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Under U.S. and other common law traditions, what conditions have to be met for that to take place? How can assets be released and generally for what purposes? How and to what extent and under what conditions can assets be unfrozen?

Saini Sudnagunta

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I. INTRODUCTION

A. ISSUE^{1*}

Rule 82 (C) of the Rules of Procedure and Evidence for the Special Tribunal of Lebanon provides that the Trial Chamber or the Pre-Trial Judge can request States to freeze the assets of the accused.² This memorandum surveys the mechanics of asset freezing. It looks at the general principles established by the International community such as the United Nations and the European Union. Examining the principles of the United Nations and the European Union would be important as these principles would be binding on the Member States. This memo will examine the procedures followed by the common law jurisdictions. The common law jurisdictions this memo will consider are the United States, the United Kingdom, Canada, India, Pakistan, and South Africa. This memo will focus extensively on freezing of terrorist assets as the tribunal was established to try those found responsible for the terrorist crime that killed former President Hariri.

B. SUMMARY OF CONCLUSIONS

^{1*} Under U.S. and other common law traditions, what conditions have to be met for that to take place? How can assets be released and generally for what purposes? How and to what extent and under what conditions can assets be unfrozen?

²

STL RPE, Rule 82 (C) Special Tribunal of Lebanon, “*Rules of Procedure And Evidence*”, [reproduced in accompanying notebook at Tab 15].

1. After the 9/11 attacks in the United States, there has been an increased effort in freezing terrorist assets.

Freezing of assets was often used as measure in combating terrorism. It was often a tool used to freeze the funds of individuals or entities so that the money will not be used for further terrorist activities. In addition it is also used as a precautionary measure to prevent the individual from using the funds to flee from authorities. Freeze and seizure of assets could be considered as a prejudgment measure. Once the individual or entity is convicted there would be a confiscation of the assets. Until there is a conviction, the Individual is the owner of the funds and assets, the government would be acting as a trustee of the property till the person is convicted or found not guilty.

2. International Organizations such as the United Nations and the European Union place legal obligations on member states to freeze assets and at the same time to protect the Individual's rights.

While looking at the laws and regulations of common law jurisdictions regarding the freezing of assets, it is essential to consider the measures adopted by the United Nations and the European Union. The United Nations has created a framework of counter-terrorism measures, which the member states are obligated to follow. The European Union through its common positions requires its member states to follow certain measures. The European Court of Justice (ECJ) is the highest court in the European Union. The European Court of Human Rights is an International judicial body, which was established under the European Convention of Human

Rights (ECHR).³ Cases dealing with this issue have went before both the ECJ and ECHR, which the following sections of the memorandum will discuss.

3. In general, designation of an individual or an entity as a terrorist will result in their assets being frozen.

The United Nations and Individual countries usually follow a listing mechanism where they list the specific person or organization as involved with terrorism. Once they are designated as such, the financial institutions and the respective government agencies must take steps to freeze the assets and funds of the listed person.

4. An individual or entity does not have a right to receive a notice before their assets are frozen.

There has been litigation in the courts claiming that before the assets or funds are frozen the affected party did not receive notice. The courts have held that notice before the freezing of assets is not an absolute requirement. It recognized the fact that sometimes national security interests prevent the government from giving notice to the individual. In addition, the courts have recognized that if the individual is given notice that the assets will be frozen it would be easier for them to move the assets. Therefore, for this tool to work efficiently a notice would not be required before the freezing of assets, as long as they are given notice after the action is taken place.

³See Wikipedia, European Court of Human Rights [reproduced in accompanying notebook at Tab 58].

5. International Jurisprudence recognizes that frozen assets could be released for the person to continue their day to day activities.

Freezing of assets does not necessarily mean that a person will be charged immediately and brought before the court. Therefore, while the person is waiting for his/her terrorism charge to be decided, it is reasonable to expect that the person would need money to continue their daily living. Therefore funds could be released to the individual for basic expenses such as food, rent, mortgage and such. These released funds will be carefully watched by the authorities ensuring that they would not be used for terrorism purposes.

6. Assets might be unfrozen if the individual or organization is not found to be guilty of terrorism.

If a designated individual or organization provides the government evidence that they are not guilty of what they are accused of, the government can decide to take their name off the designated list. The removal from the list would unfreeze the person's assets. In addition, if the person is found not guilty of involvement in terrorism, the frozen assets and funds would be unfrozen. If the individual or organization is found guilty, the proceeds of crime would be confiscated.

II. FACTUAL BACKGROUND

Before examining the laws of individual countries regard to freezing of assets, we must first look at the policies of the United Nations and the European Union. They place a legal obligation on all its member states to follow with the policies. This section will examine the purpose of freezing assets, the precedent set by previous war crimes tribunals and the framework established by the United Nations and European Union.

A. THE NEED FOR FREEZING ASSETS

After the 9/11 terrorist attacks George W. Bush, the former President of the United States of America said:

“Money is the lifeblood of terrorist operations. We will starve the terrorists of funding, turn them against each other, rout them out of their safe hiding place, and bring them to justice.”⁴

Post 9/11, assets of terrorist organizations and individuals are repeatedly frozen. The goal is to deprive the organization or individual of financial power so that they would not be able to engage in future terrorist activities. It is also used as a tool to bring those accused of terrorism before justice. There are two purposes for the freezing of assets. One is for “the purposes of granting restitution of property or payment from its proceeds.”⁵ The second purpose would be to prevent the accused from taking steps to hide the assets.⁶

⁴ Remarks on United States Financial Sanctions Against Foreign Terrorists and Their Supporters and an Exchange with Reporters; Transcript, 37 Weekly Comp. Pres. Doc. 1364 (Oct. 1, 2001) [reproduced in accompanying notebook at Tab 56].

⁵

Prosecutor v. Milosevic, Decision on Review of the Indictment and Application for Consequential Orders, ¶26 ICTY-99-37-1, 24 May 1999 [reproduced in accompanying notebook at Tab 1].

⁶

Id.

**B. PROCESS USED BY THE OTHER INTERNATIONAL TRIBUNALS TO
FREEZE ASSETS OF THE ACCUSED**

**1. International Criminal Tribunal for the Former Yugoslavia
(ICTY)**

Under Article 19 (2) of the ICTY statute the judge, upon the prosecutor's request, can issue any "orders as may be required for the conduct of the trial."⁷ Using its powers under article 19(2), the tribunal ordered all United Nations member states to investigate as to whether the accused has any assets in their territory, and if so to freeze the assets until they are taken into custody. Even though Article 19 (2) did not specifically give permission to freeze assets, the tribunal found it necessary to freeze the assets because of the non cooperation from the Federal Republic of Yugoslavia and the possibility that the accused might use the assets to escape their arrest.⁸ "The orders of the tribunal are considered to be the application of enforcement measure under Chapter VII of the Charter of United Nations; the Tribunal's order theoretically has the equivalent force of law of a binding Security Council Resolution."⁹

The ICTY was facing a problem with making the states cooperate and to hand over the indicted suspects to the tribunal. Responding to the Tribunal's order, the United Nations Security Council enacted Resolution 1503 asking the member states to freeze assets of individuals or

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ICTY Statute art.19(2) (stating, "Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial") [reproduced in accompanying notebook at Tab 14].

⁸ Michael Scharf, *The Tools For Enforcing International Criminal Justice In the New Millenium: Lessons From The Yugoslavia Tribunal*, 49 Depaul L.Rev. 925, 945 (2000). [reproduced in accompanying notebook at Tab 17].

⁹

Id. at 946.

organizations that are helping the indictees evade their arrest.¹⁰ Respecting the Security Council's resolution, the Council of the European Union adopted a common position declaring that they would follow through with the resolution and freeze the assets of Kardacic, Ratko Maldic, and Ante Gotvina.¹¹ Article 1 of the position required the funds and resources of the individuals indicted by ICTY to be frozen.¹² Article three listed out exemptions of when funds or economic resources may be made available to the individuals. Funds necessary for basic expenses¹³, funds necessary for "reasonable professional fees and reimbursement of incurred expenses" as a result of legal services, "intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources", and also funds for "extraordinary expenses".¹⁴ The council however did not define what would be considered as extraordinary expenses.

¹⁰

SC Res. 1503, ¶. 6, 7 (Aug 28, 2003) [reproduced in accompanying notebook at Tab 24].

¹¹

Council Common Position of Oct 11, 2004, on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), 2004/694/CFSP [reproduced in the accompanying notebook at Tab 48].

¹²

Id.

¹³

The range of basic expenses included "payments for food-stuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges"

¹⁴

Council Common Position of Oct 11, 2004, on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), 2004/694/CFSP [reproduced in accompanying notebook at Tab 48].

The United States followed the order of the tribunal and declared the indicted individuals as “specially designated nationals”¹⁵ The indictees property was to be blocked under Executive Order 13088.¹⁶ The Executive Order ordered the freezing of assets of the governments of Federal Republic of Yugoslavia, Serbia, and Montenegro.¹⁷

As Professor Scharf explains in his article, in order to ensure the arrests of indictees, the ICTY used the powerful tool of freezing of assets “through an unexpected legal interpretation.”¹⁸ The procedure followed by the ICTY shows how the court can freeze an individual’s assets even though the rules did not explicitly provide for it. It issued a freeze of assets order determining that the freezing of assets is necessary to bring the accused to justice.

2. International Criminal Tribunal for Rwanda (ICTR)

Rule 61(D) of the Rules of Procedure and Evidence for the ICTR provides that the Trial Chamber can order States “to adopt provisional measures to freeze the assets of the accused.”¹⁹ The freezing of assets has to be done with no prejudice to the third parties.²⁰ Therefore, the ICTR was perhaps the first tribunal to be explicitly given the authority through its rules to freeze the assets of the accused.

¹⁵

49 Depaul L.Rev. 925, 945 (2000).[reproduced in accompanying notebook at Tab 17].

¹⁶

Id.

¹⁷

Exec. Order No. 13,088, 63 Fed. Reg. 32,109 (1998) [reproduced in accompanying notebook at Tab 31].

¹⁸

49 Depaul L.Rev. 925, 946 (2000). [reproduced in accompanying notebook at Tab].

¹⁹ ICTR RPE, Rule 61 (d) [reproduced in accompanying notebook at Tab 17].

²⁰

Id.

In a Request for Arrest and Transfer, the Tribunal specifically requested all United Nations member states to inquire as to whether the accused has assets in their territory. If the member state discovers that the accused has assets in their territory, they were requested to adopt provisional measures to freeze assets.²¹ This specific example of the tribunals order shows that through a request, a tribunal can essentially request United Nation member states to freeze the alleged individual's assets. States can take adopt provisional measures to freeze assets even before a person's arrest: It can be that in the process of finding the accused, if they discover his assets, it can be frozen.

3. Special Court for Sierra Leone (SCSL)

Similar to the ICTY and the ICTR, the SCSL requested that the assets of the accused be located and frozen within Sierra Leone “without any prejudice to the third parties.”²² However, in the case of *Prosecutor v. Norman*, the Judge refused the request of the Prosecutor asking for the assets of the accused be frozen.²³ The Prosecutor requested the Court to issue an order asking that Mr. Norman's bank accounts be frozen.²⁴ The Judge recognized that the accused has a right to “own and enjoy his property”²⁵ The International Community and Sierra Leone can deprive

²¹

Prosecutor v. Augustin Ngirabatware, Request for Arrest and Transfer, ICTR-99-54-I, 02 Nov 2000. [reproduced in accompanying notebook at Tab 2].

²²

Prosecutor v. Augustine Gbao, Order Confirming Prior Arrest and Transfer And Ordering Continued Detention, SCSL-2003-09-I, 16 Apr 2003. [reproduced in accompanying notebook at Tab 3].

²³

Prosecutor v. Norman, Decision on Inter Partes Motion By Prosecution to Freeze The Account of the Accused Sam Hinga Norman At Union Trust Bank, SCSL-04-14-PT, 19 Apr 2004. [reproduced in accompanying notebook at Tab 4].

²⁴

Id. at ¶ 1

²⁵

Id. at ¶ 5

him of that right only under “certain defined circumstances.”²⁶ The Judge mentioned that there is no explicit authority in the SCSL statute or rules that authorizes the prosecutor to seek a order to freeze the assets of the accused.²⁷ The Judge articulated a test to determine if the prosecutors’ request to freeze the accused be granted. He stated that there should be “clear and convincing evidence that the targeted assets have a nexus with criminal conduct or were otherwise illegally acquired.”²⁸ Probable cause or mere suspicions are not enough to order the accused’s assets be frozen.²⁹

4. Lesson from the tribunals

It can be seen that the tribunals have used the power granted by the rules to order the assets of the accused be frozen. A conviction was not necessary for the assets to be frozen. The tribunals essentially ask the International community to take steps to freeze the assets of the accused. The International community obliges the request by taking steps to freeze the assets in their territory. The Tribunal should also take notice of the decision in the Norman case where the judge said there must be a nexus between the crime and the assets that is being frozen. Perhaps it might mean that the Prosecutor cannot just ask for all assets of the accused be frozen. There might have to be a relationship with the crime the accused allegedly committed and asset that would be frozen.

²⁶

Id.

²⁷

Id. at ¶ 10

²⁸

Id. at ¶13

²⁹

Id.

C. THE ROLE OF THE UNITED NATIONS

The United Nations “has been at the centre of the counter terrorism campaign” at the International level.³⁰ As part of its strategy to aid in its counter terrorism campaign, the United Nations built up a network of conventions and resolutions dealing with finances.³¹ It has the authority to enact binding security resolutions on its member states. The States must enact measures in their jurisdictions to implement these resolutions. Therefore, when considering the procedure of freezing assets in common law jurisdictions, one must also look at the measures enacted by United Nations. In general, the United Nations (UN) imposed an obligation on all its member states to take steps to freeze terrorist assets. This section will discuss about the International Convention for the Suppression of the Financing of Terrorism, the resolutions enacted by the Security Council dealing with the issue. It will also discuss about the rights of the affected individual or organizations recognized by the UN.

1. International Convention for the Suppression of the Financing of Terrorism

In 1999, the United Nations General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism.³² States that are parties to the convention are under a legal obligation to freeze funds that are used for terrorist activities.³³

³⁰

Jae-myong Koh, *Suppressing Terrorist Financing and Money Laundering* Page 32 (2006). [Reproduced in accompanying notebook in Tab 11].

³¹

Tim Parkman & Gill Peeling, *Countering Terrorist Finance: A Training Handbook for Financial Services* Page 63 (2007). [Reproduced in accompanying notebook in Tab 12].

³² International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229 [Reproduced in accompanying notebook at Tab 21].

33

Jimmy Gurule, *THE DEMISE OF THE U.N. ECONOMIC SANCTIONS REGIME TO DEPRIVE TERRORISTS OF FUNDING*, 41 CWRJIL 19 (2009) [Reproduced in accompanying notebook at Tab 16].

Terrorism is defined in Article 2 of the convention as an “act intended to cause death or serious bodily injury to a civilian, or to a person not taking an active part in hostilities in a situation of armed conflict, when the purpose of the act was to intimidate a population, or to compel a government to do or to abstain from doing any act.”³⁴ Article 8 of the convention requires each member State to take “appropriate measures” for “identification, detection and freezing or seizure of any funds allocated for the purpose of committing the offences set forth in article 2.”³⁵ Article 9 requires that upon receipt of information about an individual’s commission of terrorist acts, the State must take sufficient measures to take action complying with the request.³⁶

Immediately after the September 11, 2001 terrorist attacks, the Security Council adopted Resolution 1373 which required that all States prevent and suppress the financing of terrorism and to freeze funds and assets of people involved with terrorism.³⁷ The United Nations views the mechanism of asset freezing as a preventive measure rather than to punish the person for the commission of a crime.³⁸ Therefore, under the treaties of the United Nations, a criminal charge is not necessary to freeze entities assets or to include the entity on a consolidated list.³⁹ The standard of proof to freeze assets is “whether there are “reasonable grounds” or a “reasonable

³⁴ International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229 [Reproduced in accompanying notebook at Tab 21].

³⁵ *Id.* art. 8

³⁶ *Id.* art. 9

³⁷

See generally S.C. Res. 1373 [Reproduced in accompanying notebook at Tab 23].

³⁸

41 CWRJIL 19, 38 (2009) [Reproduced in accompanying notebook at Tab 16].

³⁹

Id. at 38

basis” to believe that such funds or other assets could be used to finance terrorist activity.⁴⁰
Member States are under an obligation to cooperate with the requests of other countries.⁴¹

2. UN Security Council Resolutions

This section will outline some of the resolutions dealing with terrorist finances that are passed by the Security Council. The resolutions are UNSCR 1267, UNSCR 1373. Generally, it is required that all States have in place the required legal framework to implement the UN Security Council decisions. Most the resolutions dealing with terrorism are adopted under Chapter VII of the UN charter.⁴² Resolutions enacted by the Security Council pursuant to Chapter VII⁴³ of the charter are legally binding on all UN member states.⁴⁴

a) Resolution 1267

As a result of the terrorist bombings of embassies in Kenya and Tanzania in 1998, the Security Council adopted a number of resolutions to “combat international terrorism.”⁴⁵ It asked member states to implement a number of sanctions, one of which was to “freeze the funds and other financial assets or economic resources of individuals, groups, undertakings, and entities.”⁴⁶

⁴⁰

Id at.38

⁴¹

Tim Parkman & Gill Peeling, *Countering Terrorist Finance: A Training Handbook for Financial Services* Page 64 (2007). [Reproduced in accompanying notebook in Tab 12].

⁴²

Id.

⁴³

Chapter VII of the Charter deals with “Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”

⁴⁴

U.N. CHARTER arts. 39-51. Chapter VII is entitled “Actions With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” [Reproduced in accompanying notebook at Tab 20].

⁴⁵

The Law Society Gazette, “Freezing assets of “terrorists”- how fair is the UN sanctions committee, 10 Sep 2009. [Reproduced in accompanying notebook in Tab 53].

⁴⁶

A sanctions committee was established by the Security Council through Resolution 1267. The Sanctions committee was required to monitor the member States actions in freezing the funds and assets of Taliban as required by the resolution 1267.⁴⁷ The committee maintains a consolidated list of individuals and entities that are subject to the sanctions.⁴⁸ The resolution covers individuals or entities associated with Taliban or Al Qaeda. The committee provides a narrative summary of reasons for why the person or entity was listed.⁴⁹

“The Guidelines of the committee for the conduct Its Work” outlines the process of listing an entity on consolidated list and also delisting the entity and such.⁵⁰ The guidelines provide that a criminal charge or conviction is not a prerequisite to be included on the consolidated list. “The sanctions are intended to be preventive in nature”.⁵¹ A notice will be sent to the Interpol of a new entry to the consolidated list. Interpol is then requested to issue an “Interpol-United Nations Security Council Special Notice.”⁵² Within a week of the name being added on the list, the Secretariat should notify the country of which the listed individual is a national of. Upon receiving the request, the Country should take measures to notify the

Id.

⁴⁷

UNSC Resolution 1267 (15 October 1999) (54) S/RES/1267 [Reproduced in accompanying notebook at Tab 22].

⁴⁸

See “The Al-Qaida and Taliban Sanctions Committee” at <http://www.un.org/sc/committees/1267/consolist.shtml> [Reproduced in accompanying notebook at Tab 26].

⁴⁹

Id.

⁵⁰

1267 Committee *Guidelines of the Committee for the Conduct of its Work* (adopted on 7 November 2002, as amended on 10 April 2003 and revised on 09 December 2008) www.un.org (accessed 22 November 2009) [Reproduced in accompanying notebook at Tab 27].

⁵¹

Id.

⁵²

Id.

individual of in a timely manner about them being listed on the consolidated list, about information the individual could get from the committee’s website, and the information provided by the Secretariat, which includes a copy of the statement of the case, the effect of the being listed, information about de-listing procedure.⁵³

The sanctions committee was attempted to improve through resolutions 1617 (2005), 1730 (2006), and 1735 (2006). The courts of the member states reiterated the fact that the individuals and entities that are placed on the list must be afforded certain protections under the law, especially the right to know what they are accused of, right to be heard, and a right to appeal the decision before an independent body.⁵⁴ The Security Council passed Resolution 1822 in June 2008 which introduced “stronger review mechanisms for listing, enhanced notification procedures, and required publicly releasable statements of case and narrative summaries of reasons for listing.⁵⁵

b) Resolution 1373

Resolution 1373 was passed following the 9/11 terrorist attacks. Resolution 1373 is “one of the lynchpins of international action against terrorist financing, and includes a range of steps and strategies to combat the financing of terrorism generally.”⁵⁶ It reminded the member states of its obligation to prevent and suppress the financing of terrorism and to freeze the financial assets of terrorist groups.⁵⁷ It emphasized the need for States to enhance information

⁵³

Id.

⁵⁴ U.N.Doc. S/2005/572 [reproduced in accompanying notebook at Tab 28].

⁵⁵

U.N. Doc. S/RES/[1822](#) (June 30, 2008) [Reproduced in accompanying notebook at Tab 25].

⁵⁶

Tim Parkman & Gill Peeling, *Countering Terrorist Finance: A Training Handbook for Financial Services* Page 64 (2007). [Reproduced in accompanying notebook in Tab 12].

⁵⁷

Id

between each other and provide cooperation to other member states in freezing of assets.⁵⁸ It “extended the notification and sanctions regime to individuals and organizations suspected of connections with terrorism.”⁵⁹ It also established the Counter-Terrorism Committee, which is a monitoring body ensuring of effective implementation of the resolution and provide assistance for countries that need help in implementing the resolution.

3. Rights of the Individual under the Security Council Resolutions

A report titled Third Report of the Sanctions Monitoring Team by the United Nations stated that a consolidated list is not a criminal list; even though the listed entity might have been convicted of criminal offenses or charged criminally, the list itself is not a criminal one.⁶⁰ The U.N. Report states: “[T]he sanctions do not impose a criminal punishment or procedure such as detention, arrest or extradition, but instead supply administrative measures such as freezing assets.”⁶¹ “A person whose name is added to the consolidated list is afforded an opportunity to present his case to the Sanctions Committee for review. The Committee’s guidelines authorize de-listing or removing names from the Consolidated List. Individuals, groups or entities may submit a petition to consider their cases for de-listing through their States of residence or citizenship.”⁶²

D. The Council of Europe

The Council of Europe is a multi-national political organization consisting of 47 member

⁵⁸

Id

⁵⁹

Id

⁶⁰

Id at. 38

⁶¹

U.N.Doc.S/2005/572 [Reproduced in the accompanying notebook at Tab 28].

⁶²

41 CWRJIL, 19, 42, 43 [Reproduced in accompanying notebook at Tab 16].

states. Therefore when looking at the process of freezing assets in United Kingdom, it is essential to examine the framework of the Council of Europe. It is the oldest international organization working towards European integration.⁶³ The European Court of Human Rights is one of the bodies of the Council. This Court enforces the European Convention of Human Rights. It has put in force a series of conventions against money laundering. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention) was put into force in 1993. One of the convention's goals was to improve international cooperation between council of Europe member states and with other states like USA, Canada.⁶⁴ An example is when assets used in a crime are transferred abroad into overseas bank accounts, states which are parties to the convention are required to cooperate with each other and freeze and seize the assets.⁶⁵ In 2005, the convention was updated to include the financing of terrorism⁶⁶. This was an attempt to be compatible with the international convention for the suppression of the financing of terrorism.⁶⁷ In addition to money laundering and confiscation of criminal proceeds, the convention now also focused on money that is generated through legitimate sources, but destined for criminal purposes.⁶⁸

63

See Wikipedia, "Council of Europe" [Reproduced in accompanying notebook at Tab 57].

64

Tim Parkman & Gill Peeling, *Countering Terrorist Finance: A Training Handbook for Financial Services* Page 65 (2007). [Reproduced in accompanying notebook in Tab 12].

65

Id.

66

It now became *The Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and on the Financing of Terrorism*

67

Tim Parkman & Gill Peeling, *Countering Terrorist Finance: A Training Handbook for Financial Services* Page 66 (2007). [Reproduced in accompanying notebook in Tab 12].

68

Id.

Community regulations undertaken by the European Council are “directly applicable in the domestic legal orders of EU member states, thus do not require further legislative action.”⁶⁹ “Subject to certain reservations, Member State courts will generally give precedence to Community law over national law. In addition, only the Community Courts are competent to rule on the validity of Community legislation, which can be challenged on the ground that the measure violates primary law of the EU, including fundamental rights as protected by the Community legal order.”⁷⁰

E. Application of the principles to the Lebanon Tribunal

As it has been discussed the International community plays a major role in freezing assets of individuals and organizations accused of terrorism. The Member States of the UN are already under an obligation to freeze assets of people suspected of terrorism. Since asset freezing is a prejudgment measure, the member states could take action to freeze the assets of those indicted by the Lebanon Tribunal. The indicted individuals would be placed on a designated list. The placement on the list would mean that the States have to take steps to freeze assets. Once their assets are frozen, the accused could place a request for release of their funds for things such as food, medical treatment and reasonable attorney fees. Their assets could not be disposed of by the countries if the freezing is just a precautionary measure. The individuals would be the owners of their assets till there is a conviction by the Lebanon Tribunal.

III. ADMINISTRATIVE APPROACHES-THE PROCESS FOLLOWED BY THE COUNTRIES

⁶⁹

Chia Lehnardt, *European Court Rules on UN and EU Terrorist Suspect Blacklists*, ASIL INSIGHT, Jan. 31, 2007 [Reproduced in accompanying notebook at Tab 49].

⁷⁰

Id

This Section will look at the process of how assets are frozen, for what purposes are they released, and how the assets are unfrozen. It will consider the process followed by the United States of America, the United Kingdom, Canada, Australia, India, and Pakistan.

A. HOW DO COUNTRIES FREEZE ASSETS

1. United States of America

Economic sanctions have been used as an effective tool by the United States against International terrorists and terrorist organizations.⁷¹ The Office of Foreign Assets Control, part of the Department of Treasury, is responsible for “implementing sanctions with respect to assets of international terrorist organizations and terrorism-supporting countries.”⁷² The President of the United States has the authority to confiscate property which was planned, authorized, aided, or engaged in which under the International Emergency Powers Act.⁷³ The United States (U.S) is member of the United Nations, therefore has an obligation to cooperate with asset freeze requests under UNSCR 1363.⁷⁴

a) Executive Orders

After the 9/11 attacks then President George W Bush signed Executive Order 13224 declaring a national emergency.⁷⁵ He ordered that all property and interests in property of those covered under the Executive Order must be blocked.⁷⁶ There are three ways a person could be

⁷¹

Office of Foreign Assets Control, *Terrorist Assets report: Sixteenth Annual Report to Congress on Assets in the United States of Terrorist Countries and International Terrorism Program Designees*, 2007 [Reproduced in accompanying notebook at Tab 34].

⁷²

Id. at Section B

⁷³

See International Emergency Powers Act, 50 USC Sec. 1701 [Reproduced in accompanying notebook at Tab 33].

⁷⁴

“Executive Order 13224, Federal Registrar Vol.66, No. 186 [Reproduced in accompanying notebook at 32].

⁷⁵

Id.

⁷⁶

covered under the order. First, the entity could be specifically listed in the order.⁷⁷ Second, the individual could be determined by Secretary of State to have committed acts of terrorism that threaten national security, foreign policy or economy of the Country.⁷⁸ Finally the person could be known to act on behalf of the specifically listed persons.⁷⁹ The order specifically defines terrorism.⁸⁰ When signing the Executive Order, President Bush stated that when the U.S. individual or organizations are given the status of Specifically Designated Global Terrorists (SDGT), the banks and the financial institutions around the world who have accounts of the SDGT entities must take steps to freeze the account and block the ability for the account holder to get access to the accounts. If these banks and institutions do not follow the orders and support the government, the Department of the Treasury has the authority to freeze the bank's assets and transactions in the United States.⁸¹ The Order gives the Secretary of State and the Attorney general, the power to enlist individuals or organizations as SDGT's.⁸²

Another example of the U.S. government's use of Executive Orders to freeze assets is Executive Order 13338. The Order gave the Secretary of Treasury the power to freeze financial

Id. at Section 1

⁷⁷

Id. at Section 1a

⁷⁸

Id. at Section 1b

⁷⁹

Id. at Section 1c

⁸⁰

Id. at Section 3 d (the term "terrorism" means an activity that involves a violent act or an act dangerous to human life, property or infrastructure, and appears to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

⁸¹

"President Freezes Terrorists' Assets: Remarks by the President, Secretary of the Treasury O'Neill and Secretary of State Powell on Executive Order," White House: Office of the Press Secretary, Sep. 24, 2001, available at: <http://www.whitehouse.gov/news/releases/2001/09/20010924-4.html>. [reproduced in the accompanying notebook at Tab 36].

⁸²

Executive Order 13224 [Reproduced in the accompanying notebook at Tab 32].

assets of individuals who Contribute to providing safe haven for terrorists in Syria.⁸³ The treasury department has the ability to freeze the assets of an individual who is believed to pose a threat to national security (EO 13224).⁸⁴

By looking at the various Executive Orders issued by a President, it can be concluded that United States uses Executive Orders as a tool to freeze the assets of terrorists. Through Executive Order the president can order the assets of the accused be frozen in the United States territory. Therefore, if United States deems it necessary that the assets of those accused by the prosecutor of Lebanon Tribunal must be frozen, the President can issue a Executive Order ordering any assets or funds of the accused located in the territory of United States be frozen.

b) The USA Patriot Act

The Patriot Act was passed after the 9/11 attacks in the U.S. “The USA Patriot Act permits forfeiture of property traceable to proceeds from various offenses against foreign nations”.⁸⁵ Accounts in foreign banks can be forfeited if that foreign bank has an interbank account in a U.S. financial institution.⁸⁶ The threshold for asset seizure [in United States] is low.⁸⁷ The Patriot Act gives the Treasury Department the power to freeze an organization’s assets pending an investigation into possible associations with a designated terrorist group.⁸⁸

⁸³

Matthew Levitt & Jamie Chosak, “*Freezing U.S. Assets of Syrian Officials*”, (2005). [Reproduced in accompanying notebook at Tab].

⁸⁴

Executive Order 13324 [Reproduced in accompanying notebook at Tab 32].

⁸⁵

Martin Weiss “*Terrorist Financing: U.S. Agency Efforts and Inter-Agency Coordination*” Page 11 [Reproduced in accompanying notebook at Tab 54].

⁸⁶

Id. at 11

⁸⁷

OMB Watch “Authority and process of Office of Foreign Assets Control to Release Frozen Charitable Funds”, ¶8 Nov 23 2006 [Reproduced in accompanying notebook at Tab 35].

⁸⁸

Id.

c) Anti-Terrorism and Effective Death Penalty Act

Under the Anti-terrorism and Effective Death Penalty Act the Secretary of the Treasury has the authority to designate an organization as a foreign terrorist organization. The secretary can do so if: 1) it is a foreign organization, 2) it engages in terrorist activity 3) the terrorist activity of the organization threatens the security of the united states nationals or the national security of United States.⁸⁹ Seven days before making the designation, the secretary must notify certain members of Congress in writing about the designation and the basis for his designation. Seven days after the notification, the Secretary must publish the designation in the Federal Registrar.⁹⁰ After fulfilling the notification requirements, the Secretary can require U.S financial institutions to block financial transactions involving the assets of the designated organizations.⁹¹ Within 30 days of the publication in the Federal Registrar, the designated organization may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit.⁹² The review of the court will be solely based on administrative record except for classified information, which the government may submit as *exparte* or *in-camera* review.⁹³

If the U.S. is requested to freeze the assets of those indicted by the Special Tribunal of Lebanon, U.S. can freeze the assets in its territory through Executive Orders, USA Patriot Act or the Anti-Terrorism and Effective Death Penalty Act. It can also freeze the assets under a request from the United Nations.

2. THE UNITED KINGDOM

Since the United Kingdom is a member of the European Union, its asset freezing

⁸⁹

8 U.S.C. § 1189(a)(1) [Reproduced in accompanying notebook at Tab 30].

⁹⁰

Id at. 2 (A)

⁹¹

Id at 2 (C)

⁹²

Id at 8 (B)(1)

⁹³

Id at 8 (B)(2)

mechanisms must comply with European Union laws. In the European Union, the legal framework for freezing terrorists assets involves a combination of the United Nations Security Council Resolutions, Common Positions taken by the Council of the European Union, European Council regulations, and the national authorities' decisions and enforcement actions against the assets of terrorist organizations and those suspected of connections with such groups.”⁹⁴

Therefore, it is important to consider both domestic freezing of assets law and the European Union freezing mechanisms. The Courts of European Union attempt to maintain a “delicate balance between the practical operation of the asset freezing system and the need to provide adequate protection of the interests of those subjected to such measures.”⁹⁵

a) Domestic law

The Terrorism Act of 2000 ⁹⁶ is a principal legislation for dealing with assets: It establishes a list of organizations with which the United Kingdom financial institutions are prohibited from dealing with. The act authorizes the government to seize, freeze and forfeit terrorist property.⁹⁷ The United Kingdom follows a designation process similar to a consolidated list. Failure to follow the order and freeze will result in imprisonment and fine.⁹⁸ The Bank of England is responsible for issuing the notices regarding the persons and entities listed on the asset freeze list.⁹⁹

⁹⁴

Angus Johnston, “*Freezing Terrorist Assets Again: Walking a Tightrope Over Thin Ice*”, Cambridge Law Journal, 31 (2008). [Reproduced in the accompanying notebook at Tab 59].

⁹⁵

Id.

⁹⁶

Was later amended by Anti-Terrorism, crime and security act (2001) following the 9/11 attacks. Originally was focused on terrorism in Northern Ireland.

⁹⁷

Tim Parkman & Gill Peeling, *Countering Terrorist Finance: A Training Handbook for Financial Services* Page 82 (2007). [Reproduced in accompanying notebook in Tab 12].

⁹⁸

Financial Action Task Force, Third Mutual Evaluation Report Anti-Money Laundering And Combating the Financing of Terrorism: The United Kingdom of Great Britain and Northern Ireland”, page 6, (June 29, 2007). [Reproduced in accompanying notebook in Tab 51].

⁹⁹

To follow through its obligation to comply with the United Nations resolutions, the United Kingdom adopted *The Terrorism (United Nations Measures) Order 2006*.¹⁰⁰ It also passed the Prevention of Terrorism Act in 2005. This law enables the government to put a freeze on the assets of those individuals or entities placed on a domestic designated list¹⁰¹ or a European Council maintained list.¹⁰²

The Bank of England maintains a Consolidated List of individuals and organizations who are subjected to financial sanctions in the UK and also those who are identified by the United Nations and the European Union. Being placed on this list usually means a prohibition on making funds available to the individual or entity and their needs to be a freeze on their assets.¹⁰³ It would be a criminal offense to make payments or to provide any financial services to the listed individual/entity or their agent. Information about the freezing of funds must be reported to the Bank of England. It acts on behalf of UK treasury by issuing sanctions notices when a new name is added to the list.¹⁰⁴

Similar to the U.S., the United Kingdom too has sufficient legal tools in place to comply with a request from the Special Tribunal of Lebanon to freeze the assets of those indicted. It can comply with the request through its domestic legislation or through UN resolutions.

3. CANADA

Since Canada is a member of the United Nations it is legally obliged to give effect to

Id. at 6

¹⁰⁰

HM Treasury, “Explanatory memorandum to the Terrorism (United Nations Measures) Order 2006”, 2006 No. 2657 [Reproduced in accompanying notebook in Tab 37].

¹⁰¹ There can be a domestic designation if there is a reasonable ground to suspect that the person or entity is involved in terrorist activities

¹⁰²

Id. at 4.2

¹⁰³

Tim Parkman & Gill Peeling, *Countering Terrorist Finance: A Training Handbook for Financial Services* Page 84 (2007). [Reproduced in accompanying notebook in Tab 12].

¹⁰⁴

Id.

the measures imposed by binding resolutions of the Security Council. It needs to follow the measures required by Security Council resolution 1267¹⁰⁵ and 1373¹⁰⁶. Canada maintains a list of terrorist entities and goes ahead measures such as freezing of Assets.¹⁰⁷

Canada follows three terrorists listing mechanisms. First, when the United Nations asked that countries take measures to freeze the Assets of Al-Qaida and Taliban, Canada took steps to freeze the assets of entities belonging to or associated with them. The entities whose assets were to be frozen were listed by a Committee of the UN Security Council. Second way is more general, where a Canadian list of terrorist entities are created . This list is not restricted in geography and affiliative scope. The third is under the *Criminal Code* which enables the local government to apply appropriate criminal measures to entities. Under the Criminal Code, a Federal court Judge is allowed to “order the freezing, seizure and forfeiture of property used in or related to terrorist activity.”¹⁰⁸

In order to meet its international obligations, Canada passed the Anti-terrorism Act in 2001. It defined terrorist activity as an action that takes place either within the borders or outside of Canada that is “an offense under any one of ten listened UN counter-terrorism conventions and protocols.”¹⁰⁹ It also permits the listing of groups whose activities meet the definition of

¹⁰⁵

U.N. Doc. S/RES/1267 (1999) [Reproduced in accompanying notebook in Tab 22].

¹⁰⁶ U.N.Doc. S/Res/1373 (2001) [Reproduced in accompanying notebook in Tab 23].

¹⁰⁷

Department of Justice, “Parliamentary Review of the Anti-terrorism Act, Jun 20, 2008 [Reproduced in accompanying notebook in Tab 40].

¹⁰⁸

Id

¹⁰⁹

Bill C-36 (Royal Assent Version) 83.01 (a) [Reproduced in accompanying notebook at Tab 39].

terrorist activity as terrorist groups.¹¹⁰ The Proceeds of Crime (Money Laundering) and Terrorist Financing activity requires financial institutions and intermediaries “to report suspicions of terrorist activity financing and terrorist property.”¹¹¹

Under the Anti-terrorism Act, the governor in council may, establish a list of terrorist entities on the recommendation of Solicitor General. The governor in council must be satisfied that there are reasonable grounds to believe that “(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).”¹¹² The initial step is the receipt of intelligence reports on the entity showing that there are reasonable grounds to believe the entity is involved in terrorist activities. These reports are submitted to the Minister of Public Safety.¹¹³ The minister may then recommend to the Governor in Council to place the entity on the list.¹¹⁴ The entity will be placed on a list if the government in council is satisfied by a reasonable belief about the entities involvement in terrorist activities.¹¹⁵ The listing will be published in the Canada Gazette.¹¹⁶

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), Canada's financial intelligence unit was created in 2000. It is an independent agency, reporting to the Minister of Finance, who is accountable to Parliament for the activities of the Centre. “It

¹¹⁰

Id. at 83.05

¹¹¹

Id.

¹¹²

Id.

¹¹³

Id. at ¶ 4

¹¹⁴

Id. at ¶ 5

¹¹⁵

Id. at ¶ 6

¹¹⁶

Id.

was established and operates within the ambit of the *Proceeds of Crime (money Laundering) and Terrorist Financing Act (PCMLTFA)* and its Regulations”¹¹⁷

4. INDIA

India enacted The Prevention and Suppression of Terrorism Order 2004 to implement the United Nations Security Council resolutions dealing with freezing assets.¹¹⁸ The Reserve Bank of India issues orders containing the individuals and entities whose assets need to be frozen.¹¹⁹ India also freezes assets under the Prevention of Money Laundering act 2002. The Prevention of Money Laundering requires a conviction before allowing the forfeiture of a property.¹²⁰ Proceeds of a crime can be confiscated, and property cannot be seized if there is no link between the property and the crime.¹²¹

5. PAKISTAN

Pakistan followed through its obligation and froze accounts of all individuals and organizations designated as terrorists by the United Nations.¹²² Pakistan enacted Anti-terrorism act 1997 (ATA) to implement its obligations under UNSCR 1267. Under ATA, the government can freeze assets of an organization involved with terrorism. Under the act, the organizations office can be sealed, its bank accounts can be frozen and any cash in its possession can be

¹¹⁷

See Financial Transactions and Reports Analysis Centre of Canada, “Our Mandate” (last updated Jul 22, 2009 [Reproduced in accompanying notebook at Tab].

¹¹⁸

Asia/Pacific Group on Money Laundering: India, Page 5 (July 13, 2005) [Reproduced In the accompanying notebook at Tab 41].

¹¹⁹ Reserve Bank of India, “Combating financing of terrorism- Unlawful activities (Prevention) Act, 1967”, RBI/2009-10/166 (Sep 17, 2009) [Reproduced in accompanying notebook at Tab 43].

¹²⁰

Asia/Pacific Group on Money Laundering: India, Page 4 (July 13, 2005) [Reproduced in the accompanying notebook at Tab 47].

¹²¹

Id. at 4

¹²²

Mohammad Akram Sheikh, “*Responses to the threat of terrorism by special enactments and through the criminal law*” [Reproduced in the accompanying notebook at Tab 55].

detained. The government can also consider requests from other nations but it has to be under the powers of ATA.

Another legislation the government uses to freeze assets is the Control of Narcotics Substance Act. A court trying an offence punishable under the act may order the assets of the accused to be frozen. The Special court must be satisfied that there are reasonable grounds for believing that the accused has committed the alleged offense.¹²³ A director general or an authorized officer can order the assets of an individual be frozen if he believes that an offense is being committed. The officer will then have seven days to show the court the basis for freeze his belief and for continuation of the freeze.¹²⁴ The State Bank of Pakistan also has the ability to freeze assets.¹²⁵ The bank issues directives to other banks to freeze accounts of individuals and entities involved in terrorist activities.¹²⁶

6. *SOUTH AFRICA*

In South Africa terrorist financing is criminal under Section 4 of the Protection of Constitutional Democracy Against Terrorist and Related Activities act (POCDATARA).¹²⁷ There can be a criminal forfeiture of the property, which would be based on a conviction. There can also be a civil forfeiture which is not dependent on any conviction.¹²⁸ The Asset Freezing Unit, which is a part of the National Prosecuting Authority, “administers and implements the

¹²³

Control of Narcotics Substance Act, Chapter IV, 37 (1) (July 7, 1997) [Reproduced in accompanying notebook at Tab 44].

¹²⁴

Id at. 37 (2)

¹²⁵

U.S. State Department, “*Money Laundering and Financial Crimes: Pakistan*”, Page 2, INCSR 2008 [Reproduced in accompanying notebook at Tab 45].

¹²⁶

State Bank of Pakistan, “Banking System Review: For the year ended December 31, 2005” 87 (2005). [Reproduced in accompanying notebook at Tab 46].

¹²⁷

Financial Action Task Force, “Mutual Evaluation Report: South Africa”, 7(Feb 26, 2009). [Reproduced in accompanying notebook at Tab 52].

¹²⁸

Id.

freezing and forfeiture provisions of the POCA.¹²⁹

South Africa fulfills its obligations under United Nations Resolutions through POCDATARA.¹³⁰ “The President must give notice by proclamation in the Gazette of those who have been designated by the UN Security Council. To date, 63 proclamations have been issued through this process, although no assets relating to designated persons/entities have been located”¹³¹

B. RELEASE OF FROZEN ASSETS

An individual can request for his/her to be released for basic expenses. The individual or organization must notify their government. The access to funds must be given only when appropriate. Funds necessary for basis expenses which include food, rent/mortgage, medicines, treatment, taxes, insurance premiums, public utility charges, reasonable professional fees, expenses incurred because of legal services, fees or service charges for routine holding or maintenance of frozen funds.¹³²

1. THE UNITED STATES OF AMERICA

An organization designated as a terrorist organization by the Office of Foreign Assets control can apply for a specific license from the treasury to have its frozen funds and assets released. The OFAC has the authority to either grant the release or to deny the release. The

¹²⁹

Id.

¹³⁰

Id.

¹³¹

Id.

¹³² Council Common Position of Oct 11, 2004, on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), 2004/694/CFSP [reproduced in accompanying notebook at Tab 48].

applicant can request the reasons for the denial by letter or in person.¹³³ “A blocked asset represents an amount frozen that blocks all property and interests in property of designated parties”¹³⁴ Any judicial disposition of the blocked property is prohibited.¹³⁵ One exception is the Terrorism Risk Insurance Act. This act makes it possible to use the frozen funds to satisfy certain judgments against the terrorist parties.¹³⁶

2. THE UNITED KINGDOM

To ensure that there is no violation of basic human rights, the Government is required to make payments to meet basic expenses.¹³⁷ The Government informed the Parliament that if there is an individual receiving state benefits and they are in the same household as the listed person, they will be paid under “strict license conditions”. This is to ensure that funds are not used for terrorism.¹³⁸

C. UNFREEZING THE ASSETS

A common way that an individual’s assets can be unfrozen is by being delisted from the list that designated them as a terrorist. An individual or entity listed on the consolidated list can petition for de-listing by providing a reason as to why they should not be on the list. The

¹³³ Terrorist Assets Report 2007 Section B [Reproduced in accompanying notebook at 34].
¹³⁴

Id.

¹³⁵

Id. at Section B

¹³⁶

Id. at Section B

¹³⁷

Security Service, “Countering International Terrorism: Control Orders [Reproduced in the accompanying notebook at Tab 38].

¹³⁸

Id.

request is then forwarded to the designating State and to the State of the petitioner nationality and residence. The States are asked to give their recommendations to the Chairman who will place the petition on the Committee's agenda. If the delisting is granted, the Secretariat is required to notify the State of which the person is a national and resident of. The State is then required to notify the petitioner about the delisting.¹³⁹

IV. JUDICIAL APPROACHES

Domestic courts and International courts have been asked to determine if the asset freezing mechanisms are legal under national and international law. Being aware of the kind of issues raised by the defendants and the approaches taken by the court, will help the defense office ensure that the accused are given the protection of the law. There has been litigation in the United States, United Kingdom and the European Union, which this section will discuss.

A. UNITED STATES OF AMERICA

1) Claim of Constitutional Rights

Humanitarian Law project v. Reno: The petitioners argued that their classification as a terrorist was constitutionally vague and therefore a criminalization of material support for terrorist organizations would be an infringement of their first amendment rights.¹⁴⁰ The court held that since the matter at issue involves the conduct of foreign affairs, the executive branch is given more latitude.¹⁴¹ Therefore since freezing of assets is a part of the country's counter-terrorism measures, courts give deference to the executive branch in the measures it adopts.

3. Adequate Notice

¹³⁹ 1267 Committee *Guidelines of the Committee for the Conduct of its Work* (adopted on 7 November 2002, as amended on 10 April 2003 and revised on 09 December 2008) www.un.org (accessed 22 November 2009) [Reproduced in accompanying notebook at Tab 27].

¹⁴⁰ *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (2000). [Reproduced in accompanying notebook at Tab 5].

¹⁴¹

Id.

a) *People's Mojahedin Organization of Iran v. United States*
Department of State

Appellants argued that they should have been notified before being designated as a terrorist organization.¹⁴² The court did not find anything wrong with the governments notification process.¹⁴³

b) *Holy Land Foundation For Relief and Development*

Holy Land Foundation was a charity that was designed as an SDGT by the United States government. The foundations assets were ordered to be frozen. Government agents entered the office and seized the property and millions of dollars in charitable contributions were frozen in bank accounts.¹⁴⁴ HLF filed a suit challenging its designation as an SDGT and the freezing of its assets. It argued that the government's action was "arbitrary and capricious" and a violation of the organizations due process rights under the U.S. Constitution.¹⁴⁵ Through appeal the case went before the D.C. circuit court which upheld the designation of HLF as SDGT. The court held that the government did not have to provide HLF any pre-seizure notice if such notification is believed to "impinge upon the security or other foreign policy goals of the United States."¹⁴⁶ The court stated that since HLF was given an opportunity to be heard after the seizure of its assets, its due process rights were met. It might be interesting to know that it was two and

¹⁴²

People's Mojahedin Organization of Iran v. U.S. Dep't of States, 182 F.3d 17, 18 (1999).
[Reproduced in accompanying notebook at Tab 6].

¹⁴³

Id.

¹⁴⁴

Nicole Nice-Petersen, "Justice for the Designated: The Process That Is Due to Alleged U.S. Financiers of Terrorism", 93 Geo. L.J 1394 (2005) [Reproduced in accompanying notebook at Tab 18].

¹⁴⁵

Id.

¹⁴⁶

Id.

half years later after the freezing of their assets, that the government finally charges HLF and its officials with terrorism-related charges.¹⁴⁷ This reinforces the assumption that a charge is essentially not a requisite to freeze an individual's assets.

B. THE UNITED KINGDOM

In *A, K, M, Q and G v. HM Treasury* The Court struck down the 2006 Alqadea and Talbian order which asked that the assets of individuals or entities designated by UN sanctions committee be frozen. In appeal, the judge noted that the order would only be legal if the person whose assets are frozen were given “merits-based review” of the reasons for their listing. “There must be procedures to enable him [the designated person]... to discover the case against him, so that he may have an opportunity to meet it.”¹⁴⁸

C. THE EUROPEAN COURT OF JUSTICE

The European Court of Justice heard the joint cases of Kadi and Al Barakat. The Court held that an individual must be informed of the grounds of the decision to place him on the list so that he can actively defend his listing. The court recognized that the listed individuals have a right to a fair hearing and an effective judicial remedy.¹⁴⁹ The procedure of asset freezing must include a provision where the affected individuals or entities could challenge sanctions and put their case before competent authorities.¹⁵⁰

¹⁴⁷

Id.
148

A, K, M, Q and G v. HM Treasury, EWHC 869 (2008) [Reproduced in accompanying notebook at Tab 7].

¹⁴⁹

The Law Society Gazette, “Freezing assets of “terrorists”- how fair is the UN sanctions committee, 10 Sep 2009 [Reproduced in accompanying notebook at Tab 53].

¹⁵⁰

Id.

The procedures used by EU to implement sanctions through EC regulation 881/2002, infringed on their “basic right to be heard and the right to effective judicial protection.”¹⁵¹ Their rights were violated because of the refusal of providing evidence that justifies the measures against them which prevented them from defending themselves.¹⁵² The Security Council does have the authority to impose sanctions however, EU cannot impose the restrictions on individuals or entities without informing them about the evidence that justifies putting them on the list. The Freezing of funds through United Nations resolution do not prevent the listed individual from leading a “satisfactory personal, family and social life, given that that the use of strictly private ends of the frozen economic resources is not forbidden for the per se by those measures.”¹⁵³ The Court gave the Council three months to remedy the faults found. The Presidency of the council acquired the narrative summaries from the Sanctions committee and made them available to the petitioners. After the petitioners receipt of the narrative summaries, the Commission decided to continue the measures against both of them.¹⁵⁴

In *Chafiq Ayidi v. Council of the European Union* the court dealt with the issue of notice. It found that there is no requirement in the law that the individual be provided notice before his inclusion on the list; therefore it is adequate if the resolutions do not provide notice the

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U.N. Sec. Council, Analytical Support and Sanctions Monitoring Team, Ninth Report of the Analytical Support and Sanctions Monitoring Team, ¶ U.N. Doc. S/2009/245 (May 13, 2009), available at <http://www.un.org/sc/committees/1267/monitoringteam.shtml> [Reproduced in the accompanying notebook at Tab 28].

¹⁵²

Id.

¹⁵³

Chafdi v. Council of European Union, Case T-253/02 (2006). [Reproduced in the accompanying notebook at Tab 8].

¹⁵⁴

Id.

individual before being placed on the list.¹⁵⁵ An individual must be given the right to ask for a review of the decision to the government of the country they are a national of or are a resident of. Finally in *Sison v. Council* , the court found that the individual or entity who is being placed on the designated list should be made aware of the evidence that is being considered to place him/her on the list. He/she must also be given an opportunity to be heard.¹⁵⁶

V. SUMMARY AND CONCLUSIONS

There are few common themes in the process of freezing assets among various jurisdictions. Generally domestic legislation enables the government to freeze the assets of a person who it believes to have reasonable ties with terrorism. It designates the person or entity as involved with terrorist and places them on a consolidated list. Once they are listed, the individual's assets in the country's jurisdiction will be frozen. The individual can request for release of funds for basic expenses such as food, medicine, housing, reasonable lawyer expenses. This is to ensure that the person's fundamental rights are not violated. The assets will be unfrozen if there is a determination that the person is not guilty of terrorism. If they are convicted the assets related to the crime will be forfeited. Some of the jurisdictions follow the standard of reasonable basis. The government must have a reasonable basis that the individual is involved with terrorist activities. Assets are freezing temporary: to ensure that the alleged will not use to funds to commit terrorist activities or run away from the authorities and evade arrest.

There is tremendous cooperation among member states. The United Nations places a legal obligation on member states to freeze assets of those it lists as involved with terrorist activity. Therefore, if there is a reasonable basis that an individual is involved with terrorist, it

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Id

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Sison v. Council ¶141 [Reproduced in the accompanying notebook at Tab 9].

would be easier to get countries to freeze their assets in the jurisdiction. Therefore, if the prosecutor for the tribunal requests the assets of the accused to be frozen, the judge would essentially order countries to take steps to freeze the assets in their respective jurisdictions. The accused can request the countries to release their assets for specific purposes, and the use of these released assets will be closely monitored. The assets will be unfrozen once the person is found not guilty by the tribunal.

The International community as a whole has recognized the principle that freezing of assets is not a criminal punishment. Therefore, the individual's rights should be respected. Courts have held that once the assets are frozen the individuals must be given notice of the action. Therefore, it should be ensured that the accused receive notice of the freeze on their assets upon the action. Courts have also held that the affected individuals must receive the evidence on which the government placed them on the list and froze their assets.

