

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**

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**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 their jurisdiction and intervene in a question of European Union (EU) common foreign and security policy. The European Court of Justice was responding to an application to annul Council Regulations that implemented ‘smart sanctions’ against residents of the EU as directed by several United Nations (UN) Security Council Resolutions. The circumstances and implications of the Regulations and the Judgement are interrogated here as a question of EU relations with the UN and the Security Council. The use of financial sanctions against individuals merely accused of supporting terrorism in this situation permits 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. This analysis points to a need for further research on the human rights implications that arise from the imposition of financial sanctions upon EU residents.

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

Judgements in the Case of T-306/01 and T-315/01, 21 September 2005 –  
'Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin  
Abdullah Kadi v Council of the European Union and Commission of the  
European Communities'

It is clear that the European Court of Justice (ECJ) has been explicitly excluded from deliberating and adjudicating matters involving the common foreign and security policy (CFSP) of the European Union (Smith, 2003: 30, 38).<sup>1</sup> Nonetheless, the collection of keywords at the opening of the judgement identified above begins with the phrase 'common foreign and security policy'. The complete list reads:

Common foreign and security policy – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – Competence of the Community – Freezing of funds – Fundamental rights – Jus cogens – Review by the Court – Action for annulment

This fact alone deserves investigation. Moreover, the exclusion of CFSP from the oversight of the ECJ has not prevented individuals (natural and legal) from attempting legal action against the Council and Commission that involves the second pillar of the EC. Such action is an attempt to question the *legality* of an act of the Council or the Commission at the ECJ and is pursued with an application to annul the regulation under Article 230 EC (§42; NB – all paragraph references are to the Court judgement cited above) (Costa, 2003).

The judgement of the Court of the First Instance of the European Communities, published on 21 September 2005, found that the European Community was 'competent to order the freezing of individuals' funds in connection with the fight against international terrorism.' (Press Release No° 79/05) In making this determination, the Court provided judicial

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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.<sup>2</sup> 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.<sup>3</sup> 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).<sup>4</sup> 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).<sup>5</sup>

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).<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> This list was amended on 9 November 2001 to include the applicants in this case (T-306/01), three Swedish residents of Somali origin and the Swedish-based Barakaat International Foundation. The sanctions list against terrorism is now maintained by direction of Security Council Resolution 1390 (2002). It is specifically targeted against

Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267 (1999). (United Nations Security Council, 2002: 2)

Throughout the course of events, the Council of the European Union, on the basis of Articles 60 and 301 of the Treaty on European Union, promulgated the Security Council Resolutions as EC regulations (§13, §18, and §25; see also §6 and §7).

### *The story of Al Barakaat*

The activity to create these Security Council Resolutions did not occur in isolation at the headquarters of the United Nations in New York City. The U.S. government announced on 7 November 2001 that under the authority of a Presidential Executive Order (No. 13224, 23 September 2001) it was blocking the assets of 67 individuals and organisations associated with al Barakaat and al Taqwa. (Note that this action occurred two days prior to the amendment made to the Sanctions List that included these persons. This point further emphasises the fact that this list has been fundamentally a U.S. initiative.) These two firms were alleged to have links to terrorists, and ultimately with connections to Al-Qaeda. Al Barakaat is variously identified as a money-wiring service, a money exchange, and a telecommunications service provider (as part of a diversification/expansion strategy bringing mobile phone service to the residents of Somalia). Prior to these anti-terrorism actions, it was one of the largest firms in Somalia (Kaufman, 2001). It was accused of having connections to bin Laden, possibly even receiving its initial investment capital from him. Government officials in the U.S. described the firm and its subsidiaries as conduits for terrorist financing and a source of funding for Al-Qaeda by skimming from the transaction fees charged to transfer money. These individuals were the 'quartermasters of terror' (Ottaway, 2001). The managers of al Barakaat in the U.S., Canada, Sweden, Dubai and Somalia denied all of the claims made that they were connected with or supported terrorism. Classified intelligence

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.<sup>9</sup>

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).<sup>10</sup> 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)’<sup>11</sup> 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.

The European Community is competent to order the freezing of individuals' funds in connection with the fight against international terrorism. In so far as they are required by the Security Council of the United Nations, these measures fall for the most part outside the scope of judicial review. They do not infringe the universally recognised fundamental human rights. (Press Release No° 79/05)

It is especially relevant to observe here that because these contested measures were directed by a Security Council Resolution, not only does the EU implementation fall outside the scope of judicial review by the Court of First Instance, but, similarly, there is no judicial review at the *international* level. Furthermore, state-level judicial review is not an option because the UN has immunity from such suits (Cameron, 2003: 166).<sup>12</sup> There is no place for the individual or firm to contest the implicit charge of an association with terrorism that derives from their presence on the UN list. Only a state, acting on behalf of the individual/firm may challenge the listing, and even then the initial implementation of Security Council Resolutions 1267 and 1390 did not include a method or means for any such revision or correction (Cameron, 2003: 176 – 177, 183; Fitzpatrick, 2003: 260 - 261).

The Council and the Commission argued before the Court that while the European Community may not *itself* be a member of the United Nations, it was required to act in such a way as to facilitate the obligations of its members towards the UN (§210). Consequently, 'the Community must be regarded for all practical purposes as being in the same position as the members of the United Nations (§211)'. Ultimately, it was the opinion of the Council and the Commission that the Court's jurisdiction in the instance of UN Security Council resolutions was limited.

In any event, the Council and the Commission are of the opinion that in this case the Court's jurisdiction must be limited to considering whether the institutions committed a manifest error in implementing the obligations laid down by Security Council Resolution 1390 (2002). Beyond that limit, any claim of jurisdiction, which would be tantamount to indirect and selective judicial review of the mandatory measures decided upon by the Security Council in carrying out its function of maintaining international peace and security, would risk undermining one of the foundations of the world order established in 1945, would cause serious disruption to the international relations of the Community and its Member States, would be open to challenge in the light of Article 10 EC and would conflict with the obligation on the Community to comply with international law, of which resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations form [sic] part. (§219)

The Court agreed that the UN was fundamental to world order and found that the international legal order of the UN Charter held primacy over domestic and Community law. The member states of the UN accede to the precedence of the Charter over and above all other international instruments when they sign and ratify it. This rule of the primacy of the Charter is found in Article 103 (§233). Subsequently, the Court argues ‘That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations (§234)’—which simply states ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’

The judgement noted the relevant points covering the extent of the jurisdiction of the Court and the basis of the contested regulation within the member states’ (and by extension the Community’s) obligations to UN Security Council Resolutions. Following this line of argument the Court concluded, congruent with the argument of the Council and the Commission, ‘that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law.’ (§276) It merely remains to the Court to judge upon the application of Community law ‘in a manner compatible with’ the member states’ obligations as members of the United Nations. (§276)<sup>13</sup> The dilemma with this situation is the fact that the interposition of the EU between the United Nations and its European member states also removes the option/opportunity for the listed individual/firm to contest their inclusion on these lists via a national judiciary. While there may have been a space to argue a violation of human rights in a national court (as suggested by Tappeiner), against the implementation of the UN sanctions by the member state and in the context of citizens’ rights in that state, these same national courts must now refuse to consider the case. National courts are not competent to contest the actions of the Council or Commission (Tappeiner, 2005: 116).

### **Implications of the Judgement**

In 2003 the European Commission encouraged the member states to pursue increased coordination within the UN in order to advance the collective interests of the EU, including within the Security Council (European Commission, 2003: 18). There may have been a broad consensus concerning the contribution of this specific resolution (1373) to counter the

financing of terrorism, but that is not always the case (as demonstrated by the Security Council Resolutions on Iraq in 2002/2003).<sup>14</sup> 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 state therefore may be subject to Community sanction, over and above any sanction for non-compliance that the United Nations may seek to impose. With the sanctions list produced as a part of Resolution 1390, both Sweden and France expressed their concerns and reservations (Zagaris, 2002b: 80 - 82). In this instance, the initial list of persons (natural and legal) subject to sanction was provided by the United States, without evidence or justification for the inclusion of the specific named individuals. The lack of review has been identified as a questionable practice with respect to human rights, not least because the U.S. has failed to respond to requests to provide the evidence for use in legal actions against the named persons (Cameron, 2003).

The Council and Commission may argue that their action was necessary in order to facilitate the individual obligations of the member states to the UN. The fact that EU members are UN members, however, 'does not give the *EC* competence it does not have. (Andersson et al., 2003: 121, original emphasis)' The logic of the legal argument with respect to the European Convention on Human Rights has been underscored by the European Court of Human Rights in 'that states cannot in general avoid their obligations under the Convention by transferring power to an international organization. (Cameron, 2003: 196)'<sup>15</sup> Thus, it is the opinion of some of the legal scholars cited here that, contrary to the Court's Judgement, the EU does not have competence in these matters, but rather that compliance with UN Resolutions remain the responsibility of the states.

### ***Smart sanctions***

In determining the competence of the Council to impose financial sanctions upon individuals, the Court followed the clear determination already established that the Council is competent to do so against third countries (§131, citing Article 60(1) EC). In this specific case the financial sanctions include freezing all accounts and liquid assets, as well as banning all financial transfers to the named individuals. At the extreme, this includes *not* paying them their salary if they were already employed.<sup>16</sup> Admittedly, this competence is congruent with humanitarian concerns for the greater needs of a state's population positioned against the

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 implementation of the Security Council Resolution that was made by Executive Order in the United States, which similar to a Common Position avoids the entire domestic legislative process and consequently domestic politics. At the same time, it must be recognised that the Security Council Resolution under discussion (1373) was a product of U.S. action within the Security Council, for ‘immediately after September 11, the United States began work on a new, broad-based U.N. Resolution. (Myers, 2002: 20)’ Therefore, the Executive Order merely implemented a document that had been substantially crafted by the U.S. government. The two-level game of diplomacy, negotiating a political issue at both the international and domestic levels is not present in this context, because there was no domestic negotiation.

This example demonstrates one reason for the recalcitrance and thin implementation of UN Security Council Resolutions by some member states, as a matter of conflict between the objectives of the Resolution and the domestic politics of the member state. For these particular Security Council Resolutions against the financing of terrorism the conflict with

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)<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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)<sup>20</sup> 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, but were found by the Court to be insufficient in some aspect and consequently it rejected the applicants' arguments (§277 - §346).

This research note also did not address the human rights aspect in the context of remittance flows to developing states. To indiscriminately interdict informal value transfer networks, such as al Barakaat, because they *might* be used to finance terrorist activities has tremendous knock-on effects for the economies that receive significant foreign exchange from migrant remittances (Ratha, 2003; World Bank, 2004: Appendix A). In the specific case of Somalia, the usual destination of the currency transfer facilitated by al Barakaat, the impact was immediate. Several weeks after the imposition of sanctions, *The Washington Post* would quote the UN humanitarian representative in Somalia on the ‘very, very serious effect’ of the closure of al Barakaat. ‘We are at a point where we have to start anticipating a crisis that could be unique in a modern state system—the collapse of an entire national economy. (Kaufman, 2001)’ One could argue that the Somali economy had already effectively collapsed, which had opened the space for al Barakaat to become so pivotal to the economy and foreign exchange of Somalia. Further passage of time demonstrated that other money exchange firms rapidly replaced al Barakaat (Omer and El Koury, 2004: 47). While the impact for Somalis may have been transitory, the wider consequences for the inherent tension between the measures implemented to combat the financing of terrorism and the means used to transfer migrant remittances to the developing world deserves further study (Amoore and de Goede, 2005; Ballard, 2005; Vlcek, 2006).

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### **Endnotes**

<sup>1</sup> Treaty of European Union, Article 46. For a discussion of ‘The Legalization of EU Foreign Policy’ extending beyond just the ECJ, see (Smith, 2001).

<sup>2</sup> This case also involves actions taken to counter terrorism as a matter for Justice and Home Affairs (the Third Pillar), which are not addressed here; see (Peers, 2003). For more comprehensive assessments of the human rights implications of these Council and Commission actions see (Cameron, 2003; Fitzpatrick, 2003; Warbrick, 2004; Tappeiner, 2005).

<sup>3</sup> Including General Assembly Resolution 49/60 (9 December 1994), General Assembly Resolution 50/6 (24 October 1995), General Assembly Resolution 51/210 (17 December

1996), Security Council Resolution 1267 (15 October 1999), and Security Council Resolution 1269 (19 October 1999).

<sup>4</sup> The twelve agreements Ward identified as intended to combat terrorism were: Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); International Convention against the Taking of Hostages (1979); Convention of the Physical Protection of Nuclear Material (1980); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); International Convention for the Suppression of Terrorist Bombings (1997); and International Convention for the Suppression of the Financing of Terrorism (1999). (Ward, 2003: 290, footnote 4)

<sup>5</sup> For example, the United States ratified the convention on 26 June 2002, and China, Indonesia, and Saudi Arabia have not yet ratified it.

<sup>6</sup> The FATF has 31 member states, along with representation from the European Commission and the Gulf Co-operation Council, and, as of 11 February 2005, China now participates as an observer. It is a multilateral organisation charged with combating financial crime and was created at the direction of a G-7 summit in 1989. The FATF is hosted at the OECD Secretariat in Paris. The current member states are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. The FATF is also at the centre of a network of regional anti-money laundering organisations, including the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL) (FATF, 2005).

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

<sup>8</sup> 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.

<sup>9</sup> 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 (Milbank and Day, 2001).

<sup>10</sup> The peculiar feature of the second case was the judge's method of calculating the sentence rendered as their punishment. He did it 'using a dollar amount equal to the 3 percent cut sent to [the] Al Barakaat [central office]. (Jackman, 2002)' The logic of this action seems to imply that it represented the sum provided to Al-Qaeda for future terrorism.

<sup>11</sup> Marieke de Goede is citing (Golden, 2002).

<sup>12</sup> However, in the U.S. these sanctions are implemented via Presidential Executive Order, and in connection with the events discussed here, it was necessary for two individuals in the United States to file a lawsuit in an effort to get their assets unfrozen after the government failed to charge them with a crime. See (Roth et al., 2004: 85)

<sup>13</sup> The question of assessing 'the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law' (§277) is not addressed here. See for example (Happold, 2003; Fitzpatrick, 2003).

<sup>14</sup> See (Hill, 2004), especially pages 151 - 154, for a discussion of the impact of the Iraq crisis on CFSP.

<sup>15</sup> Cameron is citing Mathews v. UK, 18 February 1999. In a very crass sense, it would be comparable to a state excusing its conduct by asserting – 'I was only following orders.'

<sup>16</sup> In Sweden members of the community collected funds to help them pay their legal fees, an action that is also in violation of the sanctions (Andersson et al., 2003: 111).

<sup>17</sup> At the same time, it should be recalled that not all states agreed with the identification of particular groups as 'terrorist' on the UN Sanctions List. For example, the refusal by Lebanon and Syria in November 2001 to freeze the assets of Hezbollah because it is 'a movement of national liberation and not a terrorist organization. (Zagaris, 2002a)'

<sup>18</sup> 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).

<sup>19</sup> 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)’

<sup>20</sup> 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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