

## Chapter 7: Conclusion and Recommendations

### 7.0 Introduction

In September 2001, the prevention of the financing of terrorism was propelled into regulatory focus. Seventeen years later, terrorist financing is still regarded as a key tenet in the prevention of terrorism.<sup>1</sup> The detection and prevention of the funding of terrorism can prevent terrorist attacks and dismantle the funding avenues exploited by terrorists. However, the ‘Financial War on Terrorism’ brought with it the introduction and implementation of controversial Counter Terrorist Financing (CTF) legislation. The overall aim of this thesis has been a comparative analysis of the impact of the regulatory framework for the prevention of terrorist financing on the right to a fair trial in the United States (U.S), United Kingdom (U.K) and Canada. These three jurisdictions were carefully chosen for comparison due to their comparable CTF legislative and policy approaches. Each has adopted a three-pronged strategy for dealing with terrorist financing; the criminalisation of terrorist financing, the freezing of terrorist assets and reporting requirements on the financial sector.<sup>2</sup> However, whilst all three jurisdictions have reiterated their commitment to the protection of human rights, their responses to challenges with regard to the legitimacy of CTF measures have been contrasting.

This research has been guided by the literature on international CTF provisions, domestic CTF laws and human rights legislation in the U.S, U.K, and Canada. The thesis has explained how terrorism has become more prevalent and the prominence of terrorist financing has also ultimately grown. The pertinence given to the effective implementation of powerful CTF sanctions has suggested that the right to a fair trial is even more likely to be adversely affected. Harsh administrative sanctions are being imposed against those suspected of financing terrorism. These measures are applied

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<sup>1</sup> The FATF have observed, “combatting the financing of terrorism (CFT) continues to be a priority for the FATF, given the threats posed by terrorist organisations. This threat includes small terrorist cells or individual cells capable of committing attacks and significantly harming society. It is therefore important to identify and dismantle the financial networks of all types of terrorist groups”. (FATF Emerging Terrorist Financing Risks, FATF Report, October 2015 at 7).

<sup>2</sup> See, N Ryder, *Financial crime in the 21st Century, Law and Policy* (Edward Elgar 2011) 66. For further reading, see P Reuter and EM Truman, *Chasing Dirty Money : The fight against money laundering* (Institute of International Economics 2004) 177

even though no conviction or indeed charge has been established leaving the suspect with limited avenues in which to challenge a terrorist designation or asset freeze. Due to this lack of procedural fairness, legal challenges have ensued, bringing the overall legitimacy of the CTF regime in the U.S, U.K. and Canada into question. The thesis has concluded that the CTF strategies adopted in the U.S, U.K. and Canada breach the right to a fair trial offered in the U.S. Constitution,<sup>3</sup> the Human Rights Act 1998, the European Convention of Human Rights and the Canadian Charter of Rights and Freedoms. Therefore, the CTF strategies are in need of review. This chapter considers the original research aims and methodology and provides a summary of the conclusions of this research. This is necessary to illustrate whether, and to what extent the original aims have been achieved. The chapter also makes a series of recommendations of how CTF sanctions might be improved.

## **7.1 Research aims**

This research aimed to provide a comparative analysis of the impact of the regulatory framework for the prevention of terrorist financing on the right to a fair trial in the U.K, U.S. and Canada. The thesis aimed to explore and identify the impact that CTF measures are having on the constitutionally protected right to a fair trial in each of the jurisdictions and therefore had five overall aims. Firstly, the research examined the evolution of international CTF legislation. It looked at how the United Nations (UN), European Union (EU) and Financial Action Task Force (FATF) have influenced the measures taken to detect and prevent the financing of terrorism. Secondly, the research identified and explained what the legislative responses of the U.S, U.K, and Canada have been to the terrorist attacks on September 11th 2001. Thirdly, the research illustrated the importance of the ‘Financial War on Terrorism’ to the overall goal of countering terrorism. Fourthly, the thesis determined whether a common policy between the three jurisdictions can be identified and establishes the importance of a unified response. Fifthly, the research aimed to illustrate the negative impact that the application of CTF measures is having on human rights and it specifically

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<sup>3</sup> The right to a public trial is offered by the Sixth Amendment to the U.S. Constitution. The right to a fair trial in the U.K. is included in Article 5.3 Human Rights Act 1998 and Article 6.1 of the European Convention of Human Rights. The right to trial by jury is included in S.11 of the Canadian Charter of Rights and Freedoms.

concentrating on right to a fair trial. With this in mind, this chapter now turns to a summary discussion of these five research aims.

### **7.1.1. The evolution of international counter terrorist financing legislation**

The terrorist attacks on September 11 2001 resulted in a monumental change in international terrorist financing laws. Until this date, the international community had been completely unprepared to deal with the financing of terrorism instead focussing their efforts on the illegal drugs trade, fraud and the prevention of money laundering.<sup>4</sup> After the attacks, the United Nations Security Council (UNSC) led the legislative shift, which was heavily influenced by the U.S. At the heart of this shift was the newly found importance for preventing and detecting terrorism by countering its financing. The UN hoped that the source of the funds would be found and the financial information could consequently be used to identify terrorists and their supporters.

The newly acknowledged value of terrorist financing can be demonstrated by the introduction of a plethora of anti-money laundering (AML) and CTF initiatives by the UN, EU, and FATF following the terrorist attacks in September 2001. The ‘Financial War on Terrorism’ is central to these measures. It has been noted that the UN had recognised the importance of the financing of terrorism prior to 2001 and had urged member states to take appropriate measures to prevent terrorism.<sup>5</sup> The 1998 bombings of two U.S. embassies in Kenya and Tanzania led the UN to introduce the International Convention for the Suppression of the Financing of Terrorism 1999.<sup>6</sup> This Convention sought to achieve an internationally coordinated effort in combating terrorism. Such a unified response is required to prevent terrorists from avoiding those countries with comprehensive CTF legislation in favour of exploiting those

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<sup>4</sup> For further commentary, see section 3.1, chapter 3.

<sup>5</sup> The UN adopted the legal term ‘terrorist financing’ in its Declaration of Measures to Eliminate International Terrorism in 1994. 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” (United Nations A/RES/49/60 84th plenary meeting Measures to eliminate international terrorism, December 9 1994).

<sup>6</sup> 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

countries with weak CTF policy. An example of the achievement of an international coordinated response can be seen with the FATF 40 Recommendations<sup>7</sup> and the ‘9 Special Recommendations’.<sup>8</sup> Whilst these Recommendations do not represent a binding convention, this has not prevented many countries from implementing the measures.<sup>9</sup> Whilst it is impractical to ask countries with varying financial and regulatory systems to adopt identical measures, the implementation of minimum standards by which to set counter measures has, to some extent, limited the opportunity for criminals to launder money and more recently for terrorists to finance terrorism. These ‘9 Special Recommendations’ together with the 40 Recommendations provided detailed guidance on how to achieve a basic framework, which detects, prevents and suppresses the financing of terrorism.<sup>10</sup> Some of the international community has supported the Recommendations by the FATF through the implementation of UN Security Council Resolutions.<sup>11</sup> This endorsement has further strengthened the global response to what is inherently a transnational problem. The introduction of United Nations Security Council Resolution 1267 and United Nations Security Council Resolution 1373 are integral to the international efforts to prevent terrorist financing. UNSCR 1267 called for the Taliban to comply with previous Resolutions<sup>12</sup> and “to cease provisions of sanctuary and training for international terrorists and their organizations”.<sup>13</sup> It also established the Security Council Sanctions Committee whose purpose it is to freeze any funds that are owned by the Taliban or are being used for the benefit of the Taliban. This process of

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<sup>7</sup> Financial Action Task Force, FATF 40 Recommendations, October 2003. Available at: <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>

<sup>8</sup> 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. Financial Action Task Force ‘International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. The FATF Recommendations’, October 2012. For further discussion on the FATF Recommendations, see section 3.3, chapter 3.

<sup>9</sup> There are currently 37 members of the FATF. There are 35 member jurisdictions and 2 regional organisations (FATF Members and Observers, Financial Action Task Force Website. Available at: <http://www.fatf-gafi.org/about/membersandobservers/>, accessed 06.03.17).

<sup>10</sup> 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, G20, 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 2009) at 7.

<sup>11</sup> 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](http://www.fatf-gafi.org/document/52/0,3343,en_32250379_32236869_34027188_1_1_1_1,00.html)

<sup>12</sup> UNSCR 1189 (1998), UNSCR 1193 (1998) and UNSCR 1214 (1998).

<sup>13</sup> S.1. UNSCR 1267 (1999)

freezing terrorist's assets gained momentum in the aftermath of September 11 2001 when 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.<sup>14</sup> This request was strengthened by the introduction of UNSCR 1373, which represents the linchpin of the international fight against the financing of terrorism. 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.<sup>15</sup> 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 thereof.<sup>16</sup> It has been noted how this Regulation ensures that the Community have implemented their obligations under UNSCR 1373.<sup>17</sup> UNSCR 1373 should provide some uniformity between member states, varying steps taken by states to comply with this legally binding Resolution mean that the international CTF effort is not universal. The discretion allowed to member states for interpreting and applying UNSCR 1373 suggests that legislation in relation to CTF is not wholly consistent. It has been noted in this study that CTF actions taken by the U.S., U.K. and Canada are seemingly comparable and the application of CTF sanctions in all three case studies has produced modest results. However, the inconsistent application of legislation in these states and differing regard for human rights has led to dissimilarity in the outcome of legal challenges. This has been illustrated throughout this thesis with the use of case law and demonstrates how CTF legislation in the three case studies impacts on the right to a fair trial.

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<sup>14</sup> 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)".

<sup>15</sup> 2002 OJ L164/3

<sup>16</sup> Article 3, Council Regulation (EC) No 2580/2001.

<sup>17</sup> Furthermore, Council Decision 2001/927/EC gives effect to the list of persons to which Council Regulation 2580/2001 applies. In addition to this 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.

## **7.1.2 The legislative responses of the U.S, U.K, and Canada to the events of September 11<sup>th</sup> 2001- A three pronged strategy.**

### **7.1.2.1 United States**

The terrorist attacks of September 11 2001 prompted a hasty and dramatic change to financial crime regulation in the U.S.<sup>18</sup> Up until this date the subject of terrorist financing had only been a peripheral concern. Financial crime regulation instead focussed on fraud, money laundering and the illegal drugs trade.<sup>19</sup> However, following the terrorist attacks in September 2001 legislation was introduced that permitted the designation and freezing of assets in order to counter the financing of terrorism. The U.S. CTF policy is very similar to that adopted in the U.K. and Canada and has three key components: the criminalization of terrorist financing<sup>20</sup>, the freezing of assets<sup>21</sup> and the filing of suspicious activity reports (SARs).<sup>22</sup> Financing terrorism was not criminalized in the U.S. until the introduction of the Suppression of the Financing of Terrorism Convention Implementation Act 2002. This legislation implemented the United Nations International Convention for the Suppression of the Financing of Terrorism and makes it a criminal offence for a person to provide funds with the intention or the knowledge that they will be used to support terrorism.<sup>23</sup> Accordingly, the United States Code of Law contains four offences in relation to providing material support for terrorist activities.<sup>24</sup> These offences are also included in Presidential Executive Order 13,224 which provides the U.S. government with the power to designate and block the assets of non-US citizens and entities that commit or pose a significant risk of committing acts of terrorism. Not only does Order 13,224 provide the power to designate and block assets, it also authorizes the U.S. government to ‘block the assets of individuals and entities that provide support,

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<sup>18</sup> For further commentary, see section 4.1, chapter 4.

<sup>19</sup> Seventh public hearing of the National Commission on Terrorist Attacks Upon the United States, Statement of Robert C. Bonner to the National Commission on Terrorist Attacks Upon The United States January 26, 2004. Also, see, W Allen ‘The war against terrorism financing’ [2003] 6(4) *Journal of Money Laundering Control* 306-310 at 306. Biersteker, T., Eckert, S and Romaniuk, P. ‘International initiatives to combat the financing of terrorism’ in T. Biersteker and S. Eckert (eds), *Countering the financing of terrorism*, (Routledge Cavendish: London, 2008) 234.

<sup>20</sup> For further commentary, see section 4.2.1, chapter 4.

<sup>21</sup> For further commentary, see section 4.2.2, chapter 4.

<sup>22</sup> For further commentary, see section 4.2.3, chapter 4.

<sup>23</sup> Title II of P.L. 107-197.

<sup>24</sup> 18 U.S.C. §2339A, 18 U.S.C. §2339B, 18 U.S.C. §2339 C (a), 18 U.S.C. §2339 C (c).

services or assistance to, or otherwise associate with, terrorists and terrorist organizations designated under the Order, as well as their subsidiaries, front organizations, agents, and associates'. The U.S. government employed these hastily considered powers without delay and attached a list of 27 designated individuals and entities to Presidential Executive Order 13,224.<sup>25</sup> The assets of these individuals and entities were frozen immediately before any evidence of terrorist involvement was collected or analysed. Significantly, the Executive Order lacks comprehensive direction as to what behaviour the provisions apply, leaving regulators with a large amount of discretion in applying the legislation. For instance, the Office of Foreign Assets Control (OFAC) is charged with enforcing the freezing of assets laws, yet no detailed direction has been given as to the circumstances in which asset freezing powers should be utilized. OFAC may use its own discretion and further to this, the actual reason for enforcing an asset freeze can be classified. This implies that these unprecedented powers can be applied in the absence of any judicial control and indeed even without any comprehensive evidence that suggests involvement in terrorism. Such a situation means that human rights such as the right to public trial are adversely affected.<sup>26</sup> This is a point, which has been discussed throughout this thesis and shall be concluded on later.

The third part of the U.S. CTF Policy is the use of Suspicious Activity Reports (SARs). The comprehensive range of provisions contained within the PATRIOT Act 2001 is aimed at detecting terrorist funds prior to their introduction to the financial system.<sup>27</sup> The Act was a direct response to the terrorist attacks in September 2001 and its related aim for the thesis was to bolster previous provisions by significantly extending and increasing the reporting responsibilities of deposit taking institutions.<sup>28</sup>

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<sup>25</sup> Executive Order 13,224 of September 23 2001, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten To Commit, or Support Terrorism. Available at: <http://www.fas.org/irp/offdocs/eo/eo-13224.htm>

<sup>26</sup> The Sixth Amendment to the U.S. Constitution sets fourth rights in relation to criminal prosecutions, and states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence".

<sup>27</sup> Title III: International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, USA PATRIOT Act 2001.

<sup>28</sup> Contained in the Bank Secrecy Act 1970, the Money Laundering Control Act 1986 and the Anti-Money Laundering Act 1992.

Under the PATRIOT Act 2001, financial institutions are required to file a SAR where they suspect the transaction is used for the purpose of terrorism.<sup>29</sup> Compliance with the reporting requirements is clear, the dramatic increase in the number of SAR's since this legislation was enacted illustrates that financial institutions are being careful to report any suspicious behaviour.<sup>30</sup> However, the number of convictions in relation to the number of SARs filed is modest.<sup>31</sup> So called "defensive filings"<sup>32</sup> may be counterproductive as SARs with an actual link to terrorism are hidden amongst thousands of unrelated reports. This thesis has determined that a reason for the limited success of this part of the CTF policy is that the reporting obligations are based on the previous AML model and terrorist financing and money laundering are vastly different.<sup>33</sup> For instance, deposit taking institutions are asked to pay particular attention to transactions that are for at least \$5,000 (\$2,000 for money services business).<sup>34</sup> This implies that transactions for a lower sum will be disregarded even though it has been shown that low value financial transactions can be linked to terrorism.<sup>35</sup> A transaction for a sum as little as \$100-200 could and has provided a significant part of the funding required to carry out a terrorist attack.<sup>36</sup> Indeed, with recent terrorist attacks in mind, the cost of mounting a terrorist attack can only include the price of a machete or gun.<sup>37</sup>

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<sup>29</sup> USA Patriot Act 2001, s. 326.

<sup>30</sup> For further commentary, see, section 4.2.2.1, chapter 4

<sup>31</sup> I Warde *The Price of Fear, al-Qaeda and the truth behind the financial war on terror* (I.B. Tauris & Co 2007) 160. He further notes that "out of 96,900 SARs filed, there were only 932 money laundering convictions (none for terrorist financing) representing a cost of more than \$10 million per conviction; yet the number of reports kept on increasing, jumping to 156,931 in 2000."

<sup>32</sup> *The SAR Activity Review, Trends, Tips and Issues*, April 2005, Issue 8 at 3. Available at: [http://www.fincen.gov/news\\_room/rp/files/sar\\_tti\\_08.pdf](http://www.fincen.gov/news_room/rp/files/sar_tti_08.pdf)

<sup>33</sup> For further commentary, see section 4.2.3, chapter 4.

<sup>34</sup> 31 CFR 1022.320

<sup>35</sup> Financial Action Task Force *Third mutual evaluation report on anti-money laundering and combating the financing of terrorism- United States of America* (Financial Action Task Force: Paris, 2006) at 146.

<sup>36</sup> J. Robinson, "Brown's war just doesn't add up: you can't kill terrorists with a calculator", *The Times*, February 14, 2006. Available at: [www.timesonline.co.uk](http://www.timesonline.co.uk). However, it is important to note that the government claim that including training and the purchase of materials, this figure would be more like £8,000 (House of Commons, *Report of the Official Account of the Bombings in London on 7<sup>th</sup> July 2005*. House of Commons, London, 2005 at 23.

<sup>37</sup> British soldier Lee Rigby was attacked and murdered in London on May 23rd 2013. Two British Muslim converts Michael Adebalajo and Michael Adebowale were found guilty and convicted to life imprisonment in 2014 ( Lee Rigby Murder: Adebalajo and Adebowale jailed, *BBC News* (U.K. 26 February 2014) <http://www.bbc.co.uk/news/uk-26357007> accessed: 18.10.16. On the 29<sup>th</sup> January 2017, Alexandre Bissonnette allegedly carried out a mass shooting at a mosque in Quebec. Six people died and many others were injured (Quebec mosque shooting: student charged with six counts of murder over gun attack in mosque, *The Telegraph* (U.K. 31 January 2017) <http://www.telegraph.co.uk/news/2017/01/30/quebec-mosque-shooting-two-students-arrested-gun-attack-mosque/> (accessed 14.02.17).



Notwithstanding these criticisms, the use of SARs and financial intelligence is important to counter terrorism. The U.S. Department of Treasury has remarked how significant financial intelligence has proven to countering the financing of terrorism.<sup>38</sup> By highlighting a transaction as suspicious and subsequently suggesting that a person or organisation is potentially involved in terrorism can lead to the detection of other terrorists and their supporters and may even expose a paper trail to a planned terror attack. Such a discovery is without doubt a worthwhile reason to impose the SARs regime on financial and credit institutions. However, this thesis has underlined what the implications of this legislation might be on the right to a public trial. The use of measures that are not consistent with human rights calls into question the validity of the powers. Enforcing administrative sanctions, which label a person a terrorist, and freezing their assets can have a substantially detrimental impact on the individual.<sup>39</sup> This situation based on mere suspicion is permitted to continue indefinitely and in this time there is no legal requirement for any prosecution to be sought. The means for redress are extremely limited and the designee may never learn the reasons for the executive's action. With no automatic right under the CTF regime to learn the facts of the case against him and no opportunity to be heard in a court of law leads to the conclusion that the designation and asset freezing regime is procedurally unfair. If the right to a public trial was permitted to apply in such instances, then the designee would be protected by "the right to a speedy and public trial, by an impartial jury of the State...and be informed of the nature and cause of the accusation".<sup>40</sup> However, as these severe sanctions are administrative rather than criminal, the designee is not afforded such human rights protection. Consequently, any legal challenge brought against CTF measures in the U.S. has to date, been unsuccessful and CTF sanctions have been upheld. The U.S. has prioritised national security concerns over human rights and has allowed temporary and exceptional measures to become part of the normal legal landscape. Whilst the U.K. implemented comparable CTF measures in the outset, these have in recent years been challenged and amended. It is to the U.K., which this discussion now turns.

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<sup>38</sup> For further commentary, see section 4.2.3, chapter 4.

<sup>39</sup> Also referred to as the 'designee'.

<sup>40</sup> Sixth Amendment to the U.S. Constitution.

### 7.1.2.2 United Kingdom

In contrast with the U.S., the U.K. has history of dealing with terrorism and counter terrorism provisions have been in place in the U.K. since the 19<sup>th</sup> century.<sup>41</sup> Further statutory measures were implemented to tackle terrorism by the IRA<sup>42</sup>, including the Northern Ireland (Emergency Provisions) Act 1973<sup>43</sup> and the Prevention of Terrorism (Temporary Provisions) Act 1974.<sup>44</sup> Legislation in this area continued to be extended and the Prevention of Terrorism (Temporary Measures) Act 1989<sup>45</sup> saw the introduction of specific measures to deal with terrorism and terrorist financing.<sup>46</sup> These emergency provisions were arguably limited in success attracting very few prosecutions and thus new, permanent legislation was required as a matter of urgency.<sup>47</sup> However, these new counter terrorism powers needed to be compatible with international human rights. A review by Lord Lloyd of Berwick concluded that the existence of emergency legislation pursuant to the Prevention of Terrorism (Temporary Measures) Act 1989 had caused some damage to the U.K.'s international human rights reputation.<sup>48</sup> This had occurred by allowing temporary provisions, which were not consistent with human rights to continue running for a long period of time. In doing so, the U.K. had adopted a similar approach to the U.S. and disregarded the importance of human rights; legal challenges ensued.<sup>49</sup> Whilst the recommendations made by Lord Lloyd's Report were not immediately implemented, amendments to CTF legislation were made in 2000 with the enactment of the Terrorism Act, which created five terrorist financing offences.<sup>50</sup> This Act marked the beginning of permanent CTF provisions and the U.K. government introduced a

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<sup>41</sup> L Donohue *The cost of counterterrorism – power, politics and liberty* (Cambridge University Press, 2008).

<sup>42</sup> L Donohue *Counter-Terrorist Law and Emergency Powers in the United kingdom 1922-2000*, (Irish Academic Press, 2001).

<sup>43</sup> c.53.

<sup>44</sup> For further commentary, see section 5.1, chapter 5.

<sup>45</sup> c.4

<sup>46</sup> Section 13, Prevention of Terrorism (Temporary Measures) Act 1989.

<sup>47</sup> For further commentary, see section 5.1, chapter 5.

<sup>48</sup> *Inquiry into Legislation Against Terrorism*, by the Rt. Hon. Lord Lloyd of Berwick. October 1996 Cm.3420 at 10.

<sup>49</sup> *Ireland v U.K.* (1978) Y.B. EUR. CONV ON HUMAN RIGHTS at 602, *Brogan and Others v UK* (1988) 11 EHRR 117, *Brannigan & McBride v UK* (5/1992/350/423-424) E.C.H.R. and *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157.

<sup>50</sup> Ss 15-19 Terrorism Act 2000. For further commentary, see section 5.2.1.1, chapter 5.

Counter Terrorist Finance strategy.<sup>51</sup> This thesis has determined that the U.K, has adopted a three pronged CTF strategy, like that implemented in the U.S. and Canada, this includes: the criminalisation of terrorist financing<sup>52</sup>, the freezing of assets<sup>53</sup> and the filing of SARs.<sup>54</sup>

Whilst the U.K government were somewhat exceptional in the fact that they had long recognised the importance of countering terrorist finance to combat terrorism,<sup>55</sup> it was the attacks on the U.S in 2001 that affirmed its significance. With this in mind, the ability to promptly freeze the assets of suspected terrorists gained huge value and following the lead of the UN and the U.S, the U.K. strengthened its asset freezing regime.

The extensive powers contained in ATCSA 2001 allows the seizure of terrorist cash anywhere in the U.K,<sup>56</sup> the freezing of funds at the start of an investigation,<sup>57</sup> the monitoring of suspected accounts,<sup>58</sup> the imposition of requirements on people working within financial institutions to report where there is reasonable suspicion that funds are intended for terrorism and permits HM Treasury to freeze assets of foreign individuals and groups. Freezing orders, contained in Part II of ATCSA 2001, have the effect of blocking the use of monies by the person concerned. Further to this and in conformity with UNSCR 1373, the U.K. government enacted the Terrorism (United Nations Measures) Order.<sup>59</sup> By virtue of Article 4 of this Order<sup>60</sup> HM Treasury has been awarded the authority to designate a person.<sup>61</sup> Whilst conditions need to be met before a designation can be applied, problems with the procedure have been illustrated in the thesis. Indeed, it has been demonstrated through the use of case law that subjecting those who ‘may be’ involved in terrorism to powerful sanctions is

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<sup>51</sup> HM Treasury Combatting the financing of terrorism, A report on UK action, 2002.

<sup>52</sup> For further commentary, see 5.2.1, chapter 5.

<sup>53</sup> For further commentary, see 5.2.2, chapter 5.

<sup>54</sup> For further commentary, see 5.2.3, chapter 5.

<sup>55</sup> For further commentary, see section 5.1, chapter 5.

<sup>56</sup> Anti-terrorism Crime and Security Act 2001, Sch. 1, Part 2.

<sup>57</sup> Anti-terrorism Crime and Security Act 2001, ss. 4-16.

<sup>58</sup> Anti-terrorism Crime and Security Act 2001, Sch. 1, Part 1.

<sup>59</sup> S.I 2006/2657.

<sup>60</sup> S.I 2006/2657.

<sup>61</sup> Provided four conditions are met. HM Treasury has reasonable grounds to suspect that a person is or may be (a) a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism; (b) a person named in the Council Decision; (c) a person owned or controlled, directly or indirectly, by a designated person; or (d) a person acting on behalf of or at the direction of a designated person (Article 4 Terrorism (United Nations Measures) Order 2006).

outside the scope of what is required by international legislation.<sup>62</sup> Moreover, allowing the executive, blanket permission to interpret international regulations,<sup>63</sup> such as UNSCR 1373, without any Parliamentary scrutiny and then denying an opportunity for the suspect to be heard, is contrary to the right to a fair trial. For example, chapter five highlighted the important case of *Ahmed and Others v H.M. Treasury*,<sup>64</sup> which drew attention to many contentious issues surrounding the asset freezing regime which significantly included a lack of procedural safeguards. Once a designation and asset freeze was actioned there was no available means of recourse for the suspect under the Al Qaida Order. Those concerned were not privy to the evidence against them and were not given any opportunity to appeal the designation. As a result, Article 3(1)(b) of the AQO was declared to be *ultra vires*. Therefore, as a result of this case, amendments to the asset freezing regime were made and further legislation was enacted. Whilst The Terrorist Asset Freezing Act 2010 ensures that the U.K is still compliant with international obligations under UNSCR 1373 and Council Regulation (EU) No 2580/2001, criticisms with the system still exist. For example, Tafa 2010 created the power to impose interim<sup>65</sup> and final designations.<sup>66</sup> Whilst the establishment of interim designations in the U.K. is a positive step as it implies that some designations will be short term, their impact can still be great. Moreover, whilst action to make a final designation requires a higher standard of suspicion, an interim designation can be made based on rather broad speculation as was the case with designation and the freezing of assets under the TO 2006.<sup>67</sup> Thus, although it was decided in *Ahmed* that the wording of the UNSCR 1373 does not suggest that the Security Council had a “reasonable suspicion” test in mind before exercising an asset freeze, it appears that lessons have not been learned.<sup>68</sup> It has been a contention in this thesis that the impact of an asset freeze, whether temporary or permanent, on an individual cannot be underestimated.<sup>69</sup> However, the potential

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<sup>62</sup> For further commentary, see section 5.2.2.1, chapter 5.

<sup>63</sup> Provided for by Section 1 United Nations Act 1946. C.45.

<sup>64</sup> [2008] EWHC 869.

<sup>65</sup> S. 6-9 Tafa 2010.

<sup>66</sup> S. 2-5 Tafa 2010.

<sup>67</sup> By virtue of S.4 TO 2006.

<sup>68</sup> *Ahmed and Others v United Kingdom* [2010] UKSC 2 at paragraph 225.

<sup>69</sup> An asset freezing order was unfrozen with immediate effect after a terrorism case against Moazzam Begg collapsed. This freezing order on Begg was active since his arrest in February 2014 and was promptly annulled in October 2014 on his release from prison. A spokesman for Begg observed: Moazzam Begg has been the subject of an arbitrary system that seeks to dismantle not only his ability to live, but also that of his family. The fact that there was never any case to answer in the first place,

consequences of such a sanction are tempered by the fact that an appeals mechanism now exists under TFAA 2010. Access to a means of redress suggests that the U.K. CTF regime, to a degree, recognises the impact of a designation and asset freeze. Even though these are administrative sanctions operated by the executive, they lack accountability and judicial oversight and therefore an avenue in which to challenge these sanctions is vital. Whilst this is a positive step, it does not provide the same procedural protection that access to the right to a fair trial would. In the absence of a minimum evidentiary standard of proof, guaranteeing a right to be heard in court to learn the facts of the case against a suspect would ensure that a designation could be effectively challenged. It would also provide an opportunity for the court to check that the executive is not acting in an arbitrary manner and authorising CTF sanctions without due cause. Failing to provide this safeguard in relation to the application of CTF legislation in the U.K. suggests that, this regime is lacking procedural fairness. Thus, it is determined that CTF legislation in the U.K. continues to run contrary to Article 6.1 of the European Convention of Human Rights.<sup>70</sup>

Along with fortifying the legislation to freeze assets, the importance of financial intelligence to the prevention of terrorism also gained prominence. To this end, it has been discussed how the regulated sector are charged with ensuring that any suspicious financial activity is reported to the National Crime Agency.<sup>71</sup> The filing of a SAR can represent the first step in the designation and freezing of assets of a person. By alerting the authorities to a potentially suspicious transaction, the financial institution is identifying the person concerned as a possible terrorist or terrorist supporter. From here, that person may have the sanctions applied to them and be designated a terrorist and have their assets frozen.

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exposes such decisions as cruel, vindictive and politically motivated.” (The Guardian, ‘Moazzam Begg’s financial sanctions lifted by UK Treasury’, October 14 2014, available at: <https://www.theguardian.com/world/2014/oct/14/moazzam-begg-financial-sanctions-lifted-by-uk-treasury> (Accessed: 19.03.17)

<sup>70</sup> For further commentary, see section 5.3.1, chapter 5.

<sup>71</sup> Persons in the regulated sector are required under Part 7 of the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000 to submit a SAR in respect of information that comes to them in the course of their business if they know, or suspect or have reasonable grounds for knowing or suspecting, that a person is engaged in, or attempting, money laundering or terrorist financing. The requirement for the submission of such reports is contained in the ATCSA 2001, which inserted s. 21A into the TA 2000 and created the offence of failure to disclose for the regulated sector.

These provisions are similar to those in the U.S. and Canada and attract comparable criticism regarding their apparent limited success. The statistics on frozen assets and CTF convictions in the U.K. fail to illustrate that the provisions have been successful. However, it is important to note that the actual effect of the legislation is impossible to quantify. The measures are meant to be precautionary and could be preventing terrorist funds from ever entering the financial system. Thus, the success of the measures would go unnoticed. However, even if the CTF measures are considered successful, a balance needs to be achieved between the effective implementation of CTF measures and human rights such as the right to a fair trial. Notwithstanding the significant amendments that have been made to U.K. CTF legislation, a lack of procedural fairness remains and the application of CTF sanctions are violating the right to a fair trial.

### **7.1.2.3 Canada**

Prior to the terrorist attacks on September 11 2001, Canada already had legislation in place to deal with terrorism.<sup>72</sup> However, these laws were aimed at domestic terrorism for which Canada had considerable past experience, yet there was no provision in Canadian law to deal with the prevention and detection of terrorist financing. Canada, like the U.S. and U.K, very quickly recognised the importance of the financing of terrorism and implemented legislation to prevent and detect it.

Significantly though, the Canadian government utilised powerful counter terrorism measures in the past and in doing so have prioritised national security over human rights.<sup>73</sup> During the October Crisis in 1970, emergency provisions, which were only meant for use during times of War, were invoked and these measures permitted the authorities to suspend certain civil liberties in order to facilitate the swift discovery of those involved in terrorism.<sup>74</sup> In practice, this meant that suspects could be arrested and detained without charge, denying them their due process rights. The fact that such protection was suspended at the time of the October Crisis is of great significance to

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<sup>72</sup> Historically, Canada has utilised the War Measures Act 1914 to deal with terrorism. Also, prior to the enactment of the Anti Terrorism Act 2001, many of Canada's provisions for dealing with terrorism were contained within the Criminal Code. Offences relating to terrorism were however, limited. For further commentary, see section 6.2. and 6.2.1.1, chapter 6.

<sup>73</sup> For further commentary, see Section 6.2, chapter 6.

<sup>74</sup> Pursuant to S. 6 of the War Measures Act S.C. 1914, c. 2.

the contention that counter terrorism measures, albeit emergency provisions can have a detrimental impact on human rights. The use of these powers is greatly controversial and it is highly probable that this experience has influenced the Canadian governments more considered reaction towards terrorism. For example, the inclusion of sunset clauses with some of the provisions in the Anti Terrorism Act 2001 goes some way to ensuring that the powers offered by the legislation continue to be necessary.<sup>75</sup>

Canada swiftly responded to the September 11 attacks and implemented the United Nations Suppression of Terrorism Regulations.<sup>76</sup> These Regulations extended terrorist financing listings and sanctions and brought Canada into line with UN Resolution 1373. Following this, the enactment of the Anti Terrorism Act 2001 brought in a whole new section to the Criminal Code including provisions relating to the financing of terrorism. This legislation is consistent with provisions adopted in the U.S. and the U.K. However, Canada also brought in controversial measures in relation to investigative hearings and preventative arrests of suspected terrorists. These extensive powers were brought in after a relatively short period of debate. This swift action was taken in order to comply with international provisions and also the example that was being set by the U.S. The U.S., U.K. and Canada all responded promptly to the September 11 2001 attacks, but arguably Canada were more tempered in their response and allowed for more heavy debate of the laws. They listened to criticism voiced by opposition parties, Cabinet Ministers and human rights groups and the ATA 2001 was subsequently amended.<sup>77</sup> One of these changes was the significant inclusion of sunset clauses in relation to preventative arrests and investigative hearings. This, at the very least illustrated that the Canadian government were aware that emergency measures should be reviewed to assess their necessity and should not become part of the permanent legal landscape. Despite this, these measures were reinstated in the Combating Terrorism Act.<sup>78</sup>

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<sup>75</sup> S. 83.32(1) Anti Terrorism Act 2001 states, “Sections 83.28, 83.29 and 83.3 cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006 unless, before the end of that day, the application of those sections is extended by a resolution...passed by both Houses of Parliament.”

<sup>76</sup> SOR 2001-360.

<sup>77</sup> For further commentary, see section 6.2.1.1, chapter 6.

<sup>78</sup> S.C. 2013 c.9.

In line with the approach of the U.S. and the U.K, Canada made reporting requirements a significant part in their CTF policy. Canada arguably made the same mistake as the U.S. and merged their AML policy with CTF policy in the Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000.<sup>79</sup> Despite money laundering and terrorist financing being two very separate issues, Canada is attempting to tackle them with the same approach. It has been discussed that part of this method includes utilising the financial sector to identify any suspicious financial activity. This suspicion is promptly reported to FINTRAC for further investigation, an approach that mirrors that of the U.S. and U.K. Whilst the characteristics of laundered money may be identifiable, terrorist funds may not be so obvious. A transaction of funds that are destined for terrorist purposes may look like any other ordinary transaction. This is due to the fact that terrorist money may derive from a legitimate source and may just be a small amount of money, meaning that such a transaction is unlikely to rouse the suspicion of a person working in a financial institution. This contention is reflected in the statistics. It has been noted how Canada has seen a huge amount of Suspicious Transaction Reports filed but few have led to convictions.<sup>80</sup> This is especially so in relation to terrorist financing suggesting that the reporting aspect of CTF measures is having a limited impact. Recent calls to investigate the area of countering terrorist financing in Canada suggest that the seeming lack of efficacy of the measures has not gone unnoticed.<sup>81</sup> This question over the success of the CTF regime in Canada is accompanied by criticisms regarding its incompatibility with the right to trial by jury. Whilst CTF measures may have had limited results on the financing of terrorism, the impact of their application on suspects is much more identifiable. Designation labels the suspect a terrorist and an asset freeze denies them access to their funds. This action is taken based on the executive's suspicion that the individual concerned may have a link to terrorism. This subjective approach does not require there to be concrete evidence, indeed at this point no investigation is required. The designee is not privy to the details relating to the justification of this action and it is fair to say that the means to appeal are limited.<sup>82</sup> Even though a request for de-listing can be made, it does not offer the same

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<sup>79</sup> S.C. 2000, c.17.

<sup>80</sup> For further commentary, see section 6.2.3, chapter 6.

<sup>81</sup> House of Commons Terrorist Financing in Canada and Abroad: Needed Federal Actions, Report of the Standing Committee on Finance, 41st Parliament, Second Session, June 2015.

<sup>82</sup> A request for de-listing can be applied for by virtue of S.83.05(2) Criminal Code of Canada.



level of procedural protection for the designee as the right to a public trial would. Comparable criticisms have been made of the CTF regime in Canada and those, which are in operation in the U.S. and the U.K and shall be concluded later.

## **7.2. The importance of the ‘financial war on terrorism’ to the prevention of terrorism.**

The significance of the money that supports terrorism became the source of much regulatory attention following the terrorist attacks on September 11 2001. Countering the financing of terrorism came to be accepted as an essential method by which to prevent and detect terrorism. Investigation into the money used to finance September 11 2001 proved that the U.S. financial system had been used to transfer money between terrorists.<sup>83</sup> The Federal Bureau of Investigation (FBI) concluded that some \$300,000 had been placed in the terrorist’s bank accounts “by a variety of means”.<sup>84</sup> Whilst the terrorists may have had access to cash, which left no money trail, the FBI believes that the visible \$300,000 was sufficient to cover the terrorist’s expenses. This money was used in preparation for the September 11 attacks and provided living expenses, travel costs and flight training for the terrorists.<sup>85</sup> It should be reiterated that the counter abuse mechanisms of the financial sector that were in place prior to 2001, namely the Bank Secrecy Act 1970, were not designed to route out the type of financial activity performed by these terrorists. Therefore, the legislation did not fail, it simply did not exist. With this in mind, this thesis has suggested that CTF legislation may prove valuable to the prevention of terrorist attacks. For example, the case of Ramzi Yousef has illustrated that a lack of funding can at least reduce the size of a terrorist attack. Following his capture, Yousef conceded that the World Trade Center bombing in 1993 was not as large as initially intended due to a lack of

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<sup>83</sup> The bulk of this money was provided by al-Qaeda.

<sup>84</sup> National Commission on Terrorist Attacks Upon the United States, *Staff Monograph on Terrorist Financing, Staff Report to the Commission at 133*. Available at: [http://www.911commission.gov/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://www.911commission.gov/staff_statements/911_TerrFin_Monograph.pdf) (accessed 16.02.13)

<sup>85</sup> National Commission on Terrorist Attacks Upon the United States, *Staff Monograph on Terrorist Financing, Staff Report to the Commission at 133*. Available at: [http://www.911commission.gov/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://www.911commission.gov/staff_statements/911_TerrFin_Monograph.pdf) (accessed 16.02.13)

money.<sup>86</sup> This fact may serve to demonstrate that starving terrorists of some if not all of their funds can play a positive role in counter terrorism efforts.

Notwithstanding examples such as this, this study has questioned the worth of such legislation. Since the application of these powerful measures, the prevalence of terrorism has grown significantly. There has been a significant increase in the incidence of international terrorist attacks. These have not all been large scale operations carried out by terrorist organisations. There has been a notable growth in sporadic terrorist attacks carried out by individuals and small groups. These attacks have also not required large sums of money to finance, as they have seemingly only required a limited amount of weapons, travel and organisation.<sup>87</sup> The FATF suggest that terrorists are self-funding and thus their low value and legitimate financial transactions are highly unlikely to be regarded as suspicious by authorities.<sup>88</sup> This suggestion along with a low number of terrorist financing prosecutions in the U.S, U.K. and Canada implies that the ‘Financial War on Terrorism’ may not be central to the prevention of terrorism. The small amount of terrorist financing convictions achieved in the U.S., U.K and Canada since 2001 implies that either terrorist financing offences are not being sought or that terrorist financiers are not being successfully prosecuted. It would appear however that the former is more likely. On challenge, the tendency is to de-list suspects rather than to attempt to secure a terrorist financing related conviction. Further to this, it has been discussed that although a person may be suspected of financing terrorism, authorities have pursued a greater charge with a potentially harsher punishment. This calls the merit of CTF legislation into question. However, it is concluded that the value of chasing the financing of terrorism may be found in the collection of financial intelligence. It has been discussed how the information that following the financial trail may expose could lead to the capture and prosecution of terrorists. Further discussion on this suggestion falls outside the scope of this study but is an area that could be considered for future research.

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<sup>86</sup> FBI: Foreign Terrorists in America: Five Years after the World Trade Center, Statement of Dale Watson, Chief International Terrorism Section, National Security Division, FBI. Before the Senate Judiciary Committee, Subcommittee on Technology, Terrorism, and Government Information, United States Senate, Washington D.C, February 24 1998.

<sup>87</sup> This is especially so with regard to recent terrorist attacks in Europe detailed throughout this thesis.

<sup>88</sup> FATF Report on Emerging Terrorist Financing Risks, October 2015 at 25.

### **7.1.3 The common policy adopted by the three jurisdictions and the importance of a unified response**

The U.S., U.K. and Canada have adopted a common policy in order to prevent the financing of terrorism. Whilst the three jurisdictions have varying historical experiences of legislating against terrorism, since 2001, all three have recognised the importance of and worked towards the achievement of a unified response to terrorist financing. Whilst action to prevent the funding of terrorism was taken by the UN prior to September 11 2001,<sup>89</sup> it was the terrorist attacks that resulted in the financing of terrorism becoming of great international concern. The attacks in the U.S. were characterised “as acts of international terrorism”.<sup>90</sup> Therefore, countries need to produce a coordinated effort in the elimination of terrorism by ensuring that they have 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 response is paramount. The foundation of international cooperation in the investigation and prosecution of terrorist financing is the 1994 Declaration of Measures to Eliminate International Terrorism.<sup>91</sup> By following the lead of the UN, the three jurisdictions concerned have been able to collaborate more effectively. The U.S., U.K. and Canada have all developed a three-point strategy for combating the financing of terrorism. This policy has centred upon the criminalisation of terrorist financing, the filing of SARs and the freezing of assets.

However, whilst the legislation implemented by the three jurisdictions is analogous, the outcome of their application has varied. The discretion awarded to authorities in these three jurisdictions has meant that CTF measures have not been universally applied. Moreover, challenges that have been brought on the basis of human rights

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<sup>89</sup> The UN adopted the legal term ‘terrorist financing’ in its Declaration of Measures to Eliminate International Terrorism in 1994. 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”. (United Nations A/RES/49/60 84th plenary meeting Measures to eliminate international terrorism, December 9 1994 (emphasis added)).

<sup>90</sup> H Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge University Press 2005) 17.

<sup>91</sup> A/RES/49/60

violations have had very different outcomes. For example, it has been discussed how the U.K. has had some of its CTF powers declared *ultra vires* and on this basis they have been required to implement new legislation. There have been no successful challenges to CTF powers in the U.S. and Canada. However, the recent ruling in the case of *Federation of Law Societies of Canada v Canada*,<sup>92</sup> suggests that Canada may in the future be receptive to ruling in favour of human rights over CTF legislation.

#### **7.1.4 The negative impact of Counter terrorist financing measures on the right to a fair trial**

The implementation of powerful CTF measures in the U.S., U.K. and Canada, have adversely affected the right to a fair trial.<sup>93</sup> It has been illustrated how the U.S., U.K. and Canada all claim to be robust supporters of human rights and each have their own human rights instruments, which promise to uphold (in most circumstances) the rights contained within them and are party to international human rights treaties. Despite this, security measures have taken precedence over human rights. The movement away from protecting human rights has been justified on the premise that there are exigent circumstances resulting from the terrorist threat. Whilst the threat of terrorism is not disputed, by sidelining human rights, the legitimacy of any counter terrorism provisions is left vulnerable to challenge. The emergency CTF measures introduced immediately after September 11 2001 in the three case studies concerned have not been operated on a temporary basis and instead have been permitted to become part of the normal legal landscape. When the implementation of legislation such as this is justified by the need for an emergency response, it is quite impossible to argue that it is still reasonable or legitimate 16 years later.

The authority to monitor accounts, oblige financial institutions to file SARs, and freeze assets can, as discussed, have significant consequences for those suspected of terrorist involvement. It has been explained and indeed illustrated how the filing of a SAR may lead to a designation as a terrorist or terrorist supporter and the freezing of that person's or organisation's assets. This action may be permitted to continue in the

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<sup>92</sup> (2013) BCCA 147.

<sup>93</sup> This right is known as a right to a fair trial in the U.K, the right to a public trial in the U.S. and the right to trial by jury in Canada. Whilst they offer slightly different protection, the fundamental aspects of these rights in the three case studies are the same.

absence of any terrorist related charge let alone terrorist related conviction. A designation as a terrorist or terrorist supporter can have serious implications for a person's reputation and a freezing order means that they have very little access to funds for as long as the order is in operation. The considerable detrimental impact of such action was recognized by the ECJ in the high profile case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*<sup>94</sup>. It has been considered that whilst the sanctions are imposed, the suspect is not afforded any right to be heard and indeed may even have little knowledge as to why action has been taken against them as it is thought necessary that details remain classified. Whilst the reasons for keeping the details of a designation confidential are logical, this action is not consistent with the right to a fair trial. It would be impossible for a person to mount a defence to a claim that they are financially supporting terrorism when they are not privy to the details of the case against them. In order to suitably defend themselves, they need to know the particulars of the accusations against them. Thus, the individual or organization that is designated as a terrorist is not privy to a presentation of the evidence, has no notification of a designation and has no opportunity to present evidence in opposition of the designation. Consequently, CTF measures in the U.S., U.K, and Canada are not consistent with the right to a fair trial. Whilst it has been considered that the right to a fair trial may not be applied as the freezing of assets is not a "criminal prosecution...but a preventative measure,"<sup>95</sup> a designation and consequent freezing of assets has a punitive effect and these sanctions have some of the hallmarks of a criminal charge and indeed a conviction, therefore the right to a fair trial offered by all three jurisdictions should be valid.

This prosecutorial impact on a person is felt even though they have not been convicted or charged of any wrongdoing and at the point of action has not even been suitably investigated. These powerful economic sanctions are being imposed based on inferences made by the authorities rather than by the gathering of evidence. Such a situation leads to suggestions that the powers are arbitrary. Indeed it has been discussed how CTF powers in the U.K., have been found as such in the highly

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<sup>94</sup> *Joined cases C-402/05 and C-415/05, Kadi and Al-Barakaat International Foundation v Council & Commission* , 3 September 2008

<sup>95</sup> As argued by the U.S Sanctions Committee (UN Security Council Sanctions Committee, Asset Freeze: explanation of terms, [www.un.org](http://www.un.org)).

significant case of *HM Treasury v Ahmed and Others (FC)*<sup>96</sup>. No such challenge to CTF provisions has been successful in the U.S. or Canada thus far. However, cases in the U.S. where charities such as the *Benevolence International Foundation*, *KindHearts for Charitable Humanitarian Development Inc* and *al-Barakaat International Foundation* serve as illustration that CTF provisions are vulnerable to mistake and the Department of Treasury is making such errors in the absence of basic due process protections for those involved.

## 7.2 Conclusion and Recommendations

Since the terrorist attacks in September 11 2001, there has been a tendency by governments to weaken human rights in favour of legislation, which claims to offer greater national and international security. This security is promised by way of the prevention of terrorism through the elimination of terrorist financing. The U.S., U.K. and Canada have all adopted CTF strategies, which impose harsh sanctions on those who are merely suspected of involvement in the financing of terrorism. Individuals are being designated as connected with terrorism and are having their assets frozen for a significant period of time without ever being convicted or indeed charged with a crime. The measures are not merely preventative in nature but rather punish a suspect who may later be found to be innocent of any terrorist related offence.<sup>97</sup> Not only do these powers allow authorities too much discretion but they also lack an opportunity for judicial scrutiny. Further to this, as CTF powers operate outside of the criminal justice system, means of redress and accountability are weakened. Arguably provisions of the Human Rights Act, the United States Constitution and the Canadian Charter of Rights and Freedoms should protect against arbitrary or unfair powers being applied by authorities. However, as CTF measures operate outside criminal law, the suspects are not offered the same protection. If they were being prosecuted for a criminal offence, they would be able to make use of inherent protections offered for the accused including the right to a fair trial. Such a lack of procedural protection

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<sup>96</sup> [2010] UKSC 2.

<sup>97</sup> A designated person is guilty of terrorist involvement until proven innocent, a situation which, could be regarded as in violation of Article 6.2, ECHR and S. 11 (d), Canadian Charter of Fundamental Rights and Freedoms. The right to be presumed innocent until proven guilty is not protected in the U.S. Constitution but is a feature of common law. This presumption of innocence and CTF sanctions, requires further examination and may be of interest for future research.

leads to the conclusion that CTF measures in these three jurisdictions are not legitimate and are in need of clear review. Firstly, it is suggested that what is needed is movement away from the current regime which allows authorities to exercise over broad discretion. The criteria for the enforcement of designations and the freezing of assets need to be stricter ensuring that the sanctions process is appropriate and more transparent. In order to achieve this, more stringent criteria should be put in place for the application of asset freezing powers. There should be a universal test implemented, which suggests what behaviour may amount to suspicious and justifies the implementation of a designation and asset freeze. Whilst it is accepted that it would be counter productive to award notice to a suspect of any imminent action, it is paramount to ensure that these harsh sanctions are not applied based on broad speculation. The creation of a minimum evidentiary standard even for an interim designation would guard against the unfair application of CTF sanctions.

Secondly, the right to be made aware of the allegation against a person is an essential component of procedural fairness and the rule of law. Whilst the essence of a right to a fair trial i.e. trial by a public jury might be impossible to provide in this instance, there should be an irreducible minimum of disclosure. This was suggested in the preliminary judgement of *Gulam Mastafa v HM Treasury*<sup>98</sup> and it is argued that, armed with at least a minimal amount of information, the individual concerned would have some scope to mount a credible defence. Whilst the Special Advocate Procedure adopted in the U.K. and Canada improves this situation, potentially offering better procedural justice, the system is still flawed because without disclosure to the designee of the evidence gathered, the ability to argue any charge or suspicion is limited.

While it is accepted that, the necessary confidentiality of the evidence should be taken into account, the designee should be provided with at least the absolute minimum amount of detail with regard to the accusation against them. This can be fulfilled without having to provide the designee with comprehensive information relating to the evidence or its origins. The designee should be made aware of the reasons for a designation and asset freeze, providing an explanation on what behaviour or links led

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<sup>98</sup> [2012] EWHC 3578. Departing from an earlier judgement in *R (Bhutta) v HM Treasury* [2011] EWHC 1789 (Admin), Mitting J.

to a suspicion of terrorist financing. If, the previous recommendation was implemented i.e. a universal test for the application of these sanctions then this test could be used to illustrate the essence of the grounds for suspicion and action. It is proposed that this information should be given within days of action being taken. Further to this, and in the absence of a right to trial, it is contended that an opportunity should be given for the individual concerned to contest this evidence before an impartial person or group. This 'hearing' should take place within a few weeks of the sanction being applied. In a situation similar to administrative court, the evidence can be ruled upon and a decision made as to the justification of the sanction. Prompt examination of the reason for a designation and asset freeze is essential for the suspected terrorist financier and for the legitimacy of the designation and asset freezing process.

Thirdly, there should be a means to appeal any designation and asset freeze that is in place for longer than a time which can be considered temporary. For these powerful and potentially harmful sanctions to apply to an individual or organisation for a lengthy or indefinite period, it is imperative that the suspect has been charged and found guilty of terrorist involvement. Whilst in the U.K. designations have a one year time limit (subject to renewal) there is no such expiry date on designations in the U.S. and Canada. Whilst a time limit such as this ensures that designations are regularly reviewed, many designations may still be permitted to stay in operation for years without any charge or conviction being brought. A reasonable date should be provided by which a terrorism related charge should either be applied or the suspect should be considered for de-listing. At least if a charge is brought, then the accused will be given an opportunity to exercise their right to a fair trial.

Such amendments to the operation of asset freezing orders means that the procedure is open, fair and it conforms better to human rights legislation in the U.S, U.K. and Canada. By complying better with such rights, the possibility of legal challenges to the CTF regime by designated persons is reduced. Amendments to punitive sanctions such as these will provide stronger evidentiary foundations for the implementation of designations and asset freezes. Transparency and procedural fairness of CTF sanctions will also be improved thereby reinforcing the credibility of the CTF regimes in the U.S., U.K. and Canada.



