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Executive summary

Blacklisted: Targeted sanctions, preemptive security and fundamental rights

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1. The terrorist proscription regimes enacted by the United Nations (UN) and the European Union (EU) after the attacks of 9/11 have been seriously undermined by growing doubts about their legality, effectiveness and disproportionate impact on the rights of affected parties. *Blacklisted* documents the development and implementation of these regimes and the legal and political crisis they presently face.
2. The UN blacklisting regime stems from UN Security Council Resolution 1267, which first created the list of alleged terrorists ‘associated with’ Osama bin Laden, the Taliban and Al-Qaeda. UN Security Council Resolution 1373, adopted in the immediate aftermath of 11 September 2001, encouraged states to create their own blacklists to prevent “the financing of terrorist acts” and enact other counter-terrorism provisions criminalising the support of terrorism through asset-freezing. The EU’s terrorist lists stem from the measures it took to transpose Resolution 1373 into EU law.
3. At face value, terrorist proscription (the act of designating a group or individual as terrorist, as an associate of known terrorists, or as a financial supporter of terrorism) seems like a reasonable response to the crimes of 9 / 11 and subsequent terrorist attacks. Ostensibly, these ‘smart sanctions’ (which target groups and individuals rather than whole populations) are designed to disrupt the activities of terrorist groups by criminalising their members, cutting off their access to funds and undermining their support. In practice, however, far too many people have been included in national and international terrorism lists. At the same time, they have been systematically denied the possibility of mounting a meaningful defence to the allegations against them. Moreover, many listings are clearly politically or ideologically motivated, undermining genuine counter-terrorism efforts and paralysing conflict resolution efforts.
4. There is now an irrefutable body of expert legal opinion that views international proscription regimes as incompatible with the most basic standards of due process. The adverse and unacceptable impact of the sanctions on fundamental human rights is also abundantly clear and systemic violations have been recognised repeatedly in judicial proceedings, particularly within Europe. Listing decisions are usually based on secret intelligence material that neither blacklisted individuals nor the Courts responsible for reviewing the implementation of the lists will ever see. Needless to say, affected parties cannot contest the allegations against them (and exercise their right to judicial review) if they are prevented from knowing what the allegations actually are.
5. Like control orders and administrative detention without charge, blacklisting has been seen as a key component of the preemptive security agenda pursued by states in the years since 9/11. Whilst it is widely accepted that the lists have been largely ineffective in blocking terrorist financing, states have nonetheless prioritised blacklisting as a means of facilitating prolonged interference with the lives of terrorist suspects on the basis of intelligence material incapable of withstanding proper judicial scrutiny.

6. The Report examines the most important legal challenges to international proscription regimes to date. This includes both successful and unsuccessful legal cases – there have been many ‘pyrrhic victories’ for blacklisted individuals as the executive bodies of the UN and EU have sought to maintain control in the face of growing judicial dissent – as well as acts of political resistance.
7. One of the most important legal challenges brought to date has been the case of Yassin Abdullah Kadi. Kadi successfully challenged the European implementation of his UN listing in the EU Courts. Significantly, in 2008 the European Court of Justice (ECJ) ruled that despite the supremacy of the United Nations in the hierarchy of international law, the principle of due process enshrined in the European Convention on Human Rights had to take priority. In response, the UN and EU introduced several due process reforms – culminating in the 2009 appointment of an Ombudsperson (OP) to facilitate de-listing requests. Yet they maintained the sanctions against Mr. Kadi. In 2010 the ECJ ruled against the European implementation of the UN list for a second time, noting that the creation of the OP fell far short of the standard necessary to ensure compliance with European human rights law. Mr. Kadi may ultimately be removed from the list to prevent further successful litigation. But it will not be long before the fundamental problems created by the UN and EU proscription regimes return to the Courts.
8. Another important case recently heard by the UK Supreme Court involved five blacklisted men (known as *A, K, M, Q and G*) who successfully challenged the implementation of the relevant UN Security Council Resolutions by the British government. The Court held that the UK implementing regulations were *ultra vires* the *United Nations Act* because of their impact on fundamental rights (a similar judgment is now expected from the Canadian Courts in the case of Abousfian Abdelrazik). In its scathing judgment, the Court found that the UK/UN regime “strike[s] at the heart of the individual’s basic right to live his own life as he chooses” and effectively renders “designated persons ... prisoners of the state”. The Court ruled that such a draconian regime could only be justified by an Act of Parliament, which would have surely introduced an appeals procedure. This decision led to the UK’s implementing measures being struck down by the Court. However, instead of referring the UN terrorism list to parliament, the UK government has simply chosen to directly apply the EU Regulations that transpose the UN terrorism list into EU law. Put more simply: people in the UK who have been blacklisted by the UN will remain “prisoners of the state” because of EU governments’ unflinching reluctance to demand meaningful reform at the UN.
9. In Switzerland, which is home to the assets of numerous blacklisted individuals, legislative reforms have been introduced that empower the Swiss Federal Council to refrain from implementing the UN 1267 blacklist in certain circumstances – including, *inter alia*, where blacklisted individuals and groups have not been afforded access to an independent mechanism of review and/or where they have been listed for more than three years without being brought before the Court. Upon approval of the proposal in March 2010, the Swiss Parliament stated that the government “should make clear that it is not possible for a democratic country based on the rule of law that sanctions imposed by the Sanctions Committee, without any due process guarantee, result in the

suspension, for years and without any democratic legitimacy, the most basic human rights that are proclaimed and propagated by the United Nations”.

10. Despite numerous Court rulings and widespread proclamations of this nature, there has been very little public debate about the role and function of terrorist blacklisting. The discussion that *has* taken place within institutional and academic circles has tended to follow the increasingly complex legal architecture arising from litigation and piecemeal reform. It is crucial therefore that the wider political significance of the blacklisting regimes is not overlooked because their impact extends far beyond individual human rights to fundamental matters of social justice, self-determination, peace-building and conflict resolution. These matters call into question the very role and function of the ‘international community’.
11. Blacklisting has had a tremendously negative impact on attempts to resolve long-standing conflicts and complex struggles for self-determination, often undermining the right to self-determination itself. International development organisations have had to adjust to a new regime of due diligence obligations at home while simultaneously finding their work in conflict zones and fragile states paralysed by the blacklisting of groups and individuals in the communities in which they operate. In Europe and North America, Diaspora communities have come under particular scrutiny because of their association with terrorist organisations. Kurds, Palestinians, Tamils, Kashmiris, Baluchis and other minority communities have all felt the effect of suspicion and stigmatisation. The practice has had a disproportionate and gendered impact on the lives of women and other family members of those who are designated. It has also facilitated the creation of new forms of unaccountable and supranational authority at the UN level to directly target and interfere with the rights of individuals. The adoption of ‘terrorist lists’ by the UN and EU also sets a dangerous precedent that legitimises the principle of blacklisting and encourages its use in other security frameworks, with worrying long-term implications for civil liberties.
12. There is an emerging consensus that something urgently needs to be done about terrorist blacklisting that goes beyond mere procedural tinkering. However, there are only actually two options available to the United Nations that could satisfy constitutional due process safeguards and international human rights law. These are either (a) introduce an independent judicial review mechanism at the UN Level, or (b) allow judicial review of UN blacklisting decisions in national courts. In reality, the permanent members of the Security Council will sanction neither development. In the face of such intransigence the Report argues that the time has therefore come to radically rethink the issue and for the international legal framework underpinning the blacklisting regimes to be abolished. As Martin Scheinin (UN Special Rapporteur on the promotion and protection of human rights while countering terrorism) states in the Report’s foreword:

“Whatever justification there was in 1999 for targeted sanctions against Taliban leaders as the de facto regime in Afghanistan, the maintenance of a permanent global terrorist list now goes beyond the powers of the Security Council. While international terrorism remains an atrocious crime ... it does not justify the exercise by the Security Council of supranational sanctioning powers over individuals and entities”.

13. While the EU's legal order and court system ensures a relatively higher standard of 'due process' than the UN, the EU's blacklisting regime also falls far short of any reasoned interpretation of the substantive obligations on the Union to introduce a much fairer system - one that respects both fundamental rights and the principles of proportionality and democratic control. If the fundamental flaws of the blacklisting regimes are to have any chance of being properly addressed, then both wholesale reform and a broader public debate about how terrorism ought best be dealt with is required. This is both a legal and political task and a process we hope the Report can usefully contribute to.