

Chapter 1: Introduction

1.0 Introduction and Context

“Counter-terrorism practitioners ignore human rights at their peril: a failure to pursue security and human rights jointly and concomitantly can result in the degradation of both human rights and security.”¹

Money forms the foundation of any terrorist activity and whilst the actual cost of a terrorist attack may be small, finances and resources are needed to support terrorist’s recruitment and training. Due to the terrorist attacks in September 2001, tackling terrorist financing has become an integral part of the international effort’s to counter terrorism.² As a result of the ‘Financial War on Terrorism’ and the introduction and implementation of controversial legislative provisions, human rights have been sidelined in order to ensure that the counter-terrorist financing (CTF) measures are swiftly and effectively implemented by nation states.³ Powerful sanctions such as the designation of individuals and entities as a ‘terrorist’ or ‘suspected terrorist’ and asset freezes have been enforced against individuals who have not been charged with any crime let alone convicted.⁴ With such severe administrative sanctions such as designation and asset freezing being imposed, this thesis suggests that being suspected of terrorism or supporting terrorism is akin to being charged with such a crime. With this in mind, the underlying research question is whether the fundamental

¹ Combating the financing of terrorism while protecting human rights: a dilemma? Background Paper Giessbach II Seminar on Combating the Financing of Terrorism Davos, Switzerland, Office for Democratic Institutions and Human Rights, (October 2008) 32.

² N Ryder, *Financial Crime in the 21st Century - Law and Policy* (Edward Elgar, 2011).

³ The Office of the United Nations High Commissioner for Human Rights observes “There has been a proliferation of security and counter-terrorism legislation and policy throughout the world since the adoption of Security Council resolution 1373 (2001), much of which has an impact on the enjoyment of human rights. Most countries, when meeting their obligations to counter terrorism by rushing through legislative and practical measures, have created negative consequences for civil liberties and fundamental human rights” (Office of the United Nations High Commissioner for Human Rights, ‘Human Rights, Terrorism and Counter-terrorism, factsheet No.32’ Available at: <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (accessed 20.03.17).

⁴ Mohammed Salah (*USA v Marzook, Salah, Ashqar No. (2006) 03 CR 0978*) was convicted of a single count of obstruction of justice on 1st February 2007.⁴ Despite not being found guilty of any terrorism related charges, Salah still features on OFAC’s SDN List⁴ and thus his assets remain frozen. (This case is discussed further in Chapter 4).

human rights such as the right to a fair trial⁵ should be permitted to apply in cases where CTF sanctions have been enforced. There are other human rights besides the right to a fair trial which may be dispensed with by the application of CTF legislation which designates a person as a terrorist and freezes their assets, such as the right to right to privacy. For example, arguably the freezing of someone's assets, is breaching their right to property and applying sanctions in the absence of a criminal conviction is violating the presumption of innocence.⁶ However, a discussion of the right to a fair trial is pertinent as, in the absence of the fulfilment of other human rights, this fundamental right⁷ should give the suspected terrorist a means for redress or at the very least the opportunity to hear what the case is against him within a reasonable time and before an impartial jury or tribunal.

Such a means for review is essential, as CTF legislation has attracted criticism for its incompatibility with human rights and the lack of procedural fairness involved in the application of sanctions.⁸ Challenges in relation to the legitimacy of CTF provisions have been brought in the United States (U.S), United Kingdom (U.K) and Canada and it is these three countries that this research focuses on. The originality of this thesis lies in the application of the content of the right to a fair trial to CTF policy in the U.S., U.K. and Canada. Whilst counter terrorism legislation has been the subject of some controversy surrounding human rights violations, this thesis is concerned with how the application of CTF legislation has adversely affected the right to a trial in the U.S., U.K. and Canada. The literature review has confirmed that whilst national and international CTF measures have been the subject of much academic critique, there is an absence of research into how this legislation impacts on human rights. This is especially the case with regard to the right to a fair trial, a right that is protected in all three selected case studies.

⁵ This right is protected in all three case studies. The right to a public trial is offered by the Fourteenth Amendment to the U.S. Constitution. The right to a fair trial in the U.K. is included in Article 5.3 Human Rights Act 1998 and Article 6.1 of the European Convention of Human Rights. The right to trial by jury is included in S.11 of the Canadian Charter of Rights and Freedoms.

⁶ The right to be presumed innocent until proven guilty is provided for by the U.K. in Article 6(2) Human Rights Act 1998 and by S.11(2) of the Canadian Charter of Rights and Freedoms in Canada. It is not explicitly declared in the United States Constitution but is incorporated by the due process of law. The due process of law is provided for by the Fifth Amendment and S.1 of the fourteenth Amendment of the United States Constitution. Furthermore the presumption of innocence is included in Article 11 of the Universal Declaration of Human Rights and Article 6(2) of the European Convention on Human Rights.

⁷ Article 6 of the ECHR, the right to a fair trial is an absolute right which cannot be limited.

⁸ Peter Binning, In safe hands? Striking the balance between privacy and security - anti-terrorist finance measures *European Human Rights Law Review* [2002] 6 737-749.

The U.S., U.K. and Canada have all pledged a commitment to the protection of human rights and have promised that defendants in criminal prosecutions will have the right to trial within a reasonable time and they have the right to be informed of the accusation against them.⁹ However, whilst a designation and asset freeze are not criminal proceedings, it is proposed in this thesis that the implications of such sanctions suggest that they may be regarded as punitive in nature. With this in mind, it is asserted that the CTF regime does not offer adequate procedural fairness and by underrating the importance of this human right, the CTF regime has been left open to legal challenges regarding its legitimacy.

This research utilises the doctrinal method¹⁰ and focuses on the three jurisdictions, in order to gain a comparative perspective.¹¹ The doctrinal research includes an exploration of documentary evidence relating to combating terrorism, CTF and related human rights. The investigation of documentary evidence will provide a comprehensive understanding of the provisions of the terrorist financing legislative frameworks in the U.S., U.K, Canada and the United Nations (UN). Documents from organisations such as the Office of Foreign Assets Control,¹² HM Treasury, Department of Treasury, Financial Transactions and Reports Analysis Centre of Canada¹³ and the Financial Action Task Force¹⁴ will be crucial to the examination of the appropriateness of CTF provisions. This method of research will also be utilised to learn more about the human rights provisions in each jurisdiction, examining their origins and application.

⁹ Article 6 of the Human Rights Act 1998 provides the right to a fair and public trial heard by an independent and impartial court or tribunal within a reasonable time. The sixth Amendment to the U.S. Constitution provides the right to a speedy and public trial, by an impartial jury of the state and to be informed of the nature and cause of the accusation. Section 11 of the Canadian Charter of Rights and Freedoms provides the right to a fair trial by jury, within a reasonable time and the right to be informed of the offence.

¹⁰ Vick observes, “Doctrinal research treats the law and legal systems as distinctive social institutions and is characterized by a fairly unique method of reasoning and analysis. In its purest form ‘black-letter’ research aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources”.¹⁰(Douglas Vick, 'Interdisciplinarity and the Discipline of Law' [2004] 31(2) Journal of Law and Society 178).

¹¹ Eberle observes that, “applied to law, the act of comparison provides insight into another country’s law, our own law, and, just as importantly, our own perceptions and intuitions—a self-reflection that can often yield insight into our view of the law” (Edward Eberle, 'The method and role of comparative law' [2009] Washington University Global Studies Law Review 8 (3) 455).

¹² Hereafter OFAC.

¹³ Hereafter FINTRAC.

¹⁴ Hereafter FATF.

This thesis also utilises a degree of socio-legal research.¹⁵ This will broaden the scope of the research and allow for the law to be considered in the wider social structure in which it operates. This will facilitate a critical appraisal on the application of CTF legal provisions and will be used to illustrate how CTF legislation has impacted on the right to a fair trial. The application of the socio legal research method will demonstrate how fundamental a person's right to a fair trial is when CTF sanctions are applied. These three common law countries have taken a similar approach to CTF following September 11 2001. However, human rights challenges have forced some significant changes to be made and this case law presents an excellent opportunity for comparison of the value given to human rights in the U.S., U.K. and Canada. Whilst all three jurisdictions have reiterated their commitment to human rights protection, their responses to challenges with regard to the legitimacy of CTF measures have been contrasting. Such judicial precedent will help to illustrate the apparent failings of the CTF regime. Any changes to CTF legislation following this case law may suggest ideas for best practice in other jurisdictions.

1.1 Background

Following the terrorist attacks in September 2001, the international community implemented a large number of legislative and soft law measures to tackle the financing of terrorism. This includes several UN Security Council Resolutions (UNSCR) and the extension of the remit of the FATF. These measures have been adopted by the U.S., U.K. and Canada.¹⁶ However, the value of focussing on terrorist funding is a relatively new notion. Historically, the term financial crime referred to money laundering.¹⁷ The UN and its member states have introduced a number of

¹⁵ Singhal and Malik contend that, "socio-legal research is significant because in linking the law to society, it functionalizes law, rendering it an effective instrument for the achievement of social, political and economic objectives. Socio-legal research is important for and impacts upon government policy- makers, regulators, industry representatives and other actors concerned with the administration of justice and the legal system" (Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' [2012] Educational Research Journal 2(7) 252-256, 255).

¹⁶ For further commentary, see chapter 3.

¹⁷ These types of financial crime are referred to as 'white collar crime'. Such activities were defined by Professor Edwin Sutherland as 'a crime committed by a person of respectability and high social status in the course of his occupation'. (E. Sutherland, *White Collar Crime* (Dryden: New York, 1949, 9), as cited in S. Wilson, 'Collaring the crime and the criminal? Jury psychology and some criminological perspectives on fraud and the criminal law' [2006] 70(1) *Journal of Criminal Law* 79). Sutherland furthered commented that, "The present-day white-collar criminals, who are more suave and deceptive than the 'robber barons', are represented . . . [by] many other merchant princes and captains of finance and industry, and by a host of lesser followers. Their criminality has been

measures to counter this type of financial crime but the financing of terrorism went largely unrecognised until the terrorist attacks of September 11 2001. Notwithstanding this, the UN recognised the term terrorist financing in its Declaration on Measures to Eliminate International Terrorism 1994.¹⁸ The International Monetary Fund (IMF) has noted that terrorist financing “involves the solicitation, collection or provision of funds with the intention that they may be used to support terrorist acts or organizations”.¹⁹ The International Convention was implemented partly in response to the al-Qaeda embassy bombings in Kenya and Tanzania in 1998²⁰ and provides that member states must criminalise the financing of terrorism, and take steps to identify, detect and freeze the funds used for the purposes of supporting terrorism.²¹ However, at the time of the 2001 terrorist attacks, the International Convention had not received the necessary twenty two ratifications.²²

demonstrated again and again in the investigations of land offices, railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry, real estate, reorganization committees, receiver- ships, bankruptcies, and politics”. (E. Sutherland, ‘The white collar criminal’ (1940) 5(1) American Sociological Review, 2).

¹⁸ The Declaration stated that, members of the UN should “reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations”(This Resolution (49/60) was adopted by the General Assembly on 9 December 1994). Subsequently, the International Convention for the Suppression of the Financing of Terrorism 1999 defined funds for terrorism to include “assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form” (United Nations International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. Hereafter International Convention).

¹⁹ International Monetary Fund, ‘Anti-money laundering/combating the financing of terrorism – topics’, available from <http://www.imf.org/external/np/leg/amlcft/eng/aml1.htm#financingterrorism> (accessed 16 August 2016).

²⁰ The August 1998 bombings of the U.S. embassies in Kenya and Tanzania resulted in the deaths of 234 people.

²¹ Article 8, supra at note 18. Up until this point, although the perpetrators were being prosecuted by the U.S. Department of Justice, the financial supporters of these terrorist attacks were not being investigated. This fact demonstrates the little impact that the declaration had previously had upon national legislation and practice.

²² A Richard Fighting terrorist financing: transatlantic cooperation and international institutions (Center for Transatlantic Relations: Washington, 2005) 22. It was stipulated that 22 ratifications were required for the International Convention to come into effect (Annex, paragraph 1, Article 26, United Nations International Convention for the Suppression of the Financing of Terrorism). Since the attacks of September 11 2001, a total of 186 members of the UN have become signatories to the International Convention (United Nations ‘United Nations Treaty Collection’, International Convention for the Suppression of the Financing of Terrorism’. Available from: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en. (Accessed April 30 2015). It is important to note that the International Convention does not provide a definition of terrorism.

The al Qaeda terrorist attacks in September 2001,²³ resulted in terrorist financing being propelled to the forefront of the global political agenda by demonstrating “the scale on which Al Qaida was prepared to operate, its desire for ‘high impact’ attacks with a worldwide resonance, its indifference to causing mass civilian casualties of any background or religion and its ability to deploy ambitious, innovative methods of attack- using planes rather than explosives as weapons”.²⁴ Ryder aptly describes the financing of terrorism as the “sleeping giant of the international community’s financial crime policies”²⁵ as it was clear, that up until this point, they were totally unprepared for the problems associated with terrorist financing. Prior to this, the international community, largely led by the UN and the FATF dealt with money laundering, the illegal drugs trade, fraud and corruption.²⁶

However, terrorist organisations are now far more evolved than al-Qaeda in terms of operation and funding. For example, the Islamic State of Iraq and Levant (ISIL) poses the principal international terrorist threat and have become “one of the most powerful groups in the recent history of terrorism”.²⁷ ISIL is managed like a company with an organisational hierarchy²⁸ and operates self sufficiently with diversified resources.²⁹ These resources are derived from various funding streams and include the proceeds from illegal activities, antiquity sales, kidnapping and oil.³⁰ Due to the complex nature of ISIL’s financial operations, the FATF observes that more needs to be done to expose further information on ISIL’s financial activities in order to implement the most efficient countermeasures.³¹ The Centre for the Analysis of Terrorism claim that

²³ On September 11 2001, a series of coordinated terror suicide attacks were carried out on the U.S. Al Qaeda terrorists hijacked four commercial passenger aeroplanes, crashing two into the Twin Towers in New York City and one into the Pentagon in Virginia. The fourth plane crashed in a field in Pennsylvania. A total of 2,993 people were killed and Kochan has commented that these events are “said to have cost no more than \$500,000” and “that puts a modest hole in Osama bin Laden’s reserves”. (Nick Kochan, *The washing machine, how money laundering and terrorist financing soils us* (Thomson 2005) 65

²⁴ www.mi5.gov.uk/output/Page23.html

²⁵ Nicholas Ryder, *Financial crime in the 21st Century, Law and Policy* (Edward Elgar 2011) 51

²⁶ This situation can be contrasted with the U.K. who had in place a number of statutory measures to tackle terrorism in Northern Ireland.

²⁷ Centre for the Analysis of Terrorism ‘ISIS Financing 2015, May 2016. Available at: <http://cat-int.org/wp-content/uploads/2016/06/ISIS-Financing-2015-Report.pdf> (accessed 22.03.17).

²⁸ Ibid at 8.

²⁹ Ibid at 1.

³⁰ Financial Action Task Force ‘FATF action on the terrorist group ISIL’, October 24, 2014. Available from <<http://www.fatf-gafi.org/topics/fatfgeneral/documents/fatf-action-isil.html>> accessed February 22 2015.

³¹ Financial Action Task Force Report ‘Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)’, February 2015 at 5.

the economic model that ISIL use are fundamentally different from those used by al-Qaeda and as a consequence suggest that CTF measures are in need of updating.

1.2 What is Terrorist Financing and why is there a need for an internationally coordinated response?

Terrorist financing can be described as the lifeblood of the global age of terrorism,³² and it is now accepted that any fight against terrorism must include the elimination of their sources of finance.³³ It is anticipated that by eliminating or certainly reducing access to the “fuel of the terrorist enterprise,”³⁴ terrorist organisations can be dismantled and terrorist attacks prevented. Further to this there may be the huge value in the intelligence that can be gathered from investigating a terrorist or terrorist supporter. Following the money trail can lead to the identification and capture of terrorists and the intelligence gathered can also provide valuable information regarding the modus operandi of terrorist organisations. However, chasing the financial resources of terrorists has proven to be problematic. The sources of funding are extremely diverse, for instance, it has been suggested that a terrorist organisation’s “global fundraising network can be built upon a foundation of, charities, nongovernmental organisations, mosques, websites, intermediaries, facilitators, and banks and other financial institutions”.³⁵ Further to this, money may also be acquired through illegal activity such as fraud, the sale of counterfeit goods and drug

³² ‘UK freezes terror funds,’ *BBC News* (London 1 October 2001) <http://news.bbc.co.uk/1/hi/uk/1572452.stm> accessed 15th February 2011

³³ This is not a new approach. President Clinton has previously acknowledged that attacking the financial assets of Al Qaeda was important if they were to be punished, after they were found responsible for the bombings of two US embassies in Kenya and Tanzania in 1998. Rider has commented on the importance of the prevention of terrorist funds stating: “disrupting the flow of funds to terrorist and subversive organisations is one of the more obvious strategies imaginable”. (B Rider, ‘Editorial- Laundering Terrorists’ 4(4) (2002) *Journal of Money Laundering Control* 255

³⁴ A Acharya, ‘Small amounts for big bangs? Rethinking responses to “low cost” terrorism’ 12(3) [2009] 12(3) *Journal of Money Laundering Control* 285-298

³⁵ M Greenberg, W Wechsler and L Wolosky ‘Terrorist financing,’ (2002) *Council on Foreign Relations*, (New York) 1.

trafficking.³⁶ For example, ISIL is thought to be extremely wealthy³⁷ with their funds deriving from a number of sources.³⁸ Jones, citing Zelin contends

“They’re [ISIS] probably the richest jihadi organization ever seen . . . they get their money from trafficking weapons, kidnappings for ransom, counterfeit currencies, oil refining, smuggling artefacts that are thousands of years old and from taxes that they have for areas they are in – either on businesses, or at checkpoints or on ordinary people.”³⁹

As a result of these extensive sources, tracking these funds is almost impossible, especially as this seemingly legitimate money can be moved from country to country without arousing suspicion. If such funds are to be swiftly identified then countries need to coordinate their CTF efforts and work together. Cooperation between states is paramount to counter the threat posed by international terrorist groups. For example, Al Qaeda is said to be “an organization of organizations with a global reach”⁴⁰ and such groups are constantly seeking to modify the funding streams to hide and move their money and may run an entire organisation and operation in a different country to the one in which they eventually target. As such national regimes need to follow an

³⁶ C Linn, 'How terrorists exploit gaps in US anti-money laundering laws to secret plunder' [2005] 8(3) *Journal of Money Laundering Control* 200

³⁷ “Terrorist financing and Islamic State – Testimony submitted to the House of Committee on Financial Services”, (Matthew Levitt, November 13 2014). Available at <http://www.washingtoninstitute.org/policy-analysis/view/terrorist-financing-and-the-islamic-state> accessed August 19 2016.

³⁸ For further commentary, see, N Ryder ‘Out with the old and ... in with the old? A critical review of the Financial War on Terrorism on the Islamic State of Iraq and Levant’ *Studies in Conflict and Terrorism*. ISSN 1057-610X [In Press] Available from: <http://eprints.uwe.ac.uk/28343>

³⁹ S. Jones, ‘Diverse funding and strong accounting give ISIS unparalleled wealth’, *Financial Times* (London, June 22 2014) <https://www.ft.com/content/21e8c922-f95d-11e3-bb9d-00144feab7de> .accessed 16 August 2016. Ryder and Harrison note, citing Doshi, that the terrorist group Al Shabaab, a Somali based Militant group funds their enterprise thorough the proceeds of the illegal smuggling of ivory. This activity is thought to provide around £365,000 per month. (K Harrison and N Ryder, *The law relating to financial crime in the UK* (2nd Ed edn, Routledge 2017) 56 For further information on this, see: V.Doshi, ‘Elephant Campaign: How Africa’s “white gold” funds the al-Shabaab militants’ *The Independent* (London, 3 February 2014) <http://www.independent.co.uk/voices/campaigns/elephant-campaign/elephant-campaign-how-africas-white-gold-funds-the-alshabaab-militants-9102862.html> accessed 18.10.16. For further information on the funding sources of ISIL, see, Institute for Economics and Peace “Global Terrorism Index 2014” 51. Available at: <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf> Accessed August 19 2016. “Remarks of Deputy Assistant Secretary for Terrorist Financing Jennifer Fowler at the Washington Institute for Near East Policy on US Efforts to Counter the Financing of ISIL”, (US Department of the Treasury, February 2 2015). Available at www.treasury.gov/press-center/press-releases/Pages/jl9755.aspx accessed August 19 2016. Humud, Pirog and Rosen, “Islamic State Financing and US policy approaches”, Congressional Research Service, (2015) 10. Available at: <https://www.fas.org/sgp/crs/terror/R43980.pdf> accessed August 19 2016.

⁴⁰ G Chalind and A Blin, *A History of Terrorism, from Antiquity to Al Qaeda* (University of California Press 2007) 434

internationally agreed CTF strategy. This ensures that CTF measures are consistent and allow for cooperation with enforcement agencies in other jurisdictions.⁴¹ The international uniformity is being reached as a common theme in legislative measures can be identified in particular between the U.S., U.K. and Canada, who have all developed a three pronged approach with the criminalisation of terrorist financing, the implementation of an asset freezing regime and reporting requirements on financial and credit institutions.

1.3 The Legislative Response to the financing of terrorism

The events of September 11 2001 prompted the international community into taking immediate action. Although legislative steps had previously been taken to prevent terrorism, this attack demonstrated that the legislation was wholly inadequate. President George Bush proclaimed a 'war on terror' and stated that, "the American people must understand this war on terrorism will be fought on a variety of fronts, in different ways" and announced "a strike on the financial foundation of the global terror network".⁴² In September 2001 President Bush utilized the powers under the International Emergency Economic Powers Act IEEPA 1977 and implemented Executive Order 13,224 titled 'Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism.'⁴³ This Order sought to "block [and freeze] all assets and interests in property of certain terrorists and individuals and entities materially supporting them."⁴⁴ The unprecedented powers provided by Executive Order 13,224 were further bolstered by the implementation of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001.⁴⁵ Title III of this Act expanded the onerous reporting requirements of financial institutions already imposed by the Bank Secrecy Act 1970.

⁴¹ Acharya purports that, "Decisions involving measures to counter terrorism and terrorist financing are interdependent; one country's counter measures are highly dependent on those of other countries." (A Acharya, *Targeting Terrorist Financing, International Cooperation and new regimes* (Routledge 2009) 84 .

⁴² 'Bush: We will starve the terrorists,' CNN News (United States September 24 2001) <http://edition.cnn.com/2001/US/09/24/ret.bush.transcript/index.html> accessed 15.02.11.

⁴³ Executive Order 13,224 of September 23 2001, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten To Commit, or Support Terrorism. Available at: <http://www.fas.org/irp/offdocs/eo/eo-13224.htm>. Hereafter Executive Order 13,224.

⁴⁴ These powers already existed under previous US legislation, "yet the new sanctions also significantly expanded on existing ones". See B Zagaris, 'The merging of the anti-money laundering and counter-terrorism financial enforcement regimes after September 11, 2001' [2004] 22(1) Berkeley Journal of International law 123

⁴⁵ Hereinafter USA PATRIOT Act 2001.

Whilst the focus on the funding of terrorism was prompted by the U.S, the UN was responsible for pioneering the response to terrorist financing and has implemented several Security Council Resolutions. For example, UNSCR 1267 requires Member States to impose sanctions against al-Qaeda, Osama bin Laden, the Taliban and other known or suspected associates.⁴⁶ The sanctions included the freezing of assets, an arms embargo and travel restrictions.⁴⁷ However, the cornerstone of the CTF measures following September 2001 is UNSCR 1373, which imposes four obligations on its members.⁴⁸ These obligations all centre on choking off terrorist funds and facilitate international coordination in the area.

The European Union (E.U.) also promotes an internationally consistent approach to CTF. However, like the FATF, the E.U. has traditionally focused on money laundering⁴⁹ and not the prevention of terrorist financing. However, following the September 11 2001 attacks the E.U. developed an Action Plan on Terrorism,⁵⁰ which included the need to prevent terrorist financing. The Action Plan led to the adoption of the Framework Decision on Fighting Terrorism.⁵¹ The E.U. did not criminalise the financing of terrorism until it implemented the Third Money Laundering Directive in 2005.⁵² The Fourth Money Laundering Directive⁵³ was introduced in 2015 and requires Member States to update their money laundering laws by June 2017. This

⁴⁶ Ibid., Article 4(b).

⁴⁷ Resolution 1267 also established the Sanctions Committee of the UN Security Council whose objective was to freeze the funds owned by or used for the benefit of the Taliban.

⁴⁸ Firstly, it specifically requires states to thwart and control the financing of terrorism. Secondly, it criminalises the collection of terrorist funds its members territory. Thirdly, it freezes funds, financial assets and economic resources of people who commit or try to commit acts of terrorism. Finally, it prevents any nationals from within their territories providing funds, financial assets and economic resources to people who seek to commit acts of terrorism. (S.C. Res, 1373, U.N. SCOR, 56th Sess., 4385th Mtg. Article 1(a), Article 1(b), Article 1(c), Article 1(5)).

⁴⁹ This point can be demonstrated by the content of the first two E.U. Money Laundering Directives. See, Council Directive 91/308/EEC, 10 June 1991, and Council Directive 2001/97/EC, 4 December 2001

⁵⁰ Council of European Union *Extraordinary Council Meeting: Justice, Home Affairs and Civil Protection*, Brussels, 20 September 2001. Available at: http://europa.eu/rapid/press-release_PRES-01-327_en.htm. accessed 11.10.16.

⁵¹ 2002 OJ L164/3.

⁵² Council Directive 2005/60/EC, 26 October 2005. Turksen opines that the intention of the Third Directive was to “provide a common EU basis and benchmarks for implementing the FATF Recommendations” (U Turksen, Implications of anti-money laundering law for accountants in the European Union – a comparative study’. in Ryder and others (eds), *Fighting Financial Crime in the Global Economic Crisis* (Routledge 2014) 81). A Fourth Money Laundering Directive was proposed by the European Commission in February 2014, it is yet to be implemented.

⁵³ 4th Anti-Money Laundering Directive (EU) No. 2015/849

Fourth Directive⁵⁴ also seeks to implement the updated FATF Recommendations from 2012.⁵⁵

The remit of the FATF Recommendations were extended from money laundering to include the financing of terrorism following the terrorist attacks in 2001 and became known as the ‘Special Recommendations’.⁵⁶ There are nine Special Recommendations which aim at, ensuring that terrorist financing is criminalised, that CTF regimes are strengthened, that suspected terrorist funds are seized, any suspicious transactions are reported and overall that international cooperation as regards sharing information is enhanced. The UN provisions on tackling terrorist financing and the special recommendations of the FATF have influenced a number of jurisdictions including the U.S., the U.K. and Canada. For example, the U.S. instigated the ‘Financial War on Terror’⁵⁷ and since the attacks it has frozen assets and restricted access to hundreds of bank accounts that they believed to assist terrorists and their operations.⁵⁸ As a result of Executive Orders 12,947 and 13,224, a number of entities were designated as a terrorist group or a foreign terrorist organisation for the purposes of freezing their assets. This action has led to \$37.6m of terrorists and suspected terrorists assets being frozen.⁵⁹ Although such figures may suggest that such steps have proven successful, the actual assets frozen are believed to form just a small amount of the funds available to terrorists.⁶⁰ Furthermore, Seldon has commented on several failed prosecutions of individuals and organisations who

⁵⁴ The central changes made by this legislation relate to; further emphasis upon a risk based approach; the expansion of the definition of a politically exposed person (PEP); the development of new rules that apply to electronic money and registers for ultimate beneficial ownership and an improved sanctions regime (See J Kaetzler and T Kordys, 'Fourth Money Laundering Directive: Increased risk management requirement' [2015] 4(5) Compliance and Risk 2-5).

⁵⁵ The FATF Recommendations set out a comprehensive framework of measures which if implemented by member states would assist them in combatting money laundering and terrorist financing.

⁵⁶ These Recommendations were amended in February 2012 and are now referred to as the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.

⁵⁷ This term was coined following President George Bush’s announcement “we will starve terrorists of funding, turn them against each other, rout them out of their safe hiding places, and bring them to justice” (The White House ‘Fact sheet on terrorist financing executive order’, September 24, 2001. Available from <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010924-2.html>>, accessed July, 2013). This speech became known as the Rose Garden Strategy.

⁵⁸ This is administered by the Office of Foreign Assets Control (OFAC) of the Treasury Department.

⁵⁹ This figure is correct up to December 31st 2015. US Treasury Department Office of Foreign Assets Control Terrorist Assets Report 2015, Twenty Fourth Annual Report to the Congress on assets in the United States relating to terrorist countries and international terrorism program designees, at 9.

⁶⁰ J Winer and T Roule, 'Fighting Terrorist Finance' [2002] 44(3) Survival 88

have had their assets frozen illustrating that it may be difficult to ultimately secure a conviction or that the assets have been unnecessarily frozen.⁶¹

Prior to September 2001, the UK already had CTF legislative provisions such as the Prevention of Terrorism (Amendment) Act 1989. Following a review of these provisions, the Terrorism Act 2000 extended the scope of the UK's provisions from acts of domestic terrorism to international terrorism. The Terrorism Act 2000 creates eight offences relating to terrorist financing - fundraising,⁶² use and possession,⁶³ funding arrangements,⁶⁴ money laundering⁶⁵ disclosure of information: duty⁶⁶ and failure to disclose information⁶⁷, disclosure of information: permission⁶⁸ and cooperation with police.⁶⁹ Although these provisions appeared to provide a comprehensive cover against terrorist financing, the impact of the Act has been questioned. For example, between 2000 and 2010 a total of 36 people have been charged with terrorist financing offences under the Terrorism Act 2000,⁷⁰ yet only a total of 11 people have been convicted of fund raising offences under the 2000 Act during the same time period.⁷¹ The implementation of the Anti-terrorism Crime and Security Act 2001 substantially increased U.K. CTF powers and provides for the authorisation by the HM Treasury of the seizure of terrorist cash anywhere in the U.K.⁷² Part II of the 2001 Act permits HM Treasury to freeze the assets of overseas governments or residents who have taken, or are likely to take, action to the detriment of the UK's economy or action constituting a threat to the life or property of a

⁶¹ R Seldon, 'The executive protection: Freezing the financial assets of alleged terrorists, the constitution, and foreign participation in US financial markets' [2003] 8(3) *Fordham Journal of Corporate and Financial Law* 503

⁶² Terrorism Act 2000, s. 15.

⁶³ Terrorism Act 2000, s. 16.

⁶⁴ Terrorism Act 2000, s. 17.

⁶⁵ Terrorism Act 2000, s. 18.

⁶⁶ Terrorism Act 2000, s. 19.

⁶⁷ Terrorism Act 2000, s. 19.

⁶⁸ Terrorism Act 2000, s. 20.

⁶⁹ Terrorism Act 2000, s. 21.

⁷⁰ Home Office 'Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation; Arrests, Outcomes, and Stops & Searches Great Britain 2009/10' (Home Office: London, 2010) 16.

⁷¹ Home Office 'Operation Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes, Stops & Searches, Great Britain 2008/09', 26 November 2009, at .26.

⁷² and the freezing of funds at the start of an investigation,⁷² the monitoring of suspected accounts,⁷² the imposition of requirements on people working within financial institutions to report where there are reasonable grounds to suspect that funds are destined for terrorism and to permit HM Treasury to freeze assets of foreign individuals and groups.

national or resident of the U.K.⁷³ In July 2009, Lord Myners the Financial Services Secretary to HM Treasury, reported that “as of the end of June 2009, a total of 237 accounts containing £607,661 of suspected terrorist funds were frozen in the UK”.⁷⁴ This figure has decreased significantly and frozen assets in the U.K. currently total £100,000.⁷⁵ This asset freezing regime is said to be “working well in practice”⁷⁶ and the U.K. was “the first country to be awarded the fully compliant rating” in relation to asset freezing.

Canada responded to September 11 2001 in a similar legislative manner of the U.S. and U.K. In order to implement the UN Security Council Resolutions, they established a process for the listing of terrorist entities so that specified measures could be applied, such as the freezing of assets to those who are listed. The Canadian government claim that three distinct yet complementary mechanisms have allowed them to become active in the prevention and detection of terrorist funds.⁷⁷ The first is the UN Al-Qaida and Taliban Regulations⁷⁸ (UNAQTR), under the United Nations Act 1946 to freeze the assets of entities belonging to or associated with the Taliban and Al-Qaida. The second mechanism consists of the more general Regulations⁷⁹ implementing the UNSCR on the Suppression of Terrorism, which create a Canadian list of terrorist entities not restricted in terms of geography or association, as is the UNAQTR. These implement more general requirements to suppress the financing of terrorism pursuant to UNSCR 1373. Importantly, the last factor, allows the Canadian Government to apply appropriate criminal charges to entities believed to be involved

⁷³ HM Treasury are allowed to make a freezing order if two statutory requirements are met. Firstly, they must reasonably believe that action threatening the UK’s economy or the life or property of UK nationals or residents has taken place or is likely to take place. Secondly, the persons involved in the action must be resident outside the UK or be an overseas government (Terrorism Act 2000, s. 4(1)(a) and (b)).

⁷⁴ 15 July 2009 : Column WS96. In October 2007, this function was transferred from the Bank of England to the HM Treasury and the Asset Freezing Unit was established.

⁷⁵ HM Treasury Operation of the UK’s Counter-Terrorist Asset Freezing Regime: 1 July 2015 to 30 September 2015, Written Ministerial Statement. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/474472/Annex_A_-_2015Q3-WMS.pdf. (Accessed: 11.10.16).

⁷⁶ Financial Action Task Force Third mutual evaluation report anti-money laundering and combating the financing of terrorism – the United Kingdom and Northern Ireland (Financial Action Task Force: Paris, 2007) 76.

⁷⁷ Rights, Limits, Security: A Comprehensive Review of the Anti Terrorism Act and related issues, Government Response to the Seventh Report of the Standing Committee on Public Safety and National Security, Subcommittee on the Review of the Anti Terrorism Act, Parliament of Canada. Available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3066235&File=21>. (Accessed: 30.06.16).

⁷⁸ SOR/ 99-444

⁷⁹ United Nations Suppression of Terrorism Regulations SOR 2001-360

in the funding of terrorism. The CTF regime in Canada has been highly rated by the FATF and is the subject of ongoing changes by virtue of Bill C-25⁸⁰.

Arguably such legislation was required in order to detect and prevent terrorist financing, a crucial arm of the international community's counter terrorism response.⁸¹ For example, terrorists may need very little money to carry out an attack such as the London bombings of July 7th 2005,⁸² and the Charlie Hebdo murders in Paris in January 2015.⁸³ Indeed the perpetrators of the recent terror attacks in Paris⁸⁴ and Germany⁸⁵ avoided large costs by carrying out their attacks with knives and machetes. Nevertheless terrorist groups do require a continuous flow of funds to operate their organisation allowing for living costs, recruitment, training, weapons and communication. Terrorists have traditionally relied upon two sources of funding: state and private sponsors.⁸⁶ As state sponsorship is thought to have declined since the 1990's,⁸⁷ terrorists have been forced to find new ways of raising capital to fund themselves.⁸⁸ This has made the task that the authorities face even more difficult as mechanisms to raise funds include a complicated mix of "ideological, religious,

⁸⁰ Detail the addition to powers regarding the information that FINTRAC can share with partners and the power to issue fines for non-compliance.

⁸¹ It is important to note that Resolutions brought in under Chapter VII of the UN Charter are binding on member states.

⁸² On this day, a series of coordinated terror suicide attacks were carried out on London's public transport system, 56 people were killed and 700 were injured. These attacks were thought to have cost no more than a few hundred pounds.

⁸³ J Levs, E Payne & M Pearson *CNN News*, (United States January 10 2015) 'A timeline of the Charlie Hebdo terror attack', <http://edition.cnn.com/2015/01/08/europe/charlie-hebdo-attack-timeline/index.html> accessed 16 August 2016.

⁸⁴ Police Officer and wife killed in 'Isis-inspired knife attack in Paris suburb before officers shoot dead suspect' *The Independent* (London 13 June 2016) <http://www.independent.co.uk/news/world/europe/yvelines-french-police-officer-killed-and-family-taken-hostage-in-attack-in-paris-suburbs-a7080461.html> accessed August 20 2016.

⁸⁵ D Chazan 'Machete attack outside police station leaves two Belgian officers injured as third officer shoots assailant dead' *The Telegraph* (London, 7 August 2016) <http://www.telegraph.co.uk/news/2016/08/06/belgian-police-officers-injured-in-machete-attack/> accessed August 20 2016.

⁸⁶ I Bantekas, 'The international law of terrorist financing' [2003] 97(2) *The American Journal of International Law* 315

⁸⁷ Acharya credits this decline with "the end of the Cold War and the superpower rivalry reduced the incentive for Washington and Moscow to fund proxies in pursuing geopolitical goals" (A Acharya, *Targeting Terrorist Financing, International Cooperation and new regimes* (Routledge 2009) 84). For more on this subject, see M Basile, 'Going to the source: Why al-Qaeda's financial network is likely to withstand the current war on terrorist financing' [2004] 27(3) *Studies in Conflict & Terrorism* 183 and S.D. Collins, 'State-sponsored terrorism: In decline, Yet still a potent threat' [2014] 42 (1) *Politics & Policy* 131-159

⁸⁸ Lee stated that the al-Qaeda "network increasingly is shifting to non-bank methods of moving and storing value and is relying on a decentralised structure of largely self-financing cells". See R Lee *Terrorist Financing: The US and International Response Report for Congress* (Washington: Congressional Research Service 2002) 19.

criminal and business sources, which often mingle and merge, so that it becomes difficult to determine the provenance of any particular terrorist funds in any given case”.⁸⁹ The more sources of finance which terrorists use only serve to add to the complexity of pinning down funds from terrorist supporters.⁹⁰ The very origin of terrorist monies can frustrate the detection of terrorist funds. Terrorist organisation’s capital can derive from both legitimate and illegitimate sources,⁹¹ and money from a legitimate source such as a salary or state benefit is highly unlikely to arouse any suspicion. This money can carry on its purpose unnoticed helping to finance terrorism. Terrorists are highly mobile and are able to identify less hostile environments in which to run their operations and take advantage of loopholes in law enforcement. This is especially true of terrorist financing as technological advances⁹² make it particularly problematic for enforcement agencies to detect and prevent terrorist funds from achieving their ultimate goal.⁹³ Moreover, recently, the terrorist threat has not just come from organised groups but has taken a more fragmented approach with terrorists emerging everywhere. For example, there have been many terrorists attacks committed by individuals such as the Lee Rigby murder in 2013⁹⁴ and the murder of two French police officials in 2016.⁹⁵ Due to this and statistics on

⁸⁹ J Winer and T Roule, 'Fighting Terrorist Finance' [2002] 44(3) *Survival* 89

⁹⁰ It has also been accepted that terrorists use alternative or non-remittance underground banking systems to transfer their funds. One such underground method believed to be utilised by terrorists is the Hawala system that makes little use of written records and is operated on the basis of trust. See R Pathak 'The obstacles to regulating the hawala: a cultural norm or a terrorist hotbed?' (2004) 27 *Fordham Int'l L. J.* 2007

⁹¹ These sources include benefit and credit card fraud; identify theft, the sale of counterfeit goods and drug trafficking. See C Linn, 'How terrorists exploit gaps in US anti-money laundering laws to secret plunder' [2005] 8(3) *Journal of Money Laundering Control* 200

⁹² See G Benstead 'Terrorist financing and the internet: dot com danger' [2012] 21(3) *Information and Communications Technology Law* 237-256

⁹³ It is the scale, sophistication and complexity of the movement of such terrorist funds, which poses a massive problem. Generally these funds will need to be transferred across borders, which makes monitoring, and interception impossible without internationally cohesive rules and regulations. The EU Council of Ministers commented that “measures adopted solely at national or even Community level, without taking account of international coordination and cooperation, would have very limited effects”. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the third money laundering Directive), OJ L309 of 25 November 2005, recital 5.

⁹⁴ British soldier Lee Rigby was attacked and murdered in London on May 23rd 2013. Two British Muslim converts Michael Adebalajo and Michael Adebawale were found guilty and convicted to life imprisonment in 2014 (Lee Rigby Murder: Adebalajo and Adebawale jailed, *BBC News* (U.K. 26 February 2014) <http://www.bbc.co.uk/news/uk-26357007> accessed: 18.10.16.

⁹⁵ Two French police officials were murdered at their home in June 2016. Larossi Abballa was responsible for these murders and was shot and killed by police at the scene. Abballa had previously been sentenced to jail over his links to jihadist groups. 'French jihadist murders police couple at Magnanville,' *BBC News* (Europe14 June 2016) <http://www.bbc.co.uk/news/world-europe-36524094> accessed: 18.10.16.

frozen assets and terrorist financing convictions, it can be argued that CTF legislation is having a limited impact. The small number of convictions brought for terrorist financing offences and the reduction in the amount of assets frozen recently suggests that CTF legislation is not detecting and punishing the financiers of terrorism as it should. However, the true success of CTF measures is impossible to determine as they are primarily preventative in nature. The adverse implications of their application however, is more tangible. The supposed preventative CTF legislation implemented by the U.S., U.K. and Canada is actually having a punitive effect on suspected terrorists which is exacerbated by suspects inability to exercise a right to a fair trial.

1.4 The impact of Counter Terrorist Financing Legislation upon the Right to a Fair Trial

We have witnessed a flurry of rules and regulations implemented in order to starve terrorists of their funds and although the speed at which countries have responded may be commended, the powers that have been afforded to authorities by way of the CTF legislation have attracted widespread criticism. These measures been introduced in a hurried manner and have not adequately taken into account how they will work successfully alongside human rights.⁹⁶ The International Commission of Jurists state:

“terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, they have allowed themselves to be rushed into hasty responses, introducing an array of measures which undermine cherished values as well as the international legal framework carefully developed since the Second World War”⁹⁷.

It has been declared that “safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the State”⁹⁸ and in 2003 the UNSC reiterated that States must ensure that any counter terrorism measures complied with obligations “under international law, in particular

⁹⁶ It has been claimed that the threat of terrorism is so unprecedented and exceptional that the world is facing a genuine emergency and in such a state, “the rules must change and individuals must forego their liberties for the greater good”. See Assessing damage, urging action. Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, International Commission of Jurists. Available at www.icj.org

⁹⁷ Ibid at 2

⁹⁸ The ICJ Declaration on Upholding Human Rights and the Rule of law in Combating Terrorism (The Berlin Declaration). Ibid at 21.

international human rights, refugee and humanitarian law”.⁹⁹ The Eminent Jurists Panel argues that some counter terrorism mechanisms such as torture, arbitrary detentions and unfair trials “lack the normal guarantees of oversight and accountability”.¹⁰⁰ Notwithstanding such criticism in relation to accountability, CTF legislation can also be condemned for negatively impacting on human rights.¹⁰¹ Such consequences for human rights have been restrictions on freedom of speech and association and the isolation or targeting of minority communities.¹⁰² The apparent concentration of attention on Muslim communities in particular is based on the belief that terrorists are partly financed by donations of followers to predominantly Islamic charities. The focus on Islamic charities amounts to Islamophobia and noted by Ryder and Turksen who argued that “one of the most controversial aspects of the US policy is its attitude towards Islamic charities”.¹⁰³ Whilst it was found in the case of the Holy Land Foundation,¹⁰⁴ that donations had provided support for terrorism, evidence to suggest the wide use of such a method is yet to be found. Despite this, such a supposition has resulted in Muslim charities being disproportionately affected by CTF provisions.¹⁰⁵ For example, within the space of ten days in December 2001, the U.S.

⁹⁹ United Nations Security Council S/RES/2249 (2015)

¹⁰⁰ Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, International Commission of Jurists, at 10. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9F9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20EJP-Report.pdf>. Accessed: 14.09.16.

¹⁰¹ “Most countries when meeting their obligations to counter terrorism by rushing through legislative and practical measures, have created negative consequences for civil liberties and fundamental human rights” (Human Rights, Terrorism and Counter-Terrorism, Fact Sheet No.32, Office of the United Nations High Commissioner for Human Rights at 20).

¹⁰² Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, International Commission of Jurists, at 11. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9F9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20EJP-Report.pdf>. Accessed: 14.09.16.

¹⁰³ N Ryder and U Turksen, 'Islamophobia or an important weapon? An analysis of the US financial war on terrorism' [2009] 10(4) Journal of banking regulation 307-320

¹⁰⁴ The Holy land Foundation was the largest Islamic charity in the U.S. and in 2001, their assets were frozen by the European Union and the U.S. and were subsequently shut down after it was found to be funding Hamas. This was a case that attracted some controversy after the Holyland Foundation challenged the U.S. government on the premise that the OFAC's action of designating them as a terrorist organisation and freezing their assets was “arbitrary and capricious” and in violation of the Administrative Procedure Act. They also questioned the lack of sufficient notice or a meaningful opportunity to be heard but the OFAC's designation was upheld. A conviction took 7 years to achieve with founders of the organisation being found guilty in 2008 of providing more than \$12.4 million to Hamas. Consequently they were given life sentences in 2009. It should also be noted that the Global Relief Foundation (GRF) challenged the U.S. on similar constitutional grounds as the Holy land Foundation but they also failed. The Benevolence International Foundation (BIF) challenged a blocking order put on the organisation due to its alleged violation of statutory and constitutional due process rights. This case was voluntarily dismissed as BIF could no longer continue.

¹⁰⁵ Blocking faith, freezing charity, chilling Muslim charitable giving in the war on terrorism financing (2009) at 8. American Civil Liberties Union. Available at www.aclu.org

government froze the assets of the three largest Muslim charities in the U.S. and has closed six U.S. based Muslim charities by designating them as terrorist organisations.¹⁰⁶ Such an action by the federal government has angered Muslim communities whose religion requires them to make charitable donations but such CTF provisions have given rise to a climate of fear and Muslim people are concerned that a contribution to a charity may ultimately be regarded as suspicious.¹⁰⁷ Such actions have been commented upon by the American Civil Liberties Union who claims “the U.S. government’s terrorism financing policies and practices have alienated Muslim Americans and engendered mistrust of law enforcement”¹⁰⁸.

Further inconsistencies with human rights have been recently identified. For example, Jones *et al.*,¹⁰⁹ stated that the asset freezing procedures have given rise to serious human rights concerns especially regarding the lack of requirement on the UN Sanctions Committee to provide justification for listing an individual or entity.¹¹⁰ They state: “Even the most hardened supporter of counter- terrorist measures would have to concede that the placing of a person’s name on the UNSC list, with the consequent freezing of assets and travel ban, is an extremely far reaching measure, with profound consequences for the life and reputation of the persons whose assets are frozen”¹¹¹. This leaves the CTF regime vulnerable to mistake. In a landmark decision, the Court of Justice of the E.U. held in the joint cases of *Kadi* and *Al Barakaat*¹¹² that the system under EU Law by which a person became listed is seriously flawed.¹¹³ These cases call into question the legality of UN Security Council Resolutions 1267 and 1373 in reference to their confliction with human rights, in particular the right to a fair trial.

Asset freezing powers in the U.K. have also been criticised for their apparent inconsistencies with human rights. This point can be illustrated by the fundamental

¹⁰⁶ Ibid at 7.

¹⁰⁷ Ibid at 16.

¹⁰⁸ Ibid.

¹⁰⁹ ‘Freezing assets of ‘terrorists’- how fair is the UN Sanctions Committee? John RWD Jones and Dr Misa Zgonec-Rozej, Law Society Gazette, 10 September 2009.

¹¹⁰ Equally, the UN Sanctions Committee is not required to provide reasons for rejecting a request.

¹¹¹ ‘Freezing assets of ‘terrorists’- how fair is the UN Sanctions Committee? John RWD Jones and Dr Misa Zgonec-Rozej, Law Society Gazette, 10 September 2009.

¹¹² Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission C-402/05 P and C-415/05 P

¹¹³ Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission C-402/05 P and C-415/05 P

ruling in the case of *A v HM Treasury*,¹¹⁴ which was said to have left the U.K's asset freezing regime "in tatters".¹¹⁵ In this case, Collins J concluded that HM Treasury's powers to freeze suspects' bank accounts were unlawful. Consequently these asset freezing orders were quashed by the Court of Appeal.¹¹⁶ Collins J was also critical of the absence of a procedure for suspects who wanted to challenge their listing as terrorists. The matters raised in *A V HM Treasury* came before the Supreme Court,¹¹⁷ where the applicants sought to challenge the legal basis behind the Terrorism Order 2006 and the Al Qaida Order 2006.¹¹⁸ These Orders were enacted by way of the United Nations Act 1946. Section one of this Act permits the executive to make "such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied".¹¹⁹ Thus no parliamentary debate was necessary and the powers could be automatically implemented. Significantly, this process was found to be contrary to the rule of law and a panel of 7 judges unanimously concluded that HM Treasury had acted *ultra vires*, exceeding their powers under Section 1 (1) of the United Nations Act 1946. The judges in *Ahmed*¹²⁰ also criticised the lack of procedural safeguards in the asset freezing scheme. The AQO did not provide those subjected to designation under this law with any means of recourse. The men concerned had no avenue to appeal their designation or even to learn the evidence against them. Consequently, Article 3(1)(b) of the AQO was declared to be *ultra vires*.¹²¹ The outcome of this case law is very pertinent to this research and shall be discussed in great detail.

This thesis explores the impact that the analogous CTF provisions implemented in the U.S., U.K, and Canada have had on the right to a fair trial. This human right is offered by all three jurisdictions but the value given to constitutionally protected rights has arguably been different. This is evident by the outcome of legal challenges in the area. Focus will be on the ability of countries to list individuals as suspected terrorists and terrorist supporters and to subsequently freeze their assets. Discussion is centred on the contention that listing a person as a suspected terrorist and accordingly freezing

¹¹⁴ [2008] EWHC 869

¹¹⁵ S O'Neill 'Freezing assets of terror suspects ruled unlawful by High Court,' *The Times* (U.K. April 25 2008) accessed 14.03.13.

¹¹⁶ *A V HM Treasury* [2008] EWCA Civ 1187

¹¹⁷ *Ahmed and Others v United Kingdom* [2010] UKSC 2

¹¹⁸ Hereafter AQO

¹¹⁹ Section 1 United Nations Act 1946 c.45

¹²⁰ At footnote 116.

¹²¹ *Ahmed and Others v United Kingdom* [2010] UKSC 2

their assets is not merely a preventative measure but a sanction, which has a punitive effect. The consequent lack of a means to challenge such sanctions may have great impact upon the right to a fair trial. Also, of significant importance to this research will be the ability of the three jurisdictions to derogate from human rights in certain situations.

1.5 Rationale

This thesis explains the legislative contribution of the U.S., U.K. and Canada to the ‘financial War on Terrorism’. It examines how the provisions aimed at countering the financing of terrorism have impacted upon the right to a fair trial in these countries. Furthermore, it seeks to provide a comparative analysis of the CTF approaches taken in the U.S., U.K. and Canada and critiques the lack of procedural fairness in the application of CTF sanctions in these jurisdictions.

1.5.1 Why the U.S?

The U.S. is central to any discussion of CTF law. The U.S. is responsible for instigating the ‘Financial War on Terrorism’ and influencing many UNSCR Resolutions and FATF Recommendations.¹²² Before the September 11 2001 attacks, the financing of terrorism was not recognised as a primary regulatory issue.¹²³ Indeed, at the time, terrorist financing was not even a criminal offence in the U.S. Notwithstanding this, the importance of terrorist funds to an investigation had been previously acknowledged by President Clinton. Following the bombings by al-Qaeda of the U.S. embassies in Kenya and Tanzania in 1998, “the Clinton administration initiated the first significant effort to disrupt the network’s financing”.¹²⁴ This approach gained great recognition and became the focus of the counter terrorism

¹²² Since September 2001, America . . . has spearheaded a groundbreaking and comprehensive disruption operation to stem the flow of funds to and among terrorist groups. Combined with the unprecedented law enforcement and intelligence efforts to apprehend terrorist operatives worldwide and thereby constrict the space in which terrorists can operate, cracking down on terrorist financing denies them the means to travel, communicate, procure equipment, and conduct attacks (M Levitt, ‘Stemming the flow of terrorist financing: practical conceptual challenges’ [2003] 27(Spring/Winter) Fletcher Forum of World Affairs 61).

¹²³The 9/11 Commission Monograph on Terrorist Financing observed that prior to 2001, “fundamentally, the domestic strategy for combating terrorist financing within the United States never had any sense of urgency”. (National Commission on Terrorist Attacks Upon the United States Monograph on Terrorist Financing (National Commission on Terrorist Attacks Upon the United States: Washington DC, 2004) at 4).

¹²⁴ M.E Beare and S Schneider, *Money Laundering in Canada, Chasing dirty and dangerous dollars* (University of Toronto Press 2007) 251

effort following September 2001. The U.S. is regarded by many academics¹²⁵ as the global leaders on tackling money laundering. It was the early U.S. money laundering provisions that formed the basis of the new CTF laws. What followed was a three-pronged strategy for dealing with terrorist financing;¹²⁶ the criminalisation of terrorist financing, the freezing of terrorist assets and reporting requirements on the financial sector.

1.6.2 Why the U.K?

The U.K, unlike the U.S. has considerable experience in dealing with terrorism. For instance, counter terrorist legislation in the U.K. dates back to the eighteenth century¹²⁷ and Jonsson and Cornell noted that “terrorist financing is not a new phenomenon [in] . . . the United Kingdom”.¹²⁸ The U.K. has had CTF provisions in place since the implementation of the Prevention of Terrorism (Temporary Measures) Act 1989.¹²⁹ This Act saw the creation of specific measures to deal with terrorism and terrorist financing. Importantly, Part III of the Act, criminalised terrorist financing and allowed the government to seek the forfeiture of any money or other property which, at the time of the offence, he had in his possession or under his control. The U.S. and Canadian governments however did not, at this point in time, appreciate the importance of countering the financing of terrorism. CTF legislation in the U.K. was reinforced further by the introduction of five terrorist financing offences by virtue of the Terrorism Act 2000.¹³⁰ Despite already having comprehensive legislation in place to deal with terrorist financing, following September 11 2001, the U.K. extended their CTF provisions with the implementation of the Anti Terrorism Crime and Security Act 2001.¹³¹

¹²⁵ N Ryder, *Financial crime in the 21st Century, Law and Policy* (Edward Elgar 2011) 47.

¹²⁶ See, N Ryder, *Financial crime in the 21st Century, Law and Policy* (Edward Elgar 2011) 66.

P Reuter and EM Truman, *Chasing Dirty Money : The fight against money laundering* (Institute of International Economics 2004) 177

¹²⁷ These legislative provisions include, the Explosive Substances Act 1883, the Criminal Law and Procedure (Ireland) Act 1887, and the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (Brandon,D.‘Terrorism, human rights and the rule of law:120 years of the UK’s legal response to terrorism’ (2004) *Criminal Law Review*, December, 981–997, at 982.

¹²⁸ M Jonsson, M. and S Cornell ‘Countering terrorist financing’ [2007] 8 *Conflict and Security* 69.

¹²⁹ c.4

¹³⁰ Terrorism Act 2000, ss 15-19.

¹³¹ c.24. Hereafter ATCSA 2001

1.5.2 Why Canada?

Canada has some history of dealing with terrorism but has relied on employing emergency powers, which were intended for use at times of war.¹³² Prior to 2001, there was no provision in Canadian law for countering the financing of terrorism. Roach claims that “Canada’s response to terrorism reflects many of the same 9/11 effects seen in other countries”.¹³³ However, the difference here is that Canada shares a border with the U.S. McGuire observes, “Canada’s legislative response to counter-terrorism was precipitated by a section in the USA PATRIOT Act entitled, ‘Protecting the Northern Border’ which singled out the U.S.’s shared border with Canada as a potential soft target for would-be terrorists seeking to gain entry into the United States”.¹³⁴ Furthermore, the U.S. currently considers Canada’s financial system to be vulnerable to financial crime. They have noted Canada to be a ‘jurisdiction of primary concern’ in the International Narcotics Control Strategy Report (INCSR).¹³⁵ This implies that the U.S. believes financial institutions in Canada to be engaging in transactions “which involve significant amounts of proceeds from international narcotics trafficking”.¹³⁶ Canada is thus regarded as susceptible to criminals who wish to move or hide illicit funds. This suggests that potentially Canada’s financial system could be utilised by terrorist financiers. The implied vulnerability of Canada’s U.S. border and their financial system suggests that Canada’s contribution to the international CTF effort is highly significant. It is necessary for Canada to satisfy the U.S. that it is implementing comprehensive security measures to prevent terrorists from gaining access to the U.S. through the Canadian border. Canada is keen to keep the Northern border open and to continue trading with the U.S. and thus cannot afford for the U.S. to lose confidence in their security measures.¹³⁷ Due to this pressure, Canada has, following September 2001, implemented an extensive CTF strategy, which almost replicates the U.S. and U.K. approach.

¹³² The War Measures Act R.S.C. (1970), C W-2. This Act was employed during the October Crisis when Canada declared a state of emergency, this is discussed further in Chapter 6.

¹³³ K Roach, *The 9/11 Effect, Comparative Counter-Terrorism* (Cambridge University Press 2011) 361

¹³⁴ SK McGuire, 'Legislating Against the Threat: The US and Canadian Policy Elite Response to the Terrorist Threat' [2013] 6(3) *Journal of Strategic Security* 248.

¹³⁵ U.S. Department of State ‘2016 INCSR: Major Money Laundering Countries’, Bureau of International Narcotics and Law Enforcement. Available at: <http://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253367.htm> (Accessed: 11.10.16)

¹³⁶ S. 481(e)(7) Foreign Assistance Act 1961.

¹³⁷ SK McGuire, 'Legislating Against the Threat: The US and Canadian Policy Elite Response to the Terrorist Threat' [2013] 6(3) *Journal of Strategic Security* 249.

1.6 Contents Overview

Chapter one of the thesis has provided an overview of the subject area, briefly explaining how CTF measures such as designation and asset freezing are negatively impacting upon the right to a fair trial. It has explained why the three case studies were selected for comparative analysis and what the rationale is behind this research.

Chapter two provides a literature review and examines some of the major published works in this area and details how they are relevant to the thesis. It will also explain how this study is unique and differs from previous research explaining the substantial contribution that it will make to the area. This chapter also describes the research methodology utilised for the study, explaining why the methods adopted were appropriate to this subject area. It will also detail why certain research techniques were not employed.

Chapter three includes an in-depth discussion of the international policy in the area of terrorist financing. It considers the contribution of the UN and the E.U. to the 'Financial War on Terrorism', highlighting the influence of the UN on the U.K, U.S. and Canada's legislative policies and identifies a common CTF policy between them. Discussion is centred on UNSCR 1373 which is arguably the largest international step taken with regard to the prevention and detection of terrorist financing. The significant impact on the three jurisdictions concerned of the FATF and the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation is also examined. This chapter also details the human rights commitments of the international community and comments upon the incompatibility of CTF measures with such human rights.

Chapter four concentrates on the 'Financial War on Terror' that was instigated by the President George Bush in 2001. It examines the main objectives of their CTF policy, which aim to disrupt the financial infrastructure of terrorists. It is suggested that in line with the U.K. and Canada, the U.S. has adopted a three-pronged CTF strategy: the criminalisation of terrorist financing, the freezing of assets of known or suspected terrorists and the reporting of suspicious transactions. It is a discussion of this three-pronged strategy, which the chapter focuses on. Fundamental to this discussion is an examination of Presidential Executive Order 13,224, and The PATRIOT Act 2001. Criticisms of these burdensome legislative provisions are examined along with the

proposition that State security is being prioritized over the country's human rights obligations. With this in mind, the impact of CTF legislation on the right to a public trial is considered including a comprehensive review of a number of high profile cases in which the U.S authorities targeted Islamic charities in the wake of the September 11 2001 attacks.

Chapter five considers how the U.K. has a long history of dealing with terrorism and thus had provisions in place prior to 2001 to counter the threat. Notwithstanding this, the 2001 attacks in the U.S. prompted a major overhaul of counter terrorism and CTF legislation and this chapter discusses how the Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act 2001 were hastily implemented. The CTF measures included in these provisions ensure that the U.K. complies with their international obligations supplied by the UN Convention for the Suppressing of the Financing of Terrorism and they also mirror those employed in the U.S. and Canada, forming a CTF strategy that can be divided into three parts. This chapter examines this strategy and with the use of pivotal case law, comments upon the compatibility of the criminalisation of terrorist financing, the freezing of assets and the reporting of suspicious financial activity on the right to a fair trial.

Chapter six examines how Canada followed the lead of the U.S. and brought in CTF measures with the implementation of the Anti Terrorism Act 2001 as a response to the September 11 attacks. These laws were of significant importance due to claims of a porous Canadian-American border and the belief that international terrorist organisations were hiding in Canada. Canada joined the U.S and U.K. in introducing a three point CTF strategy consisting of the criminalisation of terrorist financing, the freezing of terrorist and suspected terrorist assets and the reporting of suspicious transactions. It is discussed how the expanded counter terrorism powers were highly contentious due to their apparent incompatibility with the Canadian Charter of Rights and Freedoms. This point is expanded on with an examination of the notion that CTF measures introduced by the Anti-Terrorism Act 2001 are in violation of the right to trial by jury. This chapter also includes a discussion of Canada's relatively short but pertinent history of counter terror provisions and discusses Canada's ability to suspend human rights under the War Measures Act 1914.

Chapter seven considers the original research aims and provides a summary of the conclusions of this research. Recommendations are also suggested of how situations might be improved to ensure that CTF regimes are regarded as legitimate.