

Challenge Research Note

Work Package 2 – Securitization beyond borders: Exceptionalism inside the EU and impact on policing beyond borders

**The European Court of Justice and Acts to Combat the Financing
of Terrorism by the European Community**

November 2005

Abstract: This Research Note considers the recent judgement concluding a case before the Court of First Instance that involved measures to interdict the financing of terrorism. The case presented the Court with an opportunity to step outside the designated boundaries of

assessments on the relationship of the European Community to the United Nations (UN) Security Council, the Resolutions of the Security Council as mandating action on the part of the United Nations' member states and the primacy of the United Nations Charter over and above any and all other inter-state agreements. This judgement carries with it implications for both current and future foreign and security policy of the European Union. For example, should the EU members sitting in the Security Council support a Resolution that contradicts an established Common Position or would pre-empt the development of an EU Common Position in an instance where other members of the Community may disagree with the substance of the Resolution under debate.

This research note will assess the decision of the Court of First Instance (CFI) to rule itself out of the job of determining the legality of certain Council and Commission actions taken against terrorism. The specific case involves the legality of regulations to freeze the assets of those *suspected* of financing terrorism. Therefore, the following discussion only assesses those aspects of the decision made with regard to the measures taken against the financing of terrorism, and relatedly money laundering, in connection with CFSP.² The main points presented are: the precedence of the UN Charter over all other international agreements and obligations, at §227; the use of 'smart sanctions' against terrorist financing and their application on resident individuals (natural or legal), at §94; the process for inclusion/exclusion on the Sanctions List and the secrecy surrounding this procedure (which subsequently determines EU/national action), based upon a presumption of the of the submissions made for inclusion in the Sanctions list, at §304 and after; and finally, the argument made that judicial review by the Court would undermine the foundations of world order (as represented by the UN), at §219.

This judgement offers some interesting insights as to the impact of determinations that are made outside the EU yet influence European policy. In this instance it involved giving precedence to the actions of the United Nations Security Council (which had been heavily influenced by the United States) on the matter of terrorist financing. It should also be recognised that the defendant(s) in this specific case were only part of a larger transnational operation, and due reference will be made to related proceedings in other jurisdictions (and specifically the United States) when relevant to the points explored in this Research Note.

Background – to combat terrorist financing*At the United Nations*

The measures developed to counter terrorism through the removal of the funds used to underwrite terrorist enterprises emerge from a variety of national and multinational institutions. In the closing years of the twentieth century the need to combat the financing of terrorism was present in a number of United Nations' Resolutions, both in the General Assembly and the Security Council.³ There was a flurry of activity leading to further Security Council Resolutions involving terrorism after 2001, beginning with Security Council Resolution 1368 on 12 September 2001. The crucial Resolution for this ECJ Judgement was Resolution 1373 on 28 September 2001, which directs that all states shall 'prevent and suppress the financing of terrorist acts (United Nations Security Council, 2001: 1(a))'. This Resolution does not, however, contain a Sanctions List, rather this procedural aspect of UN action against terrorism remained part of other Security Council Resolutions. The Sanctions List involving the applicants in this case was part of Security Council Resolution 1390 (2002) and implemented in the EU by Common Position 2002/402/CFSP (adopted 27 May 2002). Beyond the Security Council Resolutions already identified, Curtis Ward listed twelve international instruments intended to combat terrorism and negotiated before the end of 1999. The latest of these instruments was the Convention for the Suppression of the Financing of Terrorism (adopted on 9 December 1999 and entering into force 10 April 2002). He noted that on 10 September 2001 just two states had ratified all twelve of the listed conventions (Botswana and the United Kingdom), while at the end of July 2003, this number had risen only to thirty-five states (Ward, 2003: 290 - 291).⁴ At the time of writing (November 2005) the number of states that have ratified the specific Convention concerning the financing of terrorism stands at 148 (which is still not 100% as there are 191 member states of the UN).⁵

Parallel to the measures undertaken by the UN to deal with terrorist financing have been the multilateral efforts of the Financial Action Task Force (FATF) to deal with money laundering (initially focused upon drug trafficking).⁶ Even before the terrorist attacks in September 2001 the FATF began to broaden their mandate and investigate the tactics and techniques used to finance terrorist activity. In particular they had noted the similarities that were found between terrorist-related money laundering and the methods used by organised crime (FATF, 2001a: 19 - 21). Then in October 2001 the FATF convened an extraordinary meeting in

Washington, D.C. to specifically consider the financing of terrorism and how to combat it. The result was eight *Special Recommendations on Terrorist Financing* (FATF, 2001b). As remarked by Jean-Marc Sorel, these special recommendations 'restate rather than innovate the most relevant measures expressed previously in the framework of terrorism. (Sorel, 2003: 373)' In fact, the first recommendation was to ratify the 1999 Convention for the Suppression of the Financing of Terrorism, which as already noted only received sufficient ratifications to enter into force in April 2002. Nevertheless, in a circular fashion to close the tautology, with Resolution 1617 (2005) the Security Council now 'strongly urges' all member states to implement 'the comprehensive, international standards embodied' in the FATF's Recommendations concerning money laundering and the financing of terrorism (United Nations Security Council, 2005).

In Europe

Prior to the efforts already mentioned, the Council of Europe had sought to promote European measures to counter terrorist financing. In 1980 the Council of Europe recommended that member states track illegal money entering the banking system with the intention of intercepting the proceeds of any criminal activity (Council of Europe, 1980). The underlying objective for this Recommendation was to counter the fundraising activity (through kidnapping and other crimes) undertaken by terrorist groups in Europe at the time (including the Red Brigades and the Red Army Faction) (Pieth, 2002: 365). It could be suggested that this Council of Europe recommendation was a little ahead of its time, since it was not 'widely accepted nor implemented.' (Alldridge, 2003: 96) Its objective, however, resonates with the goals of more recent multilateral initiatives to combat the financing of terrorism.⁷

These examples represent the broad measures undertaken to establish procedures against the financing of terrorism as part of the normal course of business within the financial system. The specific Security Council Resolutions involved in the court case discussed here are Security Council Resolution 1267 (1999), Resolution 1333 (2000), and Resolution 1390 (2002). The first resolution condemned the use of Afghanistan as a safe haven for terrorists, and established a 'Sanctions Committee' to assure the compliance of member states to implement the directed measures intended to interdict and freeze all financial support to the Taliban regime. The second resolution in 2000 reiterated the first resolution and added

Usama bin Laden, the Al-Qaeda organisation and all associates to the list of individuals and organisations whose assets were to be frozen.

information was cited as the evidence and basis for the enforcement action to close the firm and freeze its assets worldwide. This evidence also served to justify the placement of the named individuals and firms on the United Nations sanctions list, however, this evidence was not shared with other UN members.⁹

Ultimately, none of those arrested in the U.S. were charged with terrorism, although one Somali was convicted of operating an unlicensed money transfer firm in Boston, and two Somalis who operated the al Barakaat office near Washington, D.C. would plead guilty to one count of ‘conspiracy to structure transactions to avoid reporting requirements’, an anti-money laundering charge (Jackman, 2002).¹⁰ Notwithstanding the public statements by government officials, apparently there had been a rush to action without sufficient credible evidence. As an unnamed government official quoted in the *New York Times* said, ‘This is not normally the way we would have done things. ... We needed to make a splash. We needed to designate now and sort it out later. (de Goede, 2003: 523)’¹¹ The subsequent inquiry by the Federal Bureau of Investigation (FBI) into al Barakaat received ‘unparalleled access and support’ from the Central Bank of the United Arab Emirates in order to analyse the bank records for the al Barakaat accounts held with the Emirates Bank International (Roth et al., 2004: 81). In the course of two visits to the United Arab Emirates in early 2002, they reviewed over 2 million pages of records, interviewed senior officials of al Barakaat (including its founder, who had been alleged to have had personal contact with bin Laden in the late 1980s), yet failed to find ‘the smoking gun’ required to implicate the firm in the financing of terrorism. ‘Overall, the [lead FBI] agent believed that much of the evidence for al-Barakaat’s terrorist ties rested on unsubstantiated and uncorroborated statements of domestic FBI sources. (Roth et al., 2004: 82)’ Following this brief background, the Note now considers the actions of the European Court of Justice for Case T-306/01 and T-315/01.

The Judgement of the Court of First Instance

As stated in the opening paragraphs of this Note, the significant points from the judgement were summarised in the press release announcing its publication.

financing of terrorism, but that is not always the case (as demonstrated by the Security Council Resolutions on Iraq in 2002/2003).¹⁴ Nonetheless, this Judgement may also be interpreted as meaning that the Community is obligated to assure that its members, as members of the United Nations, comply with Security Council Resolutions. A dissenting

misconduct, actual or potential, of selected individuals within that state (§113). These so-called ‘smart sanctions’ are deemed to be applicable to any individuals and not simply the leadership of a targeted state (§115). This interpretation of Articles 60 EC and 301 EC, accompanied by representative past Council Regulations, was deemed sufficient and ‘justified both by considerations of effectiveness and by humanitarian concerns.’ (§116) At issue here, however, is a question of effectiveness and perhaps even more importantly actual success with respect to ‘smart sanctions’ against possible terrorist financiers or fundraisers (Cameron, 2003: 185). There are distinct differences between the individuals and other objectives involved in terrorism from those connected with the government of a sanctioned state (Serbia for example).

While this decision may be correct and appropriate for international (and Community) law, as a matter of international politics it is rather more problematic. The *a priori* acceptance of UN Security Council Resolutions as a matter of *domestic* law, with total disregard for domestic politics (specifically on the question of human rights), raised concerns outside of the sterile environment of judicial protocol and legal precedence. As remarked by the Director for International Financial Affairs in the Office of Combatting Terrorism at the National Security Council of the U.S. government in 2002 with regard to UN Security Council Resolutions in general, ‘they are also often observed in the breach, and their language frequently leaves ample room for interpretation. (Myers, 2002: 17)’ This speaker also alluded to the simple implemented to 9-.0195 Tc 2.1795 Tw (gegesolutions in) Tj 0 -20.64 n

domestic politics and judicial procedure emerged in several European states. In Luxembourg funds were seized from individuals suspected of an association with al Barakaat in December 2001, only to be returned to them in April 2002 when it was determined that there was insufficient evidence to prosecute (Finn, 2002). Both Switzerland and France requested evidence from the United States in order to support judicial proceedings in conjunction with implementing the sanctions (Zagaris, 2002a; Zagaris, 2002c). The important point raised by these incidents and the position of the Swedish government with regards to the treatment of these citizens was noted by Bruce Zagaris. ‘The efforts of the Somali Swedes to remove their names from the list and require due process procedures in the UN and EU processes have brought attention to the absence of firm due process and evidentiary procedures, without which the integrity of the sanctions’ legal process can be questioned and undermined. (Zagaris, 2002d),¹⁷ 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. (Eeckhout, 2004: 464)’

The Sanctions List and exclusion

The implementation of a CFSP Common Position is functionally the same as a U.S. Presidential Executive Order in terms of the absence of domestic political debate. For the specific Security Council Resolution(s) at the basis of this legal action the situation represents the underlying concern noted by Eeckhout, which resulted in EU member state action on behalf of the individuals identified in the UN Sanctions list. As individual persons they have no voice in the proceedings of the United Nations, UN Security Council or the Sanctions Committee, nor do they have an avenue for rectifying any errors that have led to their presence on the list (Cameron, 2003: 183). While this simple fact, that an individual (as an individual citizen and not a government representative) has no presence in international politics, is not new, it is, however, a new circumstance for domestic politics and the rule of law. Within the structures of any individual state there are methods and means for a judicial review of the legislative and executive branches of government. Judicial procedures are in fact of particular importance as an aspect of democratic governance in that they serve to overcome the arbitrariness that exists within non-democratic societies. The European

Convention for Human Rights and Fundamental Freedoms (ECHR) provides the framework for these aspects of the rule of law (De Hert, 2005).

The line of argument that extends the justification behind smart sanctions from the leadership cadre of a targeted third country to the far more nebulous ‘Al-Qaeda network and the persons and entities associated with them (§128 and subsequent)’ may be more problematic. Smart sanctions are ‘smart’ because they target very specific known individuals and firms intimately connected to a ruling elite. While it may be argued, as the Court has done here, that the past activities of the UN Sanctions Committee have been consistent with a policy of smart sanctions, in this instance the targeted nature of these sanctions are not as precise as, for example, those imposed on Serbia. Fundamentally, as Iain Cameron emphasised, ‘Resolution 1390 is “open-ended” and so involves a qualitative difference [from previous Sanctions Resolutions] in that there is no connection between the targeted group/individuals and any territory or state. (Cameron, 2003: 164)’ As already discussed above with respect to al Barakaat, following extensive investigation the American FBI was forced to concede that there was no evidence connecting the money transfer firm with Al-Qaeda or terrorism more generally. The urgency of the moment may have impelled the government to ‘do something’, nonetheless, the ensuing problem is that later efforts to refine and correct the Sanctions List are not conducted with the same expediency, while the individuals *wrongly* accused suffer as a consequence.

Whose ‘world order’?

The European Union has no legal personality within the Security Council, and therefore an EU Common Position is *not* required by the UN Charter as the EU *qua* international entity is not a member.¹⁸ On the other hand, the member states of the EU, as member states of the UN, *are* obligated to comply with the Resolutions of the Security Council. The rationale then for an EU Common Position (as argued before the ECJ by the Commission) is to assure that the EU member states, as a single market, implement compatible and consistent measures in their execution of the Security Council Resolutions to establish and maintain sanction regimes (§99). Consequently, the creation of a lacuna, the absence of any avenue or recourse of action for the named individual (natural or legal) European resident to contest their inclusion on any sanction list initiated by the UN. And the ECJ was also aware of this problem. ‘However, it is also to be acknowledged that any such lacuna in the judicial

protection available to the applicants is not in itself contrary to *jus cogens*. (§341) In essence, to be named is to have the rights to property stripped away from the individual as a subject. To be listed is to be accused of an association with terrorism, and all financial assets frozen. The objective for financial sanctions that freeze all liquid assets of an individual is to prevent their future use to underwrite acts of terrorism. This Judgement implies that such action represents a case where the rights of the majority supersede those of the minority/individual. But we must not accept this simple solution merely because it does not personally affect us. 'We should be even more careful about giving up our commitment to the civil liberties of a minority, so that we can enjoy *our* liberties in greater security.' (Waldron, 2003: 210, emphasis in the original)

The consequence that arises from this situation is that the named individual has no rights. Subsequently, they may be treated as if they have barely even an existence (Edkins and Pin-Fat, 2005). They are subject to the United Nations' sanctions by name and fact, which are then enforced without question by state institutions. In this particular case, the Swedish government resisted and argued on behalf of their named citizens.¹⁹ But there is no avenue to protest innocence or to force the evidence to be placed before them, as a matter of the right to a fair trial or judicial remedy, even if the evidence is considered 'too sensitive' for open, public consumption and would require that a special court be convened (Andersson et al., 2003: 130 - 131). 'Where there is no means whatsoever of challenging the Security Council measure before some form of independent tribunal satisfying, more or less, the standards of the [European Convention on Human Rights], the very essence of the right of access to court is impaired. (Cameron, 2003: 195)' In the absence of any means to rectify the situation for these persons the arbitrary force of the state, re-mediated through the international, has designated them, in the conceptualisation of Giorgio Agamben, *homo sacer*, existing in a state of 'bare life' without rights and no avenue to recover their presence in society (Agamben, 1998). The arbitrariness of the action could be removed, however, *without* threatening the sanctity of the UN (and the Security Council) as final arbiter of what may threaten 'international peace and security' (§219). Cameron suggests that this difficulty could be avoided by focussing judicial efforts on the subordinate 1267/1390 Sanctions Committee. Thus, 'in the same way as the renaissance King could do no wrong, but his ministers could, so too can the sanctions committees commit errors and be reviewed by an external body, without damaging the authority of the Security Council as such. (Cameron, 2003: 184)²⁰ Even though citizens may not 'cut off the King's head', this does not mean that

we may not challenge the administrative arms that implement the King's desires, in this instance the UN as the 'foundation of world order'. (Neal, 2004).

With this observation the threads of the discussion may be woven together. Foreign policy is the sum of relations between sovereign states in the international system (Hill, 2003; Tonra and Christiansen, 2004). While this Research Note has concerned itself with the 'common foreign and security policy' of the European Union, the emphasis rests upon the word 'common' in an understanding that EU foreign policy is the result of a negotiating process of the member states rather than existing independently of the member states (Wagner, 2003). Rather more important is an assertion that the purpose of these actions by the state (foreign and security policy) is to improve the conditions for this state, and in particular the collective situation of the residents of the state. Therefore, foreign policy actions taken against the best interests of society, and to the very specific detriment of individual residents, should be challenged. The judgement of the ECJ supports the obstacle confronting any EU resident that would contest their presence on a sanction list and the implicit accusation of supporting terrorism.

Suggestions for further research

At issue here with the implementation of the sanctions list, and the anti-money laundering directive more generally, is the consequences carried forward by a strategy of financial surveillance and confiscation of assets against the citizens and residents of the European Union. Included is the impact upon migrant remittance flows, the freedom of choice in matters of charity and the support of non-governmental organisations (McCulloch and Pickering, 2005); the seemingly contradictory discussion in this ECJ decision between a 'right to property' as distinct from/to a 'right to make use of property' (see §285 - §303); and for wider questions of international law, such as the absence of judicial review on the acts of the Security Council (§345). This latter point concerns the human rights of the individual, as protected by *jus cogens*, not only the right to property, but more fundamentally a right to hear the evidence placed against them and to defend themselves from the accusations (Andersson et al., 2003). All of these points were raised by the applicants, s fr6j OfCoued by the Corht tn

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⁷ The specific features of financial surveillance instituted to combat the financing of terrorism have been discussed elsewhere, see (Vlcek, 2005).

⁸ Transliteration of Arabic names into English varies, therefore this Note will follow the spelling used in the Judgement of the Court of First Instance, except when in quotations from other sources.

⁹ Similarly, al Taqwa was targeted as providing investment services to Al-Qaeda. This firm was actually a structure of offshore business companies registered in the Bahamas, Liechtenstein and Switzerland, and the principals were initially detained by Swiss authorities

¹⁸ This is not to assert that the European Union has *no* legal personality as an international organisation *per se*. Merely that as the EU is not (and at present cannot be) a signatory to the United Nations Charter, it is not a member and thus is not *itself* (as an international legal personality) subject to the actions and directives of the UN Security Council and General Assembly. Elsewhere, the EU is a member of the World Trade Organization and the European Community has observer status in the UN General Assembly while the European Commission is a member of the FATF. For a general discussion of legal personality and the international legal status of the EU, see (Wessel, 2000).

¹⁹ However, the U.S. agreed only to remove the names of two individuals. The third was not removed as he ‘had not been willing to cooperate with the American agency OFAC [Office of Foreign Assets Control]. (Andersson et al., 2003: 111, fn 1)’

²⁰ This assertion does not, however, suggest that the present author believes that the ‘authority’ of the Security Council should go unquestioned. The members of the Security Council, as states, reflect the desires and objectives of those individual state actors and their respective foreign policy goals. It is contestable to claim that the Security Council acts in the best interests of all members of the United Nations. One objection is that the composition of the Security Council reflects the dominance of developed states, which does not automatically result in actions intended for the greater good of all.

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