

## *Legal opinions by*

**Henri Labayle:** Professor of Community law at Pau University

**Bruno Nascimbene:** Professor of Community law at Milan University

### **The validity of the inclusion of the PMOI on the EU anti-terror lists in view of the European Law and its applicability by the judge**

## **Summary**

The inclusion of PMOI on the European Union anti-terror lists creates a serious legal question both from a technical standpoint and from the point of view of the respect of the basic rights guaranteed in the Union as well as in its Member States. This inclusion was done on May 2, 2002, six months after a first anti-terror list was adopted by the European Union after the events of September 11, 2001. It has been maintained since, at each modification of the basic list, and without more legal justification.

### **I- The technical point of view**

The process of inclusion of PMOI on the list of the EU is of a considerable complexity, so much so that one is allowed to wonder whether this complexity is not justified mainly by the concern of avoiding any transparency and to prevent an effective jurisdictional control.

A - The anti-terrorist lists of the EU on which the PMOI figures are two: the first is established on the basis of a Common Foreign and Security Policy (**CFSP**) of the EU. The second is established by a Council decision which puts forward a community resolution. These two lists apply to a general joint CFSP position, itself abiding by a

Security Council Resolution of the United Nations aimed at fighting terrorism. It is thus an extremely complicated technical device, in "cascade" or on several levels, which can be described schematically as follows:

- o - a resolution of the United Nations ordering the application of the decisions of the Committee of the sanctions of the United Nations,
- o - a general joint CFSP position translating this resolution into obligatory terms for the Union,
- o - a joint CFSP position specific to the fight against terrorism applying the latter in the Union, in particular on the legal and police level,
- o - a Community decision making it also applicable within the Community, most particularly in freezing and confiscation of assets,
- o - a Community decision applying this resolution
- o - national decisions on rules of implementation

The assessment of the legality of the process of inclusion of the PMOI in these lists can be made in the light of the following:

B - The validity of the list fixed by a joint CFSP position is doubtful. This joint position defines in its first article the individuals who are the object of the list and the criminal acts concerned. The examination of the legal situation and the legal status of PMOI in regard of the public international law and the humane international law (see the legal opinions expressed in the annex) appears to show that [this organization and its members] correspond neither to the definition which is given of individuals or entities implied in acts of terrorism nor to the definition of the acts likely to fall under the "acts of terrorism" as defined by this joint position.

Apart from a total lack of a factual analysis of the operational activities of the PMOI, the interpretation of the known joint position must also be made in view of the laws of the Union and in particular of the basic text of the "framework decision" 2002/475 on terrorism. This "framework decision" defines the common right regarding the fight against terrorism. The latter excludes from its field of application *"the activities of the armed forces in period of war, with the signification given to these terms in*

*International Humanitarian Law, which are prescribed by this Law"* and its adoption was accompanied by a joined declaration to the statement by the Council indicating that it did not apply to the *"behavior of those which acted with an aim of preserving or to restore these democratic values, like it was the case in certain Member States during the Second World War, and could be regarded today as "terrorist" acts.*

It is thus difficult to conclude that the military activities of the PMOI in its struggle against Iran can fall in the field of application of the anti-terrorist legislation and thus the list of the UE, not only in view of the international law but also from the will expressed clearly by the Union in its incrimination of terrorism.

C- The validity of the list blaming the PMOI on the European Community level is quite as doubtful, mainly because it is based on a Community treaty which creates technical and procedural constraints in addition to the preceding remarks. The vague character of the conditions in which the list has been forged, though existent in the texts of laws of the Union, make appear serious irregularities. As to the *"precise details"* and other *"indications"* to adopt as to the motivation of the act in question, the inclusion of the PMOI on the list is problematic and in view of the conditions of its application it resembles to an arbitrary act. It is not evident that the mechanical application of a decision taken within a framework other than that of the Union, without particular examination of the circumstances carried out on the level of the Union which is likely to justify the serious material consequences that it can involve either from the police and legal point of view or the question of property rights or the rights of the refugees. These methods of elaboration deprive PMOI of the minimal conditions of a good administration necessary to the exercise of the rights of defense, the only document in proof brought by the Council consisting of the execution of an international obligation. The respect of the principles of legality and proportionality would have to lead the Council to a detailed examination of the facts and applicable law, in accordance with the first article of the joint position and to many declarations of the Council in this direction, in order to avoid a gross error of appreciation in the legal qualification of the activities of PMOI.

This error seems to be accompanied by a misuse of the procedure of the "list", when the latter is used as a diplomatic means of pressure rather than an instrument of fight against terrorism.

## **II - The point of view of the guarantee of the basic rights**

The European Union guarantees the protection of the basic rights within the framework of its action. It must also respect the international law of the Human Rights and the Humanitarian Law whose analysis confirms the applicability of its rules to the PMOI and to its action. The inclusion of the PMOI on the EU anti-terrorists lists must thus yield to this basic obligation.

A - There is no doubt that such an inclusion can give rise to problems in view of the basic rights and in particular with the European Convention on human rights. Besides, the Council emphasizes on this point expressly since it tries to be reassuring on this issue throughout the procedure. However, the conditions of the inclusion of the PMOI appear to contravene the standards on the matter, be it from the point of view of the rights of defense or under that of the right to an equitable trial and the right to the judgement, not to mention the objections to the question of presumption of innocence or the principle of legality. One of the major problems comes from the fact that the whole foundation of this argument rests on a CFSP joint position which is, under the terms of the principle of attribution of competences to the Union, excluded from the control of the Community jurisdiction for lack of competence to act. The judge of the UE explicitly recognizes this detrimental situation in a decision which today is facing an appeal (TPI, June 7, 2004, Segi): according to its own terms, the applicants currently "*do not have any effective jurisdictional recourse*". This acknowledgement of incompetence does not necessarily lead to the Court establishing its competence but to the application, without possible dispute, of the allegations expressed. There is thus a denial of justice which constitutes a violation of the jurisdictional protection guaranteed to individuals in the European Union as well by the international law of the human rights as by the ECHR or the laws of the Union. Matters are clear for the list of the Union, which constitutes the police and legal answer. It is also to fear that this limitation of jurisdictional control concerns also the "Community" list so much the latter is restricted to the sole application of the disputed joint position.

B - This situation will thus give rise to two possibilities : the judge of the Union would persist in his refusal and would not make an incidental control of the joint position when proceeding to the control of the "Community" list. The first way is open to the state judge at the time of his examination of the extent of the application of the list on a national level. It would be up to him to accept or refuse to draw aside the rule of primacy of the law of the Union in terms of the fundamental nature of the transgressed obligations, which find their basis in the constitutional laws of the Member States, the international law and the ECHR. This solution is not to exclude in certain Member States.

The second solution is more likely and consists for the European Court of Human Rights to establish its jurisdiction on the list. In its Segi May 16 2002 decision it did not draw aside the principle which indicates that measures of the various joint positions must be subjected to such control. It is permitted thus to think that in the event of failure of the national and community jurisdictional bodies, the jurisdiction of Strasbourg will establish its control and will sanction the committed illegalities.