

ANDRÁS L. PAP*

Constitutional Ambiguities Regarding Anti-Terrorist Financial Enforcement Measures—The Case of Hungary

Abstract. The policy of “proscription” or “designation” of groups and individuals as “terrorist” has been deployed as a crucial legal weapon in the global war on terrorism. Despite its serious human rights implications, judicial review is excluded from this highly politicised process, which has been embraced uncritically by the international community and member states’ domestic legal system. The essay aims to survey certain contradictions within legal regimes imposed by the UN Security Council, the EU and the Hungarian Government, aimed at freezing assets and financial transactions of terrorist organisations and organs associated with anti-democratic political regimes. It is argued that legal regimes that would serve the thorough implementation of anti-terrorist sanctions brought by the UN Security Council or the European Council are extremely underdeveloped. In other words, the three normative levels of sanction measures—(1) legislation passed by the UN Security Council; (2) the implementing legislation of member states and the EU; (3) sui generis EU sanction-regulations—are not harmonized. Even though the examples are brought from Hungary, a new EU-member state that so far has not been directly affected by terrorism, arguably the scrutinized controversies point to general Rule of Law questions that presumably most European states are bound to face.

Keywords: international law, European law, anti-terrorist measures, due process, Rule of Law

The policy of “proscription” or “designation” of groups and individuals as “terrorist” has been deployed as a crucial legal weapon in the global war on terrorism. Despite its serious human rights implications, judicial review is excluded from the highly politicised process of designating persons and legal entities as terrorists.¹ Although proscription carries extremely serious consequences,² particularly for individuals subject to asset freezing, this policy has

* Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences. The paper was presented at the “Illiberal Practices of Liberal Regimes?” Challenge Annual Conference, 9 June 2006, Centre d’Etudes et de Recherches Internationales (CERI), Paris
E-mail: pap@jog.mta.hu

¹ See Statewatch Analysis, Terrorising the rule of law: the policy and practice of proscription, <http://www.statewatch.org/terrorlists/terrorlists.pdf>.

² “Proscription has extremely serious consequences, not just for the groups and individuals that are named expressly on the lists, but their associates, supporters and

been embraced uncritically by the international community and member states' domestic legal system.

This essay aims to survey certain contradictions within legal regimes imposed by the UN Security Council, the EU and the Hungarian Government, aimed at freezing assets and financial transactions of terrorist organisations and organs associated with anti-democratic political regimes. Even though the examples are brought from Hungary, a new EU-member state that so far has not been directly affected by terrorism, arguably the scrutinized controversies point to general Rule of Law questions that presumably most European states are bound to face.

While outlining the specific loopholes within the Hungarian legal regimes, the following general issue is raised: legal regimes that would serve the thorough implementation of anti-terrorist sanctions brought by the UN Security Council or the European Council³ are extremely underdeveloped. In other words, the three normative levels of sanction measures—(1) legislation passed by the UN Security Council; (2) *sui generis* EU sanction-regulations; and (3) the implementing legislation of member states and the EU—are not harmonized. Several crucial questions remain unanswered with respect to sanctions that involve the curtailment of fundamental rights such as the freezing of assets of persons or legal entities. These questions include:

1. How are sanctions passed?
2. What is the legal nature of a UN Security Council resolution, especially if it involves sanctions against non-state actors and infringement on people's fundamental rights, such as freezing assets or deportation?
 - a) Can such a resolution be rebutted
 - aa) by the UN Sanctions Committee?
 - ab) by the European Court of Justice?
 - ac) by the European Court of Human Rights?
 - b) Can it be contrary to national *jus cogens*?
3. How should such a resolution be adopted or incorporated/transformed into national law?

contact networks. Given these implications for fundamental rights, the failure to provide adequate mechanisms for appeal and redress for groups and individuals affected by proscription is extremely alarming." See above. As Iain Cameron notes: "The effect[s] of a freezing order, if it is effectively implemented, are devastating for the target, as he or she cannot use any of his or her assets, or receive pay or even, legally speaking, social security.", Cameron, I.: (2003) European Anti-Terrorist Blacklisting, in *Human Rights Law Review* 3 (2003) no. 2.

³ See for example Bohr, S.: Sanctions by the United Nations Security Council and the European Community, *European Journal of International Law* 4 (1993) 156–268.

- a)* How is it implemented?
- b)* When does it take effect?
- 4. What procedures should apply to the enforcement of such a resolution?
 - a)* Can a national court suspend the application of the resolution due to constitutional misgivings?
 - b)* What standards should be applied in the process of granting, say, an emergency exception from the sanctions?
 - c)* What practical standards can be applied in constructing the criminal sanctions applicable to those who provide material support to terrorist organisations?
 - d)* Can a national court award compensation for damages caused by such sanctions?

Due to spatial constraints, I shall mostly limit my analysis to posing these questions as they arise in national law, leaving issues of international law out of the discussion. I wish to draw the reader's attention to a few points where institutional weaknesses, if not a degree of cynicism can be observed in the transformation or realization of international anti-terrorist measures. It seems as though states operate on the assumption that no cases would ever arise in which the lack of procedural guarantees or even the procedures themselves become substantive issues. The principle of rule of law is a recurrent mantra within UN and (especially) European documents,⁴ but its application has been subject to a double standard. On the one hand, accessing states' commitment to the rule of law is thoroughly monitored. On the other hand the EU failed to formulate strict procedural guarantees for anti-terrorist financial enforcement measures, and instead broadened their scope of application (to non-terrorist anti-democratic regimes)⁵ without paying attention to their potential human rights risks. As a

⁴ See for example the Guidelines on human rights and the fight against terrorism on 11 July 2002 adopted by the Committee of Ministers of the Council of Europe: "II. All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision. ... IX. 1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law. 2. A person accused of terrorist activities benefits from the presumption of innocence. ... XIV. The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court."

⁵ The EC and the EU is and has been adopting regulations aimed at implementing UN sanction resolutions, but also created its own unilateral Community sanction regimes. See

new member state, Hungary has only travelled a short distance on the road of rule of law constitutionalism, when a restrictive legal regime has been induced from the (highly valued) international organizations and the new regime has been taken for granted without due political (or even professional) debate.

It is important to note that this is the context in which the Hungarian case study should be seen. Otherwise the debate over Islam or Muslim communities has not been a dominant issue in the Hungarian political discourse. Given the very small size of the Muslim community in Hungary (roughly 0.057 percent of the population), a fundamentalist terrorist threat is not considered a factor of significance, as the dominantly naturalised Muslim community lives integrated within Hungarian society.⁶ There is no measurable public hostility towards the Muslim community, and, even after September 11 or March 11, Islamophobia appears to be an altogether marginal, if at all existent phenomenon or sentiment in Hungary. All in all, Hungary has had two unrelated incidents where individuals were accused of maintaining terrorist connections: one case involved a Muslim religious leader (2004), the other, a non-nationalised immigrant doctor (2003). These events received a considerable media attention but neither triggered a particularly long-lasting or prominent public debate.

Following the structure laid out above, let us begin the analysis of the controversial legal regime of anti-terrorist financial sanctions. As I mentioned before, this paper is limited in its scope: it aims to raise questions and point to controversies without developing a full analytical framework or solutions to the issues raised.

1. Conflicting constitutional obligations and the legal nature of UN Security Council sanctions

It appears that the threat of weapons of mass destruction and recurring terrorist attacks have overpowered the previously dominant principle that it is better to have nine criminals go free than to have a single innocent person punished. In a world where “kill ten and keep thousands in a state of fear” is the operating

for example Pavoni, R.: UN Sanctions in EU and National Law: The Centrocom Case. *International and Comparative Law Quarterly*, 48 (1999) 582–612.

⁶ In the 2001 national census 5,777 persons identified themselves as Muslim, which is about 0.057 per cent of the Hungarian population. Taking into account non-citizen migrants and converted Hungarians, media and academic estimates occasionally refer to a larger Muslim population size, sometimes as large as 20,000–50,000. <http://www.manacs.hu/index.php?gcPage=/public/hirek/hir.php&id=10117> (11 April 2005).

principle of the social psychology of global terrorism, anti-terrorist measures obviously need to be strict and hit terrorist organisations where it hurts: their financial umbilical cord. Even if these measures involves unveiling legal entities and ordering financial organisations to identify their beneficiaries, or creating new, daring standards of criminal liability for those who donate to charities that might be involved in terrorist activities.⁷

It also appears to be the case that the implementation of these political commitments does not always go hand in hand with the subsequent adjustment of the legal and constitutional system. Popularly supported and politically accepted as it is, legal exceptionalism does not always fit well with the traditional principles of constitutionalism. Take for example the case of proscription: The selection criteria and process for designation is fairly straightforward. “Intelligence”, much of it secret, provides the basis for including groups and individuals on the various lists. The judiciary is excluded and parliaments play only a minimal role. In the EU and UN frameworks there is no democratic scrutiny whatsoever. None of the regimes provide for notification to the accused that designation is pending or opportunity for the accused to contest any allegations before proscription: the normal judicial process is entirely discarded.⁸

The UN Security Council is a political organ, created to make political decisions that bind member states. Recent anti-terrorist action plans have, however, actually given quasi-judicial authority to the Council for imposing sanctions on persons and legal entities without the proper guarantees habitually present in all national procedures that may end in imposing such sanctions. It was commonly held that the Security Council (as a political organ) is not and should not be bogged down by restraints like judicial independence, the presumption of innocence, fair trial etc., because initially, Council resolutions affected states only and the sanctions were political in nature. Needless to say,

⁷ For more, see Pap, A.: *Ethnic Discrimination and the War Against Terrorism—The Case of Hungary*. In: Halmai, G. (ed): *Hungary: Human Rights in the Face of Terrorism*, Special English Edition of *Fundamentum*, Human Rights Quarterly, USA, 2006, also see at <http://157.181.181.13/dokuk/05-eng-02.pdf> (24 August 2006).

⁸ Together with the EU legislation allowing proscription, the first EU “terrorist” list was agreed by “written procedure” on the 27 December 2001. This meant that the four legal texts were simply faxed around to the foreign ministries of the 15 EU member states and adopted if none raised any objections, which two days after Christmas was surely unlikely. The various UN Security Council Resolutions have been adopted in similar fashion—at least in terms of the absolute lack of debate. Both the UN and EU lists have been amended so many times it is very difficult to keep track of the decisions being taken. See Statewatch Analysis, *Terrorising the rule of law: the policy and practice of proscription*, <http://www.statewatch.org/terrorlists/terrorlists.pdf>.

this is hardly the case today, with financial and other sanctions pertaining to persons and organisations designated as terrorists.

Because UN sanctions (qua non-self executing international rules) are formally only binding states and not, say, the financial institutions that will eventually freeze the accounts, it is obviously the state who is bound to simultaneously bear responsibility for keeping its international obligations and uphold internal rule of law.⁹ In other words, it may create conflicting responsibilities if a state receives a Security Council resolution which is based on mostly unrevealed sources of information and political deliberations (invariably lacking fair trial guarantees). The reason: the state will be under an obligation to a) enforce these sanctions under its jurisdiction, while b) it will not be exempt from the rule of law obligation to respect the “presumption of innocence” principle, for example.¹⁰ The first question (which will remain unanswered within the bounds of this paper) is thus the following: *can an obligation under international law be contrary to national jus cogens?* There is some literature that would support an affirmative answer to this question. For example, Derek Bowett argues that “...a Council decision is not a treaty obligation. The obligation to comply may be, but the decision per se is not. ... The Council decisions are binding only in so far as they are in accordance with the Charter.”¹¹ Michael Fraas considers the UN and, as its organ, the Security Council to be bound by general international law, in particular basic human rights guarantees and

⁹ According to Article 25 of the UN Charter, States have the obligation to implement enforcement measures adopted pursuant to Article 41, which obligation they perform in accordance with their national constitutional system.

¹⁰ The presumption of innocence is a fundamental right, laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU). Article 6 of the Treaty on European Union (TEU) provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States. The “presumption of innocence” is mentioned in Article 6(2) ECHR (The right to a fair trial): “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law” and Article 48 CFREU (Presumption of innocence and right of defence): “1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.” For more, see, The Presumption of Innocence, Green Paper, Commission of The European Communities, Brussels, 26 April 2006, COM(2006) 174 final.

¹¹ Bowett, D.: The Impact of Security Council Decisions on Dispute Settlement Procedures. *European Journal of International Law* 5 (1996) 4–5.

norms of jus cogens.¹² His reasoning about jus cogens is as follows: The constituent treaty of an international organization may not contradict jus cogens rules. “From this it follows that the organs of the organization may not be empowered to violate rules of jus cogens.”¹³

But let us assume that national law actually satisfyingly accommodates these sanctions, say, with an institution that resembles pre-trial detention. Let us also assume that satisfactory forums and procedures (that include judicial guarantees) are being created for people under these sanctions to prove their innocence and provide evidence for, say, an error that caused them to appear on a list of terrorists. However unlikely, for the purposes of the example, let us imagine that even though her bank accounts are frozen, a terrorist suspect manages to hire a competent attorney who finds out that she is indeed an exemplary patriot only her name happens to closely resemble that of a terrorist’s and it had been misspelled or mistyped in one of the secret service files – a phenomenon not entirely unusual when transcribing Arabic names to English. The question is, even if such a simple factual error relating the UN Security Council’s decision can be proved, what procedures would follow? Can such a resolution be rebutted?¹⁴ Or all the state can do is ask the Security Council to correct its decision?¹⁵ Should we opt for the second alternative, subsequent questions arise: can a national court order the state to file such a request to the Security Council? What happens if the Security Council is reluctant to change its resolution? Can a national court nevertheless order the suspension of such a sanction?¹⁶

¹² Fraas, M.: *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof: Die Rechtmässigkeitsprüfung von Beschlüssen des Sicherheitsrats der Vereinten Nationen im Rahmen des VII. Kapitels der Charta durch den Internationalen Gerichtshof*. Frankfurt am Main, 1998. 82–84, 246.

¹³ *Ibid.* 77. For more, see Fassbender, B.: Quis judicabit? The Security Council, Its Powers and Its Legal Control, Review Essay, *European Journal of International Law* 11 (2000) No. 1.

¹⁴ There is some literature that suggest this possibility. See Bowett, D.: The Impact of Security Council Decisions on Dispute Settlement Procedures. *European Journal of International Law* 5 (1994) 1–101.

¹⁵ For example, Jochen Herbst argues that the judicial review of the legality of SC decisions is both possible under procedural law and permitted under UN constitutional law. The General Assembly and the SC have the right to request an advisory opinion of the ICJ on the legality of a SC decision. See Herkst, I.: *Rechtskontrolle des UN-Sicherheitsrates*. Frankfurt am Main, 1999.

¹⁶ Bowring, B.–Korff, D.: Terrorist Designation with Regard to European and International Law: The Case of the PMOI, International Conference of Jurists, Paris, 10 November 2004, <http://www.cageprisoners.com/articles.php?id=7822>.

According to a Statewatch Analysis: “The UN and EU lists make no provision for appeal to the courts whatsoever. Groups and individuals on the lists may make diplomatic representations to their government, or the government that they believe proposed their proscription. An individual EU member state may grant a “specific authorisation” to unfreeze funds and resources after consultation with the other Member States, the Council of the EU and the European Commission (the issue of whether to continue to include someone on the EU list is decided by the Council). In the UN framework the requested member state may then make “diplomatic” representations to the Security Council Committee with a view to informal resolution of the issue¹⁷ (and failing this, resolution by the Security Council itself). As far as the courts are concerned, individuals and groups could challenge the application of the EU/UN measures in the national courts on the basis that they contravene human rights or constitutional standards—though such appeals could well be denied on the grounds that international sanctions regimes are binding on member states. Groups and individuals have indirect recourse to the EU Courts and can seek annulment of the Council measures implementing the freezing regime, or damages for unlawful Council acts at the European Court of First Instance (and subsequently the full European Court of Justice). However, the proceedings in these courts would be directed at the EC/EU rules; they would not really concern the national measures implementing them.”¹⁸

A number of groups have taken case to the EU Courts and claimed sizeable damages. The composition and functioning of the CFI and ECJ as international courts, however, leaves them inadequately equipped to deal with the complex issues raised by proscription cases. In such a situation, they offer no real prospect of adequate judicial redress for groups and individuals proscribed as “errorist” by the EU. A vivid example for this can be seen in the Court of First Instance judgements in the case of T-306/01 and T-315/01, 21 September 2005—‘Ahmed Ali Yusuf and Al Barakaat International Foundation’¹⁹ and Yassin

¹⁷ In the Ahmed Ali Yusuf and Al Barakaat International Foundation case (see below), the Swedish government actually resisted and argued on behalf of its named citizens.

¹⁸ Statewatch Analysis, Terrorising the rule of law: the policy and practice of proscription <http://www.statewatch.org/terrorlists/terrorlists.pdf>.

¹⁹ Applicants argued that Articles 60 EC and 301 EC, on the basis of which that regulation had been adopted, authorise the Council solely to take measures against third countries and not, as it did in this case, against nationals of a Member State residing in that Member State. Applicants also denied the allegation that sanctions were imposed on them on account of their association with the regime of the Taliban in Afghanistan. In their view, the sanctions were not imposed on them because they maintained a link with that regime

Abdullah Kadi²⁰ v Council of the European Union and Commission of the European Communities'. Here, the court held that the European Community is competent to order the freezing of individuals' funds in connection with the fight against international terrorism. However, insofar as they are required by the Security Council of the United Nations, for the most part, these measures fall outside the scope of judicial review. The Court of First Instance held that, according to international law, the obligations of the Member States of the United Nations under the Charter of the United Nations prevail over any other obligation, including their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and under the EC Treaty and this paramountcy extends to decisions of the Security Council, as although it is not a member of the United Nations, the Community must also be considered to be bound by the obligations flowing from the Charter of the United Nations, in the same way as are its Member States, by virtue of the Treaty establishing it.²¹ The Court went on to state that any review of the internal lawfulness of the regulation would therefore involve the Court in examining, indirectly, the lawfulness of the decisions in question. Having regard to the rule of paramountcy set out above, those decisions fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority to call into question, even indirectly, their lawfulness in the light of Community law or of fundamental rights as recognised in the Community legal order.

In regards of the *jus cogens* issue, according to the Court of First Instance, it is nevertheless empowered to check the lawfulness of the contested regulation and, indirectly, the Security Council resolutions in the light of the higher rules of general international law falling within the scope of *jus cogens*, understood as a peremptory norm of public international law. However, after due scrutiny, the Court found that the freezing of funds provided for by the contested regulation does not infringe the applicants' fundamental rights as protected by *jus cogens*.²² On the other hand, the Court was on the opinion that it is not for

but because of the Security Council's desire to combat international terrorism, regarded as a threat to international peace and security.

²⁰ In support of his claims, the applicant has put forward in his application three grounds of annulment alleging breaches of his fundamental rights. The first alleges breach of the right to a fair hearing, the second, breach of the right to respect for property and of the principle of proportionality, and the third, breach of the right to effective judicial review.

²¹ See Press Release No. 79/05.

²² The Court held that because the contested regulation makes express provision for possible derogations, at the request of interested persons, allowing access to funds necessary to cover basic expenses. It is therefore neither the purpose nor the effect of those measures to subject the applicants to inhuman or degrading treatment, nor have the applicants been

it to review indirectly whether the Security Council's resolutions are compatible with fundamental rights as protected by the Community legal order, or to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council. The Court also pointed out that the right of access to the courts is not absolute. In this instance, it is curtailed by the immunity from jurisdiction enjoyed by the Security Council.²³

Once all avenues for appeal have been explored, proscription may be challenged at the European Court of Human Rights. The ECHR, however, has so far held that all judicial remedies—including the ECJ must be exhausted before it can consider any cases, and this leaves applicants facing severely lengthy procedures.²⁴

In conclusion, it is well to note that even though the EU has created a mechanism that is aimed at creating unified normativity, the EU is not a member of the UN and only national organs are regarded as addressees (and responsibility bearers) of sanction resolutions. National rules are therefore viable, indispensable and crucial elements in the process.²⁵

This way, the key to the above questions will lie within how the state inserts its international obligation (and domestic national security interest) into its constitutional system. Through the example of Hungary, I will show that very often neither the process of implementation, and thereby the source of law

arbitrarily deprived of their right to property, in so far as that right is protected by jus cogens. Indeed, the freezing of funds constitutes one aspect of the United Nations' legitimate fight against international terrorism and is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. Furthermore, the Court held, the resolutions of the Security Council provide for a means of reviewing, after certain periods, the overall system of sanctions and for a procedure enabling the persons concerned to present their case to the Sanctions Committee for review, through their State. As regards the rights of defence, the Court found that no rule of jus cogens appears to require a personal hearing of those individuals concerned by the Sanctions Committee. Since the regulation is a precautionary measure restricting the availability of property, observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them, where the Security Council was of the view that that there are grounds concerning the international community's security that militate against it. Id.

²³ For more, see Vlcek, W.: The European Court of Justice and Acts to Combat the Financing of Terrorism by the European Community, *Challenge Research Note Work Package 2—Securitization beyond borders: Exceptionalism inside the EU and impact on policing beyond borders*, November 2005.

²⁴ Id.

²⁵ See Pavoni: *op. cit.* 610.

nature of the sanctions, nor the adjacent legislation that would integrate them into the nation's legal system are sufficiently coordinated.

2. The implementation of resolutions imposing sanctions

The best way to show the contradictory Hungarian practice of implementing sanction-type resolutions is to divide the question into three further sub-questions: (1) how is a sanction-type resolution implemented? (2) when does it take effect?, and (3) when does it cease to be in effect?

2.1. *The form of implementation*

The Hungarian legislator does not take a clear stance on positioning itself in the monism versus dualism question. In a dualist legal system, international legal norms have no legal effect and are unenforceable without and prior to incorporation into national law. This implies that international norms themselves do not enjoy a special rank in the hierarchy of legal norms; their rank will correspond to that of the implementing instrument. According to modern theories, a legal system is said to be monist when it conforms to the idea that international law is automatically part of and superior to domestic law.

In Hungary, some international documents are properly promulgated and transformed into the Hungarian legal system; some are only published in the Official Journal²⁶ (which according to some authors²⁷ suggests a monist direct effect).

When it comes to sanction-type resolutions, some are promulgated in the form of acts of parliament. Such were for example the resolutions 827 (1993) establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY),²⁸ or 955 (1994) establishing the Tribunal for Rwanda (ICTR).²⁹

Many other sanction-type resolutions, however, are promulgated in the form of a government decree such as for example 883 (1993) concerning The

²⁶ "Magyar Közlöny".

²⁷ See for example Kovács, P.: Nemzetközi szervezetek szankciós típusú határozatai magyarországi érvényesíthetőségének alkotmányjogi gyakorlata és problémái (Constitutional Practice and Problems in Hungary During the Implementation of Sanction type Resolutions Taken In International Organizations). In: Bodnár, L. (ed.): *EU-csatlakozás és alkotmányozás* (EU-Accession and Constitution-Making). Szeged, 2001.

²⁸ Act 39 of 1996.

²⁹ Act 101 of 1999.

Libyan Arab Jamahiriya.³⁰ This is in itself a somewhat problematic scenario as Article 8 (2) of the Hungarian Constitution states that “in the Republic of Hungary, regulations pertaining to fundamental rights and obligations are determined by law [in this context meaning acts of parliament, ALP]; but the substance of fundamental rights cannot be restricted even by law.” As sanction-type resolutions often carry severe restrictions on right to property, or even criminal liability, an act of parliament would be the desirable medium for implementation.

Nevertheless, government decrees are still ranked second in the hierarchy of legal norms in Hungary. Very often, however, we will find government resolutions promulgating Security Council resolutions. (See, for example, 748 (1992) concerning the Libyan Arab Jamahiriya.)³¹ This is all the more worrisome given that these resolutions are not even proper legal norms according to the Hungarian legal system. It would be very difficult to detect any regularity within these practices: the two aforementioned sanctions against Libya were almost identical³² and one might wonder why such different forms of implementation were used.³³

What is more, some resolutions are only published as Foreign Ministry announcement-like documents, and to increase the chaos, some are published in English,³⁴ others in Hungarian, yet others in both languages, but quite a few resolutions are only implemented as summaries with references to the original.

Things can get even worse; a great number of resolutions are not implemented in any way.³⁵ This is not an insignificant issue, as some resolutions frequently make reference to further ones and it might take a few turns until we actually get to the lists that contain the names of individuals or companies to be sanctioned. And it may easily happen that some parts of this chain will not be formally implemented in Hungarian law.

Having said all this, it seems to be the least troubling element that when the UN Security Council resolutions are published in the Official Journal, they appear under the title “International Treaties”—which they clearly are not.

³⁰ 164/1993 (XI. 30.) korm. r. (government resolution).

³¹ 1020/1992 (IV. 15.) korm. h. (government resolution).

³² For another example see the respective government resolutions (2130/1999) and decrees (118/2000) implementing sanctions against 1999/206CFSP and 1298 (2000) on the situation between Eritrea and Ethiopia.

³³ For more see, Kovács: *op. cit.*

³⁴ 1996/16 Nemzetközi Szerződés a külügyminisztertől (Agreement International of the Foreign Ministry), for more see, Kovács: *op. cit.* 155.

³⁵ See Kovács: *op. cit.* 162.

2.2. *The time of implementation*

Besides the form of implementation, timing is another problematic issue: in particular, the starting and endpoint of the effect of the sanctions. Ideally and formally sanctions should take effect immediately. In reality, proper transformation (sometimes the mere translation), even if it takes the form of a summary released by the foreign minister, may take weeks or months. *Nullum crimen sine lege* is a fundamental rule of law requirement, which means that no criminal sanction (whether national or international in origin) may have retroactive effect. However this can indeed happen, if the original text (which obviously cannot be altered) contains a starting date that will pre-empt the time of promulgation.³⁶

2.3. *The time of deregulation*

The next problem arises in the context of deregulation. The Hungarian practice again has been quite irregular regarding the implementation of resolutions lifting sanctions. The promulgation of such resolutions are often omitted, or done in sketchy summary documents issued by the Foreign Ministry.³⁷ What is more, we can even see examples of promulgation with one type of legal norm and annulations of the exact same resolution with another type—sometimes using media that are positioned significantly lower in the hierarchy of legal norms. What a constitutional gem: an act of parliament annulled by a government resolution! (This is unacceptable even in if the original source of law, the international sanction has been revoked, and the norm subsequently had been emptied.)

This cacophony of solutions is not only questionable from the constitutional point of view, but also creates a jungle of regulations which law enforcement agencies and private subjects (who are also bound to follow and enforce them) have difficulties following—and this runs against the principle of legal security. Péter Kovács, for example, refers to an incident in 1996 when apparently the Ministry of Foreign Affairs itself has lost track and erred in establishing the applicable status of revoked and reinstalled sanctions against Yugoslavia.³⁸

³⁶ For a pre 9/11 example, see the sanctions concerning Eritrea and Etiópia. See *supra* note 10.

³⁷ For example, to bring examples of resolutions regarding Yugoslavia, 943 (1994) was promulgated but 988 (1995) was only released as a summary.

³⁸ Kovács: *op. cit.* 154.

3. National enforcement—Constitutional misgivings and lack of efficiency

So far, we have seen how sanction-type resolutions “make their way” into the Hungarian legal system. And this is the point where the real problems emerge; as the sanctions need to be integrated within the constitutional structure. We will now focus our attention to post-9/11 anti-terrorist sanctions, in particular financial sanctions on designated terrorist organisations and persons supporting their activities.

As mentioned above, enforcement procedures pose a number of questions including these: can a national court suspend the application of an international sanction due to constitutional misgivings?; what standards ought to be applied in the process of granting for example an emergency exception from the sanctions?; what practical standards can be applied in constructing the criminal sanctions applicable for providing material support to terrorist organisations?; can a national court award compensation for damages caused by such sanctions?, etc.

Answers to these and related questions should ideally be provided within national legislation incorporating the international sanctions. If they are not (as it is with Hungary), their absence indicates the substantial amount of work still awaiting legislators. This paper will do considerably less: it will bring attention to the omissions and describe deficiencies in the harmonizing attempts of the Hungarian legislators.

The sanctions ordering the freezing of funds and other financial assets or economic resources against persons who commit, or attempt to commit terrorist acts or who participate in or facilitate the commission of such acts “arrived” in the Hungarian legal system with Act 83 of 2001, an anti-money laundering and anti-terrorism package which (motivated far more by the European Union integration process³⁹ than a fear of terrorism) contained a host of new measures and regulations intended to aid the global effort to combat terrorism, especially in the area of financial sanctions and restrictions towards organisations and persons supporting terrorism. The Act authorised the government to issue decrees which for 90 days can enforce and impose financial and economic sanctions posed by the UN Security Council or EU Council. The scope of this authorisation ran parallel with those in the EU and UNSC resolutions: freezing accounts, suspending contracts, imposing embargos and entry restrictions, etc. However, the Ministry of Justice was of the opinion that the application of this

³⁹ It is especially noteworthy that in June 2001, Hungary was put on the FATF/OSCE black list of countries non-conforming in money laundering issues.

authorisation would carry the risk of violating fundamental constitutional principles, as the authorisation enables the government to curtail the exercise of fundamental rights, whereas according to the constitution, only acts of parliament can issue such provisions. Thus, until May 1, 2004 (Hungary's accession to the EU and the consequential "incorporation" of all directly effective EU law, *inter alia* the sanction-type regulations) only one such government decree was issued.⁴⁰

As EU regulations are directly enforceable and applicable in Hungary, the general legislative framework for preventing and combating money laundering and financing terrorism is in place, although Hungary has not done much to fine-tune EU regulations. For example, even *Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism* contained general guidelines and authorisations for exemptions from the sanctions⁴¹ and on 27 March 2003 the Council adopted *Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002*;⁴² instead of setting forth standards and procedures, the

⁴⁰ 56/200 (III. 29.) Decree. In line with UNSCR 1390 (2002) and 2001/931/CFSP.

⁴¹ According to Articles 5–6: The competent authorities of the Member States under such conditions as they deem appropriate can defreeze accounts for the use of frozen funds for essential human needs of a natural person or a member of his family, including in particular payments for foodstuffs, medicines, the rent or mortgage for the family residence and fees and charges concerning medical treatment of members of that family. Also, certain payments can be made from frozen accounts for the purposes of: payment of taxes, compulsory insurance premiums and fees for public utility services such as gas, water, electricity and telecommunications, etc.

⁴² On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, 1). Under Article 1: 'The following Article shall be inserted in Regulation (EC) No 881/2002: "Article 2a 1. Article 2 shall not apply to funds or economic resources where: (a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are: (i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges; (ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services; (iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or (iv) necessary for extraordinary expenses; and (b) such determination has been notified to the Sanctions Committee; and (c)(i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of

Hungarian government decree⁴³ that was passed to implement and accomodate these procedures says almost nothing. All it contains is that the general rules of administrative procedure should apply in these procedures, where the National Police shall act as a first instance and the Ministry of Internal Affairs as an appeals authority; and the Foreign Ministry and the National Security Office should participate in the proceedings. Not a word about standards, equity, etc....

Besides human rights misgivings, one may also have serious efficiency concerns, as, according to Hungarian law, a full fledged freezing of assets can only be ordered in the course of a criminal procedure,⁴⁴ or as part of an operation induced by international criminal cooperation. The problem concerns the fact that no automatic criminal procedure is initiated against persons on the various EU and UNSCR lists, not to mention corporations and other legal entities, against which such procedures cannot even exist. Thus, not even the direct effect of EU regulations will solve these issues, if (as it is the case) no criminal procedure is underway, say, against Usama bin Laden.

Also, directly effective EU law can only be applied to those assets which are somehow registered and processed by courts⁴⁵ or financial institutions. In theory, however, assets should include real estate, corporate ownership, etc. Thus, even though since September 2005 the Criminal Code⁴⁶ contains a

notification; or (ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination. 2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State as listed in Annex II. The competent authority listed in Annex II shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted. The competent authority shall also inform other Member States whether the request for such an exception has been granted.

⁴³ 306/2004 (XI. 13.) Decree.

⁴⁴ Articles 159–160 of Act 19 of 1998.

⁴⁵ Act 127 of 2004 amended Act 145 of 1997 on corporate registration which authorises civil courts to suspend the activities of corporations and order the freezing of assets and accounts.

⁴⁶ Article 261/A of Act 4 of 1978. Section 261/A (1) The person who violates an economic, commercial or financial prohibition pronounced on the basis of an international law obligation of the Republic of Hungary, if a separate Act orders the punishment of the violation of the prohibition, commits a felony, and shall be punishable with imprisonment of up to five years. (2) The punishment shall be imprisonment from two years to eight years, if the violation of an international law duty is committed a) with violence; b) in the quality of an official person. (3) The punishment shall be imprisonment from five years to ten years, if the violation of an international law duty is committed a) in connection with the trade of fire arms, ammunition, explosives, blasting-agent or an apparatus serving for

provision that sanctions the violation of an international law-based economic, commercial or financial sanction, without proper implementation, it cannot be enforced.

As the 2005 FATF Recommendations⁴⁷ for Anti-Money Laundering and Combating the Financing of Terrorism pointed out, even though a comprehensive Act on the Prevention and Combating of Money Laundering has been adopted, some gaps remain in the legislative framework. Three points of particular concern were raised.

The first regarded the following: while the EC Regulations 881/2002 and 2580/2001 are self-executing in Hungary as an EU member state, there is no domestic legislation implementing the United Nations Security Council Resolutions (UNSCRs) 1267 and 1373, which is especially problematic in relation to the freezing of non-banking/financial assets. The second major criticism related to the criminal law framework. It was pointed out that the provisions regarding the financing of terrorism should include the financing of individual terrorists. The third point concerned the suspicious transaction reporting system. The current regulations seem over- and at the same time under-inclusive. On the one hand there is no legal obligation in the current legislative framework to report a transaction on the basis of a suspicion that the funds involved may be relevant to terrorism. On the other hand however, the system is producing a high volume of low quality reports from financial institutions and only a negligible number of reports from designated nonfinancial businesses and professions. The potential over-reporting from financial institutions could be linked to the criminal liability for both wilful and negligent non-reporting under the Criminal Code, which is also a concern for all service providers. This regime appears to have led to a large amount of “defensive reporting,” rather than attempts to identify genuinely suspicious individuals, as very few of the reports have led to investigations and none to prosecutions. Out of 14,120 reports received in 2004, only 20 cases turned into investigations and no

the utilization thereof, or of any product designed for military utilization; b) in an armed manner. (4) The person who perpetrates the preparation of the violation of an international law duty, shall be punishable for a felony with imprisonment of up to three years. (5) The person who credibly learns that the violation of an international law duty is prepared and fails to report that to the authorities as soon as he can, commits a misdemeanour, and shall be punishable with imprisonment of up to two years. As the wording requires the proper promulgation (in an act of parliament or a government decree), in its present form it appears to be applicable only for EU-induced sanctions but not to those passed by the UNSC.

⁴⁷ IMF Country Report No. 05/347.

prosecution was ever initiated out of an investigation arising from a suspicious transaction reporting.

We see that over-zealousness is not unheard of in regulating financial institutions in Hungary. For example, a recommendation of the President of the Hungarian Financial Supervisory Authority⁴⁸ on the prevention and impeding of terrorist financing and money laundering⁴⁹ provides a vivid example for

⁴⁸ No. 1/2004, See <http://www.pszaf.hu/english/start.html>.

⁴⁹ Act 15 of 2003 on the prevention and impeding of money laundering states that the objective of the act is to combat the laundering of funds originating from crime, or financing terrorism through the money and capital market system, or making accessible for criminals, through financial service providers. Act 4 of 1978 on the Criminal Code, Section 303 provides for the following definition of money laundering: (1) Any person who uses any item originating from the commitment of a criminal act punishable with imprisonment during his economic activities in order to conceal its origin, or perform any financial or banking transaction in relation to the item shall commit a crime and may be punished with imprisonment up to five years. (2) The punishment is imprisonment up to eight years if the money laundering is committed a) in a businesslike manner, b) involving especially large or even higher amounts, c) by an officer or employee of a financial organisation, investment enterprise, investment fund manager, clearing house, insurance company or an organisation involved in the organisation of gambling, d) by official persons, or e) attorneys at law. (3) Those who make an agreement on committing money laundering shall commit an offence and can be punished with imprisonment up to two years. (4) Those cannot be punished due to money laundering who voluntarily submit a report to the authority, or initiates such a report, providing that the action has not been detected at all, or it has only been detected in part. (5) The item specified in Paragraph (1) also includes documents and dematerialised securities representing a right to assets, which provide the right of disposal over the asset value or entitlement on their own or, in the case of dematerialised securities, for the beneficiary of the securities account. Section 303/A (1) In case of items originating from a punishable action committed by a third party, a) those who use the item while exercising business activities, or b) perform any financial or banking transactions in relation to the item, and are not aware of the origin of the item due to negligence, may be punished with imprisonment up to two years, community work or may be imposed a fine. (2) The punishment for an offence is imprisonment up to three years if the action defined in Paragraph (1) is committed a) involving an especially large, or even higher value, b) by an officer or employee or a financial institution, investment enterprise, investment fund manager, clearing house, insurance company or organisation engaged in the organisation of gambling games, or c) by official persons. Section 303/B (1) Those who do not fulfil the reporting obligation specified in the Act on the prevention and hindering of money laundering shall commit a crime and may be punished with imprisonment up to three years. (2) Those who do not fulfil their reporting obligation specified in Paragraph (1) for negligence shall commit an offence, and may be punished with imprisonment up to two years, community work, or may be imposed a fine. For the legislative background also consider the following: Act 83 of 2001 on combating terrorism, aggravation of regulations on

singling out Arab and Muslim countries by the very formulation of its due diligence and reporting requirements:⁵⁰ “The procedures aiming at the detection of money laundering intentions need to be used especially when.... Transactions should primarily be examined in terms of whether they are related to individuals, countries(!) or organisations contained in the specific international lists. ... Raised attention needs to be paid to electronically sent and received amounts, which are unusual for certain reasons, including especially the size of the amount, the beneficiary target country(!), the country(!) of the customer placing the order, currency or the method of sending or receipt. ... If an activity does not fit in the registered and reported activities, if the origin of received funds is unclear, if an amount increases from unusual sources, the target country(!) or addressee raises a suspicion, the financial service provider needs to analyse and evaluate them with special care, and the transaction should be reported to the authority even if the smallest suspicion arises.”

4. Case law

Both of the two Hungarian terrorism-related cases involved charges of providing financial support to terrorist organisations and in one way or another started off from bank reports. Also, both cases show the inconsistencies within criminal law and UNSCR or EU-induced anti-terrorist legislation.

The first case involved Kinan Haddad, a Syrian physician who had been working in Hungary for several years and has been summarily expelled in 2003 after he transferred money to a bank account for a charity that was linked to a terrorist organization. Following the bank’s report to the National Security Office, Interior Ministry’s Immigration and Citizenship Office summoned Dr Haddad, notified him that the account number to which he made his donation was linked to Hamas, extradited him and told him he could not return for 10 years. Although he said he had not known who was behind the account, the National Security Office insisted that as the account belongs to one of the cover organizations of Hamas, in such cases, expulsion is the only possible reaction. Because the action was taken without a proper investigation and Dr Haddad has not been given an opportunity to defend himself and therefore was not afforded due process of law, Ferenc Kőszeg, chairman of the Helsinki

the prevention of money laundering, and ordering certain restrictive measures, Act 101 of 2000 on the announcement of the Strasbourg convention of November 1990 (on money laundering, and the detection, seizure and confiscation of items originating from crime).

⁵⁰ Id. See Part 1.4. Blocking the funds financing terrorism.

Commission claimed that the Hungarian expulsion process conflicts with general human rights principles and leaves no room to mount a legal defence. (Some argued that the fact that Dr Haddad was separated from his wife, with whom they got married according to Islamic law, constituted a breach of Article 8 of the European Convention on Human Rights.) Mr István Diczig, Dr Haddad's lawyer, filed appeals with several government agencies but received no replies. Commentators draw attention to the following controversy: were the National Security charges well-founded, an ex-officio criminal procedure should have been initiated. As it was not done, the factual and legal basis for the extradition remains questionable.⁵¹

The second case concerned a naturalized Jordanian-Hungarian dual citizen dentist, Saleh Tayseer who also worked as imam of a mosque in Hungary, which was expecting a donation of 470,000 euros from the Al-Haramain Foundation (Saudi-Arabia) as contribution to building a new mosque. According to media reports, US intelligence has been watching the movement of this foundation's alleged money laundering activities for years and believed that the foundation is closely linked to Bin Laden's Al-Qaeda and has cell groups in several countries. The media also reported that the location where Tayseer's mosque is registered is the same as for a company called FAB Ltd, owned by a Sudanese national by the name of Hassanein, who, according to The Washington Post, was involved in arms smuggling to Bosnian Muslims and associated with Usama bin Laden. The accounts were frozen but Mr Tayseer was detained and placed under preliminary arrest only in April 2004, after someone reported to the police that on the first day of Israeli President Mose Katsav's visit, he had attempted to blow up the Jewish Museum in Budapest. (The opening ceremony at the museum was part of the president's programme.) Although Katsav's spokesperson in Jerusalem claimed that the attack was planned against the president of Israel, Hungarian police denied any connection between the visit and Tayseer's arrest. Nevertheless, within a few weeks, due to the lack of evidence the Prosecutors Office dropped the case which was eventually based on just one finger-pointing allegation, by an accuser who has had a long police track record and had been extradited from Hungary on two occasions.⁵²

⁵¹ For more, see for example Kovac, C.: Syrian doctor expelled from Hungary for allegedly supporting Hamas, *British Medical Journal* 2003; 326:1002, <http://bmj.bmjjournals.com/cgi/content/full/326/7397/1002/b>.

⁵² For more, see for example S Kiss, T.: Police release suspect *Budapest Sun*, 1 July 2004, Vol. XII, Issue 27, or Szakacs, J.: Arrest Highlights Muslim Disunity, *TOL*, 23 September 2004, Volume XII, Issue 39.

We can see that both (we might as well say, all) Hungarian cases show the inconsistent implementation and application of anti-terrorist legislation.

Conclusion

This paper has argued that despite all the official commitment to the principles of rule of law and constitutionalism, much of the anti-terrorist legislation exists in a legal vacuum. Not only is the legal nature of UN Security Council resolutions ambiguous (a fact states may argue they cannot do much about) but in many countries (Hungary included) only half-hearted efforts are taken in national legislation to remedy this.

Thus, the use of financial sanctions against individuals merely accused of supporting terrorism permits only a very limited recourse for rebuttal and restitution. Furthermore, the use of evidence that must be kept secret from the accused for security reasons is problematic for a jurisdiction governed by the rule of law.⁵³ As noted by Piet Eeckhout, “In the absence of such [judicial] review, sanctions are pure executive acts, and no matter what type of foreign and security policy interests are at stake, it cannot be accepted in an organization based on the rule of law that executive acts which strongly affect people’s lives are not subject to any effective judicial scrutiny”.⁵⁴ This is rather unfortunate, because, as Derek Bowett reminds us, it “needs to be pointed out that verbal support for the Rule of Law, coupled with a refusal to accept any legal control over executive decisions, is not a consistent position in an age pledged to uphold democratic values.”⁵⁵

⁵³ Vilcek: *op. cit.*

⁵⁴ Eeckhout, P.: *External Relations of the European Union: Legal and Constitutional Foundations*. Oxford, 2004, 464.

⁵⁵ Bowett: *op. cit.* 12.