

Chapter 3: Counter Terrorist Financing: The International Policy

3.0. Introduction

Whilst terrorism has existed for centuries and global and regional efforts have been taken to combat it,¹ attempts to curtail the flow of funds to terrorists is a relatively new concept. Indeed, it was not until the terrorist attacks on September 11 2001,² that it became a principal concern of the international community.³ At the time of the terrorist attacks there was no comprehensive international legal framework to combat the financing of terrorism. Whilst the United Nations (UN) International Convention for the Suppression of the Financing of Terrorism 1999 applied, it had not been fully ratified at this time.⁴ In the area of financial crime, the international community were focussed on the prevention of money laundering, the illegal drugs trade and fraud.⁵ Such a situation is remarkable considering how important the pursuance of terrorist assets has become since the terrorist attacks in September 2001. Until 2001, the international community were not prepared to tackle terrorist financing, but the events of September 11 had an immediate and dramatic effect on the international legislative policy and prompted a speedy and direct response that was heavily influenced by the United States (U.S.) but led by the United Nations Security Council (UNSC). The need to combat terrorist financing has been reinforced by the recent surge in international terrorist attacks taking place in many cities across the world.⁶

¹ Arnaud Blin, *The United States Confronting Terrorism*. in Gerard Chaliand and Arnaud Blin (eds), *The History of Terrorism, From Antiquity to Al Qaeda* (University of California Press 2007) 398

² Hereafter September 11.

³ W. Gilmore 'Dirty money-the evolution of international measures to counter money laundering and the financing of terrorism' (Council of Europe: Strasbourg, 2004) at 123.

⁴ Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. Hereafter International Convention. It should be noted that this Convention did not come into force until 10 April 2002.

⁵ W Allen, 'The War Against Terrorism Financing' 6(4) [2003] *Journal of Money Laundering Control* 306-310 at 306.

⁶ Some of these recent terrorist attacks took place in Nice in July 2016, Brussels in March 2016, and Paris in November 2015 and January 2015.

With international focus turning towards the funding of terrorists⁷ and prompting a proliferation of legislation aimed at preventing such financing, concerns have been raised as to the position and relationship of human rights in the implementation of these laws, in particular the right to a fair trial.⁸ The introduction of measures, which designate an individual or entity as a terrorist and freezes their assets,⁹ pending an investigation, has implications for many human rights, but the right to a fair trial is particularly important as it provides a suspect with the opportunity to challenge a designation and asset freeze. Up until this point and indeed throughout the trial, the suspect may never learn what the evidence is that has led to designation being issued. Such a practice arguably has implications for the right to a fair trial and does not provide procedural fairness. With this in mind, this chapter discusses how an international counter-terrorist financing (CTF) policy has evolved and it then examines the legislative responses of the UN, the European Union (EU) and the soft law measures of the Financial Action Task Force (FATF). Moreover, it examines how the alleged breaches of the right to a fair trial may have implications for the legitimacy of international CTF measures.

In order to assess the impact on the right to a fair trial, it is necessary to first consider the origins of CTF legislation and to look at why it is regarded as necessary. Secondly, this chapter discusses the legislative responses of the UN, EU and soft law measures of the FATF.¹⁰ Thirdly, it considers the consequences that might have ensued for the right to a fair trial by the international community's efforts to form a coordinated CTF strategy. Fourthly, the significance of some States' ability to derogate from a number of human rights in certain situations is examined. Finally, this chapter investigates how the international legislative measures have been implemented in the U.S., the United Kingdom (U.K.) and Canada and briefly discusses how the right to a fair trial has been impacted on in these jurisdictions.

⁷ The World Bank defines terrorist financing as providing "the financial support, in any form, of terrorism or of those who encourage, plan, or engage in it" (The World Bank Reference Guide to Anti-Money Laundering and Combating the Financing).

⁸ Article 6 ECHR, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 47 of the EU Charter.

⁹ Terrorist assets may be defined as "assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form". United Nations International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations in Resolution 54/109 of December 1999, Article 1. Para 1.

¹⁰ The Recommendations of the FATF are soft law so they are not legally binding and cannot be enforced.

3.1 September 11 2001

The Islamic State of Iraq and Levant (ISIL) represents the principal international terrorist threat with Levitt remarking that “estimates put ISIL’s daily income at around \$3m, giving its total value of assets between \$1.3bn and \$2bn, making it the world’s best-funded terrorist group”.¹¹ However, it has been accepted that the terrorist attacks carried out in the U.S. on September 11 were the responsibility of al Qaeda, an Islamist terrorist network, operating internationally, providing training and logistical support to terrorists and is thought to rely primarily on donated monies to fund their organisation.¹² The Central Intelligence Agency (CIA)¹³ reported that prior to September 11, al-Qaeda required an estimated \$30 million per year to support their operations and the 9/11 Commission Report suggests that “al-Qaeda appears to have relied on a core group of financial facilitators who raised money from a variety of donors and other fund-raisers, primarily in the Gulf Countries and particularly in Saudi Arabia”.¹⁴ Although, al Qaeda requires a substantial amount of funding, the money needed to finance attacks are thought to be modest,¹⁵ with the cost of the execution of the suicide hijackings considered to be somewhere between \$400,000 and \$500,000.¹⁶ Evidence suggests that the money required to support the September 11 attacks was provided by Khalid Sheikh Mohammed¹⁷ and that the 19 operatives

¹¹ Levitt, M. ‘Terrorist financing and Islamic State – Testimony submitted to the House of Committee on Financial Services’, November 13 2014, <http://www.washingtoninstitute.org/uploads/Documents/testimony/LevittTestimony20141113.pdf>, accessed November 8 2016.

¹² J Gurule, *Unfunding terror - the legal response to the financing of global terrorism* (Edward Elgar, 2008). Crimm comments upon the U.S. governments freezing of assets claiming that based on figures which suggest that “approximately thirty percent of al Qaeda’s financial resources were derived from donations solicited in the United States and abroad”. (Nina J Crimm, ‘High Alert: The government’s war on the financing of terrorism and its implications for donors, domestic charitable organizations, and global philanthropy’ [2004] 45(4) *William and Mary Law Review* 1341).

¹³ 9/11 Commission The 9/11 Commission Report--Final Report of the National Commission on Terrorist Attacks upon the United States (Norton & Company: London, 2004) at 170.

¹⁴ 9/11 Commission The 9/11 Commission Report--Final Report of the National Commission on Terrorist Attacks upon the United States (Norton & Company: London, 2004) at 170.

¹⁵ Patrick Moulette, the Executive Secretary of the FATF commented, “terrorism can be frighteningly cheap” (*BBC News*, 2 Oct, 2003 ‘Choking off al-Qaeda’s cash lifeline, Available at: <http://news.bbc.co.uk/1/hi/world/europe/3159286.stm>, (accessed: 02.03.2013)).

¹⁶ 9/11 Commission The 9/11 Commission Report--Final Report of the National Commission on Terrorist Attacks upon the United States (Norton & Company: London, 2004) at 169.

¹⁷ It is important to note here is that Khalid Sheikh Mohammed also funded the first al Qaeda attack on the World Trade Centre in 1993.

involved in these attacks received funds through wire transfers.¹⁸ The terrorists obtained some of the funding via credit card fraud and identify theft.¹⁹ Although at this time, there were mechanisms in place to prevent abuse of the financial system these measures were aimed at money laundering and not CTF and “the hijackers and their financial facilitators used the anonymity provided by the huge international and domestic financial system to move and store their money through a series of unremarkable transactions”.²⁰

The only legal and domestic U.S. mechanism in place at the time of the September 11 attacks was the Bank Secrecy Act 1970 (BSA, 1970).²¹ This Act represented the foundation of anti-money laundering (AML) efforts in the U.S. and its purpose was to identify transactions of more than \$10,000 that would then be investigated. This legislation was aimed at preventing the financial system from being exploited by money launderers whose funds were either the proceeds of illegal activity or intended to be used for such criminal purpose. These provisions were initially able to detect some financing of terrorism, but the BSA 1970 had not been designed with the prevention and detection of terrorist financing in mind.²² For instance, Khalid Shiekh Mohammed sent a wire transfer to the terrorists in Tampa Bay and the bank reported the transaction, but it was one of 1.3m currency transaction reports submitted to the Financial Crimes Enforcement Network²³ in 2000, but there was no further investigation. Thus, the BSA 1970 provisions, in this instance were unsuccessful. Since its implementation, the BSA 1970 has been the subject of various amendments, which are addressed in chapter four, but of relevance here, is the requirement imposed by the Anti-money Laundering Act 1992, that deposit taking institutions should file Suspicious Activity Reports (SARs).²⁴ Although this suspicious activity reporting procedure was in place, Lee notes that only one SAR was filed in relation to

¹⁸ 9/11 Commission The 9/11 Commission Report--*Final Report of the National Commission on Terrorist Attacks upon the United States* (Norton & Company: London, 2004) at 172.

¹⁹ National Commission on the Terrorist Attacks upon the United States The 9/11 Commission Report (Norton & Co Inc, 2004) at 169.

²⁰ 9/11 Commission The 9/11 Commission Report--*Final Report of the National Commission on Attacks upon the United States* (Norton & Company: London, 2004) at 131.

²¹ It should be noted that this legislation was only aimed at Currency Transaction Reports and not Suspicious Activity Reports.

²² SE Eckert ‘The US regulatory approach to terrorist financing’ in TJ Biersteker and SE Eckert, *Countering the Financing of Terrorism*, (eds) (Routledge, 2008) at 210-211.

²³ Hereafter FinCEN.

²⁴ In addition to the Currency Transaction Reports (CTRs).

transactions carried out by the 19 terrorists involved in the September 11 attacks.²⁵ The BSA 1970 was never intended to highlight transactions of this nature.²⁶ The 9/11 Commission Report remarks “the existing mechanisms to prevent abuse of the financial system did not fail. They were never designed to detect or disrupt transactions of the type that financed 9/11”.²⁷ Further to this, there are other deficiencies with the reporting regime. For instance, the lack of an agreed definition of the term ‘suspicion’ implies that financial institutions are left with a large amount of discretion in deciding what amounts to a suspicious transaction. For example, the U.S. Code of Federal Regulations suggests that a transaction should be reported if the financial institution ‘knows, suspects, or has reason to suspect it involves or is an attempt to disguise proceeds from illegal activity; is designed to evade the requirements of the BSA; or it appears to have no business or apparent lawful purpose’.²⁸ This definition is rather limited whilst FinCEN provide quite detailed guidance on what behaviour might amount to suspicious including, ‘unusual financial nexuses and transactions occurring among certain business types’ and ‘unusually large numbers and/or volumes of wire transfers and/or repetitive wire transfer patterns’.²⁹ There is currently no universal criteria set by enforcement authorities for the term suspicious.³⁰ Ryder notes that this limit to the effectiveness of SARs also applies to the U.K. and Canada.³¹ This implies that this area is open to a vast amount

²⁵ This SAR was filed in September 2000. Lee. R. Terrorist Financing: The US and International Response Report for Congress (Congressional Research Service: Washington DC 2002) at 19.

²⁶ Academics have questioned the initiatives that were in place at the time of the September 11 attacks, claiming that efforts to deprive terrorists of their funds were “weak, ineffective, and a dismal failure.”²⁶ However, although such opinions are valid, it should be noted that measures such as those implemented by the Bank Secrecy Act 1970 were not unsuccessful in their aim, as they were never intended to identify the types of financial transactions that were used to fund September 11.

²⁷ 9/11 Commission ‘The 9/11 Commission Report--Final Report of the National Commission on Terrorist Attacks upon the United States’ (Norton & Company: London, 2004) 131.

²⁸ 31 CFR s 103.21(a)(2) (1995).

²⁹ <https://www.fincen.gov/resources/statutes-regulations/guidance/sar-narrative-guidance-package> (accessed 27.04.17).

³⁰ Judicial guidance is provided for the interpretation of the phrase ‘suspicious’ in *United States v. Tobon-Builes* 706 F.2d 1092, 1094-5 (11th Cir. 1983).

³¹ N Ryder *Money Laundering-An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge, 2012) 62. In the U.K, the Joint Money Laundering Steering Group have offered some guidance on what financial activity amounts to suspicion, they state “suspicion has been defined by the courts as being beyond mere speculation and based on some foundation, for example ‘a degree of satisfaction and not necessarily amounting to belief but at least extending beyond speculation as to whether an event has occurred or not’; and ‘although the creation of suspicion requires a lesser factual basis than the creation of a belief, it must nonetheless be built upon some foundation’ (Joint Money Laundering Steering Group Prevention of Money Laundering/Combating Terrorist Financing 2011

of interpretation and suggests that what one person may view as suspicious may not be regarded as such by another. Such a situation does not form a nationally coordinated approach let alone an internationally consistent one. With criticisms of the AML regime in mind, the chapter now turn towards the shift in legislative attention from money laundering to terrorist financing.

3.2 A Legislative Shift from Money Laundering to Terrorist Financing

The events of September 11 served as a catalyst and resulted in a major shift in the direction of legislative provisions. Governments began to focus their attention on denying terrorists the financial means to carry out their attacks whilst using the financial information to detect and prosecute terrorists and their supporters.³² The legislative focus changed course to take into account the new relevance that the terrorist money trail received. Indeed, Levitt suggests that “the synchronized suicide attacks of September 11, 2001, highlights the critical role financial and logistical support networks play in the operations of international terrorist organizations.”³³ He supports such an opinion with reference to the comments of former FBI Director Louis Freeh following the World Trade Centre attack in 1993, who explained that terrorists had experienced a lack of funds that had prevented the attack from causing further devastation than it actually did.³⁴ On his capture in 1995,³⁵ Ramzi Yousef confirmed that they could not afford to purchase the materials to make the bomb as large, and consequently as devastating as they had first intended. This fact may serve to demonstrate that starving terrorists of some if not all of their funds will play an incredibly positive role in counter terrorism efforts. Levitt suggests that examination of the financial trail originating from the September 11 attacks supplied early

Review Version Guidance For The UK Financial Sector Part 1 (Joint Money Laundering Steering Group: London, 2011) at para 6.11 p. 132.

³² Klein comments: “As a result of those tragic events, States began to view combating the financing of terrorism as a top priority” (P Klein, International Convention for the Suppression of the Financing of Terrorism, UN Audiovisual Library of International Law, at 4).

³³ M Levitt, Stemming the flow of terrorist financing: Practical and Conceptual Challenges [2003] Vol. 27:1 Winter/Spring *The Fletcher Forum of World Affairs*, 59. One of the terrorists confirmed this point on his capture in 1995. Furthermore, investigation of finances was used to identify the terrorists of the World Trade Centre attack in 1993. After one of the perpetrators attempted to claim his \$200 deposit back on the rental truck used in the bombings, the FBI examined bank accounts, communication records and travel documents to identify the other terrorists linked with the attack.

³⁴ M Levitt Stemming the flow of terrorist financing: Practical and Conceptual Challenges [2003] Vol. 27:1 Winter/Spring *The Fletcher Forum of World Affairs* 60.

³⁵ P Bergen, *The Osama bin Laden I know: An Oral History of Al Qaeda's Leader* (Free Press 2006) 144-145.

evidence that al Qaeda were responsible.³⁶ Consequently, scrutinising the finances of terrorists can be helpful not only in locating those individuals who are responsible for the attacks but also in unearthing the ability of terrorists to raise and move funds around countries and across borders. Consequently, financial investigation has become a significant tool used in a range of counter terrorism initiatives.

Whilst the use of preventing and following the financing of terrorism is clear, it is proposed here that an analogous approach from nation states towards CTF is paramount. While it was recognised in the 1994 Declaration that terrorist acts were growing in international character,³⁷ this fact became even more significant following the September 11 attacks which were “ubiquitously characterised, and internationally condemned, as acts of international terrorism”.³⁸ Such recognition further propounds the notion that countries need to produce a coordinated effort in the elimination of terrorism by ensuring that they had laws in place to prevent their financial institutions being used by facilitators of terrorism. There is little point in a single country having CTF related legislation to prevent terrorism financing, as terrorists could easily use financial institutions of other countries. Thus, a universal solution needs to be found.³⁹ A discussion of this quest for a solution shall be discussed later in this chapter along with the implications that this policy might have for particular human rights. Discussion now turns to an examination of the ‘Financial War on Terrorism’ and an analysis of the measures that have been taken to provide a unified approach to preventing the financing of terrorism.

3.3 The Financial War on Terrorism

On September 24 2001 President Bush announced the ‘Financial War on Terrorism’ stating: “Today, we have launched a strike on the financial foundation of the global

³⁶ M Levitt Stemming the flow of terrorist financing: Practical and Conceptual Challenges [2003] Vol. 27:1 Winter/Spring The Fletcher Forum of World Affairs 60.

³⁷ United Nations A/RES/49/60, 17 Feb 1995 at 5.

³⁸ H Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge University Press, 2005) 17.

³⁹ This was a point that had been proposed by the UN before the September 11 attacks (A/RES/49/60 Measures to eliminate international terrorism). The UN Security Council had strongly reiterated the notion since the 1990’s that terrorism jeopardised international peace and security, the maintenance of which is integral to the purpose of the UN.

terror network”.⁴⁰ Up until this point, terrorist financing had not been a principal concern and suddenly the spotlight shifted from white-collar crime⁴¹ to the funding of terrorism. Aufhauser observed how focus had been on the wrong area of financial crime and ‘clean’ money intended for terrorist purposes had been transferred globally without attracting regulatory attention.⁴² Alexander supports such a notion asserting that, “terrorist financing only became of international concern following the attacks... on the United States on September 11, 2001”.⁴³ The newly acknowledged value of tackling terrorist financing can be demonstrated by the introduction of CTF initiatives by the UN, EU, and FATF after September 2001. The Financial War on Terrorism focuses on these measures. However, it is important to note that action to prevent the funding of terrorism was taken by the UN prior to September 2001. The UN adopted the legal term ‘terrorist financing’ in its Declaration of Measures to Eliminate International Terrorism in 1994.⁴⁴ This Declaration urged States to take the appropriate measures necessary to eliminate terrorism at national and international levels stating that members should “reaffirm that acts, methods and practices of terrorism are contrary to the purposes and principles of the UN; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the UN”.⁴⁵ Further development in international CTF provisions, were not made until 1999. Action in CTF was taken as a consequence of the August 1998 bombings of the U.S. embassies in Kenya and Tanzania,⁴⁶ and the UN International Convention for the Suppression of the Financing of Terrorism

⁴⁰ The White House, “President Freezes Terrorists’ Assets,” (Washington D.C: Office of the Press Secretary, 24 September 2001). Available at: www.whitehouse.gov/news/releases/2001/09/20010924-4.html.

⁴¹ Professor Edwin Sutherland observed, “the present-day white-collar criminals, who are more suave and deceptive than the ‘robber barons’, are represented . . . [by] many other merchant princes and captains of finance and industry, and by a host of lesser followers. Their criminality has been demonstrated again and again in the investigations of land offices, railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry, real estate, reorganization committees, receiver- ships, bankruptcies, and politics. (E Sutherland, ‘The White Collar Criminal, American Sociological Review 1940 5(1), 1-2).

⁴² D Aufhauser, ‘Terrorist financing: foxes run to ground’ [2003] 6(4) *Journal of Money Laundering Control*, 301–305 at 302.

⁴³ R Alexander, ‘Money Laundering and Terrorist Financing: time for a combined offence’ [2009] 30(7) *Company Lawyer* 200-204, at 200.

⁴⁴ A/RES/49/60.

⁴⁵ United Nations A/RES/49/60 84th plenary meeting Measures to eliminate international terrorism, December 9 1994 (emphasis added).

⁴⁶ S Mair, ‘Terrorism and Africa – on the danger of further attacks in sub-Saharan Africa’ [2003] 12(1) *African Security Review* 107–110; and X Raufer, ‘Al Qaeda: a different diagnosis’ [2006] 26(3) *Studies in Conflict & Terrorism* 391–398.

1999⁴⁷ was signed. This Convention was “prompted by an increased awareness of terrorist activities and of the role that movements of funds- ostensibly perfectly legal- play in the preparation of acts of terrorism”.⁴⁸ The International Convention was “unique amongst its 12 sister international conventions tackling terrorism in that it is the first to address the root causes and lifeblood of the phenomenon”.⁴⁹ The International Convention provides that member states must criminalize the financing of terrorism, and take steps to identify, detect and freeze the funds used for the purposes of supporting terrorism.⁵⁰ Gilmore notes that this Convention “provides for the first time, an agreed global network within which the international community can collaborate more effectively”.⁵¹ In particular, the International Convention adds a new focus to the prevention and detection of terrorist assets and defines terrorist funds to include “assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form”.⁵² The International Convention was highly praised for offering a number of innovative measures to prevent terrorist activities. For example, Védrine stated that the involvement of financial institutions and their “complete and continuous cooperation”,⁵³ was integral to this aim. The financial sector assists by identifying potentially suspicious transactions and reporting them to the Financial Intelligence Unit. The amount of money intended to fund terrorism may be small and apparently innocuous, and thereby escaping detection by financial institutions, but information collected on these transactions and customers can be provided to prosecutors to assist terrorism investigations. The report or financial information collected may be instrumental in the instigation of a terrorist financing investigation. For instance, Acharya comments upon the failed bomb plot in August 2006 “which was monitored

⁴⁷ Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. Hereafter International Convention. It should be noted that this Convention did not come into force until 10 April 2002.

⁴⁸ P Klein, *International Convention for the Suppression of the Financing of Terrorism*, UN Audiovisual Library of International Law, at 1.

⁴⁹ A Culley, ‘The International Convention for the Suppression of the Financial of Terrorism: a legal tour de force?’ [2007] 29 *Dublin University Law Journal* 397–413, at 397.

⁵⁰ Article 8, *supra* at note 25. Up until this point, although the perpetrators were being prosecuted by the U.S. Department of Justice, the financial supporters of these terrorist attacks were not being investigated. This fact demonstrates the little impact that the declaration had previously had upon national legislation and practice.

⁵¹ W Gilmore *Dirty Money- the evolution of international measures to counter money laundering and the financing of terrorism* (Council of Europe: Strasbourg, 2004) at 73-74.

⁵² Article 1. Para. 1 of the Convention, The United Nations (1999).

⁵³ Here Comes a World Convention to Strangle Terrorism, published in the *International Herald Tribune*, www.ambafrance-uk.org/international-convention-for-the.html 11.01.2000

and ultimately disrupted owing to the early lead provided by financial investigations”.⁵⁴ Large amounts of money being used to fund this planned attack were transferred into suspect’s accounts in the guise of charitable donations but were discovered and reported to the National Terrorist Financial Investigation Unit.⁵⁵ The financial information shared led to the prevention of a large scale attack and ultimately the arrest of 24 terrorists.⁵⁶ The International Convention illustrates that the international community recognises the crucial role that financial institutions play in CTF and the legal duties imposed by this convention ensure that such financial institutions are “the first line of defence against money laundering and terrorist financing”.⁵⁷

Additionally, the U.S. Department of State stated that, “the Convention fills an important gap in international law by expanding the legal framework for international cooperation in the investigation, prosecution, and extradition of persons who engage in terrorist financing.”⁵⁸ However, only four States ratified the Convention by September 11,⁵⁹ despite the fact that, as Kochan asserts,⁶⁰ authorities that highlighted the significance of the financial trail left by terrorists were largely ignored until the events of September 11 2001.⁶¹ The impact of the Convention was non-existent as there was no international effort in place that was directed towards preventing the funding of terrorism. Therefore, Ward suggested that the “existing prescriptions were

⁵⁴ A Acharya, *Targeting Terrorist Financing, International Cooperation and new regimes* (Routledge 2009) 43.

⁵⁵ Hereafter NTFIU. This Unit is based in the U.K.

⁵⁶ A Acharya, *Targeting Terrorist Financing, International Cooperation and new regimes* (Routledge 2009) 43.

⁵⁷ J Gurule, *Unfunding terror - the legal response to the financing of global terrorism* (Edward Elgar, 2008) 154. Following the US terrorist attacks, the Terrorist Financing Convention. It gained new relevance and adherence to the Convention by States increased dramatically. “The speed with which countries around the world have been galvanised is reflected in a United Nations Convention little known before 11 September” (J Scott Joynt ‘The hunt for terror funds hots up’, BBC News, 18th March 2002

⁵⁸ *Patterns of Global Terrorism*, 1999. Department of State, United States of America. Available at http://www.fas.org/irp/threat/terror_99/intro.html. Accessed 14.06.14

⁵⁹ Ibid at 4. There was not enough ratification in order for the Convention to become a Treaty. Currently, 186 UN Members have ratified the Convention (United Nations ‘United Nations Treaty Collection’, International Convention for the Suppression of the Financing of Terrorism’. Available from: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en. Accessed April 30 2015

⁶⁰ N Kochan, *The Washing Machine, How Money Laundering and Terrorist Financing soils us* (Thomson, 2005) at vii.

⁶¹ Speaking in 2002, Ron Nicholls, Deputy Assistant Secretary at the U.S. Treasury commented, “When we found someone plotting some terrorist act, we’d arrest him and then, only on a secondary level, we’d look through his finances to see where that leads” (BBC News online: ‘U.S. Terror Fund Drives Stalls’ September 3, 2002).

woefully inadequate in dealing with the multi dimensional nature of the challenge.”⁶² While the Convention is praiseworthy, without ratification by States, its existence is worthless. However, the urgency to sign and ratify this Convention increased dramatically following the September 11 attacks.⁶³

Additionally, the introduction of UNSCR 1267 called for the Taliban to comply with previous Resolutions⁶⁴ and “to cease provisions of sanctuary and training for international terrorists and their organizations”⁶⁵. Additionally, UNSCR 1267 created the Security Council Sanctions Committee whose purpose is to freeze any funds owned by the Taliban or are being used for the benefit of the Taliban. UNSCR 1267 was adopted unanimously in October 1999 and illustrates that the UN had taken action against terrorism prior to 2001. As previously discussed, the UN has specifically targeted terrorist financing and did so with the introduction of the International Convention, which initially received limited support.⁶⁶ In the aftermath of September 11 2001, the UN re-iterated their previous requests to member states to comply fully with UN Security Council Resolutions and to implement measures to counter terrorism.⁶⁷ This request was strengthened by the introduction of UNSCR 1373, which represents the cornerstone of the international fight against the financing of terrorism. It was swiftly adopted following the attacks in the U.S.,⁶⁸ and, pursuant to Chapter VII of the United Nations Charter, is legally binding on all 193 member states. In accordance with this Resolution, member states are required to adhere to four main requirements:

⁶² C. A Ward, “The Role of the United Nations Security Council in Combating International Terrorism,” Paper presented at the Oxford Conference- The Changing Face of International Co-operation in Criminal Matters in the 21st Century, Christ Church College, Oxford, 27-30 August 2001 at 1.

⁶³ This Convention entered into force on 31 October 2001, although many countries had previously signed, it has not achieved the necessary 22 ratifications. www.mofa.go.jp/announce/2001/10/1031.html.

⁶⁴ UNSCR 1189 (1998), UNSCR 1193 (1998) and UNSCR 1214 (1998).

⁶⁵ S.I. UNSCR 1267 (1999)

⁶⁶ The UN also took action against international terrorism in 1999 with UNSCR 1269 which recognised the need to strengthen anti terrorism efforts and requested all countries to work together to prevent acts of terrorism.

⁶⁷ This request came in the form of UNSCR 1368 which called on “the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999)”.

⁶⁸ It came into effect on 28 September 2001.

- to avert and suppress the financing of terrorism;⁶⁹
- to criminalise the collection of funds with the knowledge that they will be used for terrorist purposes;⁷⁰
- to freeze the funds and economic resources of those who commit or attempt to commit acts of terrorism;⁷¹
- to prohibit nationals from within their territory from providing funds to people who commit or attempt to commit terrorist acts.⁷²

These obligations aim to stifle terrorist funds as Myers asserts, UNSCR 1373 “presents a powerful tool to leverage co-operation by all states on financing issues, information sharing, police action, criminal prosecution, asset forfeiture, and border control”.⁷³ The scope of UNSCR 1373 was amended by U.N Security Council Resolutions 1390,⁷⁴ 1456⁷⁵ and 1566.⁷⁶ UNSCR 1373 also created the Counter-Terrorism Committee (CTC), which is charged with monitoring compliance with the provisions.⁷⁷ The Security Council is empowered to impose sanctions on the states that are deemed to have failed in successfully implementing CTF measures. The CTC seeks to promote the stimulation of best practice to ensure the successful implementation of UNSCR 1373. Murthy notes, “the CTC has widely chosen to go slow. It has tended to concentrate on the task of aiding and monitoring legislative and administrative capacity development rather than rushing to find deficiencies in the enforcement.”⁷⁸

⁶⁹ S/RES/1373 (2001) 4385th meeting, Article 1(a).

⁷⁰ S/RES/1373 (2001) 4385th meeting, Article 1(b).

⁷¹ S/RES/1373 (2001) 4385th meeting, Article 1(c).

⁷² S/RES/1373 (2001) 4385th meeting, Article 1(d).

⁷³ Myers J, ‘Disrupting terrorist networks: the new US and international regime for halting terrorist finance’ [2003] *Law and Policy in International Business*, 34, at 17.

⁷⁴ United Nations ‘United Nations Security Council Resolution 1390, January 28, 2002. Available from: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1390\(2002\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1390(2002)). Accessed 05.05.15

⁷⁵ United Nations ‘United Nations Security Council Resolution 1456, January 20, 2003. Online. Available from: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1456\(2003\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1456(2003)). Accessed May 5 2015.

⁷⁶ United Nations ‘United Nations Security Council Resolution 1566, October 8, 2004. Online. Available from: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1566\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1566(2004)). Accessed May 5 2015.

⁷⁷ The Security Council also established the Counter Terrorism Executive Directorate (CTED) under S.C. Resolution 1535 (2004). The CTED is charged with assisting the CTC in overseeing compliance with Resolution 1373.

⁷⁸ C.S.R Murthy ‘The U.N. Committee on Counter-Terrorism’ FES Briefing Paper, 15 September 2007. Available at <http://library.fes.de/pdf-files/iez/04876.pdf>.

Further to this, the EU's response to the events of September 11 2001 came with the adoption of a Framework Decision on Fighting Terrorism,⁷⁹ which Brent notes⁸⁰ "constituted the Community's principal legislative response to the 11 September 2001 terrorist attacks ... [and] it also partly implements the Community's obligation deriving from UN Security Council Resolution 1373".⁸¹ The passing of Council Regulation 2580/2001, binding on all Member States made provision for the freezing of funds of all persons who participate, knowingly and intentionally, in acts of terrorism or preparation.⁸² Furthermore, Council Decision 2001/927/EC gives effect to the list of persons to which Council Regulation 2580/2001 applies. Additionally, Council Resolution 881/2002 included a 'black list' of names that were identical to the list determined by the UN Sanctions Committee. Article 14 of this Council Common Position requires all Member States to ratify the necessary international conventions and treaties.

The Financial Action Task Force (FATF) has also been instrumental in the 'Financial War on Terrorism.' The FATF was established during the 1989 G-7 Summit in Paris with the aim of developing an internationally coordinated approach to money laundering.⁸³ The 40 Recommendations were originally drawn up in 1990 to counter the misuse of financial institutions to launder the proceeds of drug dealing. The 40 Recommendations were introduced following an analysis by the FATF of existing money laundering counter measures and a review of money laundering methods and trends. They were revised in 1996⁸⁴ and again in 2003⁸⁵ to take into account developing money laundering methods. The standard set by the FATF was intended to be applied internationally to ensure that the laundering of monies was not simply

⁷⁹ 2002 OJ L164/3.

⁸⁰ Along with Council Common Position (27 December 2001) [2001] OJ L344/93 and the 2001 Council Regulation (EC) 2580/2001.

⁸¹ Brent Richard, International legal sources IV – the European Union and the Council of Europe, in W Blair and R Brent (eds), *Banks and financial crime – the international law of tainted money* (Oxford University Press 2008) 114-115.

⁸² Article 3, Council Regulation (EC) No 2580/2001.

⁸³ The FATF works alongside other international organisations such as the International Monetary Fund (IMF) and the World Bank.

⁸⁴ Financial Action Task Force on Money Laundering, Annual report 1996-1997, June 1997. Available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/1996%201997%20ENG.pdf>. (accessed 17.03.16).

⁸⁵ Financial Action Task Force on Money Laundering, 'The Forty Recommendations', June 2003. Available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf>. (accessed 17.03.17).

moved to countries with weaker regulation in place. It was, and is regarded as a global problem that requires a global response. Alexander commented, “the unilateral efforts of individual states were [sic] considered to be inefficient and unsuccessful in addressing the global threat of financial crime”.⁸⁶ Further to this, Johnson comments that the Recommendations “provide a complete set of anti-money laundering procedures which covers the relevant laws and their enforcement, the activities and regulation of the financial system and matters relating to international co-operation”.⁸⁷ These Recommendations, revised in 2012, provide advice on the measures that countries should have in place to aim to:

- “identify the risks and develop policies and domestic coordination;
- pursue money laundering, terrorist financing and the financing of proliferation;
- apply preventative measures for the financial sector and other designated sectors;
- establish powers and responsibilities for the competent authorities and other institutional measures;
- enhance the transparency and availability of beneficial ownership information of legal persons and arrangements; and
- facilitate international cooperation”.

Whilst the original 40 Recommendations offered comprehensive counter measures to money laundering, they do not represent a binding convention. However, this has not precluded many countries from actively adopting these measures with the FATF declaring that it has set such measures with a degree of flexibility so that individual countries situations and constitutional structures may be taken into consideration.⁸⁸ This is crucial, as all countries have varying legal and financial systems so the application of identical provisions is impractical. Instead, the Recommendations seek to provide the minimum standard by which they suggest countries to set counter

⁸⁶ K Alexander, ‘Multi-national efforts to combat financial crime and the Financial Action Task Force, [2000] 2(5) *Journal of Insurance and Financial Management*, 178-192.

⁸⁷ J Johnson ‘Is the global financial system AML/CTF prepared? [2008] *Journal of Financial Crime* 15(1) 7-21, at 11.

⁸⁸ www.fatf-gafi.org/document/28/0,3343,en_32250379_32236920_33658140_1_1_1_1,oo.html. These Recommendations have been endorsed by 170 countries.

measures to minimise the opportunity for criminals to launder money. The FATF has also been influential in the international legal response to financial crime by ensuring that minimum standards of compliance are being achieved. The Recommendations have been referred to as “the bible for dirty money regulation worldwide”.⁸⁹ The FATF undertakes periodical reviews of countries and identifies features of their legal frameworks, which may be vulnerable to financial crime. This process involves the use of 25 criteria against which jurisdictions are examined identifying unfavourable regulations and practices that are contrary to international efforts against money laundering. It is on the strength of these findings that the FATF has published a list of “non-cooperative countries and territories” or NCCTS.⁹⁰ This list details those jurisdictions that are non-compliant with minimum standards and effectively discourages countries from doing business with them.

Whilst the FATF’s 40 Recommendations have been successful,⁹¹ in preventing and detecting money laundering, they have had a limited impact on the elimination of terrorist financing. As has been previously discussed, the notion of preventing and detecting terrorist funds was until September 11th a peripheral concern; Gilmore notes that “prior to the events of 11th September the issue of terrorist financing had not, assumed the position of any prominence in the activities of the Financial Action Task Force”.⁹² As such the 40 Recommendations were originally directed at the laundering of criminal proceeds and Kochan explains that whilst “money laundering and terrorist financing are invariably linked in the minds of politicians, police and bankers...the two are, in fact, very different”.⁹³ This implies that the provisions designed to combat

⁸⁹ ‘New Rules Widen Dirty Money Fight’ BBC News, 20 June 2003. Available at: <http://news.bbc.co.uk/1/hi/business/3007298.stm>. Accessed: 01.12.16.

⁹⁰ Commonly referred to as the FATF ‘Blacklist’. These countries are now referred to as High Risk and Non Cooperative Jurisdictions. Hereafter HRNC.

⁹¹ Doyle asserts, “on the one hand the FATF is to be commended for its heavy-handed and almost instantly effective approach, especially after a decade of lukewarm results; on the other, the group’s threatened “ultimate recourse,” if instituted, might well jeopardize the integrity of some of the most important documents undergirding the anti-money laundering effort” (T Doyle, ‘Cleaning up anti-money laundering strategies: current FATF tactics needlessly violate international law’ [2002] 24 *Houston Journal of International Law* 279-313).

⁹² W Gilmore Dirty money – the evolution of international measures to counter money laundering and the financing of terrorism (Council of Europe: Strasbourg, 2004) at 123. Gurule observes that before this time the FATF Recommendations has “concentrated upon promoting international standards against money laundering” (J Gurule, *Unfunding terror - the legal response to the financing of global terrorism*, (Edward Elgar, 2008) at 9).

⁹³ N Kochan, *The Washing Machine, How Money Laundering and Terrorist Financing soils us* (Thomson, 2005) at 65.

money laundering may be of limited use in the prevention and detection of terrorist financing. Indeed, Warde has commented that whilst money laundering and terrorist financing have for political reasons become interchangeable since 9/11, he contends that the two may be the reverse of each other. He states: “the logic of money laundering is in many ways the exact opposite of that of the funding of ideologically driven terrorism. One is about hiding the proceeds of crime in the financial system; it assumes a crime-for-profit logic. The other is, in the overwhelmingly majority of cases, about clean money being “soiled”.”⁹⁴ Such differentiation in characteristics indicates that separate provisions to deal with the financing of terrorism are required and in the immediate aftermath of September 11, the FATF held an extra plenary session to consider the expansion of its mandate to include the issue of terrorist financing.⁹⁵ The outcome of this meeting was the release of then ‘8 Special Recommendations’⁹⁶ aimed at combating the financing of terrorism. Gurule commented on this action that, “within seven weeks following the terrorist attacks on the World Trade Centre and the Pentagon, the FATF developed a comprehensive set of international standards to prevent the financing of terrorism that had eluded the international community”.⁹⁷ Again, this guidance for provision was intended to be enacted through domestic legislation and a ‘ninth recommendation’ was added in October 2004.⁹⁸ These Recommendations require all countries to immediately ratify the International Convention and take steps to implement related UNSCR.⁹⁹ Accordingly, they require that the financing of terrorism is criminalised¹⁰⁰ and measures are introduced that allow countries to instantly freeze funds or other assets of terrorists or those who finance terrorism.¹⁰¹ The Recommendations also suggest

⁹⁴ I Warde, *The Price of Fear, Al Qaeda and the truth behind the financial war on terror*, (I.B.Tauris & Co, 2007) at 36.

⁹⁵ This extra plenary session was held on October 31 2001 in Washington D.C.

⁹⁶ FATF on Money Laundering, Annual Report-2001-2002, June 2002, Annex A- The Eight Special Recommendations on Terrorist Financing. Available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/2001%202002%20ENG.pdf>.

⁹⁷ J Gurule, *Unfunding terror - the legal response to the financing of global terrorism*, (Edward Elgar, 2008) at 10.

⁹⁸ FATF IX Special Recommendations, October 2001. Available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>. Hereafter the Recommendations.

⁹⁹ Recommendation I, FATF IX Special Recommendations, October 2001

¹⁰⁰ Recommendation II, Ibid. This also requires countries to ensure such offences are designated as money laundering predicate offences.

¹⁰¹ Recommendation III, supra. In addition, the FATF request that countries ensure they have the legislative tools in place to confiscate property that is the proceeds of terrorists acts or is intended to be used for a terrorist act or to fund a terrorist organisation.

that suspicious transactions are reported immediately ¹⁰² and that wire transfers are scrutinised to prevent the financial system being used by terrorists for the movement of funds around the world.¹⁰³ Further to this, the Recommendations propose that all countries ensure that alternative remittance systems are subject to anti-money laundering requirements.¹⁰⁴ International Co-operation in terrorist financing investigations is also encouraged,¹⁰⁵ along with the requirement that countries implement measures that detect the physical cross-border transportation of currency and bearer negotiable instruments.¹⁰⁶ The Recommendations also call on countries to ensure that regulations are in place to prevent the abuse of non profit organisations by terrorists.¹⁰⁷

These ‘9 Special Recommendations’ together with the 40 Recommendations,¹⁰⁸ provided detailed guidance on how to achieve a basic CTF framework, which detects, prevents and suppresses the financing of terrorism. In February 2012, the FATF published its revised set of International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. The 40 Recommendations and 9 Special Recommendations were consequently amended and it has been suggested that these changes “have attempted to provide governments with stronger mechanisms to tackle financial crime.”¹⁰⁹ Some of the international community has supported the Recommendations by the FATF through the implementation of UNSCR.¹¹⁰ This endorsement has further strengthened the global response to what is inherently a transnational problem.

¹⁰² Recommendation IV, *ibid.*

¹⁰³ Recommendation VII, *Ibid.*

¹⁰⁴ Recommendation VI, *Ibid.*

¹⁰⁵ Recommendation V, *ibid.* This recommendation also asks countries to ensure that they do not provide a safe haven for terrorists or supporters of terrorism.

¹⁰⁶ Recommendation IX, *Ibid.*

¹⁰⁷ Recommendation VIII, *Ibid.*

¹⁰⁸ These Recommendations were amended in February 2012 and are now referred to as the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. Acharya observes that the FATF have been assisted by other international organisations such as the International Monetary Fund (IMF), the World Bank, the G7, the G8, the Egmont Group of financial intelligence units and the Asia Pacific economic Cooperation Forum (APEC). (Acharya, A. *Targeting Terrorist Financing – International Cooperation and New Regimes* (Routledge Cavendish, 2009) at 7.

¹⁰⁹ Harrison K & Ryder N, *The Law Relating to Financial Crime in the United Kingdom*, (2nd edn, Routledge, 2015) at 23.

¹¹⁰ The FATF currently consists of 34 member jurisdictions and 2 regional organisations. http://www.fatf-gafi.org/document/52/0,3343,en_32250379_32236869_34027188_1_1_1_1,00.html

The ratification of these provisions in the U.S., U.K. and Canada have collectively criminalised the financing of terrorism, and provided for the freezing of assets and designation of suspected terrorists and terrorist financiers. However, whilst the U.S., U.K. and Canada have all largely implemented the international CTF provisions, it should be noted that prior to September 11 2001, not all of these jurisdictions had implemented CTF related measures. For example, although the 1998 al-Qaeda bombings in Africa prompted an investigation into the finances of Osama Bin Laden by the U.S. it was not until September 11 2001,¹¹¹ that “the administrative structure suddenly and dramatically began to focus on the issue”.¹¹² The outcome of these deadly terrorist attacks in the U.S. was a “180 degree” turn of administration policy from money laundering to terrorist financing.¹¹³ Within days, President George Bush announced “a strike on the financial foundation of the global terror network”¹¹⁴ and thus instigated the ‘financial war on terrorism’¹¹⁵.

This historical situation in the U.S can be contrasted with the U.K. who had in place a number of statutory measures to tackle terrorism including the Northern Ireland (Emergency Provisions) Act 1973¹¹⁶ and the Prevention of Terrorism (Temporary Provisions) Act 1974.¹¹⁷ Further to these, Part III of the Prevention of Terrorism (Temporary Provisions) Act 1989, criminalised terrorist financing and provided the government with the power to seek the forfeiture of any money or other property,

¹¹¹ It is important to note here however that the financing of terrorism had been targeted by President Bill Clinton following the al-qaeda attacks in Kenya and Tanzania in 1998, President Clinton implemented Presidential Executive Order 13,098- Blocking Property of UNITA and Prohibiting Certain Transactions With respect to UNITA and Presidential Executive Order 13,099- Prohibiting Transactions with Terrorists Who Disrupt the Middle East Peace Process.

¹¹² L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press, 2008) at 147. Although attention paid to CTF significantly changed following September 11 2001, the U.S. did have some CTF measures in place before this time. These measures were found amongst the Anti Money Laundering Strategy. For example the Currency and Foreign Transactions Reporting Act 1970 (Bank Secrecy Act) contained reporting provisions for the financial sector which aimed to make the financial sector more transparent and avoid its exploitation by money launderers and terrorist financiers. This legislation was supported by other provisions found in the Money Laundering Control Act 1986, the Anti-Drug Abuse Act 1988, the Anti-Money Laundering Act 1992 and the Money Laundering Suppression Act 1994. These provisions strengthened the AML policy by expanding US forfeiture powers and increasing currency reporting requirements.

¹¹³ L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press, 2008) at 160.

¹¹⁴ CNN News. ‘We will starve the terrorists,’ September 24th 2001, available at: <http://edition.cnn.com/2001/US/09/24/ret.bush.transcript/index.html>. Accessed 01.12.16.

¹¹⁵ Harrison K & Ryder N, *The Law Relating to Financial Crime in the United Kingdom*, (2nd edn, Routledge, 2015) at 50.

¹¹⁶ c.53.

¹¹⁷ c.56.

which, at the time of the offence, the suspect has in his possession or under his control.¹¹⁸ In order to improve on these provisions and provide a comprehensive policy that covered fund-raising for all terrorist purposes, the Terrorism Act 2000 was introduced. These measures were based on recommendations made by the Home Office,¹¹⁹ and the 2000 Act represented a major overhaul of the U.Ks counter terrorism policy and introduced domestic legislative measures to implement those of the International Convention. The legislative responses of both the U.K. and the U.S. encompass the international approach to CTF and follow a three-pronged method; this includes the criminalisation of terrorist financing, the ability to freeze terrorist assets and the imposition of reporting requirements on financial and deposit taking institutions.¹²⁰

Like the U.S., Canada has a relatively short history of counterterrorist legislative provisions and most of the measures to combat the financing of terrorism were brought in as a response to September 11.¹²¹ To date, the only statutory law it has implemented in relation to counter terrorism and terrorist financing is the Anti Terrorism Act 2001.¹²² Prior to this, terrorism was dealt with via the War Measures Act 1914. However, the use of this legislation was very controversial¹²³ and its measures were only intended for use on a strict and temporary basis.¹²⁴ Recognition of the permanent need for counter terrorism provisions and the importance of the financing of terrorism came after the September 11 attacks and the ATA 2001 represents Canada's primary counter terrorist legislation. These provisions have been referred to as an "omnibus" Act, which amended 19 pieces of legislation and crucially brought Canada into line with UN anti-terrorism legislation.¹²⁵ Furthermore, the content of the ATA 2001 suggests that Canada's approach towards terrorist financing is a three-pronged method, mirroring that of the U.S. and U.K. This chapter now

¹¹⁸ Prevention of Terrorism (Temporary Provisions) Act 1989, s.13

¹¹⁹ Home Office *Legislation against terrorism- a consultation paper* (Home Office: London)) 1998b)

¹²⁰ Ryder, N, *Financial Crime in the 21st Century, Law and Policy*, (Edward Elgar, 2011) at 52.

¹²¹ The Proceeds of Crime (money laundering) and Terrorist Financing Act 2000 was brought in on June 29 2000 to facilitate the combating of money laundering and terrorist financing and allowed for the creation of Financial Transactions Reports Analysis Centre of Canada (FINTRAC).

¹²² This is the Anti Terrorism Act 2001.

¹²³ The controversy surrounding the use of this Act during the October Crisis of 1970 is discussed later in the chapter, however for a more detailed discussion please see Chapter 6: Canada.

¹²⁴ This Act was intended to be used at times of 'war' 'invasion' or 'insurrection' (War Measures Act, S.C. 1914, c. 2, s. 6).

¹²⁵ R.S.C. 1985, c. U-2.

examines the U.N. response to terrorist financing and the impact that their CTF provisions may have on human rights. The U.N approach to countering the financing of terrorism is particularly important due to the fact that the U.S., U.K. and Canada have all, to some, followed the U.N.'s lead.

3.4 United Nations

The UN is highly influential in the approach its member states take towards CTF. This is due to the fact that the UN sets encourages a coordinated effort from member states. Whilst the U.S. has had a sound influence in the international approach to CTF, the U.K, Canada and the U.S. are all guided by the U.N. Indeed, Ryder correctly observes that, “the UN has become the fulcrum of the Financial War on Terrorism”.¹²⁶ However, whilst the prevention of terrorism features strongly in the aims of the UN, so too does the protection of human rights.¹²⁷ Terrorism has been included on the UN agenda for many years and they have advocated international cooperation in confronting the problem.¹²⁸ Also central to its aims and indeed its counter terrorism strategy is the protection of human rights. The UN state that, “as an assault on the principles of law and order, human rights and the peaceful settlement of disputes, terrorism runs counter to the principles and purposes that define the United Nations”.¹²⁹ Terrorism threatens international peace and security and endangers human rights.¹³⁰ The UN is charged by its Member States¹³¹ with identifying measures that can be taken nationally to prevent and suppress terrorism and

¹²⁶ N Ryder ‘The Financial War on Terrorism: A Review of Counter-Terrorist Financing Strategies Since 2001’ (Routledge, 2015) at 49

¹²⁷ Article 1 of the Charter of the United Nations states that one of the purposes of the UN is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all”. This is supported by the UN’s creation in 2005 of the post of Special Rapporteur on the promotion and protection of human rights and fundamental freedoms whilst countering terrorism.

¹²⁸ In September 2006, the United Nations implemented The United Nations Global Counter-Terrorism Strategy A/RES/60/288. This Resolution contains a common strategic approach by member states to countering terrorism. In the Plan of Action contained in this Resolution, member states of the UN resolve to, undertake ‘measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism’.

¹²⁹ UN Action to Counter Terrorism. Available at: www.un.org/terrorism/makingadifference.shtml.

¹³⁰ Article 3 of the Universal Declaration of Human Rights states that “everyone has the right to life, liberty and security of person”. Acts of terrorism threaten this right.

¹³¹ This role is documented in the Charter of the United Nations.

contributes to the global combat of terrorism.¹³² The UN undertakes this function by publishing UNSCRs, the details of which, member states are required to action in their own countries. As regards to the counter-terrorism UNSCR, the UN has been unequivocal in their condemnation of terrorism but has reaffirmed the point that the prevention of terrorism should not be at the expense of human rights. For example, in the UN General Assembly Resolution 60/288 the United Nations Global Counter-Terrorism Strategy, Measure IV recognises the significance of upholding human rights, and it states:

“We resolve to undertake the following measures, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism”.¹³³

Since, the UN is guiding Member States on how to tackle terrorism; their attitude towards human rights in this advice is of incredible significance. The UN provides guidelines to member states on how terrorism can be prevented and advocates that this can be achieved by preventing financial support for terrorists.¹³⁴ Of relevance here are UNSCRs 1267 and 1373.¹³⁵ UNSCR 1267 is directed towards al-Qaeda, Osama bin Laden, the Taliban and other known or suspected associates. It called for the Taliban to comply with previous Resolutions¹³⁶ and “to cease provisions of sanctuary and training for international terrorists and their organizations”.¹³⁷ Additionally, UNSCR 1267 created the Security Council Sanctions Committee, who freezes any funds that are owned by the Taliban or are being used for the benefit of

¹³² This responsibility amongst others is articulated in the Charter of the United Nations. Article 1 states that one of the purposes of the UN is: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”.

¹³³ United Nations General Assembly A/RES/60/288 The United Nations Global Counter-Terrorism Strategy.

¹³⁴ UN International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999.

¹³⁵ Hereafter UNSCR 1267 and UNSCR 1373.

¹³⁶ UNSCR 1189 (1998), UNSCR 1193 (1998) and UNSCR 1214 (1998).

¹³⁷ S.1. UNSCR 1267 (1999).

the Taliban. The UNSC is responsible for the maintenance of international peace and security,¹³⁸ as Gurule notes, “the UN Security Council has played a critical leadership role in developing, revising, strengthening and implementing the legal regime”.¹³⁹ Furthermore, UNSCR 1373 is the foundation of the international approach to countering the financing of terrorism. Flynn notes “the Resolution broke new ground by placing a number of general legislative obligations on all Member States of the United Nations, thus exercising an unprecedented global legislative sweep”.¹⁴⁰ The U.S. Department of Treasury took the view that this “has been critical in winning support for our campaign and they have been essential tools for building the international coalition against terrorist financing.”¹⁴¹

Whilst some have welcomed the introduction of these measures, their negative effects should not be overlooked. For instance, the power to declare a person as involved in terrorism and to subsequently freeze their assets for an indefinite amount of time pursuant to article 1(b) and 1(c) UNSCR 1373, may breach human rights, such as the right to a fair trial. Moreover, by virtue of UNSCR 1267, if a Member State submits a name to the 1267 Committee and consensus is reached within the Committee then that person is added to the Consolidated List of Proscribed List Organizations and Individuals. It is then the duty of all UN member states to freeze the person’s assets, bar the individual from travelling and to prevent the supply of arms to the group or individual.¹⁴² Any group or individual added to this list can remain so for an indefinite period of time. Such a situation implies that whilst these measures are proclaimed as preventive, they are in fact punitive. If someone is designated a terrorist or terrorist supporter, suffering an asset freeze and travel a ban are all factors that have an overwhelmingly negative impact on a person’s life. Cameron suggests that the power of the 1267 Committee to list groups and individuals implies that “the Security Council is now behaving as a ‘quasi-criminal’ investigating, prosecuting and sentencing agency. It is starting to do things which were previously only done by

¹³⁸ The role of the UN Security Council is detailed in the Charter of the United Nations at Articles 23-26.

¹³⁹ J Gurule, *Unfunding terror - the legal response to the financing of global terrorism*, (Edward Elgar, 2008) at 233.

¹⁴⁰ E.J. Flynn ‘The Security Council’s counter-terrorism committee and human rights’ [2007] 7(2) *Human Rights Law Review* (2007) 371-384.

¹⁴¹ United States Treasury Department Contributions by the Department of the Treasury to the Financial War on Terrorism (Washington: US Treasury Department 2002).

¹⁴² S/Res/1267 (1999).

national judges, police, prosecutors and intelligence officials”.¹⁴³ Such an argument is extremely valid. Punitive sanctions such as these should not be permitted to apply against a person who is yet to be convicted of any crime or indeed even charged with a terrorist related offence. Moreover, this situation is allowed to continue by the absence of a route by which the designated person can challenge these sanctions. Whilst a de-listing request can be made, there is no opportunity available whereby an individual can directly challenge a listing themselves.¹⁴⁴ No right to trial is provided for until a criminal charge is brought. Up until this point, the suspected terrorist has no knowledge of the reason for the UN Security Council’s action, indeed the suspect might never learn this, and the sanctions continue to be applied for an indeterminate duration. Potential violations of national and international human rights are beginning to be brought to the forefront in the courts and this thesis shall discuss the right to a fair trial, which has been severely affected by the operation of CTF sanctions such as asset freezing and shall be discussed in further detail later in the chapter. For now, discussion turns to the approach of the EU to the prevention of the financing of terrorism and its impact on human rights.

3.5 The European Union

The EU policy on terrorist financing became apparent following September 11, when Europe accepted that its “open borders and different legal systems benefitted terrorists”¹⁴⁵ and consequently developed an Action Plan on Terrorism,¹⁴⁶ which included the need to prevent terrorist financing. This Plan led to the adoption of the Framework Decision on Fighting Terrorism.¹⁴⁷ Prior to this, the EU’s focus was on the prevention of money laundering. This point can be demonstrated by the content of

¹⁴³ Iain Cameron, Protecting Legal Rights: on the (in)security of targeted sanctions. in Peter Wallensteen and Carina Staibano (eds), *International sanctions : between words and wars in the global system* (Frank Cass 2005) 189.

¹⁴⁴ An application for de-listing is made to the UN Security Council. Since 2009, the appointment of an Ombudsman means that the Security Council are assisted in their consideration of any de-listing requests.

¹⁴⁵ A Richard, *Fighting Terrorist Financing: Transatlantic Cooperation and International Institutions*, 2005 Center for Transatlantic Relations, John Hopkins University at 83.

¹⁴⁶ EU Plan of Action on Combatting Terrorism, available at: http://www.consilium.europa.eu/uedocs/cmsUpload/EU_PlanOfAction10586.pdf (accessed: 17.03.17).

¹⁴⁷ 2002 OJ L164/3.

its first two Money Laundering Directives,¹⁴⁸ which mirrored the approach of the FATF, terrorist financing was simply not an area of concern. The EU did not criminalise the financing of terrorism until it implemented the Third Money Laundering Directive in 2005.¹⁴⁹ The Fourth Money Laundering Directive,¹⁵⁰ introduced in 2015 requires Member States to update their money laundering laws by June 2017.¹⁵¹ This Directive seeks to implement the FATF Recommendations and introduces a stricter regime. The central changes made by this legislation relate to; further emphasis upon a risk based approach; the expansion of the definition of a politically exposed person (PEP); the development of new rules that apply to electronic money and registers for ultimate beneficial ownership and an improved sanctions regime.¹⁵² Moreover, the terrorist attacks in Paris in November 2015 have galvanized the EU to tackle terrorist financing.¹⁵³ These attacks prompted EU institutions and national governments to take urgent action to strengthen current legislation. An Action Plan devised by the European Commission was issued in February 2016 and its objectives include improving the prevention of the movement of funds and the identification of terrorist funding and to focus on the disruption of the sources of revenue for terrorist organisations.¹⁵⁴

However, the measures must be compatible with human rights. Whilst the Framework Decision on Fighting Terrorism promotes consistency with the UN counter terrorism measures, the Parliamentary Assembly of the Council of Europe (PACE) has stressed that “their [counter terrorism provisions] imposition must, under the European Convention on Human Rights (ECHR) as well as the United Nations International

¹⁴⁸ Council Directive 91/308/EEC, 10 June 1991, and Council Directive 2001/97/EC, 4 December 2001

¹⁴⁹ Council Directive 2005/60/EC, 26 October 2005. Turksen opines that the intention of the Third Directive was to “provide a common EU basis and benchmarks for implementing the FATF Recommendations” (U Turksen, Implications of anti-money laundering law for accountancy in the European Union – a comparative study’. in Ryder and others (eds), *Fighting Financial Crime in the Global Economic Crisis* (Routledge 2014) 81.

¹⁵⁰ 4th Anti-Money Laundering Directive (EU) No. 2015/849.

¹⁵¹ Such an undertaking is uncertain however due to the outcome of the EU Referendum which will see the U.K. eventually leaving the EU.

¹⁵² J. Kaetzler and T. Kordys, ‘Fourth Money Laundering Directive: Increased risk management requirements’ [2015] 4(5) *Compliance & Risk*, 2–5.

¹⁵³ Suicide bombers and gunmen simultaneously carried out seven coordinated attacks targeting a concert hall, stadium, restaurants and bars, killing 130 people and leaving hundreds wounded (BBC News Paris attacks: what happened on the night, 9 December 2015. Accessed 01.12.16).

¹⁵⁴ European Commission ‘Action plan to strengthen the fight against terrorist financing’ February 2016. Available at: http://ec.europa.eu/justice/criminal/files/aml-factsheet_en.pdf. Accessed 01.12.16.

Covenant on Civil and Political Rights (ICCPR), respect certain minimum standards of procedural protection and legal certainty”.¹⁵⁵ PACE also noted that the EU and UN needed to make “procedural and substantive improvements” which guard against human rights breaches.¹⁵⁶ The provisions implemented under the EU counter terrorist regime are similar to those applied by the UN Security Council’s Sanctions Committee and thereby contribute to the international effort to choke off terrorist funds and dismantle their financial networks.¹⁵⁷ However, comparable approaches to CTF indicate that the EU regime attracts similar problems. For instance, the process of freezing the assets of a suspected terrorist raises many human rights concerns. In designating a person and consequently freezing their funds, infringements may occur on the right to privacy,¹⁵⁸ the right to be heard,¹⁵⁹ the right to property,¹⁶⁰ the right to be presumed innocent,¹⁶¹ the right to religion¹⁶² and the right to an effective remedy.¹⁶³ Consequently, the legality of these measures has been questioned.¹⁶⁴ For example, in the cases of *Ahmed Ali Yusuf and Al Barakaat International Foundation v Commission*¹⁶⁵ and *Yassin Adbullah Kadi v Council and Commission*¹⁶⁶ the applicants argued that Council Regulation (No. 881/20) should be declared void. This claim was rejected,¹⁶⁷ but in 2009,¹⁶⁸ the European Court of Justice (ECJ) reversed this decision for two reasons. Firstly, it held that the EU was capable of executing the Security

¹⁵⁵ Parliamentary Assembly of the Council of Europe (PACE), Resolution 1597 (2008), adopted 23 January 2008, available at: <http://assembly.coe.int/Documents/AdoptedText/ta08/ERES1597.htm>.

¹⁵⁶ Parliamentary Assembly of the Council of Europe (PACE), Resolution 1597 (2008), adopted 23 January 2008, available at: <http://assembly.coe.int/Documents/AdoptedText/ta08/ERES1597.htm>

¹⁵⁷ The EU’s contribution to the combating of terrorism was further enhanced with the EU Counter Terrorism Strategy 2005, which focused on four pillars: Prevent, Protect, Pursue and Respond. (EU Counter Terrorism Strategy, Council of the European Union 14469/4/05 REV 4).

¹⁵⁸ The right to privacy is provided for by Article 17, ICCPR and Article 8, ECHR.

¹⁵⁹ The right to be heard is provided for by Article 14, ICCPR and Article 6, ECHR.

¹⁶⁰ The right to property is provided for by Article 1, Protocol 1, ECHR.

¹⁶¹ The right to be presumed innocent is provided for by Article 14.2, ICCPR and Article 6.2 ECHR.

¹⁶² The right to religion is provided for by Article 18, ICCPR and Article 9, ECHR.

¹⁶³ The right to an effective remedy is provided for by Article 2.3, ICCPR and Article 13, ECHR. The impact of international anti terrorist financing provisions on these human rights shall be discussed in more detail later in the chapter.

¹⁶⁴ See for example, Case T-47/03 *Sison v Council*, unreported judgement of 11 July 2007; Case T-228/02 *Organisation des Modjahedines du Peuple d’Iran (OMP) v Council*, judgement of 12 December 2006.

¹⁶⁵ Case T-306/01.

¹⁶⁶ Case T-315/01,

¹⁶⁷ The claim failed on several grounds including; firstly, the Court of First Instance (CFI) ruled that the European Council is competent to freeze the funds of individuals in the combat of terrorism; secondly, the EU is bound to follow any obligations from the UN Charter and thirdly, the freezing of the applicant’s funds did not represent a violation of fundamental human rights and there had been no arbitrary deprivation of their property.

¹⁶⁸ *Kadi v Council of the European Union* (C-402/05 P) [2008] E.C.R. I- 6351.

Council Resolution as a Regulation.¹⁶⁹ Secondly, the Court “rejected the CFI’s analysis and emphasised that the EC Regulation implementing that Resolution *was* subject to scrutiny in the light of EC law fundamental rights standards”.¹⁷⁰ Johnston correctly identified that the Council’s decision was significant because “its implications for the future operation of the legal regimes for terrorist asset freezing at EC, international and national levels will be substantial”.¹⁷¹ Interestingly, Cardwell *et al.* commented that, “the approach of the ECJ is ultimately premised upon three key understandings, namely, the autonomy of the EU legal system, the constitutionality of the EU legal system and the centrality of fundamental rights to the operation of that legal system”.¹⁷²

The outcome of these cases is important to the issue of CTF powers that breach human rights such as the right to a fair trial. This judgement has validated the criticism made of the financial sanctions regime since its implementation. By accepting that “the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected”,¹⁷³ has given great weight to the contention that the UN sanctions procedure runs contrary to many human rights. The decision clearly recognises that the implementation of measures to comply with a UNSCR is of great consequence. Through failure to comply with due process norms, the fundamental principles of EU law had been violated. Whilst the Court only annulled the sanctions in relation to the applicants in *Kadi* and *Al Barakaat*, this decision has paved the way for dispute over future listings. Indeed challenges have quickly ensued.¹⁷⁴ In *Al Haramain Islamic Foundation*

¹⁶⁹ Johnston, A, ‘Frozen in time? The ECJ finally rules on the Kadi appeal’, [2009] 68(1) *Cambridge Law Journal*, 1-4, at 1.

¹⁷⁰ *Ibid.*

¹⁷¹ Johnston above, n 164 at 4.

¹⁷² Cardwell, P, French, D. and White, N, ‘Kadi v Council of the European Union (C-402/05 P) (Case Comment)’, *International Comparative Legal Quarterly*, [2009] 58(1), 229-240 at 233.

¹⁷³ Joined cases C-402/05 and C-415/05, *Kadi and Al-Barakaat International Foundation v Council & Commission*, 3 September 2008 at para.334.

¹⁷⁴ In the Case T-69/12 *Zavvar v Council* and Case T-71/12 *Meskarian v Council*, the claimants challenged the sanctions that were imposed on them due to their links with the Persia International Bank. The claimants argued that amongst other reasoning, their designation was disproportionate and that the sanctions were in “manifest violation of the applicant’s human and fundamental rights and [are] contrary to the principle of proportionality”. The claimants also brought judicial review proceedings challenging the U.K. Secretary of State for Foreign and Commonwealth Affairs for nominating them for the asset freeze and travel ban. In response to this challenge, the sanctions were lifted by the Council in August 2012.

Incorporated v U.S. Department of Treasury,¹⁷⁵ the court of appeals held that the due process rights¹⁷⁶ of the blocked entity (Specially Designated Global Terrorist) had been violated when the Office of Foreign Assets Control¹⁷⁷ had failed to mitigate the SDGT's inability to view the classified information that supported the designation.¹⁷⁸ Therefore, these successful challenges substantiate the suggestion that procedural improvements are urgently required if the international counter terrorism regime is to maintain legitimacy. The importance of this landmark case shall be discussed further in relation to each individual case study contained in this thesis. For now this chapter turns to a discussion of the FATF's influence in the international effort to counter terrorism and the adverse impact that their provisions may have upon human rights.

3.6 The Financial Action Task Force

The FATF is an inter-governmental body whose function it is to set standards and promote anti money laundering and terrorist financing initiatives. With this in mind, its role in the international effort to CTF is significant. Whilst the FATF is not a law making body, its influence should not be underestimated. Damais notes that the FATF's "Recommendations have been endorsed by more than 170 countries, are widely accepted as the international anti-money laundering and counter-terrorist financing standard, and have been, or are being, successfully implemented".¹⁷⁹ The 40 Recommendations and the 9 Special Recommendations were revised in 2012 and provide detailed guidance on how to achieve a basic framework, which detects, prevents and suppresses the financing of terrorism. However, membership of the FATF has adverse implications.¹⁸⁰ For example, being placed on the 'FATF

¹⁷⁵ 686 F.3d 965, 983 (9th Cir.2011).

¹⁷⁶ Pursuant to the Fifth Amendment of the U.S. Constitution which states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

¹⁷⁷ Hereafter OFAC.

¹⁷⁸ Former director of Al Haramain Islamic Foundation of Oregon was removed from the UN al-Qaida Sanctions List in Feb 2013 but remains a Specially Designated National in the U.S. (Department of Treasury Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List, October 11 2016. Available at: <https://www.treasury.gov/ofac/downloads/sdnlist.pdf> accessed: 19.10.16.

¹⁷⁹ A Damais, 'The Financial Action Task Force' in W.Mueller, C.Kalin and J.Goldsworth (eds.) *Anti-Money Laundering – International Law And Practice* (John Wiley and Sons Ltd, 2007) 71.

¹⁸⁰ These Recommendations were amended in February 2012 and are now referred to as the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation

Blacklist' can have a damaging effect and countries ¹⁸¹ that have found themselves designated as such have made significant attempts ¹⁸² to be deemed compliant with the FATF Recommendations. HRNC jurisdictions may not be regarded as favourable jurisdictions with which to do business, as financial transactions originating from or passing through their financial system are not subjected to a level of regulatory control that meets the international standard put forward by the FATF. The HRNC listing procedure has proven extremely successful. On conclusion of the HRNC process in 2001,¹⁸³ a total of 23 jurisdictions were listed due to a deficiency in their anti-money laundering and counter terrorist financing measures. All listed countries made considerable improvement in this area and have since been delisted,¹⁸⁴ suggesting that at present there should be in existence a fairly robust legal framework to combat money laundering and terrorist financing internationally. However, like the EU, the FATF has recently reiterated the importance of tracking and preventing the financing of terrorism. The rapidly growing terrorist organisation Islamic State of Iraq and the Levant (ISIL) "represents a new form of terrorist organisation where funding is central and critical to its activities".¹⁸⁵ With this in mind, they suggest that global CTF measures need to be further strengthened.

However, in spite of the proposed changes to CTF measures the FATF have attracted criticism for the severe sanctions. For example, Doyle argues that whilst the knowledge of the FATF HRNC list may have encouraged immediate action from

¹⁸¹ For example Myanmar was placed on the HRNC jurisdictions list in June 2001 for deficiencies in financial regulation not least the lack of a basis set of anti- money laundering provisions. A year later Myanmar attempted to rectify this with the implementation of The Control of Money Laundering Law (CMLL) (The State Peace and Development Council Law No. 6/2002). Despite this and further changes over the years, remaining deficiencies meant that Myanmar was kept on the HRNC List until October 2006. Nauru experienced a similar situation and made many changes to their financial legislation, which was finally deemed adequate in October 2005 and they were consequently removed from the HRNC List but the FATF continued to monitor their progress until October 2006. (Financial Action Task Force, Annual Review of Non-Cooperative Countries and Territories 2006-2007: Eighth NCCT Review, October 2007 at 4-5).

¹⁸² These changes include implementing basic anti-money laundering regimes.

¹⁸³ Currently Iran and the Democratic People's Republic of Korea both appear on the High Risk and non-cooperative Jurisdictions List. There are calls upon these two jurisdictions to take action and apply counter terror measures to deal with the risk of money laundering and terrorist financing in the international financial system. (FATF Public Statement, February 27 2015).

¹⁸⁴ The last jurisdiction to be removed from the NCCT list was Myanmar in October 2006.

¹⁸⁵ Financial Action Task Force Report 'Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)', February 2015 at pg.5. Also see N Ryder, 'Out with the old and ... in with the old? A critical review of the Financial War on Terrorism on the Islamic State of Iraq and Levant' (2017) *Studies in Conflict and Terrorism* (Special issue on 'Contemporary Issues, Innovation and Counter Terrorism'), 1-17.

those nations who were vulnerable to money laundering, the use of ‘blacklists’ is a “policy redolent of extraterritorial bullying”.¹⁸⁶ Whilst it is acknowledged that the FATF’s approach may have prompted countries to implement provisions that contribute towards an internationally cohesive AML policy, the actual impact of these regulations is uncertain.¹⁸⁷ This process was controversial¹⁸⁸ and the International Monetary Fund (IMF) and World Bank did not support its use by the FATF. Since 2002, no countries have been added to the HRNC jurisdictions list.¹⁸⁹

Whilst becoming a member of the FATF is voluntary and the Recommendations are not compulsory, countries feel obliged to attempt to conform due to the fear of sanctions by the FATF.¹⁹⁰ Therefore, the Recommendations may not be regarded as merely advisory and jurisdictions are under pressure to conform. Once a member, the FATF is said to promote flexibility with regard to implementing Recommendations and whilst it has been noted here that the FATF allow for varying constitutional frameworks and accept that this implies that the Recommendations cannot be incorporated in an identical fashion, it has been argued that this flexibility is not apparent as they “advocate legislation in very specific detail”.¹⁹¹ It is proposed that by following this guidance member states are breaching international human rights Treaties as well as their own domestic human rights legislation. This is due to the fact that the Recommendations suggest that certain counter terrorism provisions should be put into place such as measures, which seek to prevent the financing of terrorism. The operation of such measures can have a significant detrimental impact on human rights but in particular the right to trial, this point shall be examined later in the chapter.

¹⁸⁶ T Doyle, Cleaning up anti-money laundering strategies: current FATF tactics needlessly violate international law, [2002] 24 *Houston Journal of International Law*, 279-313.

¹⁸⁷ T Doyle, Cleaning up anti-money laundering strategies: current FATF tactics needlessly violate international law, [2002] 24 *Houston Journal of International Law*, 279-313.

¹⁸⁸ Gilmore discusses such criticism of the ‘naming and shaming’ policy arguing, that “of the objections which were voiced, perhaps the most compelling related to the use of what was widely seen as a double standard. In essence, this revolved around the nature and application of the 25 criteria...while the criteria were no doubt consistent with the 1996 version of the Forty Recommendations, in a number of obvious respects they went beyond those standards...” (W. C. Gilmore, ‘*Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism*’, [2011] (4th edn, Council of Europe, 2011) at 156.

¹⁸⁹ R Hulsse, ‘Creating demand for Global Governance: The Making of a Global Money Laundering Problem’, [2007] 21: 2, *Global Society* 155 -178 at 167. Doyle suggested that the process of ‘blacklisting’ and ‘blackballing’ is also contrary to the Vienna Convention of 1988. Ibid.

¹⁹⁰ T Doyle, Cleaning up anti-money laundering strategies: current FATF tactics needlessly violate international law, [2002] 24 *Houston Journal of International Law*, 279-313.

¹⁹¹ T Doyle, Cleaning up anti-money laundering strategies: current FATF tactics needlessly violate international law, [2002] 24 *Houston Journal of International Law*, 279-313.

Members who follow the FATF Recommendations and implementing CTF legislation are potentially breaching particular human rights, such as the right to trial. The FATF obliges member states to incorporate laws, which provides their governments with the power to immediately freeze the assets of those suspected of terrorism.¹⁹² The consequences of enforcing such measures can be the violation of human rights. For example, by freezing property, the right to property is breached and then by keeping that property frozen indefinitely without allowing the suspect concerned an opportunity to challenge such action or indeed even with the absence of an actual terrorism related charge being made, that person's right to a fair trial is potentially violated. This implies that by following guidance provided by the FATF, member states may be breaching international human rights treaties as well as their own domestic human rights legislation. This proposition will be discussed in further detail later in the chapter. The chapter turns to a discussion of the juxtaposition of human rights with the 'Financial War on Terrorism.'

3.7 Human Rights and the Financial War on Terrorism

In the immediate aftermath of September 11 2001, the threat of international terrorism was acute. Whilst such a situation requires decisive and powerful action, it is proposed that human rights have been overlooked due to the exigency of the circumstances. The International Commission of Jurists commented:

"Terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, they have allowed themselves to be rushed into hasty responses, introducing an array of measures which undermine cherished values as well as the international legal framework carefully developed since the Second World War".¹⁹³

The international CTF policy has considerable implication for human rights, which are rigidly protected by a number of international, regional and domestic legal

¹⁹² Recommendation III, FATF IX Special Recommendations, October 2001.

¹⁹³ Assessing damage, urging action. Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, International Commission of Jurists, at 2. Available at: <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf>

instruments. This includes for example the European Convention on Human Rights,¹⁹⁴ the International Covenant on Civil and Political Rights,¹⁹⁵ the Universal Declaration of Human Rights¹⁹⁶ and the United Nations Charter.¹⁹⁷ Therefore, human rights are deeply entrenched into international law. However, the practical application of CTF laws is in conflict with certain aspects of these human rights provisions. For instance, the UN has pioneered the response to terrorism and has expressed the importance of upholding human rights. Article 103 of the UN Charter provides that in the event of a conflict between international agreements, the obligations under the UN Charter shall prevail.¹⁹⁸ One such obligation is to the “universal respect for, and observance of, human rights and fundamental freedoms”.¹⁹⁹ Despite these safeguards, the obligations proposed by the UN Security Council have put certain human rights at risk. Notwithstanding legal challenges raised in individual States such as the U.S., U.K. and Canada, that will be discussed in detail in later chapters,²⁰⁰ many concerns have been expressed, not least by human rights proponents regarding the inconsistency of CTF provisions with human rights. The High Commissioner for Human Rights from the Office of the UN has commented on the adverse impact that UNSCR 1373 and stated, “Most countries when meeting their obligations to counter terrorism by rushing through legislative and practical measures, have created negative consequences for civil liberties and fundamental human rights”.²⁰¹ This is contrary to

¹⁹⁴ This Convention became effective on 3 September 1953.

¹⁹⁵ This Covenant became effective on 23 March 1976. Hereafter ICCPR.

¹⁹⁶ This Declaration became effective on 10 December 1948.

¹⁹⁷ Articles 55 and 56. This Charter became effective on 24 October 1945 and was a response to the brutality of World War II. This Charter represents the universal respect for human rights and fundamental freedoms.

¹⁹⁸ Charter of the United Nations, Chapter XVI: Miscellaneous Provisions, Article 103.

¹⁹⁹ Charter of the United Nations, Chapter IX: International Economic and Social Co-operation, Article 55(c). It is worthy of note here that the Counter Terrorism Committee has always been bound to act in accordance with the UN mandate and consequently to comply with the principle of achieving “international cooperation in promoting and encouraging respect for human rights”. However, the landmark UNSC 1373 lacked any direct reference to safeguarding human rights during anti terrorist financing efforts. It was not until 2003 that the protection of human rights was afforded significance by way of UNSC Resolution 1456 which states: “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law” (s/RES/1456(2003), paragraph 6. For further discussion on this point, see E.J. Flynn, *The Security Council’s Counter-Terrorism Committee and Human Rights*, [2007] 7(2) *Human Rights Law Review* 371-384.

²⁰⁰ In Chapters 4, 5 and 6 respectively.

²⁰¹ Human Rights, Terrorism and Counter-Terrorism, Fact Sheet No.32, Office of the United Nations High Commissioner for Human Rights at Pg. 20. Yankson also raises a very valid point regarding a lack of impartiality by governments who are responsible for reviewing themselves. He states “The concept of the “left arm” of the government reviewing and checking the “right arm” of the

the United Nations Global Counter-Terrorism Strategy, adopted by United Nations Security Council Resolution 60/288,²⁰² which obligates members of the international community to implement counter terrorism measures, which venerate human rights. The negative effects that have ensued from CTF legislation have limited the right to a fair trial and the right to property.²⁰³ These concerns are centred on the powers bestowed on nation states by UNSCRs 1267 and 1373. It becomes clear that even preventative soft law FATF measures are in fact punitive, especially with regard to the impact that they may have on human rights. Collectively the international provisions implemented by the UN, E.U. and FATF criminalise the funding of terrorism and provide for the designation of suspected terrorists and the freezing of their assets.

By virtue of UNSCRs 1267 and 1373, states are obliged to immediately freeze the assets of those suspected of terrorism or the support of terrorism. In contrast to previous counter terrorism provision, which applied to states, these Resolutions apply to individuals. UNSCR 1373 indicates what action should be taken and compels nation states to list individuals and freeze their funds and other financial assets “without delay”. However, there is no suggestion of how a listing and asset freeze should be initiated; the details of the Resolution are the subject of individual interpretation by states. The Resolution does not provide any parameters in relation to evidence or indicate that there should be a balance of probabilities before action is taken. This is the greatest shortcoming of UNSCR 1373. When a state chooses to apply an asset freeze based on suspicion without first trying a person in court, this action could run contrary to Article 14, ICCPR and Article 6 of the ECHR. The ECHR contains absolute, limited and qualified rights, an absolute right cannot be limited and applies to both civil and criminal cases. A limited right can be restricted in explicit circumstances whilst qualified rights are rights that require a balance to be made between the rights of the individual and the needs of the wider community. Whilst Article 6 ECHR, the right to trial is classified as an absolute right, the terrorist

government for abuses seems like nonsense. How can there be any impartiality if you are checking yourself?” (S.Yankson, Starving terrorists of their financial oxygen, [2010] 13(3) *Journal Money Laundering Control* 282-306).

²⁰² This Resolution was adopted on 20 September 2006.

²⁰³ For example, see, Binning, P ‘In safe hands? Striking the balance between privacy and security - anti-terrorist finance measures [2002] 6 *European Human Rights Law Review* 737-749

financing sanctions can be imposed without any case or charge being brought thus the right to trial has no effect. The punitive nature of the sanctions calls for human rights protections such as Article 6 ECHR to apply. The use of administrative procedures to effectively punish suspected terrorists, thus weakening the rights of those concerned and even goes so far as reversing the burden of proof. Under Art 6.2 ECHR and Article 14.2 ICCPR there is a presumption that a person facing a criminal charge is innocent until proven guilty.²⁰⁴ Therefore, by subjecting a person to an indefinite asset freeze and travel ban due to the suspicion that they may be involved in or connected to terrorism labels the person concerned as guilty before any trial or any actual charge is laid.

The absence of such imperative parts of due process is even more concerning when accompanied by the notion that the procedure for listing a party may require the presence of little evidence. Kruse is highly critical of this approach and argues that there is a “very low evidentiary threshold” adopted when considering listing an individual or entity and consequently freezing the assets of those thought to be associated with al-Qaeda (pursuant to UNSCR 1267) offers States too much discretion.²⁰⁵ This leaves citizens vulnerable as the most tenuous of links to al-Qaeda could cause them to become a subject of powerful UN sanctions. Notably, there is also a lack of a definite time period that restricts the amount of time that a person can have their assets frozen resulting in what Kruse suggests could be “a lifetime verdict”.²⁰⁶ Indeed it has been illustrated that individuals or entities that appear on the 1267 list can feature there until they are reviewed and possibly removed.²⁰⁷ Until 2009 there was no obligation on the Security Council to re-visit and evaluate the reason behind a listing made by a state. This situation changed with the implementation of UNSCR 1904,²⁰⁸ which called on the Sanctions Committee to re-examine all names on this Consolidated List and to conduct an annual review of all

²⁰⁴ Article 6.2 ECHR stipulates “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. This provision is mirrored in Article 14.2 ICCPR.

²⁰⁵ A Kruse, Financial and economic sanctions- from a perspective of international law and human rights [2005] 12(3) Journal Financial Crime 217.

²⁰⁶ Ibid.

²⁰⁷ UN Daily News, ‘UN Panel removes 45 names from Taliban sanctions list after reviewing nearly 500’. 2 August 2010 Available at: <http://www.un.org/news/dh/pdf/english/2010/02082010.pdf>

²⁰⁸ This Resolution also established an Office of the Ombudsperson to deal with delisting issues and ordered the Sanctions Committee to review all names on the Consolidated List by 30th June 2010 and to complete an annual review of all listed parties who had not been reviewed for three or more years.

names that had not been reviewed in three or more years.²⁰⁹ On completion of this review, the UN commented “One of the things the Committee learned during the review is that over half of the 488 entries had been on the list since 2001 and had never been reviewed. So this marked the first time that 270 names were reviewed”.²¹⁰ This implies that the 270 listed entries had been there for up to nine years with no due process. It is not surprising therefore that this Resolution came as a response to criticism that the international sanctions regime lacked due process protection.

Furthermore, an order to freeze the funds of a suspected terrorist or terrorist supporter under UNSCRs 1267 or 1373 raises questions relating to the right to a fair trial. This right is protected by several international conventions,²¹¹ but is not considered when imposing an asset freezing order as those funds are frozen “without delay”. This power highlights an inconsistency with the burden of proof as the imposition of such a financial sanction implies that the individual concerned is actually guilty until proven innocent.²¹² Bianchi commented that “by imposing sanctions against individuals short of any judicial proceedings in which charges have been discussed and a verdict rendered by an impractical tribunal the very essence of the right to be presumed innocent is jeopardized”.²¹³ The conclusion of a person’s guilt can inflict insurmountable harmful effects on the individual and their family. Jones *et al*, commented that “even the most hardened supporter of counter- terrorist measures would have to concede that the placing of a person’s name on the UNSC list, with the consequent freezing of assets and travel ban, is an extremely far reaching measure, with profound consequences for the life and reputation of the persons whose assets are frozen”.²¹⁴ Yankson supports such a contention stating that, “the size of the detrimental effect it would have on any person cannot be underestimated”.²¹⁵ Indeed,

²⁰⁹ UNSC Resolution 1904, 17 December 2009, 6274th Meeting. S/RES/1904 (2009).

²¹⁰ UN Daily News, 2 August 2010. UN Panel removes 45 names from Taliban sanctions list after reviewing nearly 500. Available at: <http://www.un.org/news/dh/pdf/english/2010/02082010.pdf>

²¹¹ The right to a fair trial is protected under Article 10 of the Universal Declaration of Human Rights, Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights.

²¹² Article 6.2 of the European Convention on Human Rights provides: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

²¹³ A Bianchi, ‘Assessing the effectiveness of the UN Security Council’s anti-terrorism measures: the quest for legitimacy and cohesion,’ [2006] 17(5) *European Journal of International Law* 881-91

²¹⁴ John RWD Jones and Dr Misa Zgonec-Rozej ‘Freezing assets of ‘terrorists’- how fair is the UN Sanctions Committee? *Law Society Gazette*, 10 September 2009.

²¹⁵ S Yankson, ‘Starving terrorists of their financial oxygen: at all costs?’ [2010] 13(3) *Journal Money Law Control* 282-306

if the person's assets are frozen, arguably they may not even be able to pay for their own legal support.

Human rights appear to be potentially fading in the midst of a preoccupation with national security, and that the legitimacy and effectiveness of the international counter terrorism regime could be undermined.²¹⁶ The Office for Democratic Institutions and Human Rights argue that cases such as *Kadi* and *Ahmed* illustrate that “where such action fails to incorporate adequate human rights protections, the credibility and, ultimately, the effectiveness of these efforts is seriously undermined”.²¹⁷ The issue of CTF legislation violating human rights such as the right to a fair trial shall be looked at in further detail in relation to the individual countries of the U.S., U.K., and Canada in chapters four, five and six.

Disapproval of the UN Sanctions regime was expressed in a report by the Secretary-General's High-level Panel on Threats, Challenges and Changes. The report stated that the “way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.”²¹⁸ Unfortunately, despite the urgent need for a fair and transparent international sanctions regime, little improvement has been made. The Secretary-General proposed that four basic elements should be introduced in order to ensure that there is a minimum standard of clear and reasonable procedure. Firstly, listed parties should have the opportunity of hearing the case against them. Secondly, they should have the right to be heard. Thirdly, they should have right to appeal via an effective review mechanism. Fourthly, the Security Council should be obligated to carry out periodic reviews of listed parties' sanctions.²¹⁹ Whilst there is still a complete lack of judicial control involved in the sanctions scheme, some progress has been made to the de-listing procedure by virtue of UNSCR 1904 (2009). This Resolution established

²¹⁶ A Kruse 'Financial and economic sanctions- from a perspective of international law and human rights,' [2005] 12(3) *Journal of Financial Crime* 217-220.

²¹⁷ *Combating the financing of terrorism while protecting human rights: a dilemma?* Background Paper Giessbach II Seminar on Combating the Financing of Terrorism Davos, Switzerland, October 2008, Office for Democratic Institutions and Human Rights, at 21

²¹⁸ United Nations General Assembly, 2 Dec 2004, 59th Session. A/49/565.

²¹⁹ This was a response by the Secretary-General in June 2006 in a letter to the President of the Security Council [referred to in the Security Council debate on 22 June 2006 (UN Doc. S/PV.5474 (2006))]

the Office of the Ombudsperson. Before this date, the Security Council Committee was solely responsible for deciding who was put on the list and who remained there. The creation of an independent Ombudsperson means that the Security Council Committee is now assisted in its consideration of delisting requests. This implies that there is now some independent review offered in this regime. However, a lack of procedural protection still exists, as those who are blacklisted remain unable to go to court to challenge a listing. Whilst acknowledging some improvements, the Special Rapporteur stated in 2012 “the Al-Qaeda Sanctions regime continues to fall short of international minimum standards of due process”.²²⁰ Moreover, Bothe correctly argues that, if a fair and transparent procedure cannot be secured in the implementation of the sanctions, then it is ever more crucial that the opportunity to appeal and to be heard is provided. The importance of effective appeal mechanisms has been illustrated by the case of *Kadi* and will shortly be further demonstrated by *HM Treasury v Ahmed*.²²¹

In order for the efforts to combat of terrorism to be a success, governments must acquire support, which can only be gained by respecting human rights.²²² Baldwin argues:

“While it is conceded that one of the primary duties of any government is to ensure the survival of its legitimate governing regime and the physical safety of its citizens, on balance an equally important duty exists to preserve democracy and civil liberties, and to fulfil the responsibilities and obligations mandated under international and national conventions.”²²³

Whilst this view is accurate, it would appear that for the three states concerned in this thesis, it is the apparent fulfilment of international obligations that have caused the problem. It will be shown later that the U.K., U.S. and Canada share a common theme

²²⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/67/396, 26 September 2012 at para. 59).

²²¹ [2010] UKSC 2.

²²² A Kruse ‘Financial and economic sanctions- from a perspective of international law and human rights,’ [2005] 12(3) *Journal of Financial Crime* 217-220. Kruse suggests that the observance of the rule of law establishes legitimacy.

²²³ F. N. Baldwin ‘The rule of law, human rights and proportionality as components of the war against terrorism: is the US judiciary in self-imposed exile?’ [2004] 7(3) *Journal of Money Laundering Control* 218-253.

in legislative measures that aim to starve terrorists and suspected terrorists of their funds. Jenkins notes that their “statutory provisions suggests that they form complimentary legal frameworks for fighting terrorism”.²²⁴ However, the similarities in their approaches can lead to comparable criticism. The UN asserts, “one of the [its] most powerful achievements ... has been the establishment of a regime of international treaties and conventions” to combat terrorism and terrorist financing.²²⁵ However, some of the obligations are very controversial regarding human rights. Importantly it will be illustrated in chapter five that by failing to uphold the due process protections, the CTF measures that are in place could be rendered unenforceable as in *HM Treasury v Ahmed*.²²⁶ Furthermore, legal challenges such as this can threaten the achievement of an international counter terrorism effort. As changes to the CTF regime in individual states are made, an internationally cohesive counter terrorism regime becomes less likely.²²⁷ Vesel supports such a view and suggests that “the limited due process rights afforded by the 1267 Committee have jeopardised the successful implementation of the sanctions at the European level, and this may have serious consequences for the regime as a whole”.²²⁸

All three jurisdictions have implemented the CTF UNSCR and have become parties to the issue that has arisen between CTF measures and human rights. This is especially so with regard to the support for UNSCR 1373. This is the case even though any deviations from human rights have been justified on the basis that they are necessary due to the serious threat posed by terrorism and are only a temporary measure. This thesis proposes that any measures adopted in a time of crises should not come to be accepted as reasonable²²⁹ and certainly the long-term suspension of human rights for whatever reason is not sustainable in a democracy. Issues such as low evidentiary thresholds, non-disclosure of information relating to a listing and the lack of an adequate appeal process require much further investigation, as does the question

²²⁴ 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.

²²⁵ www.un.org.uk/terrorism/makingadifference.shtml

²²⁶ [2010] UKSC 2

²²⁷ It should be noted here that member states are currently negotiating an additional international treaty.

²²⁸ *Combating the financing of terrorism while protecting human rights: a dilemma?* Background Paper Giessbach II Seminar on Combating the Financing of Terrorism Davos, Switzerland, October 2008, Office for Democratic Institutions and Human Rights, at 19.

²²⁹ L Lazarus and B Goold, Security and Human Rights: The Search for a Language of Reconciliation. in B Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 4.

of proportionality. Accordingly, these matters are discussed in greater detail in the subsequent following chapters. The next section of the chapter discusses the power of governments to restrict human rights in particular situations such as an imminent threat of terrorism.

3.8 Derogation from human rights

Contrary to the argument that fundamental freedoms are being unnecessarily suspended is the proposition that it is sometimes essential to circumscribe certain human rights in the pursuit for security and ultimately the protection of the right to life. The prevention of terrorism has the ultimate goal of protecting the right to life,²³⁰ is it necessary to derogate from human rights and democratic values in the pursuit of security? It is apparent that such a notion was thought necessary historically as the opportunity to derogate from human rights has been incorporated into the ECHR and the ICCPR.²³¹ For instance, the U.K. government have called on powers of derogation in the past and in some instances problems have ensued regarding the legality of their actions. For example, the UK government derogated from the right to liberty under Article 5 ECHR when it enacted Part IV of the Anti-Terrorism, Crime and Security Act 2001. This Act authorised the indefinite detention of foreign national terrorism suspects on the premise that there was a “public emergency threatening the life of the nation”.²³² Article 15 of the ECHR allows for derogations in “war or other public emergency threatening the life of the nation”,²³³ but such a restriction is limited by Article 15(2) and may only be applied to certain human rights.²³⁴ Unfortunately,

²³⁰ Article 2, ECHR and Article 6, ICCPR

²³¹ Cameron asserts that whilst States and the UNSC require a certain amount of discretion in declaring a public emergency and establishing that the action of derogating human rights is “strictly required” he contends, “the notion of a totally unsupervised power to derogate is contrary to human rights treaties”. (See Cameron n.140 at 20)

²³² An example of the problems caused by such derogation came in the case of *A (FC) and Others (FC) v Secretary of State for the Home Department*. This case concerned the indefinite detention of foreign nationals without trial at Belmarsh Prison. For a discussion of this case, see Chapter 5: United Kingdom. The U.S. has never taken advantage of the derogation clause under Article 4 of the ICCPR but they have relied on their own suspension clause contained in the U.S. Constitution, which allows them to suspend the writ of habeas corpus. The Writ of habeas corpus, also known as the ‘Great Writ’ provides that a person has the right to appear before a judge or magistrate to hear the charges against him. This provision may only be employed where public safety may require it in cases of rebellion or invasion. For further comment on this, see Chapter 4: United States.

²³³ Article 15(1) ECHR

²³⁴ “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.” ECHR

Article 15(2) does not prevent derogation from human rights such as the right to a fair trial or the right to effective remedies,²³⁵ which confirms the notion that individuals who become the subject of a listing and asset freezing order have no route available to challenge the sanction.

Similarly, Article 4 of the ICCPR permits derogations from human rights but again such restrictions are limited to certain human rights.²³⁶ The inclusion of provisions which permits the suspension of rights was only intended to be used in the short term to cover a situation of emergency and should not become accepted as reasonable.²³⁷ Just days before the September 11 attacks, the UN Human Rights Committee issued a General Comment on states of emergency and reiterated that under Article 4 of the ICCPR, any derogation is subject to a “specific regime of safeguards”.²³⁸ This is “essential for the maintenance of the principles of legality and rule of law at times when they are most needed”.²³⁹ These safeguards are represented by conditions, which require that any derogation is necessary in a democratic society and any measures taken are proportional to the nature of the objective. In the interests of ensuring that the principles of democracy are upheld in situations of derogation, the test of proportionality centres on assessing the severity of the infringement. For example the freezing of assets infringes upon an individual's right to property so the State must ensure that the contravention of the person's right to property is strictly proportionate to the nature of the objective. Proportionality is assessed by the government concerned in terms of the severity, duration and geographical scope of the human rights encroachment.

A problem with the system of assessing the necessity of any derogation is that there is no uniform test between states. Each State is awarded some discretion in deciding on this matter, as it is believed that they are best placed to choose what action is required

²³⁵ Article 13 of the ECHR provides: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

²³⁶ Article 4 (paragraph 2) states: “No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision”. ICCPR

²³⁷ Any action taken to derogate from international human rights agreements must be immediately conveyed to other State parties. This information is passed through the UN Secretary-General.

²³⁸ United Nations Human Rights Committee's General Comment No. 29, paragraph 1. CCPR/C/21/Rev.1/Add.11.

²³⁹ Ibid at paragraph 2

in an emergency situation. This view was expressed in the *Brannigan and McBride v United Kingdom*,²⁴⁰ where the court noted that it was the responsibility for protecting the life of its nation is down to the particular state and “accordingly in this matter a wide margin of appreciation should be left to the national authorities”.²⁴¹ This may imply that it is difficult to gain consistency in the international community when dealing with terrorism, as a situation that one state may view as an emergency, which requires action that restricts human rights, another may not. The UN High Commissioner explains that “necessary in a democratic society” implies that any restrictions on human rights should “not impair the democratic functioning of society”.²⁴² Such a notion is interesting, as it has been shown here that by implementing the international CTF measures, some states may have foregone the rule of law, which is vital in a democracy. Referring to situations in each of the jurisdictions concerned where human rights have been restricted by CTF measures may reinforce this argument. This will be further examined in chapters four, five and six.

Accordingly, whilst it may have long been accepted that the critical nature of some situations may require a restriction of human rights in order to bolster the efficacy of measures taken, it is important to emphasise that such derogations should only ever be on a temporary basis and are therefore not appropriate to a problem such as terrorism which is likely to be a lasting threat. Cameron supports such a contention arguing “the war against terrorism is an eternal war: the ‘emergency’ and the freezing measures taken are likely to be permanent.”²⁴³ Such a view further emphasises the crucial lack of a time period in which an asset freezing order can continue to be applied. Negative consequences for the individual and their family can continue indefinitely in the absence of any form of appeal. For now, this chapter turns to a short discussion of how the U.S. has implemented the aforementioned international laws and policies to counter the financing of terrorism and briefly discusses the suggestion that the adoption of these laws has led to a breach of the right to a fair trial in the U.S.

²⁴⁰ (1993) 17 EHRR 539, [41]

²⁴¹ Ibid.

²⁴² Human Rights, Terrorism and Counter Terrorism, Fact Sheet 32, Office of the United Nations High Commissioner for Human Rights. At pg. 24, Available at: <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>. Accessed 01.12.16.

²⁴³ See Cameron n,140 at 20.

3.9 United States

The U.S. government was heavily responsible for instigating the ‘Financial War on Terrorism’.²⁴⁴ Whilst there was little U.S. regulatory attention directed to funding terrorism prior to 2001, this situation changed completely with the enactment of Presidential Executive Order 13,224,²⁴⁵ swiftly followed by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 Act.²⁴⁶ By virtue of Presidential Order 13,224, the U.S. government yields the power to designate and freeze the global assets of those suspected of supporting terrorism.²⁴⁷ As part of its CTF policy and in the pursuit of compliance with international agreements, the U.S. operates a wide range of financial crime reporting procedures. Whilst obligations on financial institutions to fulfil currency transaction reports existed prior to 2001 pursuant to The Currency and Foreign Transactions Reporting Act (1970),²⁴⁸ those requirements were augmented with the implementation of the USA PATRIOT Act 2001. Title III of this Act enhances the power of the Department of Treasury as regards the anti money laundering regime and, importantly, requires financial institutions to file Suspicious Activity Reports (SARs) on economic activity of a client that it considers suspicious and possibly connected to money laundering or terrorist financing.²⁴⁹ This provision contributes to U.S. compliance with international policy in giving legal effect to Recommendation 13 of the FATF. Whilst the SARs regime harmonises U.S CTF laws with its U.N. obligations, it has also sparked controversy due to its apparent

²⁴⁴ N Ryder ‘The Financial War on Terrorism: A Review of Counter-Terrorist Financing Strategies Since 2001’ (Routledge, 2015).

²⁴⁵ Executive Order 13,224- Blocking property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism, September 23 2001. Whilst combating the financing of terrorism was not considered a priority prior to September 11 2001, the policy of the U.S. towards terror financing can be found in the Trading with the Enemy Act (1917), the International Emergency Economic Powers Act (1977) and the Anti-terrorism and Effective Death Penalty Act (1996).

²⁴⁶ Hereafter PATRIOT Act 2001.

²⁴⁷ The Office of Foreign Assets Control (OFAC) who maintains a Specifically Designated National List, which records all persons who are the subject of an economic sanction, supervises this regime. It is important to note here however that the financing of terrorism had been targeted by President Bill Clinton following the al-qaeda attacks in Kenya and Tanzania in 1998, President Clinton implemented Presidential Executive Order 13,098- Blocking Property of UNITA and Prohibiting Certain Transactions With respect to UNITA and Presidential Executive Order 13,099- Prohibiting Transactions with Terrorists Who Disrupt the Middle East Peace Process.

²⁴⁸ Otherwise known as the Bank Secrecy Act 1970.

²⁴⁹ Title III of the USA PATRIOT Act 2001 is otherwise known as the International Money Laundering Abatement and Anti-Terrorist Financing Act 2001.

inconsistency with human rights. The U.S. Constitution legally protects human rights, such as the right not to be arbitrarily deprived of property²⁵⁰, the right to a fair hearing²⁵¹ and the right to counsel²⁵². According to the Preamble of the U.S. Constitution, the laws contained within this provision are “the supreme law of the land”.²⁵³ Further to this, the U.S. is also a signatory to a number of international human rights treaties. For example, they have ratified the Universal Declaration of Human Rights (UDHR) and have adopted the International Covenant on Civil and Political Rights (ICCPR).²⁵⁴ Both international treaties make provision for the right a fair trial.²⁵⁵ Thus the rights in relation to a fair trial in the event of a criminal prosecution are consistent within the U.S. Constitution, the ICCPR and the UDHR.

With this in mind, the U.S. have faced the complicated task of preventing terrorism and bringing terrorist perpetrators to justice whilst complying with domestic and international human rights. This has not been achieved and the right of suspected terrorist’s following September 11 has been limited. Human rights breaches have included the indefinite freezing of assets without charge and the denial of an opportunity to challenge such an action.²⁵⁶

²⁵⁰ Fifth Amendment to the U.S. Constitution

²⁵¹ Fourteenth Amendment to the U.S. Constitution

²⁵² Sixth Amendment to the U.S. Constitution

²⁵³ Article VI, U.S. Constitution.

²⁵⁴ The U.S. was influential in the creation of the UDHR in 1948 and also ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992

²⁵⁵ Article 14 of the ICCPR contains provisions in relation to the right to a public trial. For example, Article 14. 3 stipulates “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;”. Further to this, Article 10 of the UDHR provides “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

²⁵⁶ For example in the case of *USA v Marzook, Salah, Ashqar* No. (2006) 03 CR 0978, Muhammed Salah had his assets frozen pending a trial in which terrorism related charges were later dropped. He was found guilty of a single count of obstruction of justice in February 2007. Despite not being found guilty of any terrorism related charges, Salah still features on OFAC’s SDN List and thus his assets remain frozen. The U.S. has also targeted charities whom they believe may be supporting terrorism. In *KindHearts for Charitable Humanitarian Development Inc. v Geithner*, 647 F. Supp. 2d 857, 864, 2009, the charity’s assets were frozen based on suspicion that the organisation was involved in terrorist activity. KindHearts challenged the action and in Federal Court, Chief Justice Carr concluded that the government had acted unconstitutionally. He held that the government must provide the organization with notice of the reasons for the asset freeze and should provide them with a meaningful opportunity to defend themselves. These procedural failures implied that the action taken against KindHearts had been unconstitutional. No criminal prosecution or indeed criminal charge was ever brought against the charity. These cases will be discussed further in Chapter four.

Whilst the actual ability by the U.S. government to freeze funds is not of issue here, the way in which suspected terrorists and terrorist supporters are investigated and their assets frozen does have serious consequences for their human rights. For example, the ability of the authorities to examine a person's economic dealings raises questions relating to the right to privacy. Furthermore, if an investigation results in the freezing of assets then that person's right to property is affected. The consequent lack of ability to directly appeal a listing and asset freezing before charges are brought questions a person's guarantee of the right to a fair trial. Additionally, the considerable focus of these powers on Islamic Charities²⁵⁷ can be criticised. In the wake of the September 11 attacks, the U.S. authorities focussed their attention upon charities due to the belief that terrorists are heavily financed by donations to Islamic charities.²⁵⁸ Walker observed that, "the potential link between charities and terrorism finance was signalled internationally as an innate risk by the Financial Action Task Force".²⁵⁹ Further to this, Ryder identifies terrorist organisations that are funded by way of charitable donations, "The Inter-governmental Action Group Against Money Laundering in West Africa noted that Boko Haram has been partly financed through private donors and misapplied charitable donations".²⁶⁰ Thus, the belief that charities can be used to fund terrorist organisations is substantiated. Following the 2001 attacks, charities such as the Holy Land Foundation for Relief and Development and the Global Relief Foundation became the subjects of economic sanctions provided by Executive Order 13,224 and the PATRIOT Act 2001.²⁶¹ The charities assets were swiftly blocked, effectively shutting down the organisations. Whilst CTF laws may

²⁵⁷ In the wake of the September 11 2001 attacks, the U.S. government took action against the Holy Land Foundation for Relief and Development and the Global Relief Foundation. Action taken was based on the belief that these organisations had links with terrorist organisations and terrorist financiers.

²⁵⁸ For excellent commentary on this, see: : Baron, B. 'The Treasury guidelines have had little impact overall on US international philanthropy, but they have had a chilling impact on US based Muslim charities' [2005] 25 Pace Law Review 315. Nina J Crimm, "High Alert: The government's war on the financing of terrorism and its implications for donors, domestic charitable organizations, and global philanthropy" ' [2004] 45(4) William and Mary Law Review 1341).

Engel, M. 'Donating "bloody money": fundraising for international terrorism by United States charities and the government's efforts to constrict the flow' [2004] 23 *Cardozo Journal of International and Comparative Law*, 251.

²⁵⁹ C Walker, Terrorism financing and the policing of charities: who pays the price?' . in C King and Carina Walker (eds), *Dirty Assets – Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate 2014) 230 .

²⁶⁰ Inter-governmental Action Group Against Money Laundering in West Africa Threat Assessment of Money Laundering and Terrorist Financing in West Africa (Inter-governmental Action Group Against Money Laundering in West Africa: 2010) at 94.

²⁶¹ For an in depth discussion of these cases, see Chapter four.

adversely affect many human rights, this thesis shall focus upon the impact that these provisions have upon the right to a fair trial in the U.S., U.K. and Canada. This chapter shall now turn to a brief discussion of how the U.K. has implemented the international CTF measures and suggests that like the U.S., human rights in the U.K. may be adversely affected by the application of CTF laws.

3.10 United Kingdom

The U.K. had taken steps to prevent and detect the financing of terrorism prior to September 11.²⁶² In order to deal with domestic terrorism at the turn of the 20th Century, the U.K. government implemented the Northern Ireland (Emergency Provisions) Act 1973²⁶³ and the Prevention of Terrorism (Temporary Provisions) Act 1974.²⁶⁴ Both Acts made some provision for countering the financing of terrorism. For example, by virtue of the Northern Ireland (Emergency Provisions) Act, the Crown had the power ‘to seize anything which he suspects of being, has been or is intended to be used in the commission of a scheduled offence’.²⁶⁵ Furthermore, the Prevention of Terrorism (Temporary Provisions) Act 1974 provided the courts with the ability to forfeit assets, which were ‘controlled by an individual convicted of membership, where such resources were intended for use in Northern Ireland terrorism’.²⁶⁶ Counter terrorism legislation in the U.K. continued to provide powers in relation the financing of terrorism. The Prevention of Terrorism (Temporary Provisions) Act 1989 criminalised contributions towards acts of terrorism,²⁶⁷ contributions to resources of proscribed organisations,²⁶⁸ assisting in retention or control of terrorist funds,²⁶⁹ the disclosure of information about terrorist funds,²⁷⁰ and penalties and forfeiture.²⁷¹ CTF policy in the U.K. today is founded on the basis of this legislation. The Prevention of Terrorism (Temporary Provisions) Act 1989 criminalised terrorist financing and provided the government with the power to seek

²⁶² These steps will be discussed in greater detail in chapter 5.

²⁶³ Hereafter N.I. (EP) Act.

²⁶⁴ Hereafter PoT (TP) Act 1974.

²⁶⁵ S. 11, Northern Ireland (Emergency Provision) Act 1973.

²⁶⁶ S.1 (7) Prevention of Terrorism (Temporary Provisions) Act 1974.

²⁶⁷ S. 9 Prevention of Terrorism (Temporary Provisions) Act 1989.

²⁶⁸ S. 10 Prevention of Terrorism (Temporary Provisions) Act 1989.

²⁶⁹ S. 11 Prevention of Terrorism (Temporary Provisions) Act 1989.

²⁷⁰ S. 12 Prevention of Terrorism (Temporary Provisions) Act 1989.

²⁷¹ S. 13 Prevention of Terrorism (Temporary Provisions) Act 1989.

forfeiture of money or other property in his possession at the time of the offence.²⁷² Whilst this Act was successfully employed against the Irish Republican Army, its effectiveness was doubted and a review was requested. Concern centred on the emergency and temporary nature of the provisions and the lack of successful prosecutions.²⁷³ For example, a Consultation Paper in 1998 noted that there were only four terrorist financing convictions between 1978 and 1989.²⁷⁴ The provisions of this Act were subsequently amended and strengthened with the passing of the Terrorism Act 2000, which created five offences in relation to money or property linked with terrorism.²⁷⁵ Section 15 makes it a criminal offence for a person to solicit, or to receive, or to provide money or property on behalf of terrorists if the person knows or has reasonable suspicion that such money may be used for the purpose of terrorism.²⁷⁶ By virtue of section 16 a person commits an offence if he uses money or other property for terrorist purposes.²⁷⁷ Furthermore, the person commits an offence if he possesses money or other property and he intends that it should be used, or has reasonable cause to suspect that it will be used for the purposes of terrorism. Section 17 provides that a person commits an offence if he enters into or becomes concerned in an arrangement in which money or property is made available to another and the person knows or suspects that it may be used for terrorism.²⁷⁸ A person breaches section 18 if he enters into or becomes concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist property by concealment, by removal from the jurisdiction, by transfer to nominees or in any other way.²⁷⁹ It is a defence for a person charged under section 19 to prove that they either

²⁷² Section 13 Prevention of Terrorism (Temporary Provisions) Act 1989.

²⁷³ See for example the excellent commentary by R Bell 'The confiscation, forfeiture and disruption of terrorist finances' (2003) *Journal of Money Laundering Control* 7(2) 105-125.

²⁷⁴ Home Office *Legislation against terrorism- a consultation paper* (Home Office: London)) 1998b) at paragraph 6.14.

²⁷⁵ Ss 15-18 Terrorism Act 2000.

²⁷⁶ Terrorism Act 2000, s.15. See *R.v Saleem (Abdul Rehman)* [2009] EWCA Crim 920 (CA (Crim Div)).

²⁷⁷ Terrorism Act 2000, s.16. See *O'Driscoll v Secretary of State for the Home Department* [2002] EWHC 2477 (QB); [2003] A.C.D. 35 (QBD).

²⁷⁸ Terrorism Act 2000, s.17. See *Menni (Nasserdine) v HM Advocate* [2013] H CJAC 158; 2014 S.C.L. 191; 2014 G.W.D. 1-10 (HCJ), *Secretary of State for the Home Department v AT* [2009] EWHC 512 (Admin) (QBD (Admin)) and *Secretary of State for the Home Department v U* [2009] EWHC 49 (Admin) (QBD (Admin)).

²⁷⁹ Terrorism Act 2000, s.18. See *Menni (Nasserdine) v HM Advocate* [2014] H CJAC 54; 2014 S.C.L. 552; 2014 S.C.C.R. 430; 2014 G.W.D. 20-380 (HCJ), *R. v Allpress (Sylvia)* [2009] EWCA Crim 8; [2009] 2 Cr. App. R. (S.) 58; [2009] Lloyd's Rep. F.C. 242; [2009] Crim. L.R. 363 (CA (Crim Div)) and *R. (on the application of Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin); [2008] 4 All E.R. 403; [2008] E.M.L.R. 19; [2008] U.K.H.R.R. 1151 (DC).

did not know, or had reasonable cause to suspect that the arrangement was associated to terrorist property. These provisions signify the first piece of permanent anti terrorism legislation in the U.K. and extend the scope from domestic to global terrorism of the terrorist financing offences created by the Prevention of Terrorism (Temporary Provisions) Act 1989. With Part III of the Terrorism Act 2000 comprehensively criminalizing the financing of terrorism, the U.K. had taken significant steps to counter the financing of terrorism even before UNSCR 1373 was implemented. However, whilst the TA 2000 implemented extensive powers in relation to terrorism and CTF, the lack of prosecutions²⁸⁰ and the complete overhaul of the Act just months after its introduction suggest that the legislation was inadequate.

The passing of the Anti-Terrorism, Crime and Security Act 2001 was implemented to further bolster CTF policy in the U.K. This Act authorised the seizure of terrorist monies anywhere in the U.K.²⁸¹ In brief, the provisions of this Act gave the government the power to freeze every aspect of the designated person's economic dealings from bank accounts to social security benefits. The Anti-terrorism, Crime and Security Act 2001 makes provision for the freezing of funds at the start of an investigation,²⁸² the monitoring of suspected accounts,²⁸³ the requirement on people working within financial institutions to report where there is reasonable suspicion that funds are destined for terrorism and to permit HM Treasury to freeze assets of foreign individuals and groups. Furthermore, Part II of the Act permits HM Treasury to freeze the assets of overseas governments or residents who have taken, or are likely to take action to the detriment of the U.K.'s economy or action constituting a threat to the life or property of a national or resident of the UK.²⁸⁴ Such a regime seeks to ensure that funds are not accessible to suspected terrorists and financiers of terrorism and is a vital component of the global combat of terrorism. Due to these provisions adopted by the UK, the FATF report that they are 'compliant' with Special Recommendation III, freezing and confiscating terrorist assets.

²⁸⁰ For instance between September 2001 and September 2009, just 11 people were convicted under sections 15-19 of the Terrorism Act 2000 (HC Deb, 5 February 2010, c586w).

²⁸¹ Anti-terrorism Crime and Security Act 2001, Sch 1. Part 2.

²⁸² Anti-terrorism Crime and Security Act 2001, ss. 4-16.

²⁸³ Anti-terrorism Crime and Security Act 2001, Sch. 1, Part 1.

²⁸⁴ This provision repealed the Emergency Laws (Re-enactments and Repeals) Act 1964, s. 2.

In October 2006, the U.K. implemented the Terrorism (United Nations Measures) Order 2006 to give legal effect to UNSCR 1373.²⁸⁵ However, the response to the implementation of these measures has not been entirely positive. There has been criticism regarding the inconsistency of the CTF measures with human rights, in particular the right to a fair trial, the right to be heard, the right to privacy and the right to an effective remedy.²⁸⁶ The powers yielded by the government to by way of CTF legislation have been considerably increased and U.K. citizens can be listed and have their assets investigated and frozen indefinitely. This can occur without any opportunity to hear the evidence against them or to appeal against such a listing. Such a situation encroaches upon fundamental human rights found in the ECHR and Human Rights Act 1998 and illustrates a lack of due process protections.

For instance, the Terrorism (United Nations Measures) Order 2006 has proven controversial, as its legality has been questioned in *Ahmed and Others v H.M. Treasury*.²⁸⁷ This case centred on asset freezing powers and the appellants challenged the lawfulness of the asset freezing orders and sought to have them quashed by the court. In short, the issues raised related to failure by the government to seek Parliaments approval, instead implementing the powers by way of Executive Order. The judges stated that HM Treasury had exceeded its powers in making orders that “interfere so profoundly with individuals’ fundamental rights without parliamentary scrutiny”.²⁸⁸ Although infringements on human rights should not be easily permitted even with parliamentary scrutiny, actioning law, which weakens such rights through the “shadowy route of Orders in Council”,²⁸⁹ further, compounds the argument that the legislation is unlawful. In its judgement on 27 January 2010, the Supreme Court repealed the Terrorism (UN Measures) Order 2006. This case illustrates that by complying with international policy on CTF, the U.K. has found itself in breach of

²⁸⁵ It should be noted here that the U.K. has a dualist legal system so international law does not become part of U.K. law until it is accepted into national law. In a monist state, international law does not need to be incorporated into national law, it has automatic effect. Canada is also a dualist state.

²⁸⁶ For example, see, Binning, P ‘In safe hands? Striking the balance between privacy and security - anti-terrorist finance measures [2002] 6 *European Human Rights Law Review* 737-749. A Tomkins, H Fenwick and L Lazurus ‘Terrorist asset-freezing- Continuing flaws in the current scheme’ [2011] 25(3) *International Review of Law, Computers & Technology*, 117-128 at 127. M van den Broek, M Hazelhorst and W de Zanger, Asset Freezing: Smart Sanction or Criminal Charge? [2010] 27(72) *Merkourios, Utrecht Journal of International and European Law*, 18-27 at pg 27.

²⁸⁷ [2008] EWHC 869.

²⁸⁸ *HM Treasury v Ahmed* [2010] UKSC 2.

²⁸⁹ A Macdonald ‘Case Comment *HM Treasury v Ahmed* [2010] UKSC 2’ 2 February 2010, Available at: <http://ukscblog.com/case-comment-hm-treasury-v-ahmed-2010-uksc-2/>. Accessed 01.12.16.

human rights and due to this the asset freezing regime was deemed unlawful.²⁹⁰ This landmark case is extremely significant, as it has opened the floodgates to further challenges in relation to counter terrorism and human rights infringements. With this in mind, the case will be discussed in great detail in the Chapter 5 and its impact will be examined as it is argued that the legal challenges that it has attracted have not helped the legitimacy of the regime. For now, this chapter turns to a discussion of the steps taken by Canada to comply with international CTF policy and briefly discusses that the right to a fair trial may be infringed by the operation of such policy.

3.11 Canada

Prior to 2001, there was no provision in Canadian law for the prevention and detection of terrorist financing. However, there were criminal offences provided for in the Criminal Code for terrorism related crimes such as hijacking a plane²⁹¹ or conspiracy to murder²⁹². Canada has suffered many acts of domestic terrorism²⁹³ and in order to deal with such attacks prior to 2001, the Canadian government invoked the War Measures Act. This Act was intended to be used at times of ‘war’ ‘invasion’ or ‘insurrection’²⁹⁴ and measures taken were temporary. Canada controversially used this legislation during the October Crisis in 1970. As an emergency response to terrorism the legislation allowed the authorities to suspend certain civil liberties in order to facilitate the swift discovery of those involved in terrorism, thereby preventing future attacks. For example, Art. 6 (5) of the Act provides; “The protection and guarantees extended to Canadians by the Canadian Bill of Rights, and other Charters of Rights in operation provincially in Canada, are waved aside while the Proclamation is in effect”.²⁹⁵ What followed demonstrated the impact that prioritising national security over human rights can have. The above provision of the Act meant that the Police could arrest individuals and detain them without charge. This practice ensued and some 497 suspects were arrested. Out of those detained, only 18 people

²⁹⁰ HM Treasury is currently discussing the implementation of a Terrorist Asset-Freezing Bill which will ensure that the UK continue to comply with UN obligations on freezing alleged terrorist assets. This Act will replace the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 when its powers expire on 31 December 2010.

²⁹¹ S.76, C.C.

²⁹² S. 465, C.C.

²⁹³ These acts of terrorism emanated from the Front de liberation du Quebec (FLQ), an organisation with the objective of achieving an independent Quebec.

²⁹⁴ War Measures Act, S.C. 1914, c. 2, s. 6.

²⁹⁵ Article 6(5) War Measures Act 1914.

were subsequently convicted of a crime arising from the crisis.²⁹⁶ In stark contrast to the heavy-handed manner in which, Canada dealt with the October Crisis, is their reaction to the Air India Bombings in 1985. Amongst many acts of terrorism carried out in Canada in the 1980s and 1990s,²⁹⁷ the Air India bombing represented the deadliest attack.²⁹⁸ The investigation that followed this attack was littered with errors²⁹⁹ and as a consequence of this, the perpetrators were never brought to justice. It was concluded that the RCMP had failed to “understand the value of intelligence”³⁰⁰ and as such had failed to act on it.³⁰¹ It is important to note that at the time of these attacks, there were no CTF legislative measures in Canada. The possible importance of detecting and tracking terrorist funds was not recognised in Canadian Law until after September 11 2001.

Canada’s response to September 11 2001 mirrored that of the U.S. and the U.K. and effectively recognised the important role that financing can play in terrorism. Just over a month after the terrorist attacks, Canada drafted Bill C-36, which later became known as the Anti Terrorism Act 2001, and it represents Canada’s primary counter terrorism legislation. These provisions referred to as an “omnibus” Act amended 19 pieces of legislation and crucially brought Canada into line with UN anti terrorism policy.³⁰² However, prior to the introduction of this legislation, the Cabinet implemented the United Nations Act.³⁰³ This statute provided the Governor in Council with the power to issue Regulations that validate the decisions of the UNSC taken pursuant to Article 41 of the Charter of the United Nations. In accordance with this Act, in October 2001, Canada issued the United Nations Suppression of

²⁹⁶ D Clement, ‘The October Crisis of 1970: Human Rights Abuses Under the War Measures Act, [2008] 42(2) *Journal of Canadian Studies* at 167.

²⁹⁷ These terrorist acts were linked to animal rights extremists and environmental groups.

²⁹⁸ On 23rd June 1985, Sikh extremists placed bombs in two suitcases. One detonated at Narita airport, near Tokyo killing two people and wounding another four. The other bomb exploded on a passenger jet mid air off the coast of Ireland and resulted in the death of 329 people.

²⁹⁹ The Air India Flight 182 Inquiry suggests that the Canadian government were armed with “a mosaic of information which clearly identified a particularised threat to Air India for the month of June 1985” (*Air India Flight 182: A Canadian Tragedy*, 2010, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, at 27).

³⁰⁰ *Air India Flight 182: A Canadian Tragedy*, 2010. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, at 23.

³⁰¹ Rather importantly, the Department of Justice saw no need for this inquiry as they were of the opinion that no changes to counter terrorism policy was required. Taking into consideration the conclusions of this Report, the significance of a public inquiry and governmental accountability is clear. (*Air India Flight 182: A Canadian Tragedy*, 2010. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 at 36 Volume One: The Overview).

³⁰² R.S.C. 1985, c. U-2.

³⁰³ R.S.C., 1985, c. U-2.

Terrorism Regulations,³⁰⁴ which provides that the individuals or entities designated as terrorists by the UNSC are recognised as such under Canadian law. The ATA 2001 criminalised the financing and facilitation of terrorism. Section 83.02 of the ATA 2001 makes it a criminal offence to ‘provide or collect property intending that it be used or knowing that it will be used...in order to carry out...terrorist activity’.

Consistent with UNSCR 1267 and 1373, Section 83 of the Anti Terrorism Act 2001 includes measures to provide for the listing of terrorist individuals and entities and the immediate freezing of their funds. Alongside, this reinforcement of powers to ensure complicity with international treaties and conventions, the ATA 2001 increased the reporting requirements placed on financial institutions and were accompanied by provisions allowing for the forfeiture of property.³⁰⁵

These measures introduced to criminalise the financing of terrorism, freeze the assets of suspected terrorists and obligate financial institutions to report suspicious transactions have led the FATF to report that Canada is “largely compliant” with Special Recommendations II, III and IV.³⁰⁶

The speed in which CTF legislation was enacted was attributed to the need for Canada to comply with international policy.³⁰⁷ Roach explains, “for better or for worse, amendments to Canada’s Criminal Code were being driven by the need to comply with international standards and schedules”.³⁰⁸ This need was evermore pressing due to claims of a porous Canadian-American border³⁰⁹ which terrorists had taken advantage of. The US media claimed that terrorists had entered the US through Canada³¹⁰ and Roach explains³¹¹ that whilst this suggestion was erroneous, it was not

³⁰⁴ SOR/2001-360. Hereafter UNST Regulations.

³⁰⁵ These provisions can be found in Ss. 83.02-83.16 Criminal Code of Canada.

³⁰⁶ FATF IX Special Recommendations, October 2001.

³⁰⁷ K Roach, *Consequences for Canada*, 2003 McGill-Queen’s University Press at 32.

³⁰⁸ *Ibid.*

³⁰⁹ The U.S. government made specific provision to this effect in the PATRIOT Act 2001 titled Subsection A, “Protecting the Northern Border”.

³¹⁰ This is a view supported by German who argues, “The early reaction in Canada to September 11th was very similar to that in other countries but it was significant from a perspective of the Americas, because it really was a concern that Canada, as Mexico and others, could be conduits for terrorists into the United States”. (P German, ‘*Organized crime, terrorism, and money laundering in the Americas*’ [2002] 15 Florida Journal of International Law 25).

³¹¹ K Roach, *The 9/11 Effect, Comparative Counter-Terrorism* (Cambridge University Press, 2011) 374.

unsurprising due to the earlier arrest of Ahmed Ressam in 2000. Ressam was a terrorist travelling on a fake Canadian passport who was arrested whilst trying to cross the Canadian- US border with a car full of explosives destined for detonation at Los Angeles Airport. Ressam was convicted and sentenced to 37 years imprisonment.

By enacting legislation to comply with UN and FATF provisions, Canada are contributing to the international counter terrorism regime which seeks to rid the international community of weak areas of security that may be exploited by terrorists. Interestingly however, it has been argued that whilst Canada have made a concerted effort to counter terrorism and terrorist financing, their approach has been more considered than that taken by the U.K and U.S.³¹² Despite such a notion, it is suggested that CTF policy is not consistent with human rights in Canada. These rights in Canada are contained within the Charter of Rights and Freedoms, which was implemented by way of the Constitution Act 1982. The Charter guarantees certain rights and freedoms to Canadian citizens such as the right to life, liberty and security and freedom of expression and association. In line with the U.K. and the U.S., human rights protections in Canada are further bolstered by Canada's accession to many human rights conventions such as the International Covenant on Civil and Political Rights (ICCPR)³¹³ and the International Covenant on Economic, Social and Political Rights.³¹⁴ These treaties along with the UDHR constitute an international human rights framework that commits Canada to respect individual's basic rights. However it is suggested here that the threat of terrorism and ensuing CTF legislation has put some of these rights into jeopardy. As is the case in the U.K. and the U.S, by operating laws, which allow assets to be frozen and possibly seized and to systematically deny a person the right to trial by jury can have a significant impact upon their Charter rights, in particular the right to trial by jury pursuant to S.11 of the Charter.³¹⁵

³¹² 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.

³¹³ This Treaty was ratified by Canada in May 1976.

³¹⁴ This Treaty was ratified by Canada in May 1976. Canada are also signatories to the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture, the Convention for the Elimination of Racial Discrimination, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

³¹⁵ S. 11 Canadian Charter of Fundamental Rights and Freedoms. Bahdi suggests that Canadian laws serve "as the site through which Canada expressed its commitment to the global war effort, showing its willingness to suspend the rights of citizens and non-citizens alike in the name of national and international security" (R Bahdi 'Constructing non-citizens: the living law of anti-terrorism in Canada',

With the three-pronged approach to CTF policy, the U.S., U.K. and Canada all possess the power to freeze the assets of suspected terrorists and terrorist supporters without charge or trial. The importance of the pursuit of terrorist funds is not in question here, it is accepted that the prevention and detection of the funding of terrorism can be a valuable factor in combating terrorism but what is in question is the apparent circumvention of human rights in favour of national security. This thesis will concentrate upon the impact that CTF policy can have upon the right to trial in the U.S., U.K. and Canada.

3.12 Conclusion

In response to the terrorist attacks in September 2001, the international CTF regime was swiftly strengthened. By enforcing such provisions, which allow derogation from certain human rights, it is clear that, constitutional deprivations may be occurring. Whilst it is notable that organisations such as the UN persistently reaffirm the crucial point that human rights should not be hampered by counter terrorism policies, it is contended that the pursuit of state security is overshadowing the importance of such rights. The successful challenges to the legality of the sanctions regime have put the effectiveness of the international CTF effort in doubt. The harsh CTF sanctions put forward by the UN encourage countries to implement and operate measures, which are not procedurally fair. Whilst these measures are not a criminal sanction, their impact suggests that they do in fact have a penalizing effect upon the designee. Indeed this occurs before any suspicion has been validated with investigation and evidence. The immediate and often indeterminate designation and freezing of assets of a person or entity with little opportunity for effective redress implies that the right to a fair trial is being breached. Questions regarding legitimacy and inconsistency with human rights ultimately jeopardises the achievement of consistency between states in countering terrorism as compulsory changes are made to national regimes. Such a situation makes the reconciling of CTF laws with human rights ever more critical. Vesel warns that “counter-terrorism practitioners ignore human rights at their peril: a failure to pursue security and human rights jointly and concomitantly can CTF

in *Counter-terrorism and the Post-democratic state* (eds) J Hocking and C Lewis, (Edward Elgar, 2007) 81.

procedures on human rights may merely be an unintentional side effect, is it not handing over a victory to the terrorists”.³¹⁶ Such a notion emphasises that it is imperative that CTF measures are effective whilst encompassing and respecting human rights, both nationally and internationally. The next chapter discusses the prompt development of CTF policy in the U.S. and examines how CTF legislation has impacted the right to a public trial.³¹⁷

³¹⁶ *Combating the financing of terrorism while protecting human rights: a dilemma?* Background Paper Giessbach II Seminar on Combating the Financing of Terrorism Davos, Switzerland, October 2008, Office for Democratic Institutions and Human Rights, at 22.

³¹⁷ Pursuant to the Fourteenth Amendment to the U.S. Constitution.