

Between The Political and The Judicial – EU Measures on the Financing of Terrorism

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Introduction

This conference is devoted to a reflection on terrorism, law and democracy ten years after the events of 11 September 2001 in the USA. From a European perspective, the most striking development has been the rapidity with which state action in respect of political violence has intensified since 2001 transnationally. The speed with which governments and administrations in countries in Europe were able to change their rules and procedures to permit the sharing of information, including about individuals, with the USA (and other countries we are gradually discovering) took the legal world by surprise. Further, the capture of the new practices of transnational information sharing regarding assessments of risk and threat within UN structures raised problematic questions about the relationship of politics, law and human rights. The consequences for quite a number of individuals have been problematic. The way in which the Canadian government dealt with the Arar affair is seen by a number of actors as exemplary and by others as worrying.

In this paper, I will examine one aspect of the transformations in the relationship between politics and violence in the past ten years. Though one must bear in mind the relationship has a long history in Europe at least over the past three hundred years. The French revolution transformed thinking both politics and legal regarding the legitimacy of violence against oppression. The end of WW II brought about in Western Europe an increasing reluctance to accept the legitimacy of political violence among Member States of the European Union. The end of dictatorships in Europe strengthened this approach, though the troubles in Northern Ireland and the struggles in the Basque country provided ample pressure in the other direction. The successful demonization of political violence at the international level has gone hand in hand with the US problems with radical Islam – not least the adoption by the UN of a treaty on the subject in 2000.¹ There have been a number of routes which this political move has taken, but one of the keys has been

¹ International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on 13 April 2005.

through law in particular law regarding the financing of political violence. In this paper I will examine the variety of EU responses to this aspect of the relationship of law and political violence.

The dividing line between law and politics is often difficult to determine. While overtly political actors tend to highlight their capacity to make and change laws and thus control the underlying subject matter of the jurists and so tame legal institutions, legal actors tend to downplay the role of politics in their activities. Indeed, in legal worlds even the word 'politics' is to be avoided as suggesting that the cherished impartiality and independence of the legal world is sullied by political considerations. In this contribution I will examine a clash between law and politics which is taking place rather publicly regarding the EU's legal reaction to the UN anti-terrorism measure the list on the freezing of funds. In analyzing this controversy, I will draw out the transversal appearance of the political which takes place and which is catalyzed by pressure to become visible as rights holders in international law which individuals are applying. The politics which emerges is one of responsibility and accountability: to whom are international institutions accountable and from what responsibilities should they be shielded?

My contention is that international relations and international law are under increasing pressure from the appearance of the individual as a subject in law and visible in international law and hence international politics. So long as international relations remained exclusively interstate with the occasional intercession of international organisations the issue of justice towards people as individuals did not arise. Decisions about international politics were the result of negotiations and actions between state authorities (albeit they too are animated by individuals and the sociology of their actions has become increasingly a matter of interest in IPS). However, since the end of bipolarity, there has been a temptation among actors in the international relations to engage in activities which implicate people as individuals. As political actions, these stand within the interstate system and rules on legality – it is states which negotiate and decide them. But the weight of the political decisions falls directly on individuals in some cases thus causing a crisis as regards the individual's right to a remedy for incorrect application of the measures etc. That these tensions are manifesting in the field of anti-terrorism measures is not surprising. The high political value of such measures is

generally used to justify providing them with additional protection against judicial examination. Thus fair trial duties which political actors would not normally dare to interfere with in other areas of crime, are subject to modification against the accused where terrorism allegations are made (the UK example of the permissible detention before charge of a person suspected of terrorism is only one parochial example). Thus when UN institutions engage in anti-terrorism measures which affect the individual there are two removes of protection against judicial interference – the supposed invisibility of the individual at the international level and the persuasiveness of the terrorism claim against normal judicial remedies for the individual.

Two responses to this change in the way international relations and international law operate are apparent. The first is an attempt to imbue the international institution which makes the decision with a law making capacity rather than a political persona. In this way the cloak of impartiality claimed by legal institutions is cast over political institutions and their decisions protected from challenge. The second is comprised of a revolt by legal institutions (supranational and national) against what they see as the usurping of their role as practitioners of legal rules which has taken the form of championing the claim of the individual against the international institution's action under the heading of human rights.

To examine this contention, I will take the challenge which the European Court of Justice has thrown down to the UN Security Council in its judgment C-402/05 *Kadi* (3 September 2008) on the legal duty to protect an individual against the Security Council's order of the freezing of his funds and assets on anti-terrorism grounds. This judgment has kicked up enormous amounts of legal commentary, much of it still on going. The most populist response was published in the Wall Street Journal on 25 November 2008 by Jack Goldsmith and Eric Posner (a law professor at Chicago University). Here the authors claim that the *Kadi* judgment shows that "Europe's commitment to international law is largely rhetorical. Like the Bush administration, Europeans obey international law when it advances their interests and discard it when it does not." This reaction represents perhaps the most extreme end of the reactions, one which one would imagine, even the authors would not seek to maintain in a peer reviewed journal.

At the other end of the spectrum, I have argued that when the monopoly of coercion moves to the international level but is still directed against the individual, the remedies must follow and it is incumbent on courts to ensure that the fair trial remedy, a standard in all human rights instruments, be given effect (Guild 2008). An increasing number of courts around the world seem to be coming to the same conclusion, notwithstanding somewhat different reasoning. Most recently the UK's Supreme Court handed down judgment on 27 January 2010 striking down UK implementation measures freezing assets of persons on the UN Security Council's suspected terrorist list.² To support its decision, the Supreme Court referred to similar judgments in Canada³ and the USA⁴ which follow a similar line, though the reasoning is based more exclusively on national law than international as the Supreme Court does.

For the moment, the academic community has been divided over its assessment of the European Court of Justice's decision. Jo Murkens in the Cambridge Yearbook of International Law takes a robust position on the centrality of the right to remedies of the individual against the hierarchy of application approach (Murkens 2009). Other authors deplore the EU's lack of obedience to the Security Council (de Burca 2009; Weiler 2009). There has been much hand wringing in EU legal circles about the consequences for the interaction between the UN, EU and Member States as regards what is law and what must be followed (Tridimas 2009; Kunoy & Dawes 2009; Griller 2008). Some academics have focused on the implications for human rights law in the EU (Gearty 2008; Eeckhout 2007) but tend to limit their discussion to legal impacts. However, in this substantial array of comment, only Murkens seeks to position the discussion as one in which a political entity seeks to enjoy the last word normally reserved for the judicial. But it is time to explain the issue and the problem.

The UN Security Council and the Freezing of Terrorist Assets

The starting place of the current conflict is Security Council Resolution 1267 adopted on 15 October 1999. Here the Security Council called upon the Taliban to turn over Ussama bin Laden to the appropriate authorities and that all states "freeze funds and other

² *HM Treasury v Ahmed & Ors* [2010] UKSC 2.

³ *Abdelrazik v The Minister of Foreign Affairs* [2009] FC 580.

⁴ *Kindhearts for Charitable Humanitarian Development Inc v Timothy Geithner* Case 3:08cv 02400 18 August 2009.

financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee [...], and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need". The resolution established a Sanctions Committee responsible for ensuring that states implemented the resolution. This Sanctions Committee was comprised of *all* the members of the Security Council.

The Security Council added another resolution (1333) in 2000 demanding that the Taliban comply with the earlier one and tightening up the freezing of funds provisions. In this new resolution the Security Council called on the Sanctions Committee (in other words itself) to maintain an updated list of the individuals and entities designated as associated with bin Laden (and Al Qaeda). The list was based on information provided by states and regional organisations. It was not until 8 March 2001 that the Sanctions Committee published its first consolidated list of persons and entities which must be subject to the freezing of funds (Committee press release AFG/131 SC/7028). This list included the now famous Mr Kadi, who is at the centre of the challenges before the EU's highest court. The list of persons and entities developed rapidly. It was amended (mainly with additions as far as one can tell) on an almost monthly basis after 11 September 2001. In January 2002 the Security Council adopted a new resolution (1390) which provided for the continuation of the list which under the terms of the earlier resolution was up for reconsideration. By the end of 2002, the Security Council adopted yet another resolution (1452) which provided for the first time for exceptions and derogations to the freezing of assets of persons on the list on humanitarian grounds and subject to Sanctions Committee consent.

With each Security Council resolution, the EU institutions adopted a measure giving effect to the Security Council's orders. There was a symmetry which would warm the heart of any international relations realist concerned about the implementation of Security Council measures at the regional level. This obedience of the EU's institutions is interesting not least as the EU is not a party to the UN Charter and thus not directly

implicated. It was a political choice at the EU level to transpose the Security Council resolutions directly and thus by operation of EU law to bind the Member States to obey under the EU's own doctrine of hierarchy of norms. So what happened was the resolutions of the Security Council were treated to a status equivalent to law in the EU. The Sanctions Committee's decision to list an individual had an immediate impact not only through the Security Council resolution on states parties to the UN but in the EU through the EU measures. Thus an aggrieved Mr Kadi whose assets were frozen would have to fight his way through non-existent Sanctions Committee remedies and the EU judicial system as well as seek a remedy and at the national level.

The obligation to freeze funds had devastating consequences for many people in the EU. Their capacity to constitute themselves as rights holders in respect of the disaster which engulfed them is the core issue which engaged the fault line between the political and judicial in the international community. The position of the Security Council was that individuals are the subject of political action exclusively. The aggrieved individual could complain to his or her own national authorities or to the Sanctions Committee but any review was by the Sanctions Committee which had taken the decision. Virtually no information about the reasons for the listing of an individual are made available to the person and there is no hearing of the individual either. The possibility of complaint to the national authorities of the individual is problematic as appears from the UK case I will discuss below. Here it was the UK authorities which proposed the listing of their national to the Sanctions Committee. The UK authorities then carried out the freezing of his assets on the basis of the listing. Because the listing was by the Sanctions Committee there was no national remedy available to the man at the national level other than a direct challenge to the whole system. The UK authorities thus protected the political nature of their decision to freeze the man's assets by moving the decision making to a venue against which the individual would have no redress on the facts.

The structure by which this effect of shielding the political decision from judicial examination on the facts depends on national implementing legislation which excludes the possibility of judicial review. As I note later in this article, courts in Canada and the USA and now also the UK have refused to accept this limitation on their powers. In the EU a further mechanism of constraint is added by the EU regulations giving effect of the Security Council resolutions. In EU law there is a strict hierarchy whereby national courts

are obliged to give effect to EU regulations even in the absence of national implementing legislation or in the fact of national legislation which is contrary to the regulation.⁵ Thus in the EU setting the individual must constitute him or herself as visible as a rights holder in EU law – a supranational form of law. The system of EU law discourages but does not prohibit the appearance of an individual as visible before its judicial instances. While the most important decisions of the European Court of Justice (ECJ) are the result of references, in the form of questions regarding the correct interpretation of EU law, by national courts, the most common cases are infringement proceedings by the European Commission against the Member States for failure to apply EU law. However, the EU judicial instances also include a Court of First Instance (CFI) which can hear cases of individuals aggrieved by decisions of EU institutions which are directed at them personally and have legal consequences. Most cases of this kind are in relation to contractual commitments which EU institutions have entered into and which are contested or European Commission anti-trust decisions imposing fines on companies. It is fairly rare that individuals are named in legislation as is the case in the regulation implementing the Sanctions Committee list. This individualization of legislative acts themselves is what allowed those on the list to attack the regulation directly before the CFI. Against the decision of the CFI, the aggrieved party can appeal to the ECJ which sits in chambers or a grand chamber including all the 27 judges (there is one judge from each Member State).

In the case of *Yusuf* (which came before the EU's CFI under the name of *Aden* in an application of emergency hearing⁶), Mr Yusuf, a Swedish national resident in Sweden (with his wife and four children), whose name was on both the Sanctions Committee list and its EU counterpart, was subject to a full funds freezing action by the Swedish Government's implementation of the EU regulation and the Security Council Resolution. The Swedish national court had deferred to the regulation and found that Mr Yusuf was invisible at the national level as regards a remedy. Thus he had to attack the regulation rather than national legislation before the CFI. The result was that the family literally had no money. All their resources were frozen and no one was allowed to give them any money as that was also contrary to the provisions.

⁵ C-555/07 *Küçükdeveci* 19 January 2010.

⁶ Case T-306/01 R

The CFI inquired how they were surviving and received the following response from the Swedish authorities:

“The Stockholm (Spånga-Tensta) municipal authorities decided on 12 February 2002 to deal with an application for social assistance, submitted by Mr Yusuf and his wife jointly under the socialtjänstlagen (Social Services Law), according to the normal procedure, even after the adoption of the contested regulations. Social assistance has been granted to them monthly since November 2001, taking the household's own resources into account; the amount of assistance for needs of the family that was paid in respect of March 2002 amounted to SEK7,936. The social assistance payments have been made by postal orders which Mr Yusuf's wife has cashed at the post office.

In addition, the försäkringskassa (Social Security Office) has been regularly paying family allowances to Mr Yusuf's wife for their four children since 13 November 2001. The försäkringskassa continues to pay her such benefit at the rate of SEK4,814 each month. On the other hand, the payment of housing benefit which Mr Yusuf received until February 2002 has been frozen. The document from the försäkringskassa produced by the applicants at the hearing confirms that information. (paras 101-103)”⁷

How the family survived until the Swedish authorities found a way of giving them some social benefits is left unanswered. Nonetheless, when the case came before the CFI for a full hearing, it rejected their claim on the basis that the family's name was on the UN Security Council's terrorist list and thus it was to the Security Council that the family must look for the removal of their name and therefore for relief. The problem, however, was that although a de-listing procedure was established (eventually) it only allowed petitioners to submit a request to the Sanctions Committee or to their government for removal from the list. The processing of that request is exclusively, however a matter for intergovernmental consultation. The Sanctions Committee was under no duty to take into account the views of the petitioner. Further, the de-listing procedure did not provide even the most minimal access to information on which the decision was based to include the individual on the list. As a result not least of the ECJ challenge to the exclusively political nature of listing, the Sanctions Committee now provides some minimal information on the reason for listing (subject to the agreement of the state which

⁷ T-306/01 *Yusuf* [2005] ECR II-3533.

requested the listing). Further an ombudsman has been appointed to receive complaints from individuals though the office has no power to investigate or de-list an individual.

The problem had become one of a right to fair procedures. Where the Security Council acted through the Sanctions Committee to place the name of an individual on the list of persons whose funds were to be frozen, was this a political act which had to go through the process of being turned into law at the regional or national level or was this a legal act where no transposition was required. The answer to the question rests on a wider understanding of the rule of law and human rights at the fault line of politics.

The UN Charter and the duty of Obedience

The question which appeared instantaneously as soon as the challenges by individuals appeared in respect of the list was the authority for the Security Council's action and its claim to exemption from review. The universal starting point has been Article 1(1) and (3) of the UN Charter which states "the purposes of the United Nations are inter alia '[t]o maintain international peace and security' and '[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'" This is augmented by Article 24(1) and (2) of the Charter which state:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

The argument goes that UN Members are under a duty of obedience to the Security Council within its fields of competence as it has primary responsibility for international

peace and security. Thus when it passes a resolution this should have an effect equivalent to law. However, the Security Council resembles an executive body more than a legislative one (Gowlland-Debbas 1994; Akande 1997). My purpose here is not to enter directly into this much trodden area from a theoretical perspective but rather to look at the consequences as regards the individuals seeking to construct themselves as entitled to law. The argument in their favour revolves around Article 24(2) of the Charter which obliges the Security Council to act in accordance with the principles of the Charter itself. Therefore, to exempt the Security Council from an external review of its compliance with human rights is clearly not consistent with the fair trial obligation which is part of human rights a core principle of the Charter. However, if such an approach is accepted, the question then arises what body should review action by the Security Council – the traditional German Kompetenz Kompetenz argument about constitutionality.

In the abstract, this problem solicits many different answers but the *Kadi* and other cases in the EU about the freezing of funds brings the problem back to the concrete, the line between the political and the legal. The reason is the existence of individuals who are seeking remedies against the acts of the Security Council which have deprived them of their livelihoods.

Human Rights and the Security Council before the ECJ

In the CFI decision, the court accepted the visibility of the individual as having standing to object but it chose to find the action of the Security Council justified: the freezing of funds did not constitute an arbitrary, inappropriate or disproportionate interference with the right to private property of the persons concerned and could not, therefore, be regarded as contrary to jus cogens, having regard to the following facts:

- the measures in question pursue an objective of fundamental public interest for the international community, that is to say, the campaign against international terrorism, and the United Nations are entitled to undertake protective action against the activities of terrorist organisations;

- freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof;
- the resolutions of the Security Council at issue provide for a means of reviewing, after certain periods, the overall system of sanctions;
- those resolutions set up a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

Further the CFI found that as the EU institutions were required to transpose the Security Council and Sanctions Committee measures and those measures did not provide a mechanism for examination or re-examination of individual situations, nonetheless, the matter fell wholly to the Security Council and the Sanctions Committee. In the view of the CFI, the individual remained completely invisible at the EU level as “the Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanctions Committee, no discretion with regard to those matters and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants” . (para 262). So much for the individuals – the structure of politics and law at the international level leaves them without voice or visibility according to the CFI.

On appeal to the European Court of Justice the situation was reversed in what is the most important part of the judgment for the purposes of the contention in this article. The ECJ folds in on the EU finding that respect for human rights is a condition of the lawfulness of EU acts and that measures incompatible with respect for human rights are not acceptable in its legal order (para 283). Thus an international agreement cannot have the effect of prejudicing the EU’s constitutional principles including in respect of fundamental rights as constituting a condition of their lawfulness or which it is for the Court to review in the framework of the complete system of legal remedies established in EU law (para 285). Implicit is the finding that the Security Council cannot carry out this fundamental rights review of its own decision to list an individual. The reference to the complete system of legal remedies clearly brings the individual into the light as the holder of a right to a remedy which must be capable of remedying the wrong. The Court

relies even more heavily on human rights as the basis of its decision – no other provisions of EU law which require compliance with international law can authorize “any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union “ (para 303). The ECJ then goes through the procedures of the Sanctions Committee against the CFI’s happy assessment and finds that there are profound breaches of human rights and in particular the right to an effective remedy (para 352).

Human Rights and the Security Council go National: the UK Supreme Court

Notwithstanding a substantial body of academic literature criticising the ECJ’s approach to the Security Council as effective a political body against the decisions of which an aggrieved individual is entitled to human rights protections (see de Burca et al above) in its judgment, the UK’s Supreme Court took a similar line. The facts in these cases indicate the continuing activity of the Sanctions Committee. The first appellant, G, was notified on 13 December 2006 by the UK Treasury that his funds would be frozen in accordance with the Sanctions Committee listing. His co-appellants, A, K and M were notified similarly on 2 August 2007. The Supreme Court examined the national implementing legislation which gives effect to the Sanctions Committee list. What is important here is that unlike the EU, the UK is a member of the UN and it is therefore directly obliged to comply with the UN Charter. While the ECJ could move back a step and engage with its internal legal order once it has disengaged the direct link with the Security Council, the UK’s position is somewhat different. Article 25 of the UN Charter states “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Thus an argument about the primacy of human rights in the Charter itself is going to be inevitable in this case.

While some amendments were made to the Security Council resolutions after the *Kadi* judgment⁸ in 2008 to alleviate some of the hardships on spouses and children of freezing orders against principals, the continuing problem is clear from the UK cases. Lord Hope in the lead judgment for the Supreme Court notes “In the first case, A, K and M are brothers aged 31, 35 and 36. They are UK citizens and, at the time of their designation,

⁸ C-402/05P *Kadi*

lived in East London with their respective wives and children. A and K no longer live with their families, and their current whereabouts are unknown. Their solicitor, with whom they have not been in contact for a number of months, attributes their disappearance to the damaging effects upon them and their families of the regimes to which they were subjected by the Treasury. It placed an extraordinary burden on their wives, created significant mental health difficulties and led ultimately to the breakdown of their marriages. M's marriage has also broken down, but he has continued to have a close relationship with his children. He lives at his ex-wife's address where his children live also." (para 31). He further notes that A, K and M have never been charged or arrested for terrorism related offences.

The case of G is even more noteworthy for a different reason. He was notified of the freezing of his funds by letter on 13 December 2006. A few days later he received confirmation that the reason for this was his inclusion on the Sanctions Committee's list which is binding, according to the UK authorities, on all UN Members and must be implemented in UK law. What he was not told until later is that his listing had been at the request of the UK authorities. So effectively what the UK authorities did was avoid freezing G's funds under national law which would have been liable to judicial review. Instead they presented information to the Sanctions Committee under its rather opaque procedures and recommended the listing of G. The Sanctions Committee duly complied whereupon the UK authorities, relying on their interpretation of the status of the Sanctions Committee as a body not subject to judicial oversight as regards a decision in respect of an individual, implemented the Sanctions Committee's listing (para 33). It is not surprising that the UK's Supreme Court found this somewhat hard to stomach. There appears here a transparent use of the Security Council as a venue through which to wash national executive decisions which otherwise would be subject to judicial control of their vulnerability to court supervision in the interests of the individual. Politics trumps judicial oversight for the protection of the individual.

Three issues were identified by the UK court as central, only the third of which interests me here – whether the national implementing measures of the Sanctions Committee's listing were valid in the absence of procedures that enabled designated persons to challenge their designation. Lord Hope spends some time on the *Kadi* decision of the ECJ, not surprisingly. He highlighted the importance to the ECJ judgment of the need for a genuine and effective mechanism of judicial control by an independent tribunal. He

noted that had such a remedy been available at the UN level then there would be no need at the EU level – but the failure to have such a remedy was fatal to the Council's case. For support, Lord Hope also took into consideration the decision of a Canadian court on the same issue where in *Abdelrazik v Minister for Foreign Affairs* [2009] FC 580, the judge was particularly outspoken: "I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness. ... It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge." (para 51)

In the Canadian case the judge relied on the Canadian Charter of Rights. US authority also arises in the case, but not as *De Burca* feared in the form of the problematic *Medellin* decision⁹ where the US court refused to take into account a decision of the International Court of Justice which required states to permit access to diplomatic representatives for individuals in prison (and on the facts facing the death penalty) (*de Burca* 2009). Lord Hope refers to a judgment challenging a decision blocking access to assets to pay counsel's fees.¹⁰ However, both these cases were decided on national law not an international human rights instrument as was proposed in the UK's case. The judge found himself between a rock and a hard place, however, because not long before his court had agreed that a Security Council resolution took priority over national law including obligations in respect of human rights.¹¹ In that case the UK court followed the principle of invisibility of the individual in international law unless the issue was one of *ius cogens* – that is to say preemptory norm that does not require a statute to justify its application. So the UK court had to retreat to national law which required a fair amount of gymnastics as it had then to decide whether the national law creating the system of freezing could be interpreted as excluding a right of review without express wording to that effect in the national measure itself. In order to justify this interpretation of national law, the judge provided a fascinating description of the listing process:

⁹ *Medellin v Texas* 552 UA (2008)

¹⁰ *Kindhearts for Charitable Humanitarian Development v Timothy Geithner* Case 3:08-cv-02400.

¹¹ *R (Al-Jedda) v Secretary of State for Defence* [2008] AC 332.

“Some further details can be obtained from the *Guidelines of the Security Council Committee established pursuant to Resolution 1267(1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities* of 9 December 2008. They state that the committee is comprised of all the members of the Security Council from time to time, that decisions of the committee are taken by consensus of its members and that a criminal charge or conviction is not necessary for a person's inclusion in the consolidated list that the committee maintains, as the sanctions are intended to be preventative in nature. It would appear that listing may be made on the basis of a reasonable suspicion only. It is also clear that, as the committee works by consensus, the effect of the guidelines is that the United Kingdom is not able unilaterally to procure listing, but it is not able unilaterally to procure de-listing either under the "Focal Point" procedure established under SCR 1730(2006). Although the Security Council has implemented a number of procedural reforms in recent years and has sought improvement in the quality of information provided to the 1267 Committee for the making of listing decisions, the Treasury accepted in its response of 6 October 2009 (Cm 7718) to the House of Lords European Union Committee's *Report into Money Laundering and the Financing of Terrorism* (19th Report, Session 2008-2009, HL Paper 132) that there is scope to further improve the transparency of decisions made by the 1267 Committee and the effectiveness of the de-listing process. On 17 December 2009 the Security Council adopted SCR 1904(2009) which provides in paras 20 and 21 that, when considering de-listing requests, the Committee shall be assisted by an Ombudsperson appointed by the Secretary-General, being an eminent individual of integrity, impartiality and experience, and that the Office of the Ombudsman is to deal with requests for de-listing from individuals and entities in accordance with procedures outlined in an annex to the resolution. While these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy.” (para 78).

As is the custom in British Supreme Court judgments, all the judges have a chance to put forward their views. Among the more clear spoken is the decision of Lord Rodger with whom the only woman on the Supreme Court, Lady Hale, agreed. Interestingly, Lord Rodger notes that the Security Council Resolution looks more like an international convention than a resolution. He adds that this is not surprising as it is made up of measures which are to be found in the International Convention for the Suppression of the Financing of Terrorism adopted in 1999. But because the convention had only been

ratified by few states by 2001 the Security Council Resolution pulled out key elements and adopted them in the form of a resolution (para 161). Here the allegation, albeit never made in these terms, is that the UN institutions themselves were complicit in seeking to short circuit the law making process at the UN level. Instead of sticking to the convention procedure which permits each state to make a decision whether to accede or not, a resolution was used with much of the same content which did not require signature or ratification. Thus all UN states were immediately bound by a series of obligations which even the UN institutions themselves had originally considered were the proper content of a convention.

One of the issues which divide their Lordships is the standard of proof should be necessary before an individual's funds are frozen – suspicion, reasonable suspicion, etc. This debate leads in many directions but strays from my main concern as by the time we begin to assess what the burden of proof should be we have already accepted the existence of the individual as a subject in law entitled to rights against the acts of the UN Security Council. The unanimous decision of the UK court was that national law implementing the Sanctions committee list had to be quashed though in the end the reasoning was particularly weak. The Supreme Court considered that the UK's legislative vehicle for the freezing of assets – an Order in Council – allowed insufficient democratic scrutiny in light of the severity of the consequences. Thus the Court did not exclude the triumph of the political over the legal (as including the right to a remedy) but demanded more democracy in the political decision.

Conclusions

Where is the faulty line between law and politics in anti-terrorism measures? Clearly it is at the junction with individual rights. In this paper I have examined the problem from the perspective of how the individual becomes visible as a rights holder and where. At stake is the organizing principle of international relations and international law. Both are built on the foundation that their subjects and objects are states. It is the job of the state, thereafter to engage with the individual but the individual should not appear over the parapet of international relations or international law as a subject. Only if the individual is wearing the mantle of the state as a diplomat or head of state may he or she appear as a shadow in international relations and international law as a sort of embodiment of the

state. There is much to say about the duty of loyalty of the diplomat to the state and to what part of the state but this is not within the remit of this paper.

Instead my interest is in the individual outwith state authority but nonetheless becoming visible as a rights holder in the international stage. It is not surprising that it is in the politically highly charged environment of anti-terrorism measures that the fault lines are appearing most noticeably. The close link in political imagination between treason and terrorism – the one as political violence against the ruler the other political violence against any ruler – has led to a similar tendency to take shortcuts in anti-terrorism measures as regards the rights of individuals. There is a relaxation of the burden of proof before coercive measures are adopted; a sloppy approach adopted to evidence and intelligence comes to contaminate evidence with supposition and conjecture. In the current case, the central feature of legality – the right to challenge a decision in an impartial tribunal is dispensed with as unnecessary.

This fault line reveals the political nature of the attempt to call the resolutions a form of legally binding document which does not permit judicial review. It also galvanizes the courts before which the individuals come in search of a remedy to find review mechanisms which raise the individual into a visible actor on the international stage. Even where the courts as in the case of the UK's Supreme Court limit themselves in the end to a particular interpretation of national law which permits them to provide a remedy to the aggrieved individuals, the consequence is an important challenge to the capacity of the Security Council to designate itself a law making body through the adoption of resolutions alone. This capacity was, in the case which I have examined here, particularly hindered by the deployment of one state party to the Security Council of the mechanism to make the individual disappear as a rights holder capable of challenging the listing.

The appearance (even if it turns out only to be a guest appearance) of the individual in international relations and international law promises to have important consequences. While it is unwelcome among classic public international lawyers and many legal experts are unhappy about the effects, fearing the arrival of the unruly individuals on the well bordered field of international law, it is the result, to no small extent, of the unwillingness of some states to take seriously fundamental rights as part of the domestic and international legal furniture.

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