

INTERNATIONAL CONFERENCE OF JURISTS

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BRIEF INVESTIGATION OF THE PMOI CASE FROM THE POINT OF VIEW OF THE SWEDISH LEGAL SYSTEM¹

I have been asked by the National Council of Resistance of Iran to investigate the legal implications of the EU Council Common Positions and decisions of 27 December 2001 on combating terrorism² for the People's Mujahedin Organization of Iran (PMOI) since the inclusion of this organization on the EU list of terrorist organizations.³

BACKGROUND

1. The PMOI is a Moslem resistance movement in Iran. According to the organization's program they oppose the theocratic dictatorship of the present regime and are in favor of a democratic and secular system of government for Iran. The PMOI has been one of the main targets of the present regime and claims that the regime has murdered as many as 100.000 of its members and sympathizers either after summary legal proceedings or without legal proceedings. Members and sympathizers have been tortured and held in custody without the benefit of any due process of law.

The PMOI admits to the use of violence in their political struggle since peaceful political activity is impossible in Iran. The PMOI denies that it has committed crimes against the rules of war or crimes against humanity in this struggle. With the exception of self defense against Iranian attacks against their bases near the Iranian border in Iraq, the PMOI denies that it has ever used violence outside of the territory of Iran. The PMOI claims that it has never targeted any state outside of Iran or the representatives of such a state inside Iran. The PMOI does not consider itself to be a threat to any other state than the regime in Iran.

The United States and their allies interned all members of the PMOI residing in Irak after the occupation of that country. After intensive screening by the American FBI and State Department of ca. 3800 PMOI fighters – including fingerprints, DNA samples, photos and individual interviews – the PMOI were released from internment without a single person being accused of any crime, much less any terrorist act.

An intensive search of the internet has only revealed one concrete claim of any PMOI attacks on foreign interests, and these were during the 1970s under the Shah. The PMOI is said to have killed several US military personnel and civilians working on defense projects in Tehran, in connection with attacks on the Shah-regime, and is said to have supported the occupation of the American Embassy in Teheran in 1979.⁴

¹ I was asked to write this paper in mid October. Given the time frame it could only be brief.

² Council Regulation (EC) 2580/2001 and 2001/931/CFSP, see also 2002/340/CFSP from 2 May, 2002.

³ My thanks to Ove Bring, Professor of International Law at Stockholm University, for reading this paper and giving valuable suggestions. Thanks also to Advocate Sten De Geer for useful comments.

⁴ See for instance NASOG.NET

The PMOI believes that their organization should not be considered a terrorist organization by the international community. They have repeatedly sought legal remedies which would enable them to confront and refute the accusations underlying their placement on anti-terrorist blacklists.⁵

The EU Common Positions and Council Regulation 2580/2001

2. On 27 December 2001, the Council adopted 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 and established an initial list in accordance with the procedure laid down in that Regulation (Council Decision 2001/927/EC of 27 December 2001). At the same time it also adopted Common Position 2001/930/CFSP, which accepts United Nations Security Council Resolution 1373(2001), and Common Position 2001/931/CFSP which provides a basis for Community legislation based on Articles 60 (ex Article 73g) and 301 (ex Article 228a) of the EC Treaty.

Common Position 2001/930/CFSP is of general nature calling on Member States to criminalise terrorist acts and participation in terrorist groups, to improve cooperation in regard to criminal investigations and, perhaps most significantly, calling on Member States to restrict asylum for suspected terrorists and to grant their extradition⁶. This Common Position has no direct effect in the Member States in the EU nor does it require the Member States to create specific legislation.⁷

Common Position 2001/931/CFSP deals with specific measures to combat terrorism. The main thrust of this Common Position, articles 2 and 3, is the freezing of assets belonging to designated individual terrorists and terrorist groups. It also contains measures dealing with intelligence and criminal cooperation between the Member States in article 4. Article 1 provides for the creation of a list of designated persons and groups in an Annex to the document. There is a review process of this list at least once every six months. The original list contained 25 individuals and 13 organizations. At present the list contains 45 individuals and 46 groups. A number of individuals and groups on the list are marked with an asterisk. According to a footnote in the Annex persons and groups marked with an asterisk are only to be subject to article 4 of the Common Position. Those marked with an asterisk are persons and groups who are citizens of Member States or acting in and in relation to these states. Apparently the Council believes that it can stretch the authority granted by Article 301 of the EC Treaty which deals with sanctions against states outside the European Community to include groups and individuals who are not EU nationals.⁸

Regulation 2580/2001 is a direct implementation of the decision to freeze assets contained in Common Position 2001/931/CFSP. In article 2(3) of the regulation the Council is ordered to establish, review and amend the list of persons, groups and entities to which the Regulation applies. The list adopted is the same as the list created in the Annex to 2001/931/CFSP except

⁵ See for example CFI Case T-228 *People's Mujahedin Organization of Iran v Council and People's Mojahedin Organization of Iran v United States Department of State*, 182 F.3d 17 (D.C. Cir. 1999) one of several suits made in the United States.

⁶ See articles 16 and 17 in 2001/930/CFSP

⁷ For a discussion of the legal effect of these Common Positions and Regulation 2580/2001 see Cameron "European Union Anti-terrorist Blacklisting" *Human Rights Law Review*, Volume 3, Number 2 – 2003.

⁸ See again Cameron *ibid*.

that persons and groups with an asterisk are excluded.⁹ This regulation has direct effect in the Member States. The determination of exact sanctions for the infringement of the regulation is left to the Member States.¹⁰ In June 2002 a Council Framework Decision on combating terrorism was adopted. This Framework Decision includes the same definition of terrorism as Common Position 2001/931/CFSP.¹¹ In addition it calls upon the Member States to carry out legislation dealing with, amongst other things, the criminalization of these acts and the imposition of harder penalties when a terrorist motive is present. Unlike Common Position 2001/931/CFSP the Council Framework Decision includes assurances that the intention is to respect fundamental human rights.¹²

The definition of terrorism in the EU Common Position on specific measures and in Regulation 2580/2001¹³ is so broad that, according to any normal interpretation of the wording, any politically motivated violence could be included, irregardless of the context of the act. According to this definition all national liberation movements as well as the Resistance Movements against the Nazis in Germany and the occupied territories during the Second World War would have to be characterized as terrorists. Their financial resources in other countries would have been frozen and their members would have been refused asylum and possibly deported to their countries of origin.

The Council, realizing this difficulty, issued a statement in connection with the adoption of the Council Framework Decision mentioned earlier. In this statement the Council explicitly declared that what the Council really meant by this definition was something else. This declaration states that the Common Positions on the “fight against terrorism covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed by individuals *whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilization upon which these societies are founded*”. (emphasis added)

The declaration goes on to explain that “It has to be understood in this sense and cannot be construed so as to argue that the *conduct of those who have acted in the interest of preserving or restoring these democratic values*, as was notably the case in some Member States during the Second World War, could now be considered as ‘terrorist acts’. Nor can it be construed so as to *incriminate on terrorist grounds persons exercising their fundamental right to manifest their opinions*, even if in the course of the exercise of such right they commit offenses.”¹⁴ (emphasis added)

It is, however, very unclear as to whether a court in the EU will give this declaration any legal weight when interpreting the definitions contained in the Common Position and Regulation 2580/2001. So far the ECJ has refused to give such statements any binding effect.¹⁵

What is even more disturbing is the basis for inclusion on this list of terrorists. According to article 1(4) in 2001/931/CFSP the list in the Annex “shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, *irrespective of*

⁹ See Council Decision 2001/927/EC.

¹⁰ Articles 9, 10 and 11 in Council Regulation (EC) 2580/2001

¹¹ OJ L 164, 22/06/2002, article 1(1)

¹² Ibid, point (10) in the preamble and article 1(2)

¹³ Article 1(4) in Council Regulation (EC) 2580/2001 refers to article 1(3) in 2001/931/CFSP

¹⁴ 11532/02 Annex II Statement 109/02

¹⁵ See Case 292/89 *Antonissen* (1999) ECR I-745

whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds”. (emphasis added)

In other words it is sufficient that a competent authority in a Member State suspects a person or group for some form of connection to terrorist activities in order to be proposed for inclusion in the list. Decisions for inclusion in the list must be unanimous in the Council but this doesn't change the basis for inclusion.¹⁶

Legal Consequences and Possible Remedies

3. Since the PMOI was added to the EU:s list of terrorist groups in May 2002 any assets possessed directly by the organization, or legal persons controlled by the organization, will be frozen. Individuals suspected of being members or sympathizers of the organization will be the object of police and intelligence cooperation between the Member States and risk being included on the list at a later date. Members or sympathizers, who are not citizens of a Member Country, could be refused entry into the Member States and they might not be allowed to apply for asylum, or such applications might be denied. In addition there is a theoretical risk that these persons could be deported or extradited to Iran.

Before entering into a concrete discussion as to the legal implications and possible remedies in Sweden it is necessary to point out that little, if anything, is known about the process whereby the PMOI was included on the EU's terrorist list. It is, however, important to point out that this decision was basically a political decision since there is absolutely no public evidence that the PMOI has ever been suspected of carrying out any illegal activities, much less terrorist activities, in Europe (or other countries outside Iran). For this reason, political considerations may well influence whether or not the risks mentioned above actually become reality in Sweden or any other Member State of the EU.

Unlike many other states Sweden does not have any legislation for the proscription of organizations nor is there any concept of a criminal organization. Thus there is no Swedish national “antiterrorist blacklist”. Of course the Swedish implementation of Regulation 2580/2001 does, in practice, lead to the same effect since an organization can not exist without financial resources. Also anyone giving financial aid to a person or organization on the list could be found guilty of a criminal offense according to the Swedish International Sanctions Act (SFS 1996:95).¹⁷

Neither Regulation 2580/2001 nor Common Position 2001/931/CFSP provide for legal remedies or procedures in relation to the freezing of assets on the grounds that an organization or individual has erroneously been included on the lists which flow from these decisions.

Iain Cameron has suggested that an annulment action at the level of the European Community's court system could be made according to Article 230 EC, which empowers the ECJ to review the legality of acts adopted by the Council and other organs. Another

¹⁶ For a further discussion on the creation of this kind of lists see *International Terrorism: Legal Challenges and Responses*, A Report by the International Bar Association's Task Force on International Terrorism (Transnational Publishers 2003) chapters 4 and 6.

¹⁷ For a discussion of Swedish legislation in this situation see Cameron op.cit. See also Ove Bring, Per Cramér and Göran Lysén concerning relevant Swedish legislation in Vera Gowlland (ed), *National Implementation of UN Sanctions* (Koninklijke Brill, 2004)

possibility would be to lodge a claim of extra-contractual liability on the basis of Article 288 EC. According to this latter article damages may be sought from the Community institutions if there is harm as a result of their unlawful acts.¹⁸

Criminal Prosecution

Aside from the freezing of PMOI assets through an administrative procedure¹⁹, the immediate effect of Regulation 2580/2001 in Sweden will be the implementation of the Swedish International Sanctions Act. In Section 15 of the Act the Government is required to promulgate the EU regulations for which criminal penalties apply.²⁰ According to Section 8 of the Act, the intentional breach of an ordinance issued under Section 4 of the Act or a breach of economic sanctions decided by the EU carries penalties of fines or imprisonment up to two years, or, if there are aggravating circumstances, to up to four years imprisonment. Breach of an ordinance through gross negligence carries a penalty of a fine or imprisonment up to six months. For minor offences there should be no penalty. According to Section 10 prosecution based on the Act can only be commenced with the permission of the Government or an Authority designated by the Government. This means that individuals who might try to collect money, or, in other ways solicit support or provide support for the PMOI could be prosecuted.

There is another Swedish law that could also be used against persons wishing to support the PMOI. This is the Act "On the punishment for financing especially dangerous criminality in some cases" (SFS 2002:444).²¹ This law has a definition of dangerous criminality which is almost identical to the definition of terrorism found in Common Position 2001/931/CFSP and Regulation 2580/2001.²² According to Section 3 in the Act, a person who collects, provides or receives money or other assets for the purpose that these be used for, or, with the knowledge that they are intended to be used for, the commission of especially dangerous crimes can be sentenced to up to two years imprisonment. If the crime is serious (aggravated) the penalty is a minimum of six months or up to six years imprisonment. In minor cases there is no penalty. Aside from the more serious penalty provided, the difference between these two laws is that the latter act requires intent and/or knowledge that might be more difficult to prove.

A Swedish organization or legal entity involved in supporting the PMOI would not be subject to the freezing of assets mechanism contained in Regulation 2580/2001 since the freezing of assets only targets non EC entities and individuals. Instead banks or other financial institutions would be obliged to report to the National Polis Authority on any financial transactions carried out by these entities if they suspect that the transactions lead to the PMOI.²³ Transactions could be blocked and the assets could finally be confiscated, but only after a court decision.²⁴

Prosecution of members or sympathizers of the PMOI on the basis of either of these laws would open the possibility of raising the rights guaranteed by the European Convention for the Protection of Human Rights and Basic Freedoms (ECHR). The most important relevant

¹⁸ Ibid. There are now several cases pending before Community Courts based on these articles.

¹⁹ The Swedish Financial Inspection Agency (Finansinspektionen) sent a letter to all financial institutions informing them about Regulation 2580/2001, FI Dnr 02-247-010, 2002-01-16.

²⁰ The latest promulgation list, SFS 2003:575, includes Regulation 2580/2001.

²¹ Lag om straff för finansiering av särskilt allvarlig brottslighet i vissa fall.

²² Ibid. See Section 2 points 1 and 2.

²³ Ibid. Section 8

²⁴ Ibid Sections 9 and 7.

articles in the ECHR would be Articles 6(1), 6(2), 11, 13 and Article 1 of Protocol 1.²⁵ Since the ECHR is Swedish law, domestic courts would be forced to rule on these arguments. What position the European Court of Human Rights (ECtHR) will take on these questions is, however, still an open question.²⁶

Civil Actions

A person or entity which is subject to having its assets frozen could bring an action within the framework of Swedish national law against the party which actually freezes the assets (usually a bank) for breach of contract. Assuming that the defendant argues that it is only carrying out its obligations according to Regulation 2580/2001 the national court would be forced to rule on the issue of the legality of the Regulation. This, in turn, would likely lead to the court requesting a preliminary ruling under Article 234 EC from the ECJ.²⁷

Asylum, Extradition and Deportation

Sweden has had a history of refusing asylum to persons suspected of terrorist acts.²⁸ According to the Immigration Act (SFS 1989:529) Chapter 3 Section 4 point 1 refugees can be refused residence permits if required by national security. Also according to the Special Control of Foreigners Act (SFS 1991:572) Section 1 points 1 and 2 the Government can deport foreigners due to considerations of national security or if they are suspected of terrorist acts. However both of these laws forbid the execution of a deportation decision if there is a reasonable assumption that the foreigner risks the death penalty or torture in the receiving country.²⁹ This formulation is somewhat complicated since the Immigration Authority or the Government makes the judgment as to whether or not there is such a risk. This has been circumvented by obtaining “guarantees” from the country to which the person is to be deported.³⁰ If a deportation decision cannot be executed the foreigner can be ordered to report to the police at regular intervals.

The result of the inclusion of the PMOI on the EU terrorist list could be that there will be a further deterioration of the situation in relation to members or sympathizers of the organization seeking asylum in Sweden or seeking to enter the country. The extremely weak response of the Swedish Government to the plight of the PMOI fighters in Iraq, who were threatened with deportation to Iran, certainly points in this direction. A recent request by the ECtHR asking Sweden to stay the expulsion of a Palestinian as well as criticism of Sweden from the UN Committee Against Torture indicates that Sweden’s respect for the principle of *non refoulement* has become eroded.³¹

²⁵ See Cameron’s lengthy discussion of these points op. cit. For a further discussion on

²⁶ The ECtHR has at least made clear that states cannot avoid their responsibilities under the ECHR by transferring power to an international organization.

²⁷ Cameron op.cit. Cameron goes on to discuss possible arguments against the legality of a listing decision.

²⁸ Members of the Kurdish PKK have been refused asylum although allowed to remain in the country and more recently two Egyptian citizens were actually deported to Egypt.

²⁹ Chapter 8 Section 1 of the Immigration Act (SFS 1989:529) and Section 10 Special Control of Foreigners Act (SFS 1991:572) which refers to Chapter 8 Section 1 of the Immigration Act.

³⁰ The two Egyptians mentioned in note 28, Ahmed Agiza and Mohamed El Zary, were deported to Egypt after the Swedish government received guarantees that they would not be given a death sentence or be tortured. This deportation has been severely criticized by various human rights agencies of the Council of Europe and the UN.

³¹ See CAT/C/CR28/6, 6 June 2002. For a further discussion of this problem see Chapter 4.7 in *International Terrorism: Legal Challenges and Responses* op.cit.

CONCLUSION

4. The European Community's methods to combat terrorism have, in spite of declarations to the contrary, seriously weakened the long tradition of respect for basic human rights in Europe. The right to a fair trial guaranteed in article 6(1) of the ECHR as well as the right to the presumption of innocence guaranteed by article 6(2) ECHR have been abandoned in the procedure for inclusion on the lists created under 2001/931/CFSP and Regulation 2580/2001. This absence of legal procedures is also contrary to article 13 ECHR which requires states to provide effective legal remedies when the rights guaranteed in the convention have been infringed upon.

Respect for the right to life and the prohibition of torture guaranteed in articles 2 and 3 ECHR could be endangered by governmental practice resulting from the implementation of these European Community decisions at the national level. In addition the right of association guaranteed in article 11 ECHR and the right to the peaceful enjoyment of property in Protocol 1 article 1 ECHR are seriously threatened. So far this deterioration of basic human rights has been aimed at non EC entities and persons. If this tendency is not stopped there is a real risk that this deterioration could soon also affect anyone in the European Community.

Every effort should therefore be made to challenge these practices legally both at the European Community level, including the ECtHR, and within all the Member States' national jurisdictions. It is at present impossible to predict the outcome of these legal challenges. As pointed out earlier the decisions which have led to this situation are basically political decisions. The legal battles before us must be consciously linked to this political arena. The fight to remove the PMOI from the European Community's antiterrorist list is therefore an important part of the general defense of the basic human rights which are a decisive element in any democratic society.

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