



with the public face of the subject at the UN, the High Commissioner for Human Rights.<sup>67</sup> This was in line with the approach of Security Council Resolution 1456, adopted on 20 January 2003,<sup>68</sup> which combined a new urgency in regard to Resolution 1373 with an explicit request to the CTC to ‘bear in mind all international best practices, codes and standards which are relevant to the implementation of Resolution 1373’<sup>69</sup> and recognition that in responding to this call ‘[s]tates must ensure that any measure taken to combat terrorism [must] comply with all their obligations under international law’ and that any measures they adopt should be ‘in accordance with international law, in particular international human rights law, refugee, and humanitarian law’.<sup>70</sup> In Resolution 1624, adopted on 14 September 2005, the Security Council called on states to act against incitement to commit acts of terrorism, but at the same time explicitly reiterating the obligation on states to take account of international law.<sup>71</sup>

By then, the Commission on Human Rights had already stepped into the fray, having in April that year created a new post, that of Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, with a term of three years.<sup>72</sup> The first holder of the office has been Martin Scheinin, the distinguished professor of constitutional and international law at Finland’s Institute for Human Rights. The years since his appointment have seen a gradual working through of the nature of the relationship between these two wings of UN action, the old, respected and deeply embedded human rights tradition on the one hand, and the new, more urgent, arguably more impatient counter-terrorism community on the other.

In his first report, issued at the start of 2006,<sup>73</sup> Professor Scheinin detailed the efforts he made in his first months in office to engage in dialogue with the CTC. At a meeting he held with the Committee in New York in autumn 2005, he had ‘outlined some of the “current trends” that in his view would deserve increased interaction between the CTC and the human rights world’.<sup>74</sup> These included: (i) ‘the very old trend of States resorting to the notion of “terrorism” to stigmatize political, ethnic, regional or other movements they simply do not like’, which was also in

<sup>67</sup> This was one of the intentions behind setting the CTCED up: see ‘Proposal for the Revitalisation of the Counter-Terrorism Committee’ para 7(d)—the note is to be found as an annex to the letter of the chair of the CTC to the president of the Security Council dated 19 February 2004—see S/2004/124.

<sup>68</sup> S/RES/1456 (2003).

<sup>69</sup> *Ibid.*, para 4 (iii).

<sup>70</sup> *Ibid.*, para 6.

<sup>71</sup> S/RES/1624 (2005).

<sup>72</sup> Commission on Human Rights Resolution 2005/80.

<sup>73</sup> Commission on Human Rights, 62nd session, *Promotion and Protection of Human Rights* E/CN.4/2006/98.

<sup>74</sup> *Ibid.*, para 56.



the Special Rapporteur's opinion 'very much a new trend' and which had the consequence that 'calls for and support for counter-terrorism measures by the international community may in fact legitimize oppressive regimes and their actions even if they are hostile to human rights'<sup>75</sup>; (ii) the 'most alarming' trend to question or compromise 'the absolute prohibition of torture and all forms of cruel, inhuman or degrading treatment' reflected in such ruses as narrowly defining the term or practices such as 'the dumping of crime suspects for interrogation to countries that are known widely to practice torture'<sup>76</sup>; (iii) the growing tendency to 'criminalize the "glorification" or "apology" of terrorism, or the publication of information that may be useful in the commission of acts of terrorism' without any specific requirement that such expression entail 'an objective danger that one or more such offences would be committed';<sup>77</sup> (iv) the increased 'tightening [of] immigration controls, including through so-called (racial, ethnic or religious) profiling, sharing of information between countries, and new forms of long-term or even indeterminate detention';<sup>78</sup> and finally (v) the disturbing way in which 'terrorism has largely replaced drug-related crime as the primary public justification for extending the powers of the police in the investigation or prevention of crime'.<sup>79</sup>

This is quite a challenging menu to throw in front of a committee that has been specifically designed (at least initially) to chivy Member States into ever stronger counter-terrorism measures without regard to too much else. Examining the 640 or so reports that had at that juncture been submitted to the CTC under Resolution 1373, Scheinin found 'four types of different messages received by States from their interaction with the CTC'.<sup>80</sup> First, there were the reports, 'few in number' which were examples of 'best practice' from the perspective of the Special Rapporteur's mandate, where the 'CTC [had] been explicitly promoting responses to terrorism that [were]in conformity with human rights'.<sup>81</sup> Secondly, there had been 'occasions where States [had] responded to the CTC advising that their human rights obligations [had] not permitted implementation of recommendations received',<sup>82</sup> and a dialogue had then followed as to how to resolve this mismatch between national human rights protection and the international drive towards counter-terrorism. The tension evident here between the achievement of two goals is a familiar one, but it is usually cast the other way round, with the UN in the role of human rights referee and

<sup>75</sup> *Ibid*, para 56(a).

<sup>76</sup> *Ibid*, para 56(b).

<sup>77</sup> *Ibid*, para 56(c).

<sup>78</sup> *Ibid*, para 56(d).

<sup>79</sup> *Ibid*, para 56(e).

<sup>80</sup> *Ibid*, para 57.

<sup>81</sup> *Ibid*, para 58.

<sup>82</sup> *Ibid*, para 59.

the government seeking the loophole in the interest of national security. If that might be thought a measure of how far we have travelled in inverting the normal UN priorities, the third and ‘most problematic’ of Scheinin’s categories is even more extreme: it ‘consists of instances where subsequent reports by a State suggest that the CTC’s questions and recommendations to the State in question might have been insensitive to human rights’.<sup>83</sup> Allied to this is the fourth category, also one of concern, where the CTC had ‘shown little, if any, interest in the definition of terrorism at the national level’ when if this is not addressed ‘the CTC may end up being understood as encouraging the application of measures designed to implement resolution 1373 (2001) in respect of anything that under national law qualifies as “terrorism”, however defined’.<sup>84</sup>

Fleshing out these last two categories, the Special Rapporteur gives several instances of the CTC asking questions about investigation techniques without acknowledging the serious human rights issues that might be involved in their deployment, and, in particular, without considering the tests of legitimacy and proportionality that are the stock-in-trade of human rights specialists when it comes to assessing which restrictions on rights are legitimate and which are to be disallowed. Scheinin notes that ‘[u]nless the applicable human rights standards are referred to ... States may get the impression that they are requested to expand the investigative powers of their law enforcement authorities at any cost to human rights’—and this will be particularly the case with regard to ‘regimes whose law enforcement authorities are known to violate human rights’. Belarus is given as an example of a case where ‘the questions or comments by the CTC have been used in a subsequent report to legitimize the country’s practices in the field of crime investigation, despite past criticism voiced by human rights mechanisms’.<sup>85</sup> As he goes through the details, the Special Rapporteur notes with a hint of exasperation that ‘[l]aw enforcement practices that violate human rights do not deserve to be legitimized by the Security Council’.<sup>86</sup>

In the years since this report came out, a *modus vivendi* has gradually emerged, with the CTC and CTCED having formalised their link to the human rights side of the UN, while at the same time pushing ahead with their own primary agenda of counter-terrorism. The CTC issued a comprehensive review report on 16 December 2005<sup>87</sup> and followed this up by adopting a set of ‘Conclusions for Policy Guidance regarding Human Rights and the CTC’ on 25 May 2006.<sup>88</sup> These committed the CTCED

<sup>83</sup> *Ibid.*, para 60.

<sup>84</sup> *Ibid.*, para 62.

<sup>85</sup> *Ibid.*, para 60 (footnotes omitted).

<sup>86</sup> *Ibid.*

<sup>87</sup> S/2005/800.

<sup>88</sup> S/AC.40/2006/PG.2.

to providing advice to the CTC on, inter alia, international human rights, especially in the context of dialogue with Member States. The guidance also reaffirmed the importance of liaison with the office of the High Commissioner for Human Rights. Significantly, it acknowledges that both the CTC and the CTCED should 'incorporate human rights into their communication strategy'.<sup>89</sup> On the other hand, the reviews of the work of the CTC that have been underway in the first months of 2008, preparatory to the renewal of the CTCED past the expiry date of 31 March 2008,<sup>90</sup> have been noticeably silent on human rights, with all the talk and energy being given over (perhaps not surprisingly) to counter-terrorist strategising.<sup>91</sup> The perhaps slightly unfair sense is of a committee of doers that views the human rights stuff as an imposition on their real work.<sup>92</sup>

## V. CONCLUSION

To return by way of conclusion to a point that has already been indirectly made when introducing the European cases that have been discussed: the underlying problem here is with the UN and, in particular, with the

<sup>89</sup> And see also E Rosand, A Millar and J Ipe, *The UN Security Council's Counterterrorism Program: What Lies Ahead?* (New York, International Peace Academy, 2007) for some similar conclusions. This report also suggests a greater emphasis generally on human rights: see 15–17 and the recommendation at 23.

<sup>90</sup> Now confirmed: S/RES/1805 (2008). The CTCED has been renewed until 31 December 2010.

<sup>91</sup> See the letter from the chair of the CTC to the president of the Security Council dated 7 February 2008: S/2008/80. The letter contains in an annex a letter from the executive director of the CTCED to the chair of the CTC, and that letter encloses an annex: Organisational Plan for the Counter-Terrorism Committee Executive Directorate. Para 2(a)–(f) sets out the 'Priorities of the CTCED' and here there is no mention of human rights at all. Nor does it appear in the two new priorities suggested at para 3. There is a reference to the existence of the policy guidance (see above n 88) in para 4, but this is not phrased directly as a priority. The further new priorities set out in para 6 also contain nothing on human rights. While there is a proposal to establish a 'cross-cutting technical group' (one of five) on 'issues raised by Resolution 1624 (2005); as well as the human rights aspects of counter-terrorism in the context of Resolution 1373 (2001)' (para 15), the remit here would appear to be drawn deliberately tightly. On the other hand, the reality may be broader in light of para 19's recognition of the need for the supply of general advice. The briefing to the Security Council that the CTCED executive directorate Mike Smith gave on 19 March 2008 (see S/PV.5855) contained little additional mention of human rights. In the debate that followed, the subject hardly appears, with mention of it being made by the representatives from Burkina Faso and Belgium, but few other speakers. It is to be hoped that the new working group on the human rights aspects of counter-terrorism which Mr Smith has created within the CTCED, and to which he referred in his 19 March briefing will gradually come to have an impact on the work of the directorate.

<sup>92</sup> The Communiqué of the Seventh Meeting of Heads of Special Services, Security Agencies, and Law Enforcement Organisations, 27–8 March 2008, held in Russia and involving no fewer than 54 states and various international bodies (not including any from the human rights sector), made no mention of human rights: <<http://www.un.org/sc/ctc/otherstatements/shtml>> accessed 19 August 2008.

absence of the discipline afforded by the possibility of judicial oversight.<sup>93</sup> Some years ago, the British civil service produced a booklet, *The Judge over Your Shoulder*,<sup>94</sup> designed to warn colleagues of the risks of judicial review. Derided at the time, it was a sensible pre-emptive strike by rational decision-makers: why make mistakes now which may lead to expensive and time-consuming review proceedings later? The UN blacklisting system contains no such discipline: the procedures are created and then applied in a region above law, where shoddy decision-making can never be exposed, nor manifest injustices corrected. Any fairness that is introduced, and as has been indicated this has occurred with regard to the UN framework, has been put in place in a haphazard way, without the coherence that would flow were it designed to deliver answers to potential legal objections.<sup>95</sup> The blacklisting scheme has always meant well: it makes sense to tackle the bad few rather than the innocent many; ‘smart sanctions’ are in principle better than the kinds of UN action that kill millions and let the truly culpable escape. However, such systems cannot be erected above the law or they will collapse into arbitrariness and attract a degree of opprobrium so great that the alienation they cause will outweigh the benefits they bring. And while accession of the EU to the European Convention on Human Rights, once again the focus of discussion in European fora,<sup>96</sup> would perhaps be a sensible move for many reasons, it would not by itself resolve the issue of judicial oversight thrown up by the problems discussed here.

In the absence of any effective judicial remedies, much depends on the attitude of those whose job it is to oversee the blacklisting schemes, whether at international, regional or national level. Apart from the final *Kadi* ruling however, there is a regrettable (albeit hardly unexpected) inverse relationship between those who call for reform and those who have the power to bring such changes about. Reacting to the Marty report, the best that the Parliamentary Assembly of the Council of Europe could muster was a recommendation inviting ‘the Committee of Ministers to take up the issue of targeted sanctions’ with a view to their then inviting the UN Security Council and the Council of the European Union to improve

<sup>93</sup> Of general interest in this regard is the recent report from the Austrian Federal Ministry for European and International Affairs together with the Institute for International Law and Justice at New York University School of Law, ‘The UN Security Council and the Rule of Law. The Role of the Security Council in Strengthening a Rules-based International System’ (February 2008).

<sup>94</sup> See now *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators* 4th edn (London, Treasury Solicitors, 2006), with a foreword by Cabinet Secretary Sir Gus O’Donnell.

<sup>95</sup> The latest efforts at improving the process are anticipated in Security Council Report Update Report, ‘1267 Committee: Al-Qaida/Taliban Sanctions’ (21 April 2008).

<sup>96</sup> See, in particular, the report of the Committee on Legal Affairs and Human Rights to the Parliamentary Assembly of the Council of Europe, ‘The Accession of the European Union/European Community to the European Convention on Human Rights’ (Doc 11533, 18 March 2008).

their blacklisting procedures.<sup>97</sup> The body's resolution, passed at the same time, 'confirm[ing] that terrorism can and must be fought with means that respect and preserve human rights and the rule of law', is excellent so far as it goes, but its lack of any immediate bite compounds the sense of impotence which the supplicatory nature of the recommendation hardly does anything to allay: here is a body of well-meaning discussants who are very far from the action indeed.

The emergence of a strong counter-terrorism narrative at UN Security Council level in the form of the CTC, with its determined enforcement of Regulation 1373, shows that the blacklisting scheme does not exist in isolation. There is an ominous trend here which this Committee's work, like the blacklisting bureaucracy, exemplifies, namely a counter-terrorism-driven move away from accountability, transparency and respect for international human rights standards. However, the parliamentary assembly of the Council of Europe is right even if it does not have the power to impose its view: the law is the friend and not the enemy of effective counter-terrorism. It is through a commitment to rather than defiance of international human rights that we can achieve the goal of engaging effectively with the problem of international criminality, but without sacrificing the principles upon which, after all, not just liberal democracy, but the United Nations itself is based. Much does depend on the attitude to human rights by the Member States themselves<sup>98</sup> and in particular the view of international law taken by the major powers whose historical importance has given them a grip on UN proceedings. It is not probable that either Russia or China will soon be in any sort of position to want to lead on these issues. Neither the UK nor France has the international clout to achieve anything, their only effect being to make impossible the one reform that might really assist here, their replacement by a single EU voice in the highest ranks of the UN. Since the other members of the Security Council are merely passing through, this leaves the United States, once the key driver of international human rights, but in the course of the past eight years a major and entirely deliberate violator of the legal norms that this idea has produced. There will shortly be a new occupant of the White House, and his cannot but be a presidency with a stronger commitment to the international rule of law than his predecessor. What better way to mark the change than to revive the sadly neglected campaign for an international court of human rights, or at very least for an expansion of the jurisdiction of the International Court of Justice, so that the UN, as well as the rest of us—citizens, states and regional powers—are brought within the reach of law?

<sup>97</sup> Recommendation 1824 (2008): <<http://assembly.coe.int/>> accessed 19 August 2008.

<sup>98</sup> This is one of the main emphases of a recent, excellent report from the Centre for Global Counterterrorism Cooperation: E Rosand, A Millar and J Ipe, *Human Rights and the Implementation of the UN Global Counter-Terrorism Strategy: Hopes and Challenges* (Centre for Global Counterterrorism Cooperation, 2008), available at <[http://www.globalctc.org/images/content/pdf/reports/human\\_rights\\_report.pdf](http://www.globalctc.org/images/content/pdf/reports/human_rights_report.pdf)> accessed 19 August 2008.