

Chapter 2: Methodology and Literature Review

2.0 Introduction

This chapter outlines the methodological approaches adopted for conducting research in this thesis and examines the existing literature on the development of counter-terrorist financing (CTF) legislation in the United States of America (U.S.), the United Kingdom (U.K.) and Canada. The aim of this thesis is a comparative analysis of the impact of the CTF legislative frameworks on the right to a fair trial in these three jurisdictions. The chapter illustrates how the literature review confirms that whilst national and international counter terrorism and CTF measures have been the subject of detailed academic critique, there is an absence of research into how CTF legislation impacts on human rights, especially, the right to a fair trial. The originality of this thesis lies in the application of the relationship between the right to a fair trial and the U.S., U.K. and Canadian CTF legislation. Therefore, the chapter firstly identifies the aims and objectives of the research. Secondly, the methodological approach adopted for this thesis is discussed. Thirdly, each research method utilised is discussed and justified by an explanation of its benefits and disadvantages. Fourthly, the literature review identifies and examines the central themes evident within related published work. The selected methodology is justified by its appropriateness to fulfilling the research aims; it is a discussion of these aims, which this chapter now turns.

2.1 Research aims and objectives

This thesis explores and identifies the impact that CTF measures are having on the right to a fair trial. Firstly, the research seeks to illustrate the importance of the 'Financial War on Terrorism'. Secondly, the research examines the evolution of international CTF legislation. In particular, it investigates how the United Nations (UN), the European Union (EU) and the Financial Action Task Force (FATF) have influenced the measures taken to detect and prevent the financing of terrorism. Thirdly, the research identifies and explains what the legislative responses of the U.S., U.K., and Canada have been to the terrorist attacks on September 11th 2001.¹ Fourthly, the thesis seeks to determine if a common CTF policy between the three

¹ Hereafter 'September 11'.

jurisdictions can be identified and establishes the importance of a unified response to preventing the financing of terrorism. Fifthly, the research illustrates the negative consequences that the CTF legislative measures are having on procedural fairness and seeks to explore whether the opportunity to enforce the right to a fair trial in CTF cases will improve this situation. Finally, it seeks to highlight through the use of judicial precedent that the right to a fair trial is adversely affected to the detriment of the legitimacy of the CTF regime. With these aims in mind, discussion now turns to the selected methodology for this research.

2.2 Selected Methodology

A review of the literature on terrorist financing in the three jurisdictions was the first necessary step. This established what has been published on terrorist financing legislation in the U.S., U.K., and Canada and thus contributed towards identifying the contemporary issues. The wealth of electronic and paper information was utilised whilst also examining the related human rights. An analysis of the literature suggests that there is a lack of comparative research on the relationship between CTF legislation and the right to a fair trial, especially with regard to the three selected jurisdictions. Whilst there has been considerable commentary on how counter terrorism legislation impacts human rights, a discussion of how CTF related laws affect human rights is insubstantial. This is particularly the case with regard to the right to a fair trial.

Doctrinal research is adopted, which includes an exploration of documentary evidence relating to combating terrorism, CTF and human rights. The utilisation of documentary evidence enables the collection of valuable information regarding the provisions of the terrorist financing legislative framework in the U.K., U.S., Canada and the UN. Documentary evidence from organisations such as Office of Foreign Assets Control,² HM Treasury, the Department of Treasury, Financial Transactions and Reports Analysis Centre of Canada³ and the FATF was vital to the investigation of the appropriateness of CTF provisions. This method of research is utilised to learn more about the human rights provisions in each jurisdiction, examining their origins and application in the U.K., U.S. and Canada.

² Hereafter 'OFAC'.

³ Hereafter 'FINTRAC'.

In addition to a dearth in this area of research, a review of the literature suggests a lack of comparative research on the impact of CTF policies and practices in the U.S., U.K. and Canada. This is particularly so with regard to the human rights implications that have followed from national security responses. Thus, a further research method adopted in this thesis is comparative research. Collins opines that a comparative legal method has five steps which include: identifying an aspect of domestic law which lacks a clear rationale; identifying a social problem that is a cause of dispute in relation to that area of domestic law; analysing the legal doctrines that are adopted by foreign legal systems to tackle the same problem; evaluation of this foreign legal system to ascertain whether its method is superior, and; an examination of the domestic legal system once again to reveal any obstacles to achieving more satisfactory results.⁴ These steps will be closely followed in the comparative research conducted in this thesis. This method is central to the research because it makes it possible to identify and illuminate the comparability of the laws in this area as “a coordinated, global response, involving building and sustaining international institutions and regional alliances”,⁵ a goal that is said to be paramount to containing terrorism. It was also necessary to use this method of research in relation to how each jurisdiction has attempted to implement CTF laws whilst respecting the right to a fair trial.

Moreover, as this thesis is concerned with the impact of legislative provisions on society, it is necessary to adopt a socio-legal approach to the research. Instead of relying extensively on statutes, and judicial precedent to ascertain the human rights implications of CTF legislation, the use of a socio-legal methodology would allow the law to be considered as a social phenomenon. This chapter will now go on to discuss each research method in detail outlining the reasons for their suitability to this research.

⁴ H Collins, 'Methods of Comparative Contract Law' [1991] 11(3) Oxford Journal of Legal Studies 399.

⁵ I Shapiro, 'A Global Response to Terrorism [2008] 2 (2) The Journal of the ACS Issue Groups 37.

2.2.2 Documentary Evidence

The analysis of documentary evidence or doctrinal research is a traditional and widely used method of legal research.⁶ Vick explains that:

“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”.⁷

This approach may be utilised as a sole method of research or it can be adopted with other approaches. In short, it has the aim of discovering what the law is in a particular area. This is achieved through the study of legal statutes, jurisprudence and texts to identify the legal rules and the legal doctrines that have developed. Such research will include an historical perspective, which explains the evolution of the law and the impact of its application. Research surrounding the implementation of these laws will be particularly significant to a discussion on the right to a fair trial. The thesis utilises documentary evidence to examine whether the right to a fair trial can be enforceable in situations where CTF laws have been applied. Moreover, this type of research offers an opportunity for further understanding of the general area and highlights any issues, which may need further consideration. Pearce *et al.* describe this method as, “research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.”⁸ This approach was considered appropriate to the aims of this thesis and is the predominant research method adopted. Following an extensive literature review and consequently an identification of the current issues and lack of research in this area of the law, it is necessary to discover what the law is in this area.

As a starting point to discovering the law, the author will study CTF related legislation in the selected jurisdictions. It will be necessary to gain an understanding

⁶ Douglas Vick, 'Interdisciplinarity and the Discipline of Law' [2004] 31 (2) *Journal of Law and Society* 177

⁷ Douglas Vick, 'Interdisciplinarity and the Discipline of Law' [2004] 31(2) *Journal of Law and Society* 178

⁸ D Pearce and others, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Committee* (Australian Government Publishing Service 1987) 312.

of how these laws have developed and to determine the reasons behind their introduction. This will be achieved through the interpretation of statutes and the analysis of facts and judgements in case law. It will also be necessary to investigate the international law in this area and to examine how it applies to the U.K., U.S. and Canada. In order to discover the law in this area, the author will refer to the primary sources, which include Treaties, Declarations, Regulations and Directives. This will help to identify common factors and inconsistencies between the approaches of the three countries to preventing the financing of terrorism. It will also illustrate the position of human rights within each jurisdiction.

Secondary sources will also be utilised in this research. These comprise textbooks, journal articles and commentaries on case law and legislation. The use of such material can help to explain statutes and the reasoning behind their implementation. It can also provide a critical appraisal for such laws commenting on their application and identifying existing problems with the legislation. Singhal and Malik suggest that secondary sources are “primary material that has been investigated, analyzed and elucidated by many different authors in a variety of contexts and from wide ranging perspectives”.⁹ The use of secondary sources can provide some interesting viewpoints of the law and may also identify the current issues in the area. Singhal and Malik added that doctrinal research is much focussed and involves “specific enquiries in order to locate particular pieces of information”.¹⁰ This is indeed the case and the research carried out can help to define the areas of concern. In this thesis it will confirm that with regard to the adverse impact of preventing the financing of terrorism, procedural fairness features heavily in the case law emerging from the U.K., U.S. and Canada. Whilst the use of secondary sources will be invaluable to this thesis, such a research method is not without its potential problems. For instance, there is a danger that the standard of research undertaken within a secondary source could be poor or information provided may be incomplete. The author will be mindful of such a possible situation and will identify any weaknesses before applying the relevant study to this thesis.

⁹Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' [2012] 2(7) Educational Research Journal 253.

¹⁰ Ibid.

Doctrinal research is a widely used methodology in law and it will be beneficial to this study because it makes the area of research more manageable by reducing the scope of materials to be examined. This should help to focus the thesis and concentrate on the research aims and research questions. This mode of research is also preferable to this study, because it doesn't create the ethical issues that may occur as a result of an empirical approach. However, the area in question is very sensitive and the author will be mindful throughout that comment on religious and cultural subjects must be sensitively pursued in their relation to terrorist financing laws.

Whilst the doctrinal method is a traditional and popular approach, it is not without its flaws. It is by its very nature, restrictive and does not allow for consideration of the law in a social context. McConville and Chui comment that the pure doctrinal method has been criticised “for its ‘intellectually rigid, inflexible and inward looking’ approach of understanding law and the operation of the legal system”.¹¹ Singhal and Malik further suggest that it is “too theoretical, too technical, uncritical, conservative, trivial and without due consideration of the social, economic and political significance of the legal process”.¹² Hutchinson agrees with such a notion and argues that “at times doctrinal researchers do no more than ‘work the rules’ in isolation from practice or the theory underlying the rules, and without due consideration for how the rules might be improved or reformed”.¹³ This is a valid point as without consideration of legal rules in a social context and proposals for improvement, the value of a piece of research is limited. However, doctrinal research does provide the “starting point of most legal research projects”¹⁴ and whilst the criticisms noted are well founded, the importance of this method of research should not be underestimated. Doctrinal research is paramount to successfully conducting comparative research. Without a comprehensive understanding of the CTF and human rights legislation and a broad appreciation of how this is applied in the three jurisdictions, then comparative research would be impossible.¹⁵ This is a view supported by Vick who states,

¹¹ Mike McConville and Hong Chui Wing, *Research Methods for Law* (Edinburgh University Press 2007) 4.

¹² AshishKumar Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' [2012] 2(7) Educational Research Journal 253.

¹³ Terry Hutchinson, Doctrinal research: researching the jury. in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 16.

¹⁴ Terry Hutchinson, Doctrinal research: researching the jury. in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 28.

¹⁵ Douglas Vick, 'Interdisciplinarity and the Discipline of Law' [2004] 31(2) Journal of Law and society 181.

“without the strong and distinctive disciplinary basis for legal inquiries provided by doctrinalism, there would be no benchmark against which interdisciplinary experimentation could define itself”.¹⁶ An investigation into the relevant legal doctrine is essential in legal research and Hutchinson suggests “by and large most doctrinal scholars would agree that the immediate first step is to understand the content of the law before being concerned about its derivation, or effects on society”.¹⁷ With this in mind, doctrinal research will be undertaken in this thesis in order to gain a broad understanding of the legislation, policies, judicial precedent and academic opinion of CTF and human rights.

2.2.3. Comparative Research

As well as doctrinal research this thesis adopts a comparative research methodology. This type of research is extremely valuable especially considering the advent of globalisation. Eberle contends,

“in our increasingly globally linked world, comparative law needs to take an ever more crucial role. With the rise of important new developments over the last thirty years, like the proliferation of the computer and the internet, global capital markets that begin in Asia and end in the United States, and the mutual trade in commodities like oil, foodstuffs, and metals, we are linked in important common ways. The computer, and especially its generation of the internet has made us, in effect, a global village”.¹⁸

This is a very interesting point because it suggests that common interests and traditions between jurisdictions can be found and lessons may be learned from the experience of other countries. With this in mind, the thesis looks at the similarities and differences in the manner in which CTF policy has evolved in the U.S., U.K. and Canada. Razak contends that comparative research “stimulates awareness of the cultural and social characters of the law and provides a unique understanding of the way law develops and works in different cultures”.¹⁹ The use of this research method is paramount to investigating the appropriateness of CTF measures and looking at the

¹⁶ Ibid.

¹⁷ Terry Hutchinson, Doctrinal research: researching the jury, in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 17.

¹⁸ Edward Eberle, 'The method and role of comparative law' [2009] 8(3) Washington University Global Studies Law Review 451-452.

¹⁹ Adilah Abd Razak, 'Understanding legal research' [2009] 4(March) Integration and Dissemination 21

various impacts that the operation of CTF legislation has had on the right to a fair trial. Eberle adds 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”.²⁰ Comparative research can helpfully expose what the problems are or the potential issues of applying CTF legislation that is not compatible with human rights. In applying this research process the author analyses the U.K., U.S. and Canada’s methods to preventing the financing of terrorism. Similarities and differences between the three countries’ approaches will be identified in anticipation of suggesting ways to reform the law. The thesis will not only look at the apparent success or failure of the respective CTF regimes but also how the application of legislation in this area has impacted human rights. In comparing the three jurisdictions, interesting differences may be found regarding the manner in which the right to a fair trial is affected by this legislation.

Comparative analysis, whilst time consuming, is valuable in illustrating how laws operate in other countries and can provide suggestions on how to improve legislation in comparable jurisdictions.²¹ Interestingly, as Wilson notes, such a practice is adopted by law reform organisations such as the Law Commission who look at developments implemented in other common law countries.²² As the U.K., U.S. and Canada all have common law systems; an identification of best practice in the area of CTF would be helpful for making suggestions for modification of laws. Using such a method will also allow for a comparison of how countries subject to EU law, UN treaties and FATF Recommendations and those not obligated by these, have differed in their approaches to the area. Whilst decisions from other States will not be binding, they may serve as influential authority. This is significant as international

²⁰ Edward Eberle, 'The method and role of comparative law' [2009] 8(3) Washington University Global Studies Law Review 455.

²¹ H Collins, 'Methods of Comparative Contract Law' [1991] 11(3) Oxford Journal of Legal Studies 399. Zweigert and Kotz define comparative law as “an intellectual activity with law as its object and comparison as its process”. (K Zweigert and H Kotz, *An Introduction to Comparative Law* (3 edn, Oxford University Press 1998) 2).

²² Wilson Geoffrey, Comparative Legal Scholarship in, Mike Mcconville and WingHong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 4. Interestingly, Wilson further comments that such a practice of comparative analysis was adopted in the development of European Community Law. It was required in order to ensure that EC Law could be applied in the courts of member states without creating conflict with their domestic legislation. (Ibid, at 88).

crimes such as terrorism often require a consistent and complementary approach in counter actions and the prevention of the financing of terrorism is no exception.

However, whilst this thesis is concerned with the appropriateness of CTF regimes, it is centred on the impact that the application of these regimes has on human rights, in particular the right to a fair trial. The author uses the comparative research to discover how these laws have impacted, if at all, on this right in all three States. From this research, lessons may be learned on how to successfully prevent terrorist financing without encroaching on human rights. There are nevertheless, disadvantages to this research method. For instance, Salter and Mason suggest that there may be limitations to the availability of primary materials for other countries legal systems.²³ This is a reasonable comment but primary materials in relation to the U.S. and Canada may now be sourced online so this research method should not be impeded in this way. Salter and Mason added that by using comparative research, there is a danger that the thesis will become a narrative explanation of what the law is in a particular country and lack a sufficient level of analysis.²⁴ The author intends to avoid such a situation by ensuring that cross referencing between the three jurisdictions is made in the separate chapters and that the approaches to CTF are critically analysed and contrasted to produce a good piece of research.

As Salter and Mason correctly propose “the legal issues faced in one jurisdiction are rarely so unique that the experience of others remains entirely irrelevant”.²⁵ Thus “comparative research asks how different legal systems and legal cultures have addressed problems that our law faces in a different way, and what degree of perceived success or failure”.²⁶ Therefore, by utilising this research method, the thesis compares and contrasts the CTF legislative frameworks and polices in each of the three selected jurisdictions on the right to a fair trial. The selected jurisdictions are common law countries with a comparable aim to countering the financing of terrorism. Furthermore, the three jurisdictions contribute to an international effort to prevent terrorism. The first step of the international fight to eliminating the financing of terrorism was the International Convention for the Suppression of the Financing of

²³ Michael Salter and Julie Mason, *Writing Law Dissertations: an Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited 2007) 189.

²⁴ *Ibid* at 190.

²⁵ *Ibid* at 183.

²⁶ *Ibid* at 183.

Terrorism.²⁷ However, this Convention received little support and only gained momentum following the terrorist attacks in September 2001. The aims of this Convention were strengthened by the implementation of UN Security Council Resolution 1373,²⁸ a Resolution that has become the cornerstone of the international fight against the financing of terrorism. UNSCR 1373 requires all member states to, avert and suppress the financing of terrorism;²⁹ to criminalise the collection of funds with the knowledge that they will be used for terrorist purposes;³⁰ to freeze the funds and economic resources of those who commit or attempt to commit acts of terrorism;³¹ to prohibit nationals from within their territory from providing funds to people who commit or attempt to commit terrorist acts.³² All three selected jurisdictions are fully compliant with this Resolution and thus contribute to the international CTF effort. However, whilst their aims may be identical, recent judicial precedent in each State suggests that national security is prioritised differently. For example, in the U.K. the recent landmark case of *HM Treasury v Ahmed and Others* (FC),³³ illustrates that human rights will not be suspended by the operation of asset freezing powers. Here, the Supreme Court concluded that the asset freezing regime lacked procedural fairness for designated individuals by denying them the opportunity to be heard in court or indeed to discover the evidence that had been used against them. The Supreme Court quashed the asset freezing regime due to its lack of parliamentary scrutiny and incompatibility with human rights.³⁴ In contrast, Canada's Supreme Court upheld the constitutionality of the Anti Terrorism Act (ATA) 2001.³⁵ Momin Khawaja was found guilty of offences under the legislation for his involvement in a bombing plot and was sentenced to life imprisonment.³⁶ He challenged his conviction on the basis that his constitutional right to the freedom of expression had been violated by the application of the "motive clause".³⁷ The Court of Appeal concluded that the "motive clause" was not unconstitutional and dismissed the

²⁷ adopted by UN in Resolution 54/109, 9 December 1999.

²⁸ United Nations Security Council Resolution 1373. Hereinafter 'UNSCR'.

²⁹ Ibid, Article 1(a).

³⁰ Ibid, Article 1(b).

³¹ Ibid, Article 1(c).

³² Ibid, Article 1(d).

³³ [2010] UKSC 2.

³⁴ For further discussion on this, see Chapter 6: United Kingdom.

³⁵ *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555.

³⁶ Under Part II.1 of the Criminal Code of Canada.

³⁷ Pursuant to in section 83.01(1)(b)(i)(A) of the ATA 2001. The motive clause obliges authorities to prove an individual's alleged terrorist actions were motivated by religious, ideological or political beliefs.

appeal. Whilst this case is not concerned with the terrorist financing offences under the ATA, it does illustrate that Canada's reaction to the September 11 attacks with the implementation of the ATA was purposeful, legitimate and still relevant today.³⁸

The U.S. approach towards counter terrorism and human rights is different. For example, in December 2001, the U.S. government took action against the Holy Land Foundation for Relief and Development.³⁹ On December 4 2001, President George Bush declared that the HLF had links with terrorists and consequently a blocking order was issued. This terrorist proscription was based on the belief that HLF was funding the Islamic Resistance Movement, or Hamas.⁴⁰ Despite action taken, a conviction was not secured and the judge ordered a mistrial. In 2002, HLF challenged the blocking order and seizure carried out by the U.S. government.⁴¹ Their contentions amounted to violations of the Administrative Procedure Act 1946,⁴² the Religious Freedom Restoration Act 1993⁴³ and infringements of the U.S. Constitution.⁴⁴ HLF claimed that OFAC's actions were "arbitrary and capricious" under the APA. The court dismissed such an assertion affirming that OFAC's administrative records provided "ample support" for the designation.⁴⁵ In response to suggestions that the freezing of HLF's assets contravened the RFRA, the court ruled that HLF had not proven they were a religious organization, thus failing in their contention. HLF further suggested that they should have been provided with prior notice and an opportunity to be heard before the designation and blocking order took effect. The court disagreed, upholding the fundamental element of surprise required

³⁸ Wark comments, "What the Supreme Court has done is given confidence to the notion that the Anti-terrorism Act was in some of its core provisions carefully and appropriately constructed". (Wesley Wark quoted in Ian Macleod 'Anti-terror law passes final test' 15th Dec 2012, Calgary Herald. Available at: <https://www.pressreader.com/canada/ottawa-citizen/20121215/281483568700711> accessed 03.11.16. For further discussion on this, see Chapter 7: Canada

³⁹ Hereafter HLF.

⁴⁰ HAMAS had previously been designated as a terrorist organisation (SDT) pursuant to Executive Order 12,947.

⁴¹ *Holy Land Foundation for Relief and Development v John Ashcroft* in his official capacity as Attorney General of the United States, Civil Action no. 02-442 (GK), (D.D.C. Aug 8, 2002).

⁴² Hereafter APA.

⁴³ Hereafter RFRA.

⁴⁴ Sixth Amendment of the U.S. Constitution.

⁴⁵ Judge Kessler noted that "[s]pecifically, there is evidence that HLF had financial connections to Hamas; that HLF and Hamas leaders not only had substantial involvement with one another, but also that an HLF officer agreed to take direction from a senior Hamas activist; and that HLF has provided financial support to Hamas controlled organizations and to Hamas martyrs and prisoners. (*Holy Land Foundation for Relief and Development v John Ashcroft* in his official capacity as Attorney General of the United States, Civil Action no. 02-442 (GK), (D.D.C. Aug 8, 2002)).

for effective freezing of funds. Overall, the U.S. government was considered to have acted in accordance with counter terrorism legislation and the Constitution.⁴⁶

Thus, whilst the governments of the U.S., U.K. and Canada all claim to have a strong commitment to safeguarding human rights whilst implementing a CTF policy, recent judicial precedent in each State suggests that national security and human rights are prioritised differently. Accordingly, the varying approaches of the three countries lend themselves perfectly to comparative research that will prompt suggestions for policy reform influenced by tried and tested methods.

2.2.4 Socio Legal Research

The value of doctrinal research can be improved with the adoption of a socio legal method.⁴⁷ Socio legal research is highly diverse and thus it is difficult to provide a definition but Jolly describes it as research that investigates law in action, and thereby “transcends exclusively doctrinal analysis of supposedly authoritative legal texts”.⁴⁸ Wheeler and Thomas suggest that “the word ‘socio’ in socio-legal studies means to us an interface with a context within which law exists, be that a sociological, historical, economic, geographical or other context”.⁴⁹ Thus, instead of relying extensively on statutes, and judgements to ascertain the implications of CTF legislation on the right to a fair trial, the use of a socio-legal methodology allows the law to be considered as a social phenomenon. Cotterrell contends that a socio legal approach can greatly enhance research and states, “all the centuries of purely doctrinal writing on law has produced less valuable knowledge about what law is, as a social phenomena, and what it does than the relatively few decades of work in sophisticated modern empirical socio legal studies”.⁵⁰ In order to investigate the workings of the law,

⁴⁶ HLF also suggested that their First Amendments rights of freedom of association and speech had been violated but these contentions were also rejected by the court (*Holy Land Foundation for Relief and Development v John Ashcroft* in his official capacity as Attorney General of the United States, Civil Action no. 02-442 (GK), (D.D.C. Aug 8, 2002)). For further discussion on this case and others, see Chapter 5: United States.

⁴⁷ Salter and Mason argue, “an appropriate understanding of the complexity of most legal issues and topics requires the supplementation of doctrinal analysis with methods and approaches drawn from other social sciences” (Michael Salter and Julie Mason, *Writing Law Dissertations: an Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited 2007) 116.

⁴⁸ Simon Jolly quoted by Michael Salter and Julie Mason, *Writing Law Dissertations: an Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited 2007) 125.

⁴⁹ Sally Wheeler and Phil Thomas, Socio-legal studies in David Hayton (ed), *Laws Future(s)* (Hart Publishing 2000) 271.

⁵⁰ Roger Cotterrell, *Law's Community: Legal theory in sociological perspective* (Oxford University Press 1995) 296.

research that goes beyond doctrinal analysis is necessary.⁵¹ Therefore, this methodology would broaden the scope of the research and allow for the law to be considered in the wider social structure in which it is intended to operate. An analysis of an area of law is not complete until it has explored how the legal provisions are used in practice. Singhal and Malik contend,

“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”.⁵²

A socio-legal aspect to this research would ensure that, to an extent, an examination of how legal provisions operate in practice would be possible and a critical appraisal of CTF laws as they pertain to the right to a fair trial can be carried out. This research methodology could, as Salter and Mason propose, expand “the scope of legal analysis beyond law reports and statutes to include the social, economic, gender and political factors influencing the emergence and development of legal doctrine and decision-making”.⁵³

However, whilst the merits of socio legal research are clear, disadvantages also exist. The socio-legal method has been accused of resulting in research that is “theoretical and descriptive in nature” and unsuited to the proposal of policy change.⁵⁴ Lacey argued, that “its approach to policy change has all too often been premised on both a poorly theorized account of social institutions and an insufficient attention to the democratic legitimacy of proposed changes”.⁵⁵ Therefore, the use of comparative research alongside socio-legal could ensure that the study does not become descriptive and illustrates the successful use of proposed policy changes in other

⁵¹ Thomas argues “Empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context” (Phillip Thomas ‘Curriculum Development in Legal Studies’ [1986] 20 Law Teacher 110 at 112).

⁵² Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' [2012] 2(7) Educational Research Journal 252-256 at 255.

⁵³ Michael Salter and Julie Mason, *Writing Law Dissertations: an Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited 2007) 177.

⁵⁴ Fiona Cownie and Anthony Bradney, Socio-legal studies, A challenge to the doctrinal approach. in Dawn Watkins and Mandy Burton (eds), *Research Methods in law* (Routledge 2013) 36.

⁵⁵ Nicola Lacey, 'Normative reconstruction in socio-legal theory' [1996] 5 Social and legal studies 143.

jurisdictions. However, the deployment of social science research methods such as interviewing and the dissemination of questionnaires are not appropriate for this research. A number of ethical issues are likely to arise especially as the subject matter of terrorism and human rights is of a sensitive nature. Due to the diverse nature of this methodology, research such as this would have an uncertain outcome and it would be impossible to provide any definite answers. The absence of such conclusions may bring the value of the research into question. There is the concern that the use of a socio legal method could make the research area too wide but it is asserted that when examining an area such as this where the wider implications of legislation are important then, to a degree, the adoption of a socio-legal method is necessary. The use of such a methodology could arguably enhance the research by allowing for the consideration of CTF legislation and it's bearing on the right to a fair trial in a social context.

2.3 Literature Review

The literature review can be described as “the foundation and inspiration for substantial, useful research”.⁵⁶ This vital stage of the research process involves the evaluation of previous research in the subject area and identifies which work may be relevant to the research objectives. The review establishes what has already been published in the area of CTF and human rights in the U.S., U.K. and Canada and identifies the relevant issues in the subject. Flink opines that:

“A research literature review is a systematic, explicit, and reproducible method for identifying, evaluating and synthesizing the existing body of completed and recorded work produced by researchers, scholars and practitioners.”⁵⁷

This important component of research helps to establish the academic opinion in the relevant area and can be helpful in exposing gaps in previous research. It is useful for identifying strengths and weaknesses in previous research and theories and indicates the way forward for further research. The literature review carried out for this thesis established some central themes that arose in counter terrorism and human rights research; these are discussed in more detail.

⁵⁶ David Boote and Penny Beile, ‘Scholars before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation’ (2005) 36:6 Educational Researcher 3.

⁵⁷ A Flink, ‘Conducting a research literature review: from internet to paper’ London: Sage, 2010 at 3.

2.3.1. Central Themes

The terrorist attacks in September 2001 had a global impact and prompted questions to be raised regarding the effectiveness of counter terrorism and CTF measures. This was mirrored in the academic community and the studies that have been carried out in relation to national and international CTF measures introduced post September 11 2001. Comment has been made on new legislation and the powers deriving from such laws but few academics have questioned how the imposition of CTF measures has impacted on human rights in particular the right to a fair trial. Studies have concentrated on counter terrorism measures in general and not those directed towards starving terrorists of their funds.

Research has focused on the approach of governments to preventing and detecting terrorist financing, the importance of an internationally coordinated approach to counter terrorism and CTF and the impact of counter terrorism provisions on human rights. These areas have been identified as the central themes for research in this area of law.

2.3.1.1 The prevention and detection of the financing of terrorism

The events of September 11 2001 saw the area of counter terrorism laws gain huge momentum. The U.S. government were keen to guard against the possibility of further terrorist attacks and thus implemented a plethora of provisions designed to prevent and detect terrorism. Central to their counter terrorism regime is CTF measures, which seek to starve terrorists of their funds. These measures heavily influenced the implementation of legislation in other countries such as the U.K. and Canada. The provisions deriving from this legislation have been heavily debated by academics. For example, Ryder and Turksen provide some interesting research into the legislative and policy response of the U.S. to the September 11 attacks.⁵⁸ Their paper is divided into three parts and initially considers whether an association exists between Islamic banking systems and terrorist finance. Secondly, the authors consider the ability of the U.S. authorities to freeze the assets of those organisations suspected of the financing

⁵⁸ 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.

of terrorism. Lastly, the reporting requirements imposed on financial institutions in the U.S. are examined along with some of the practices utilised to combat the financing of terrorism, which may illustrate the presence of racial profiling in the U.S. Ryder and Turksen emphasise the difficulty of legislating against terrorist financing especially since terrorists have moved away from state sponsored towards private sponsorship,⁵⁹ and discuss how the events of September 11th 2001 set in motion a new and direct legislative approach towards terrorist funding at an international level.”⁶⁰ The authors briefly discuss the international response but do not consider the legality of such measures and the impact that they might have on human rights. However, they do provide a useful discussion of asset freezing powers by virtue of Presidential Executive Order 13,224,⁶¹ providing figures which suggest that the policy for the freezing of assets has had some success in preventing individuals and entities from gaining access to the U.S. financial system. However, they warn that this represents a meagre amount of the funds available to terrorists,⁶² which questions the overall effectiveness of the asset freezing regime. The thesis differs in that it examines the negative impact of freezing a suspect’s assets on their right to a fair trial, which was not discussed in the paper by Ryder and Turksen and the thesis also questions whether sanctions, which designate a person as a terrorist supporter and freezes their assets have a punitive affect. If this is the case these sanctions amount to a criminal charge and thus the right to a fair trial should apply.

Alongside, the ability to freeze funds is the imposition of reporting requirements on financial institutions by virtue of Title III of the USA PATRIOT Act 2001. Ryder and Turksen provide a detailed discussion of such burdensome administrative responsibilities questioning whether the production of Suspicious Activity Reports (SARs) can actually go towards identifying and eliminating money from the U.S. financial system which is intended for terrorist use. Interestingly they highlight the valid point that a SAR policy was in existence prior to September 11 2001 but this did

⁵⁹ 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.

⁶⁰ See Ryder and Turksen above n. 59 at 309.

⁶¹ 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>. Accessed 19.11.16. Hereafter Executive Order 13,224.

⁶² See Ryder and Turksen above, n. 59 at 310.

not prevent the terrorists from being able to wire “a large percentage of the monies used to fund 9/11...directly through the US formal banking system”.⁶³ They conclude that the results of such onerous reporting requirements have so far been disappointing. Such a view is crucial to this thesis, as the U.S. government have seemingly put national security concerns ahead of human rights asserting that exigent circumstances require the sidelining of less important rights. It must therefore be asked if such a step is justified against the argument that CTF provisions are having a limited effect. This is a point, which will be analysed throughout this thesis.

Further work by Ryder,⁶⁴ illustrates the numerous mechanisms that are utilised by terrorist organisations to fund their operations and offers an analysis of the legislative policies of the U.S., UN and U.K.; yet, an in depth discussion of the impact that such policies may have on human rights is outside the scope of this article. Ryder concentrates on the ability of the U.S. and the U.K. to freeze suspected terrorist funds and the imposition of burdensome reporting requirements finding that the Anti-terrorism, Crime and Security Act 2001 provides identical powers to tackle terrorist financing as the USA PATRIOT Act provides.⁶⁵ However, it is important to note that this paper was published prior to the challenging of such asset freezing powers in *Ahmed and Others V United Kingdom*.⁶⁶ This case has resulted in there being a distinct dissimilarity between U.K. and U.S. terrorist financing laws, which did not exist prior to the ruling. The author further suggests that such powers form part of emergency legislation that has been inappropriately used and are a result of aforementioned hastily enacted measures.⁶⁷ Ryder briefly examines the legality of the freezing of suspected terrorist assets with regard to Article 1 of the First Protocol of the European Convention on Human Rights (ECHR)⁶⁸ commenting that the then Court of First Instance, now called the General Court, has ruled that the powers do not

⁶³ See Ryder and Turksen above, n. 59 at 311.

⁶⁴ N Ryder, ‘A False Sense of Security? An Analysis of Legislative Approaches towards the Prevention of Terrorist Finance in the United States and the United Kingdom’ [2007], *Nov Journal of Business Law*, 821-850.

⁶⁵ N Ryder, ‘A False Sense of Security? An Analysis of Legislative Approaches towards the Prevention of Terrorist Finance in the United States and the United Kingdom’ [2007], *Nov Journal of Business Law*, 821-850.

⁶⁶ *Ahmed and Others v United Kingdom* [2010] UKSC 2 at para. 69.

⁶⁷ N Ryder, ‘A False Sense of Security? An Analysis of Legislative Approaches towards the Prevention of Terrorist Finance in the United States and the United Kingdom’ [2007], *Nov Journal of Business Law*, 821-850.

⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

affect the very substance of the right to property under the ECHR.⁶⁹ This research goes further and examines whether these intended emergency measures have become part of the permanent legal landscape and have been enacted without due consideration given to procedural fairness. The study discusses the notion that the right to a fair trial should be valid in cases where harsh CTF sanctions have been applied. Such a notion is even more significant given the hasty enactment of CTF measures as mentioned by Ryder. Whilst Ryder's research provides a helpful analysis of CTF legislation in the U.K. and the U.S. whilst arguing the complexity involved with attempting to legislate against financiers of terrorist organisations, he fails to discuss what the implications might be for suspects who become the subject of designation and asset freeze. This study will address this absence in research common in many CTF legislation related studies.

Some comparative analysis between the U.K, the U.S. and Canada has been carried out but it has been shown that this research focuses on counter terrorism in general rather than CTF legislation. For example, Roach provides an excellent critical and comparative analysis on the response of the UN, the U.K., U.S. Canada and other states to the terrorist attacks of September 11 2001.⁷⁰ He looks at the legislation, which was promptly implemented to tackle terrorism, and includes discussion on the impetus for criminalising the financing of terrorism and the introduction of terrorist listing practices which was instigated by the UN. Notwithstanding this excellent critical appraisal of CTF laws, research into this area is overshadowed by discussion of counter terrorism measures. McCulloch and Pickering suggest that powerful CTF laws have avoided heavy critical scrutiny due to their apparent lack of importance when measured against the interrogation and detention regimes utilised post September 11. Such an opinion supports the contention that relatively little has been published in the area of CTF in favour of general counter terrorism provisions such as the U.K. Terrorism Act 2000 and Anti Terrorism Crime and Security Act 2001 that stand out as archaic and oppressive. McCulloch and Pickering suggest that publications in this area "uncritically accept the veracity of the assumptions and motives underlying the 'war on terror' and frame problems with suppression of

⁶⁹ Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Commission* and Case T-315/01 *Yassin Abdullah Kadi v Council and Commission*.

⁷⁰ K Roach, *The 9/11 Effect Comparative Counter-Terrorism* (Cambridge University Press 2011). Hereafter September 11.

financing of terrorism measures largely in terms of logistics, lack of adequate commitment to take what are seen as necessary measures, and the potential impact on the global movement of capital that is the bedrock of neo-liberal globalization”.⁷¹ Such an argument provides an interesting point as many of the papers in this area can be said to focus on the difficulties of legislating against the financing of terrorism rather than the impact that these extensive powers may have on human rights.⁷² With this in mind, this research aims to illustrate how CTF legislation can impact on human rights. This study focuses on the right to a fair trial, a human right that is protected in all three case studies. Whilst, the U.S., U.K. and Canada all reiterate their commitment to human rights protection, this thesis examines the notion that national security has been prioritised over human rights. It critically examines the hurried manner in which these powerful laws were implemented in all three jurisdictions and investigates the notion that these intended preventative sanctions are indeed penalizing in nature. As such, it is examined whether procedural protections inherent in a criminal prosecution, including the right to a fair trial should apply.

2.3.1.2 The importance of an internationally coordinated approach to counter terrorism and the lack of a definition of terrorism.

The global nature of terrorist financing and terrorist groups suggests that cooperation between countries is crucial. A coordinated and collaborative approach would ensure that financial intelligence could be shared and swiftly acted on by the relevant enforcement agencies. The importance of establishing such an internationally cohesive CTF policy has been briefly referred to in chapter one but a review of current literature in this area suggests that the lack of a universally agreed definition of terrorism hinders the achievement of an internationally coordinated approach to

⁷¹ J McCulloch and S Pickering ‘Suppressing the Financing of Terrorism, Proliferating State Crime, Eroding Censure and Extending Neo-Colonialism’ [2005] 45 *British Journal of Criminology* 470-486.

⁷² KE Davis, “Legislating against the Financing of Terrorism: Pitfalls and Prospects” [2003] 10(3) *Journal of Financial Crime* 269-274, N Ryder, ‘A False Sense of Security? An Analysis of Legislative Approaches towards the Prevention of Terrorist Finance in the United States and the United Kingdom’ [2007], Nov *Journal of Business Law*, 821-850, 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, D Jenkins, ‘In support of Canada’s Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law’ [2003] 66 *Saskatchewan Law Review* 419.

terrorism and terrorist financing. It is this subject which academics currently focus their attention. For example, Duffy comments on the lack of a definition of terrorism in international law.⁷³ Her book offers an excellent analysis of the parameters of the international legal framework and the response taken to September 11 and it investigates how provisions of the international legal system have been sustained or possibly undermined during the so-called ‘War on Terror’. Duffy questions the marginalisation of the issue of legality in an “overwhelmingly military” response to the attacks on the U.S. and examines its degree of correspondence with human rights.⁷⁴ She analyses the impact caused by the lack of an internationally cohesive definition of terrorism and considers the issue of state responsibility. Duffy opines that “the premise is that the legitimacy of measures taken in the name of the counter terrorist struggle depends on their consistency with international law”.⁷⁵ This thesis examines some of the same aspects of international law in the international policy chapter but in contrast with Duffy, discussion will centre on several UNSCR⁷⁶ brought in to encourage an internationally coherent response to the financing of terrorism. With this in mind, the lack of a definition of terrorism in international law is considered and Duffy comments that such a search has failed “as consensus around a single definition of international terrorism has proved elusive”.⁷⁷ She suggests that a result of this can be each State fulfilling its obligations⁷⁸ as it sees fit and thereby encouraging international divergence.⁷⁹ By failing to agree on a definition of terrorism, the achievement of an internationally consistent approach to countering terrorism is highly improbable. Similarly, McCulloch and Pickering comment on the impact of UNSCR 1373.⁸⁰ The authors make reference to the lack of a universally agreed definition of terrorism but also refer to the fundamental lack of set criteria for

⁷³ H Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge University Press, Cambridge 2005).

⁷⁴ *Ibid* at 443.

⁷⁵ *Ibid* at 2.

⁷⁶ Such as UNSC Resolution 1267 and UNSC Resolution 1373.

⁷⁷ See Duffy above, n.73 at 17. Jenkins implies that he is in agreement with other opinion that terrorism can sometimes be “considered elusive to precise legal definition” and suggests that such a lack of an analogous description has hindered the international ‘war on terror’ (D Jenkins, ‘In support of Canada’s Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law’ [2003] 66 *Saskatchewan Law Review* 419).

⁷⁸ Examples of such obligations include those contained within the International Convention for the Suppression of Terrorist Bombings A/RES/52/164 and the International Convention for the Suppression of the Financing of Terrorism A/RES/54/109.

⁷⁹ See Duffy above, n.73 at 45.

⁸⁰ S/RES/1373 (2001).

the designation of an organisation or individual.⁸¹ This, as Duffy argues, leaves substantial scope in which states may choose to fulfil their obligations under Resolution 1373. Such potential for varying application of CTF measures works against the accomplishment of an internationally coordinated approach. This is a notion, which this study discusses in detail. However, this thesis is not concerned with the lack of a definition of terrorism but looks at the comparable CTF approaches of the U.S., U.K. and Canada and with the use of case law examines how their regimes have been challenged. From the outcomes of these cases, this study will suggest if the CTF regimes in the three case studies can be deemed to be legitimate.

Davis suggests that the lack of an agreed definition for terrorism and terrorist financing causes problems for legislating against terrorist financing.⁸² His commentary focuses heavily on the diversity of legal terminology used to define terrorism and what it means to ‘finance’ terrorism in the U.K., U.S. and Canada. He comments on the problems that this might cause for international consistency and cooperation stating that this international divergence can be due to different States placing “different values on the civil liberties that are threatened by legislation against financing of terrorism”.⁸³ This is an extremely important point and one, which has presented itself as a central theme in this area of research. It is discussed in more detail below. However, Davis noted that Canada, the U.K., and the U.S. have not just legislated against the financing of terrorism they have gone further and have legislation in place, which also makes the financing of terrorists unlawful.⁸⁴ Davis suggests that this may be a positive step by providing further means in which to charge alleged terrorist financiers stating and states that “in some cases the organisational approach to defining terrorism will, by reducing the burden on law enforcement agencies, facilitate the conviction of truly culpable actors”.⁸⁵ This observation provides a useful foundation with which to discuss the apparent similarities and differences between the approach by Canada, the U.S. and the U.K.

⁸¹ Designation as a terrorist supporter is sometimes referred to as listing. J McCulloch and S Pickering ‘Suppressing the Financing of Terrorism, Proliferating State Crime, Eroding Censure and Extending Neo-Colonialism’ [2005] 45 *British Journal of Criminology* 470-486.

⁸² KE Davis, “Legislating against the Financing of Terrorism: Pitfalls and Prospects” [2003] 10(3) *Journal of Financial Crime* 269-274 at 269.

⁸³ *Ibid* at 273.

⁸⁴ See Davis n 82 at 270.

⁸⁵ See Davis n 82 at 270.

Overall, Davis concludes that a variation in the legal terminology that has been used to define terrorism and the financing of such has led to a limitation to the degree in which international cooperation can realistically be achieved. Furthermore, Davis concludes that the international differences in the legislation in this area may be reduced in the future by “the nations of the world arriving at a consensus on the core definition of financing of terrorism”.⁸⁶ However, the possibility of this being achieved is doubtful due to a lack of agreement on what is terrorism. Levitt argues that, “the search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail periodically, eager souls set out, full of purpose, energy and self confidence, to succeed where so many others before have tried and failed.”⁸⁷ Since the laws make the financing of terrorists unlawful, it is even more important to define the concept of terrorism and who is considered to be a terrorist. It will be shown how being labelled as such implies that their human rights can be limited by virtue of CTF laws. Furthermore, on the subject of a coordinated effort, Ryder and Turksen highlight how inconsistencies can exist within a country’s own CTF framework.⁸⁸ They refer to how UNSCR 1373,⁸⁹ has left the U.S. with a combination of domestic efforts that do not complement each other and may even operate at cross-purposes.⁹⁰ Such a contention will be investigated in some detail in this thesis with regard to the impact of such divergence on human rights. However, this research goes much further and determines whether analogous CTF strategies have been applied in the three jurisdictions concerned. This information coupled with outcomes of challenges to designations and asset freezes will suggest how these three countries are prioritising national security and human rights.

Jenkins’ research offers a helpful analysis for this thesis as he compares Canadian, U.K., and U.S. counter-terrorism laws and explores the responses of these three states

⁸⁶ See Davis (n 82) at 273.

⁸⁷ G Levitt, ‘Is “Terrorism” worth defining?’ [1986] 13 *Ohio Northern University Law Review*, Vol 13 97-115 at 97.

⁸⁸ 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.

⁸⁹ S/RES/1373(2001). Hereafter UNSCR 1373.

⁹⁰ 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 at 309.

to the events of September 11.⁹¹ Their national legislative schemes are examined in order to present their comparative and cooperative approach to counter terrorism laws. Jenkins notes the elemental importance of establishing complementary legal frameworks in the struggle to dismantle terrorist financial support networks. He asserts that an effective counter terrorism regime is just as important for Canada as it for other nations as citizens of all nationalities are vulnerable to terrorist attack.⁹² A comparative analysis of these three nations is appropriate for three reasons; the first is concerned with the fact that all three are faced with the threat of international terrorism and have shared security concerns.⁹³ This re-affirms the need for combined action and the author contends that much can be learned from each other in implementing effective domestic legislation. The adoption of best practice approaches can secure a means of “indirect cooperation” between states and work towards achieving concerted international action.⁹⁴ Secondly, Jenkins proposes that all three nations have a duty to protect citizens from terrorist attacks whilst ensuring that human rights are adhered to. Each of these states has a liberal democratic system and must make certain that this is not jeopardised by the implementation of panic measures. Jenkins hints at the moral importance of anti-terrorism measures and suggests that “this careful balance, without succumbing to weakness or reactionary oppression, is what allows the democratic state to remain secure, healthy, and retain the higher moral ground.”⁹⁵ Lastly, Jenkins’ suggests that since the U.K., U.S. and Canada all share a common law tradition; they can implement laws with the same respect for constitutionalism and rights in mind but proposes that they should not restrain their thinking to domestic counter terrorism regimes but consider how the legislation will contribute to international efforts to counter terrorism.⁹⁶ All three propositions for the comparison of these three nations support the appropriateness and need for research into the possible human rights ramifications of CTF regimes adopted in response to the September 11 attacks. However, whilst Jenkins research was carried out in 2003 when CTF laws were relatively new, this thesis has been conducted after CTF legislation has been tried and tested for a significant period of

⁹¹ D Jenkins, ‘In support of Canada’s Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law’ [2003] 66 *Saskatchewan Law Review* 419.

⁹² *Ibid* at 421.

⁹³ *Ibid* at 429.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* at 429.

⁹⁶ *Ibid*.

time. Thus, this study provides a unique opportunity to examine Jenkins suggestion that terrorism should be fought whilst adhering to human rights and legislation should not be the result of panic measures. It will through the examples of application of CTF sanctions in case law, be able to ascertain if procedural fairness is evident in CTF sanctions regimes in the U.S., U.K. and Canada and if the right to a fair trial is being violated by CTF legislation.

2.3.1.3 The impact of counter terrorism legislation on human rights

Whilst the impact of CTF legislation on human rights has received little academic attention, much strident criticism has been made of counter terrorism measures. The unprecedented amount of legislation⁹⁷ enacted in the area of counter terrorism,⁹⁸ since September 11 2001 has been in the spotlight and it has been suggested that rapid action taken to implement measures such as in the U.K. was done with the aim of allaying public fear.⁹⁹ In contrast, the U.K. government acted opportunistically by utilising such public fear caused by the events of September 11 to enact a set of laws “which creates a context conducive to state crime¹⁰⁰.” The investigation of this is common in academic studies in this area. For instance McCulloch and Pickering discuss the impact on civil society of extensive powers provided by CTF measures following September 11 and provide a critique of the actions taken to combat terrorism and a discussion on the merits of long established informal banking systems.¹⁰¹ Such extensive provisions provided to the U.K. government include the ability to freeze a person’s assets immediately where it is believed that they may be involved in terrorism.¹⁰² This deprivation of assets may continue even though no conviction or indeed a charge in relation to terrorist support is ever brought. During this time, the suspected party is not provided with an opportunity to be heard in a

⁹⁷ Prior to the terrorist attacks of September 11 2001, the U.K.’s counter terrorism legislation consisted of the Prevention of Terrorism (Temporary Provisions) Act 1974, the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Terrorism Act 2000. Subsequent to September 2001, the Anti Terrorism Crime and Security Act 2001 was implemented and then the Terrorism Prevention and Investigations Measures Act 2011.

⁹⁸ Extensive anti-terrorism powers already existed by virtue of the Terrorism Act 2000, c.11 but were subsequently strengthened by further legislation in the area.

⁹⁹ D McKeever ‘The Human Rights Act and Anti-terrorism in the United Kingdom: One Great Leap Forward by Parliament, but Are the Courts Able to Slow the Steady Retreat that Has Followed?’ [2010] *Jan Public Law* 110-139 at 117.

¹⁰⁰ *Supra* n 83 at 470.

¹⁰¹ *Ibid* at 478.

¹⁰² By virtue of the Anti terrorism Crime and Security Act 2001 c. 24.

court or indeed to hear what the evidence is against them. Such a situation is potentially in violation of Article 6 of the ECHR.

Apart from academic commentary, which hints at the lack of procedural fairness surrounding the CTF regime, academics have focused their research on counter terrorism in general and its impact on human rights. Headlined issues in this area are detention procedures and interrogation measures.¹⁰³ Whittaker aims to clarify some of the main counter terrorism problems highlighting the importance of striking a balance between the 'war on terror' and the conservation of human rights.¹⁰⁴ His research is centred on the U.S. and Europe and reference is also made to Africa and South East Asia. Whittaker agrees with many of the authors mentioned above and emphasises that "many of the ethical issues raised in regard to freedom of person, speech, association and movement arouse widespread anxiety, controversy, protest and some anger, if they appear compromised or reduced".¹⁰⁵ This is a fundamental point which raises the question of how the governments in the U.S., U.K., and Canada are attempting to improve the situation and ensure that human rights are not being denied or deviated from without due cause. An answer to this question shall be sought in this thesis. In contrast to existing literature, this research focuses on the juxtaposition of counter terrorism in general and human rights but on concerns with regard to CTF legislation. It elaborates on suggestions that CTF regimes are lacking procedural fairness by assessing how CTF sanctions are applied and what protection is afforded to the suspect. With McCulloch and Pickering's contention of extensive CTF powers in mind, this research looks at the lack of evidence which is needed to substantiate a CTF sanction and question whether this action can legitimately be permitted to continue (indefinitely in some examples) in the absence of any charge or conviction. Moreover, it assesses the suggestion that not providing notice of a designation and

¹⁰³ See: BLUM, S (2008) Preventive Detention in the War on Terror: A Comparison of how the United States, Britain and Israel detain and incapacitate terrorist suspects. *The Journal of the Naval Postgraduate School Center for Homeland Defense and Security* [online] Vol. IV, No.3, October. Available from <http://www.hsaj.org/?fullarticle=4.3.1>. [Accessed 08.05.14]. See also: CASSEL, D (2008) Pretrial and Preventive detention of suspected terrorists: options and constraints under international law. *The Journal of Criminal Law and Criminology*. Vol 98, No.3, p. 811-852. J McCulloch and S Pickering 'Suppressing the Financing of Terrorism, Proliferating State Crime, Eroding Censure and Extending Neo-Colonialism' [2005] 45 *British Journal of Criminology* 470-486 at 470.

¹⁰⁴ D.J. Whittaker *Counter-Terrorism and Human Rights*, (Pearson Education Limited 2009).

¹⁰⁵ D.J. Whittaker *Counter-Terrorism and Human Rights*, (Pearson Education Limited 2009) 4.

asset freeze and failure to allow a suspect to have access to trial to challenge a sanction is in breach of the right to a fair trial.

Whittaker's paper examines counter terrorism efforts in general and does not focus on CTF provisions but his discussion remains a useful point of reference and provides intricate analysis of the preservation of human rights. Such helpful information includes his detailing of the origin of human rights in the UN, U.S., and Europe and an examination of the organisations charged with ensuring the full observance of these principles. Whittaker considers whether human rights are being safeguarded and suggests that the events of September 11 appear to "have tipped the balance disproportionately towards security at all costs with human rights observance trailing the rear".¹⁰⁶ In doing so, the author suggests that the U.K. has operated in a similar manner to the U.S. and contends that terrorist attacks in London on 7 July 2005 cannot justify the circumvention of human rights by an over-zealous administration.¹⁰⁷ The thesis elaborates on Whittaker's suggestion and with the use of one human right in particular will determine if national security has in fact been prioritised over human rights in the three case studies. Further to this, the thesis discusses the notion that CTF sanctions have been implemented as an emergency response to the threat of terrorism, and have circumvented normal judicial process. By applying such sanctions, the executive in the U.S., U.K. and Canada could be regarded as acting in an arbitrary manner.

Whittaker briefly considers the background to terrorism in the U.K., noting the legislation implemented including, the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006. On discussion of the Anti-terrorism, Crime and Security Act 2001, he criticises its implementation as the Terrorism Act 2000 had already ensured that the U.K. had more counter terrorism laws "than almost any other developed democracy".¹⁰⁸ Due to this, he argues that the U.K. over-reacted and caused major controversy by introducing even more governmental powers, which were thought and held to be inconsistent with the ECHR. For instance, Whittaker highlights the incompatibility

¹⁰⁶ Ibid at 46.

¹⁰⁷ Ibid at 48.

¹⁰⁸ Ibid at 63.

with the ECHR of the power to detain foreign suspects indefinitely pending possible deportation. He suggests that this provision is in violation of Article 5 of the ECHR but that the U.K. government were permitted to justify its use by claiming a state of emergency. Such a situation would allow the government to derogate from certain obligations under the ECHR. This thesis provides a contemporary discussion on the ability of governments in the U.S., U.K. and Canada to derogate from certain human rights in an emergency situation. It provides an examination of significant legal challenges to the detention powers contained in the Anti-terrorism, Crime and Security Act 2001. The Law Lords ruled that Part 4 of this legislation was incompatible with U.K. obligations under the ECHR. This illustrates that such derogations from fundamental human rights can be shown to be disproportionate to the terrorist threat faced by the State in question and therefore unnecessary. The issue of proportionality is very important to his thesis as it will be heavily debated whether CTF measures with seemingly limited success can be regarded as proportional when the impact on human rights is considered. This thesis examines amendments that have been made to CTF legislation in the U.K. to ensure compatibility with human rights but discusses the notion that rights such as the right to a fair trial continues to be breached.

Whittaker notes that President Bush appeared to be prepared to disregard all rules of law in the name of national security and engaged in minimal deliberation before implementing the USA PATRIOT Act 2001.¹⁰⁹ He discusses the organisations responsible for countering terrorism in the U.S.¹¹⁰ and notes the criticism that they have received for ‘overlooking’ certain human rights whilst implementing heightened powers such as those relating to surveillance.¹¹¹ This supports the argument that will feature through this thesis that although the terrorist threat may be very real, the State is charged with protecting human rights and should endeavour to do so even whilst countering the financing of terrorism. Whittaker’s book provides some interesting points of reference regarding counter terrorism and human rights but in no way provides a comprehensive analysis of CTF initiatives and their impact on human rights. Whittaker’s research concerns itself with the largely reported problems of

¹⁰⁹ Ibid at 72.

¹¹⁰ The Federal Bureau of Investigation, the Central Intelligence Agency and the National Security Agency.

¹¹¹ See Whittaker above, n. 105 at 104-113.

fighting terrorism such as issues surrounding derogations from law and the use of torture and detention regimes whilst this research focuses upon the approach of the U.S, U.K. and Canada to countering the financing of terrorism. Through the use of comparative analysis, it looks at whether the three countries have achieved a coordinated response to CTF and whether any of the countries have been successful in achieving a CTF policy that is compatible with human rights.

Binning provides valuable details of CTF provisions implemented post September 11.¹¹² The author uses a description of the unprecedented powers in order to illustrate the steps that governments are willing to take in protecting national security.¹¹³ Binning comments on the notion that the prevention and detection of the funding of terrorism gained significant momentum after September 11 culminating in the implementation of UNSCR 1373, the USA PATRIOT Act 2001 and the Anti-terrorism, Crime and Security Act 2001. He details how the U.S. led the way with the enactment of the USA PATRIOT Act and provides a useful discussion of the provisions including the power to freeze assets and block financial transactions that are thought to be connected to terrorists. Binning contends that the U.S. and the U.K. used the events of September 11 as an opportunity to implement measures that target “a much wider range of criminal activity than terrorism”.¹¹⁴ Furthermore, he suggests that the powers relating to freezing orders in the U.K. may represent an inappropriate use of emergency legislation considering the powers are far wider than those initially envisaged under the Emergency Laws (Re-enactment and Appeals) Act 1964. Moreover, he importantly highlights the focus that has been put on security measures at the cost of privacy and property rights, commenting that there has not been “satisfactory parallel consideration of the consequences for those subjected to the new powers, which may be innocent of any wrongdoing”.¹¹⁵ An analysis of such consequences shall prove to be a significant discussion in this thesis. However, in contrast to Binning’s paper, this research is not concerned with privacy and property rights but the right in relation to procedural fairness; the right to a fair trial. Whilst the

¹¹² P Binning ‘In Safe Hands? Striking the Balance between Privacy and Security- Anti-Terrorist Finance Measures’ [2002] 6 *European Human Rights Law* 737.

¹¹³ These include the power to criminalise terrorist financing and associated money laundering, to seize cash, to freeze assets and to monitor accounts.

¹¹⁴ P Binning ‘In Safe Hands? Striking the Balance between Privacy and Security- Anti-Terrorist Finance Measures’ [2002] 6 *European Human Rights Law* 740.

¹¹⁵ *Ibid* at 741.

respect of any human right is important, the right to a fair trial is especially significant in a process which is susceptible to mistake. The designation and asset freezing regime in all three case studies arguably have limited effective avenues for appeal thus access to the right to a fair trial and an opportunity to challenge these CTF sanctions is paramount.

Binning helpfully details legislative provisions in the U.K. aimed at starving terrorists of their funds, including the seizure and detention of terrorist cash, forfeiture orders, and freezing orders. Such discussion will prove crucial in this thesis whilst analysing the impact that the application of these powers can have on the right to a fair trial. For example, the author here notes the negative impact that can result from the operation of the disclosure of information provisions even if the alleged suspect is later found to be innocent.¹¹⁶ Binning underlines the fact that individuals and organisations have no opportunity to discover information relating to a disclosure¹¹⁷ and further to this, “mechanisms for redress and accountability are very limited”.¹¹⁸ Crucially, Binning identified the potential problems that could arise from CTF provisions quite soon after their implementation and his concerns have proven to be well founded and are central to this thesis. However, in line with other authors, Binning merely highlights the human rights issues of national security responses and fails to discuss the implications in any great detail. This thesis fills this gap in research by examining the consequences of the operation of powerful CTF legislation on the right to a fair trial.

The arbitrary powers yielded by the executive by way of CTF legislation in the U.S. have also received heavy criticism. This is primarily due to the alleged disregard for due process that has been justified by the administration by way of declarations of a national emergency. Research carried out by Nice-Petersen provides a comprehensive critique of asset freezing powers under the International Emergency Economic Powers Act (IEEPA)¹¹⁹ and the USA PATRIOT Act 2001.¹²⁰ It discusses the three

¹¹⁶ Provided under Part 3 of the Anti-terrorism, Crime and Security Act 2001.

¹¹⁷ See Binning above, n.119 at 748.

¹¹⁸ See Binning above, n.119 at 741.

¹¹⁹ 50 USC Sec. 1705.

¹²⁰ N Nice-Petersen, ‘Justice for the “Designated”’: The Process that Is due to Alleged U.S. Financiers of Terrorism’ [2005] 93 *Georgetown Law Journal* 1387.

unsuccessful due process challenges brought by U.S. Muslim Charities¹²¹ and highlights concerns that have been raised by these cases in relation to the alleged lack of procedural safeguards.¹²² Following a thorough examination of the OFAC designation process,¹²³ the author suggests ways in which the powers can continue to operate whilst safeguarding constitutional rights provided by the U.S. Constitution. This study differs from that of Ryder and Turksen in that it focuses specifically upon the civil rights implications of the operation of emergency powers. Such research is fairly unique as it also provides some information relating to the introduction of counter terrorism emergency powers in the U.S. by way of the IEEPA. The author comments that this statute caused few legal problems when it was used for the purpose in which it was implemented but that its current use in freezing assets of those suspected of supporting terrorism “presents serious constitutional problems when used against U.S. entities entitled to constitutional rights”.¹²⁴ These powers have since been expanded by the USA PATRIOT Act 2001. One of those powers is the ability for the President to block assets “during the pendency of an investigation” allowing quite severe action to be taken even before an initial assessment into the entity purportedly supporting terrorism has even been made.¹²⁵ Nice-Petersen further criticises the law in relation to the lack of congressional review and perhaps even more importantly, the inability of the entity to appeal the designation before it takes place. It is noted how the OFAC process of designation is carried out “almost exclusively behind closed doors”¹²⁶ and that the entity in question will at no point have the chance to view any of the classified information that has been collected.¹²⁷ Nice-Petersen contends that a national emergency should not permit the disregard of

¹²¹ Mc Culloch and Pickering also provide useful arguments relating to the alleged use of charities and informal banking systems by terrorist supporters to contribute financially to their operations but does not discuss in any great detail, the legality of the measures or the impact that their use may have upon human rights nationally or internationally. (McCulloch, J. and Pickering, S. (2005) ‘Suppressing the Financing of Terrorism- Proliferating state crime, eroding censure and extending neo-colonialism’ 45 *Brit. J. Criminology* 470-486).

¹²² N Nice-Petersen, ‘Justice for the “Designated”’: The Process that Is due to Alleged U.S. Financiers of Terrorism’ [2005] 93 *Georgetown Law Journal* 1387.

¹²³ OFAC is charged with administering the Specially Designated Nationals (SDN) list. This list contains the names of individuals and organisations with whom U.S. citizens are prohibited from doing business.

¹²⁴ N Nice-Petersen, ‘Justice for the “Designated”’: The Process that Is due to Alleged U.S. Financiers of Terrorism’ [2005] 93 *Georgetown Law Journal* 1388.

¹²⁵ *Ibid* at 1389.

¹²⁶ *Ibid* at 1394.

¹²⁷ *Ibid* at 1395.

procedural safeguards in the designation procedure.¹²⁸ In line with such research by Nice-Petersen and Binning, Donohue includes critical analysis of the severely restricted means available to challenge a designation.¹²⁹ However, she provides a more comprehensive study by investigating and remarking upon the restriction put upon the securing of legal representation by alleged terrorists and terrorist supporters. She notes that regulations in this area effectively impede access to a lawyer and ultimately may make it very difficult to obtain legal representation due to a lack of funds.¹³⁰ She suggests that OFAC can use their powers to potentially prevent legal challenges and suggests that this may have been the case in *Al Haramain Islamic Foundation Inc v United States Department of Treasury*.¹³¹

In opposition to this Jenkins¹³² explains how the designation process has given cause for concern especially regarding human rights, but claims that “procedural requirements and judicial review address these concerns, while designation itself serves the rule of law.”¹³³ Such a view is incongruent to many other opinions in this area, which have criticised the designation regime for its alleged circumvention of established rules of law. Jenkins is for the most part complimentary towards the ATA in Canada, but he does highlight a concern that the TA 2000 in the U.K. could be guilty of violations of the ECHR not least due to the provisions concerning fundraising for terrorist organisations.¹³⁴ He claims that the TA 2000 raises problems with regard to rights to freedom of association under Article 11 of the ECHR. This study will not be concerned with rights to freedom of association but will instead look at possible violations in the U.K. of Article 6.1 of the ECHR; the right to a fair trial. Deliberation around arguments relating to CTF legislation and the right to a fair trial will be integral to this thesis.

¹²⁸ Ibid at 1419.

¹²⁹ L Donohue, ‘Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime’ [2008] 43 *Wake Forest L Rev.* 643-649. at 644

¹³⁰ The Regulations provide that U.S. persons may not “provide legal, accounting, financial... of other services to a [target] whose property or interests in property” have been blocked under the Order. Approval would first need to be sought from the OFAC. Furthermore, since the designated party’s assets have been frozen, funds would not be available before requesting the release of monies frozen from the OFAC for such a purpose.

¹³¹ 585 F.Supp. 2d 1233 (D. Or. 2008).

¹³² D Jenkins, ‘In support of Canada’s Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law’ [2003] 66 *Saskatchewan Law Review* 419.

¹³³ Ibid at 440.

¹³⁴ Ibid at 443.

The author reaffirms the importance of striking a balance between security and human rights but appears to be confident that this is indeed being achieved regardless of the exceptional nature of the terrorist threat.¹³⁵ Jenkins is complimentary of Canada's approach to counter terrorism, which is in stark contrast to much of the comment previously discussed of the U.K. and U.S. methods. He asserts that "Canada's Anti-Terrorism Act responds to terrorism in a manner that is both firm and conscientious of Charter rights".¹³⁶ He adds that Canada is generally more restrained than the U.S and the U.K and is taking extra measures to ensure that liberties are protected.¹³⁷ Such points will prove valuable to discussion within this thesis but they will be examined with regard to CTF provisions in particular. So whilst this research provides worthy comparative analysis on anti terrorism provisions in Canada, the U.S, and the U.K, it has added little to the debate surrounding the impact on civil liberties of legal regimes designed to identify and eliminate terrorist financing. Jenkins himself states "while this article recognizes specific points of concern in regard to Canada's Anti-Terrorism Act and the Canadian Charter of Rights and Freedoms, it does not discuss them in detail."¹³⁸

The author also observes the problems caused by a lack of definition of terrorism and moreover comments on the failure to provide a description of what amounts to a "Specifically Designated Global Terrorist". Such a lack of clarity within the legislation adds to the mystery surrounding the listing and ensures that the entity can have little knowledge of what it is being accused of. Nice-Petersen notes that such ambiguity makes the mounting of a defence almost impossible.¹³⁹ Nice-Petersen's paper contends that charities have become primary targets in the 'War on Terror' and offers a very useful commentary on three cases¹⁴⁰ which challenged the freezing of their assets mainly on the grounds of a violation of Administrative Procedure Act (APA) and also a violation of the Due Process Clause of the Fifth Amendment of the

¹³⁵ Ibid at 454.

¹³⁶ Ibid at 454.

¹³⁷ Ibid at 454.

¹³⁸ Ibid at 422.

¹³⁹ N Nice-Petersen, 'Justice for the "Designated": The Process that Is due to Alleged U.S. Financiers of Terrorism' [2005] 93 *Georgetown Law Journal* 1388.

¹⁴⁰ Holy Land Foundation for Relief and Development, Global Relief Foundation and the Benevolence International Foundation.

U.S. Constitution.¹⁴¹ These cases are extremely important to this thesis as the decisions illustrate the lengths that the U.S. judicial system is willing to go to give the counter terrorism powers their full effect. Interestingly, although the author is highly critical of the legislation, he also discusses the need for such laws and provides well thought out and logical ways in which counter terrorism efforts such as these can operate alongside the protection of civil rights claiming that “U.S. entities are due much greater protections than those currently provided”.¹⁴² This is a point on which discussion in this thesis will be centred and although this research provides some valuable insight, it does not offer any comparative analysis with any other jurisdiction including the U.K. and Canada. The cases included in this study will provide an excellent analogy with the recent ruling in the case of *Ahmed and Others v United Kingdom* in the U.K.¹⁴³

Research such as this into the legal challenges that have arisen due to the imposition of excessive CTF measures such as those in the U.S. will be of vital importance to this thesis. Donohue comments on constitutional deprivations such as violations of the Fourth and Fifth Amendments of the U.S. Constitution noting that this area “has attracted little public attention”¹⁴⁴ and some “concerns have been addressed by the courts. Many have not.”¹⁴⁵ The author explores whether such departures from the rule of law and due process are temporary and shall be corrected by judicial intervention or whether such constitutional deprivations shall be allowed to continue in the future. In order to explore this question, Donohue considers Specially Designated Global Terrorists (SDGTs), Foreign Terrorist Organisations (FTOs) and financial surveillance. The author makes note of the interest that the U.S. took of terrorist financing in the late twentieth century but comments that the regime adopted at this time was “considerably more restrained than those it implemented in the post 9/11 environment”.¹⁴⁶ She discusses the rapid steps that were taken in this area including the creation of agencies to work towards the detection and prevention of terrorist

¹⁴¹ The Fifth Amendment prevents individuals from being deprived of life, liberty, or property without basic procedural protections. Due process extends to all persons and corporate entities.

¹⁴² N Nice-Petersen, ‘Justice for the “Designated”: The Process that Is due to Alleged U.S. Financiers of Terrorism’ [2005] 93 *Georgetown Law Journal* 1387-1420 at 1405

¹⁴³ *Ahmed and Others v United Kingdom* [2010] UKSC 2 at para. 69.

¹⁴⁴ L Donohue, ‘Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime’ [2008] 43 *Wake Forest L Rev* 643-649 at 644

¹⁴⁵ *Ibid*

¹⁴⁶ *Ibid* at 645.

funds.¹⁴⁷ Donohue provides a broad discussion of laws that were applied post September 11 including the powers brought by Executive Order 13,224 and the USA PATRIOT Act 2001. She explains how these have extended the powers of law enforcement agencies by for example, extensively increasing state access to private financial information. This has fundamental impact on human rights and is a cause for concern, as Donohue remarks for the First, Fourth and Fifth Amendments of the U.S. Constitution.¹⁴⁸ Donohue provides a comprehensive analysis into the constitutional challenges of CTF initiatives in the U.S. but offers no comparison with other jurisdictions to illustrate any differences in the severity of the measures implemented, thus the thesis can be contrasted with the research of Donohue. Whilst she discusses which human rights may be impacted on, she does not discuss how individuals may be affected by the denial of the right to a fair trial. This thesis fills this gap in research and instead of and focuses on the impact of CTF measures on the right to a fair trial. Moreover, the research examines how the right to a fair trial may apply to administrative sanctions such as these. Although designation as a terrorist and an asset freeze are not deemed to be a criminal prosecution, this thesis analyses the notion that the right to a fair trial should be permitted to apply, as the CTF sanctions are actually punitive in nature. With this in mind, this study goes further than Donohue's paper and suggests that the Sixth Amendment to the U.S. Constitution as well as human rights instruments in the U.K and Canada¹⁴⁹ are infringed by the application of CTF sanctions.

It has become apparent that whilst most current studies fail to discuss CTF provisions and human rights in particular, they do offer insight into how the juxtaposition of national security and human rights may be viewed. One such book is titled *Anti-terrorism, Security and Insecurity after 9/11*¹⁵⁰ and is helpful to this thesis. These studies provide a critical analysis of the new laws implemented in Canada and the U.S, focussing on their intrusive nature and negative impact on constitutionally

¹⁴⁷ Including for example, a Terrorist Financing Unit in the Department of Justice and a Financial Review Group (which later came under the FBI's counter terrorist division).

¹⁴⁸ L Donohue, 'Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime' [2008] 43 *Wake Forest L Rev.* 643-649 at 660.

¹⁴⁹ 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.

¹⁵⁰ *Anti-Terrorism, Security and Insecurity after 9/11* (eds). Rollings-Magnusson S, 2009, Fernwood Publishing Canada.

protected rights. Two of these papers are particularly relevant to this thesis. The first provides a general overview of Canada's response to September 11 and highlights human rights implications of counter terrorism laws in Canada. Dobrowlosky *et al* comment on the notion that measures introduced post 2001 have created an even greater feeling of insecurity than that which existed prior to government responses. They assert that this is due to the increased emphasis on security and the effect that such a focus has had on human rights.¹⁵¹ They go on to explain how Canada followed the lead of the U.S. and implemented new security measures "quickly and nimbly"¹⁵² while "human security remained in the wings".¹⁵³ As was the situation in the U.S., the suspension of human rights was justified by the exceptional nature of the circumstances but the authors comment that the actual limited results that were achieved could actually be an outcome of successful police efforts and international cooperation rather than a result of improved counter terrorism legislation.¹⁵⁴ This calls into question the necessity for restricting human rights and is an issue, which is applicable to all three jurisdictions. The authors conclude that despite Canada's image of being "kinder and gentler",¹⁵⁵ they have responded in a similar manner to the U.S. and prioritized national security measures above constitutionally guarded rights.¹⁵⁶

Magnusson discusses the need for the Anti Terrorism Act 2001¹⁵⁷ and comments on its consequences for the Canadian Charter of Rights and Freedoms.¹⁵⁸ She highlights the criticism that Bill C-36¹⁵⁹ received before it was implemented including disapproval at its overly broad definitions and concern at the effects of the use of religious and racial profiling. She comments that despite the protests relating to the implications of this Bill, it was implemented and justified on the basis that it was necessary to contribute to the internationally coordinated response. Furthermore, any deviation from human rights was rationalised on the basis that this Act was enacted to

¹⁵¹ A Dobrowlosky *et al* (2009) 'Security, Insecurity, and Human Rights Contextualizing Post- 9/11' S Rollings-Magnusson, *Anti Terrorism Security and Insecurity after 9/11*, Fernwood Publishing at 13.

¹⁵² *Ibid* at 20.

¹⁵³ *Ibid* at 21.

¹⁵⁴ *Ibid* at 22.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

¹⁵⁷ S.C. 2001, c.41.

¹⁵⁸ S Rollings-Magnusson 'Buying Security with Freedom, The Vulnerability of Human Rights in Canada in the Post 9/11 Era, in S Rollings Magnusson (eds.) *Anti-Terrorism, Security and Insecurity after 9/11*, Fernwood Publishing, Canada at 83.

¹⁵⁹ This later became the Anti Terrorism Act 2001.

defend the most important of all human rights- those to life, liberty and security of the person.¹⁶⁰ Although these ideas correspond with those expressed in other papers, Rollings and Magnusson's research is different in that it uses the actions taken during the October Crisis in 1970 to illustrate the mistakes that the Canadian government have repeated post September 11.¹⁶¹ The author discusses how the War Measures Act 1914¹⁶² was used to suspend certain human rights such as the removal of the right to an attorney to increase the efficiency of counter terrorism actions. She concludes that these measures "did nothing" to help the terrorist situation that existed at this time and is illustrative of the "perils of over reaction". Furthermore, she argues that the Anti Terrorism Act 2001 represents the same mistakes being made post 2001 and the counter terrorism powers brought by the Act potentially threatens the rule of law that exists to balance the rights to life and freedom with the powers held by the State.¹⁶³

In comparing the War Measures Act with the Anti Terrorism Act, the author comments that the effects of the former legislation were contained by its withdrawal after seven months whilst the powers brought by the latter Act are continuing to have a negative impact. She emphasises that any positive benefits that may be acknowledged cannot be accepted in return for a loss of basic civil rights. This is an argument put forward by many authors in this area and will be investigated in further detail in this thesis. Rollings Magnusson's research offers a very interesting and thought provoking discussion of the area of counter terrorism and human rights but again she does not discuss CTF laws in particular. Her paper broadly criticises the negative impacts felt by the imposition of the Anti Terrorism Act upon the Charter of Rights and Freedoms in Canada but does not comment upon how human rights are being affected by efforts to starve terrorists of their funds.

It has been illustrated how academics have contested the importance of human rights considerations in the counter terrorism regime but a paper by Kruse¹⁶⁴ is a little different in that he suggests the reason (apart from the individual benefits) of ensuring that fundamental rights are given the respect that they deserve. In his paper, he

¹⁶⁰ See Rollings-Magnusson above n. 158 at 84-85.

¹⁶¹ The October Crisis occurred in 1970 and began with the kidnappings of two government officials.

¹⁶² S.c. 1914 (2nd sess.) c.2.

¹⁶³ See Rollings-Magnusson above n. 158 at 87.

¹⁶⁴ A Kruse "Financial and Economic Sanctions- From a Perspective of International Law and Human Rights" (2005) 12(3) *Journal of Financial Crime* 217.

discusses the argument that long term action such as that against terrorism cannot be won without the support of citizens. Such backing can only be achieved, as Kruse argues, when people are convinced that the approach taken by the government follows the rule of law.¹⁶⁵ The author uses UNSCR 1267 and 1373 to illustrate his point. He suggests that the UN Security Council established a low evidentiary threshold which States have followed and like other research in this area, highlights the fact that in the application of UN sanctions against individuals and entities, there is no mechanism provided whereby those who may feel the measures to be unfounded or wrong can appeal.¹⁶⁶ He suggests that this may have consequences for the credibility of such international sanctions.¹⁶⁷ Like Nice-Petersen, Kruse accepts that the overruling of national or international decisions may have harmful consequences on the efficacy of the ‘war against terror’ but suggests that a balance must be struck between the effectiveness of laws against the financing of terrorism and the protection of fundamental human rights.¹⁶⁸ He puts forward some very interesting suggestions for reform of the area. They include securing a “satisfactory level of evidence”¹⁶⁹ before imposing measures against terror suspects; ensuring that the individual concerned has the opportunity to be heard and importantly to defend himself, including the right to counsel; to have access to a legal body in order to try all relevant aspects of the measures imposed against the suspect.¹⁷⁰ These proposals provide a valuable contribution to the area and their suitability in providing an improvement to the area of CTF and human rights and shall be examined in this thesis.

Furthermore, Duffy highlights international crimes that may have been committed by way of the attacks on the U.S. and the legal mechanisms that exist in order to enforce criminal law internationally. During this, she discusses extradition in international law explaining that although it is an obligation on States not to provide a safe haven for terrorists¹⁷¹ there are other obligations under international law, which need to be considered such as human rights. She notes that there have been “numerous occasions on which states have shown little, or only selective, respect for these obligations by

¹⁶⁵ Ibid at 217.

¹⁶⁶ Ibid at 218.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid at 219.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ This obligation is contained within UNSC Resolution 1373 S/RES/1373 (2001).

transferring suspected terrorists despite a substantial risk to their basic rights”.¹⁷² Thus whilst it can be shown that human rights violations may be occurring as a result of applying international counter terrorism provisions, Duffy does not consider how the implementation of CTF provisions can also impact upon human rights such as the right to a fair trial. Whilst Duffy briefly mentions the right to property,¹⁷³ which is undoubtedly a right, which is adversely affected by CTF provisions such as the freezing of assets, she offers no depth of analysis of this area. This study fills this gap in research and looks at asset freezing in detail to assess its impact upon the suspect. It looks in detail at how the right to a fair trial may be infringed by the application of an asset freeze and suggests that by not conforming to human rights legislation, the legitimacy of the CTF regime is in jeopardy.

Throughout Duffy’s book, she considers the legality and impact of international counter terrorism provisions on human rights. She concludes that conflict between counter terrorism and human rights is not a new phenomenon and argues that Resolution 1373 was initially blind to human rights law but that this situation has now improved.¹⁷⁴ She argues that there has been a “climatic shift towards greater recognition of the importance and centrality of the human rights dimension”¹⁷⁵ and comments that there is no longer a dichotomy between security imperatives and respect for human rights. This proposition will be analysed in further detail throughout this thesis but in contrast to Duffy’s book, it shall be concerned with the CTF arm of national security. This research will focus upon the CTF legislation that has been implemented in response to Resolution 1373 and assess what its impact has been upon the right to a fair trial.

2.4 Conclusion

This chapter has outlined the research methodology underpinning this thesis. It has sought to justify the relevance of the research methods chosen to the overall aims and objectives of the study. In conclusion, the value of doctrinal study to this thesis is paramount. Although it has been noted that doctrinal research can be regarded as

¹⁷² See Duffy above, n. 73 at 139.

¹⁷³ Article 1, Protocol No. 1 European Convention on Human Rights.

¹⁷⁴ See Duffy above, n. 73 at 373.

¹⁷⁵ See Duffy above, n. 73 at 375.

inadequate due to a lack of opportunity to examine the law in practice, the use of case law and a socio legal method allows for an analysis of the law in action. The literature review has illustrated some central themes of existing research in this area and a detailed examination of each of these has shown that, comparative analysis of the legal provisions relating to the suppression of terrorist financing in the U.K., U.S, and Canada remains under researched. Secondly, studies have not considered in any detail the human rights implications of the prevention and detection of the funding of terror. Thirdly, previous studies have reached a number of conclusions and made recommendations for improving on the relationship between counter terrorism efforts in general and human rights. Fourthly, none of the research has discussed the U.K., U.S., and Canada's CTF provisions whilst determining their impact upon the right to a fair trial. The thesis will look at the gap in the literature and thus will investigate the impact of CTF with regard to the right to a fair trial in the U.K., U.S., and Canada. This research also examines the legality of these measures by investigating the manner in which legislation was implemented and discusses how violation of the right to a fair trial may affect the legitimacy of CTF provisions. From primary and secondary sources, the successes and failings of functioning CTF legislation will be exposed and will also allow for current policy debates to be considered in order to suggest relevant means of reform. A comparative look at the implications of CTF law on the right to a fair trial in the three jurisdictions is a wide area for discussion and the research questions posed may be answered thoroughly with the deployment of a doctrinal, comparative and socio legal approach. The next chapter discusses the international policy on countering the financing of terrorism and its compatibility with international provision for human rights protection particularly the right to a fair trial.