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COMPOSITE DECISION-MAKING AND ACCOUNTABILITY NETWORKS: SOME DEDUCTIONS FROM A SAGA

By Carol Harlow*

Abstract

This paper sets out to explore the impact of multi-level decision-making on accountability machinery through a case study of asset-freezing decisions taken in response to UN resolutions ordering 'smart sanctions' against persons and bodies suspected of involvement in terrorism. A wide literature already surrounds UN counter-terrorism measures and their implementation. This attacks the issue from two main standpoints: first, the concern of lawyers with the hierarchy of legal norms and the question of the 'primacy' of international law as posed in the *Kadi* decisions of the Luxembourg Courts; secondly, the due process rights of individuals, with the consequential intervention of courts, again notably the Luxembourg Courts, to redress this omission. This article adopts a different standpoint. Using asset-freezing as a paradigm of multi-level or composite decision-making, it explores the effectiveness of traditional accountability machinery in dealing with this phenomenon, concluding that cooperative 'accountability networks' or networks of entities specialising in accountability such as courts, parliaments and ombudsmen, should be developed to fill the serious accountability gaps that have emerged. The article has three parts. Part 1 deals at a theoretical level with the evolution of composite decision-making and with theories of accountability aimed at the consequential problems. Part II deals with the structure of asset-freezing decision-making at UN, EU and UK levels and the operation of accountability machinery at these levels. Part III evaluates existing accountability machinery, suggesting that change is necessary to redress shortcomings.

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Part I: Network Governance and Accountability

1. Composite decisions

Until very recently, public administration was understood as a relatively closed system operating within the boundaries of a unitary or federal nation-state. The commonest framework for analysis was some variant of separation of powers theory, in which the organs of government were seen to check and balance each other, with a triadic division of functions into legislative, executive and judicial. Executive and administrative functions tended to be conflated and viewed solely in terms of implementation - a 'transmission belt' depiction of the executive function[1] in which the multiple policy- and rule-making functions of the administration were discounted. The administration was viewed as a strictly delimited set of public bodies or 'bounded organisations' clearly distinguishable in function and character from entities and individuals composing civil society.[2]

Inside this stereotypical framework sat a simple and familiar accountability paradigm. The administration was hierarchically accountable to the executive, in turn accountable to a representative legislature, which not only set in place the framework of laws but also possessed powers of scrutiny. Both executive and administration were accountable to courts, which provided redress for individuals whose rights had been infringed, and acted as arbiters of legality through the judicial review process. Legislatures were in principle accountable to an electorate through periodic elections, although their policy choices in specific issues were largely beyond popular reach. As constitutional review became more widely available, however, legislatures were rendered accountable to courts[3] and the function of courts as a forum for public accountability began to gain

[1] R Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harv. Law Rev. 1667, 1675.
[2] M Shapiro, 'Administrative Law Unbounded' (2001) 8 *Indiana Journal of Global Legal Studies* 369.
[3] A Stone Sweet, 'The European Court of Justice' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2nd edn, 2011) records that, of 106 national constitutions written since 1985, all contain a charter of rights and all but five establish a mode of rights review. The EU has followed this trend.

wider recognition.[4] Courts remained relatively unaccountable, protected by the deeply entrenched doctrine of judicial independence.

In the last decades of the twentieth century, this paradigm was increasingly questioned and exposed as little more than an ideal-type. Inside the nation-state a large-scale delegation of administrative tasks to agencies was taking place; the centralised administrative state that characterised the early twentieth century was broken down through programmes of privatisation, and governance through regulators became the order of the day. The term 'governance', understood as an 'institutionalised mode of co-ordination through which collectively binding decisions are adopted and implemented',[5] was introduced specifically to denote the perceived break with traditional accounts of government and indicate the 'new method by which society is governed'.[6]

The new governance patterns were quick to migrate to the hospitable terrain of global space. [7] Sometimes with trepidation, commentators noted the emergence of transnational bodies with regulatory functions (often self-endowed), which steadily undercut the authority of the nation-state. Slaughter devised the concept of 'the disaggregated state' to refer to emerging networks of public actors operating above the state, instancing 'regulators pursuing the subjects of their regulations across borders; judges negotiating mini-treaties with their foreign brethren to resolve transnational cases; and legislators consulting on the best ways to frame and pass legislation affecting human rights or the environment.' She distinguished 'horizontal networks', composed of national officials forming cross-border links that might or might not be formally authorised from 'vertical networks', in which states agreed 'to delegate their sovereignty to an institution above them with real power', where the institution might emerge as 'the genuine counterpart existence of a national government institution'.[8]

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[4] D Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, (Open University Press, 1991); R Mulgan, *Holding Power to Account, Accountability in Modern Democracies* (Palgrave Macmillan, 2003).
[5] T Börzel, 'European Governance' (2010) 48 JCMS 191, 194.
[6] R Rhodes, *Understanding Governance* (Open University Press, 1997) at 6.
[7] M Flinders, 'Distributed Public Governance in Britain' (2004) 82 *Pub. Admin.* 883 and 'Distributed Public Governance in the European Union' (2004) 11 *JEPP* 520.
[8] A-M Slaughter, *A New World Order* (Princeton University Press, 2004) at 12 and 13.

In the EU, where inter-state cooperation was more firmly established and institutionalised and policy- and decision-making routinely crossed from national to transnational level, commentators began to speak of 'multi-level governance',[9] executed by both vertical and horizontal networks. Marking the growing closeness of network actors and co-ordination of administrative levels, a new terminology of 'composite decision-making' or 'decision-making in concert' was introduced to capture situations where either several administrative systems executed a single policy objective expressed in an EU legal framework or member state and EU actors joined together in a fragmented policy-making network.[10] This terminology extends, however, to any situation, transnational or otherwise, where autonomous entities and jurisdictions come together to pursue common aims of public concern. Though less institutionalised than the EU, the global sphere houses many decision-taking networks where 'the organizations are legally separate [and] their exercise of public authority can often not be attributed to one level; rather, [it] is an interconnected effort of functionally interwoven bureaucratic actors.'[11] Such a network may be arranged hierarchically; equally it can consist of a multiplicity of decision-taking points operating on various levels. Asset-freezing (hereafter freezing) decision-making occurs in just such a network.

In this changing framework, the classical accountability paradigm began to seem dysfunctional.[12] Policy-making was being transferred outside the state to horizontal networks in which political and hierarchical controls over bureaucracy might be very weak; in vertical networks, 'real power' was being delegated upwards to regions where the controls of the classical accountability model were not in place. As international bodies gained rule-making functions, national legislatures were transformed from principal to agent[13] yet the representative legislatures that underpinned the classical model were either absent or – as in the EU, where lawmaking machinery was

[9] Terminology derived from G Marks, L Hooghe and K Blank, 'European Integration from the 1980s: State-Centric v Multiple-level Governance' (1996) 34 *JCMS* 341.
[10] S Cassese, 'European Administrative Proceedings' (2004) 68 Law and Contemporary Problems 21, 22.
[11] A von Bogdandy and P Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) 9 German Law Journal 2013, 2015, available on line.
[12] Y Papadopolous, 'Problems of Democratic Accountability in Network and Multilevel Governance' (2007) 13 ELJ 469.
[13] M Pollack, 'Learning from the Americanists (Again): Theory and Method in the Study of Delegation' (2002) 25 *W. Eur. Pol.* 2000.

institutionalised - had attenuated authority. In short, 'the trend toward European policy-making [was] not being matched by an equally forceful creation of appropriate accountability regimes.' [14] Accountability gaps were appearing which traditional accountability machinery could not reach. The plight of individuals affected by composite decisions was realised.[15] There was general agreement that courts were gaining in power and influence yet seemed unable to provide redress.

2. Accountability models

Accountability, not so far defined, is a complex and fluid concept that attracts many differing definitions.[16] Bovens treats accountability as a *process*: someone called to account has to give an account of his actions in a forum where he can be questioned and his actions evaluated.[17] Here accountability is both retrospective and external. It can equally carry an *ex ante* meaning, to cover a policy-making process in which there is public participation, or the scrutiny functions of a parliament in the legislative process.[18] Grant and Keohane introduce the idea of benchmarks against which conduct can be measured: 'some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards and to impose sanctions if they determine that these responsibilities have not been met.'[19] Here 'sanction' suggests punishment, a sense preferred by lawyers, who tend also to view outcome in terms of a binding judgment delivered by a court of justice. Bovens is more generous; he construes the notion widely to embrace the informal sanctions of publicity or apology and other negative consequences such as 'disintegration of reputation or career.' Other authors focus on redress; accountability machinery should operate so as 'to put matters right if it should appear that errors have been made.'[20] In network

[14] M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 ELJ 447
[15] H Hofmann, 'Composite decision making procedures in EU administrative law' in H Hofmann and A Tűrk (eds), *Legal Challenges in Administrative Law* (Edward Elgar, 2009) at 155-7.
[16] E Fisher, 'The European Union in the Age of Accountability' (2004) 24 OJLS 495.
[17] Above n.144.
[18] K Auel, 'Democracy, Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs' (2007) 13 ELJ 487.
[19] R Grant and R Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *Am. Pol. Sci. Rev.* 1; C Harlow, 'Accountability as a Value for Global Governance and Global Administrative Law' in G Anthony et al (eds), *Values in Global Administrative Law* **(**Hart Publishing, 2011**).**
[20] Oliver, above n. 4 at 22.

contexts too, it is especially important to pin accountability down by asking who is to be made accountable, to whom, for what and where? [21]

Three main strategies have been suggested to tackle such problems. There is first the utopian idea of a systematised global administrative law administered through courts or other adjudicative machinery. [22] Secondly, Scott's very different approach seeks to supplement formal, classical, public law machinery by harnessing the 'dense networks of accountability within which public power is exercised'; in other words, Scott would largely internalise the accountability process. [23] His *interdependence* model relies on pressure from network members who, motivated by a relationship of mutual dependence, agree to account to each other for their actions. This creates a 'mutual accountability network', which can either stand alone or be grafted on to classical modes of accountability as an 'extended accountability network'. Scott uses the term *redundancy model* to cover situations where 'overlapping (and ostensibly superfluous) accountability mechanisms reduce the centrality of any one of them.' In reality this is likely to prove dysfunctional, creating a system that impairs the efficiency of the actor by requiring too many answers in too many accountability forums[24] – an obvious problem in composite decision-making networks.

Harlow and Rawlings prefer to retain the classical, external nature of accountability. Their answer to the problem of multi-level decision-making is for 'accountability networks', composed of agencies specialising in accountability processes such as audit, adjudication or the investigatory techniques of ombudsmen, to cooperate more closely, with the common objective of provide public accountability and redress. [25] Typically, accountability networks are composed of agencies specialising in a single mode of accountability, fortified by a shared professional expertise and ethos, as in Slaughter's example of 'judges negotiating mini-treaties with their foreign brethren to resolve

[21] C Scott, 'Accountability in the Regulatory State' (2000) 27 JLS 38.
[22] S Cassese, 'Administrative Law without a State?' (2005) 37 JILP 684; B Kingsbury, N Krisch, R Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.
[23] Above n. 210 at 50-54.
[24] J Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' (2008) 2 *Regulation and Governance* 137.
[25] C Harlow and R Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' (2007) 13 ELJ 542.

transnational cases.' At international level where representative institutions are often lacking, deficiencies in judicial accountability are especially serious. Accountability networks can also collaborate with each other – as courts and parliaments buttress each other's authority in a classical separation of powers constitution.

Part II: The decision-making network

3. Asset-freezing

Freezing measures are 'smart sanctions' imposed on individuals who engage in or otherwise support or encourage terrorism. They comprise one element of a wider counter-terrorism strategy that embraces detention without trial, travel and passport restrictions and other repressive preventative measures. Some of these, like how the now defunct British 'control order', are specific to particular national regimes; freezing decisions, however, can be taken by the UN, by its member states, with highly variable regimes, and by regional groupings, such as the EU. In the interests of coherence, this article is confined to the UK and EU.

In terms of network governance, the variable relationships are hard to characterise. National governments, charged with implementation of the UN measures, participate in freezing decisions and also take them in their own right. Decision-makers include government ministers, diplomats, legislators and officials, while parliaments, courts and, at UN level, an ombudsperson, act as accountability forums. Whether the network is hierarchical in the sense of involving 'an institutionalised relationship of domination and subordination'[26] is a point of keen controversy amongst international lawyers,[27] which this article will have to address. If not a hierarchy, we find at least a relationship of 'tight coupling' that 'significantly constrains the autonomy of subordinate actors' rather than a pluralistic transnational negotiation system in which 'the formal relations between the actors are equal.'[28] The network is best viewed as a composite: a multi-level, multi-functional process, in which the same functions may be carried out at different nodal points on the network and relationships are ambiguous. The same

[26] Börzel, above n.5 at 194.
[27] C Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' (2008) 9 German Law Journal 1513.
[28] Börzel, ibid.

uncertainties mark the accountability machinery. The ideal-type is strongest at national level where counter-terrorism regimes have typically to be justified in both political and legal forums. But national systems of accountability are largely horizontal and whether they can be linked in such a way as to achieve 'joined up accountability' is questionable.

4. The United Nations

UN Resolution 1267 (1999) called on all member states to 'freeze funds and other 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.' States were to freeze the assets of designated persons, report any assets frozen to competent authorities and prohibit unlicensed transactions or dealings with designated parties.[29] All member states were required 'to act strictly in accordance with' the provisions of the resolution, to co-operate fully with the Sanctions Committee (SC) to bring proceedings against persons and entities within their jurisdiction violating its provisions and to impose appropriate penalties. In the wake of 9/11, Resolution 1373 (2001) extended smart sanctions generally to the freezing of funds made available by any person or body 'with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.' The responsibility for listing was left to states, with a 90-day period for all states to report to the Committee on the steps taken to implement the resolution. The SC maintains a consolidated list of named individuals, entities and groups submitted to it by member states and international organizations, which take the initiative in proposing names; first published in March 2001, the consolidated list has been amended and supplemented many times.

Asset-freezing decisions are handled by the Security Council (SecC) and the SC, technically a sub-committee of the SecC consisting of all 15 members, which was set in place by Resolution 1373 for the purpose of monitoring implementation of that resolution. The SC operates by consensus; every state possesses a veto. A request from a single state, not necessarily the national state of the suspect, is sufficient for listing.

[29] S/RES/1269 (1999) of 19 October 1999. The full range of counter-terrorism measures is discussed by the Eminent Jurists Panel of the International Commission of Jurists, *Assessing Damage, Urging Action* (ICJ, December 2008).

In the rush to 'intensify the fight against terrorism at the national level', due process rights were virtually ignored. No specific mention of due process can be found in early UN resolutions, though there were brief references in debates to the expectation that 'strong action against terrorism will be consistent with broader commitments to human rights and the rule of law.'[30] Resolution 1373 made cursory reference to 'respect for international humanitarian law and human rights' - a formula that is now standard – but the phrase was not unpacked, although the resolution did contain a requirement for all states to ratify the Convention for the Suppression of the Financing of Terrorism. This provides guarantees of fair treatment in conformity with national and applicable provisions of international law, including international human rights law.[31] These best practice provisions, however, bear on *states* and not the UN.[32] Resolution 1333 (2000) not only reminded states of their obligation 'to implement strictly' the measures imposed by Resolution 1267 but contained a formulation of the so-called 'primacy rule', requiring states 'to act *strictly in accordance with* the provisions of the resolution notwithstanding the existence of any rights of obligations conferred or imposed by any other international agreement.' Again there was no mention of due process.

There were at first no requirements as to information that could provide a basis for listing nor was there provision for notice to or comment from individuals affected. Similarly, delisting procedure made no concession to due process. All that an individual could do was to request his state of 'residence or citizenship' to petition the SC on his behalf. And even where a state could be found to act on behalf of an individual – by no means always the case - the rule that the SC acted by consensus meant that the application could be - and often was - vetoed by a single hostile state. In *Sayadi and Vinck v Belgium*,[33] a case that shows how easy it is for a hostile state to manipulate the

[30] Interventions of Canada and the Netherlands in S/PV.4053, the debate on draft S/1999/1071 adopted as Res. 1069 (1999). And see J Flynn, 'The Security Council's Counter-Terrorism Committee and Human Rights' (2007) 7 HRLR 371.
[31] Article 17 of the International Convention for the Suppression of the Financing of Terrorism, Resolution 54/109 (1999).
[32] Whether the UN is bound by human rights law is disputed: see I Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 Nordic Journal of International Law 159 and the response by G Lysen, 'Targeted UN Sanctions: Application of Legal Sources and Procedural Matters' (2003) 72 Nordic Journal of International Law 291.
[33] *Sayadi and Vinck v Belgium* (1472/2006), CCPR/C/94/D/1472/2006 (2008); 16 IHRR 427 (2009) at 46.

composite decision-making process, subjects of freezing orders had been found innocent of terrorism charges by Belgian courts but had not been de-listed. The UN Human Rights Committee exhorted Belgium 'to undertake all that was in its power to have the complainants' names removed from the list as soon as possible and to prevent similar violations from occurring in the future.' In fact, two previous requests from Belgium had been blocked by SC members. A decision-making trap is created whereby the SecC downloads responsibility for due process to states, which justify their own restrictions on the basis of the UN mandate. Where decisions taken by national authorities are not respected by the SC, as in *Sayadi and Vinck*, the chance of redress or accountability is minimal.

At this stage it is important to clarify the connection between due process and accountability, two concepts that are not necessarily connected. The primary purpose of due process rights, and the aspect on which critics have focussed, is to allow individuals to defend themselves against criminal charges or administrative measures imposing sanctions.[34] In this sense, due process rights are merely the object of accountability procedures. A strong link exists, however, between the due process owed to individuals and the wider accountability of public bodies and officials. Due process envisages a two-stage process in which information is central: at the first stage before the decision-maker, someone affected has a right to access information sufficient to prepare a case; to make representations to the decision-maker, including where appropriate at an oral hearing; and to a reasoned decision from the decision-maker. At a second stage, the core due process right, strongly protected in modern human rights texts[35] and a fundamental constitutional principle of EU law,[36] is to challenge unfavourable decisions before an impartial adjudicator. Properly operated therefore, stage 1 rights safeguard the right to effective judicial review and have the effect of transforming the court into an 'accountability forum' in the sense used by Bovens: the decision-maker has to explain the measures taken in a reasoned decision, which can be questioned and evaluated by the court. At UN level, where there is no accountability to an elected assembly or

[34] E.g., L Zedner, 'Seeking Security by Eroding Rights: the Side-stepping of Due Process' in B Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007).
[35] Article 14 of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights (ECHR); Articles 47-50 of the EU Charter of Fundamental Rights (ECFR).
[36] Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 651.

electorate and no court currently exists with competence as an accountability forum, due process rights afford the only slim chance of accountability.

Increasingly, the UN has come under mounting pressure to mend its ways. There has been powerful indirect pressure from a steady flow of challenges to -freezing measures in national and transnational courts. Important human rights actors such as Mary Robinson, then Human Rights Commissioner, and Kofi Annan, then Secretary-General, have expressed concern. Several reviews, highly critical of UN procedures, have been instituted by the UN or funded by independent foundations,[37] and independent researchers have called for reform.[38] Standard political activity no doubt – but with some resemblance to Scott's 'mutual accountability network', where a decision-maker comes under pressure from network actors.

The minor procedural reforms that followed point, however, not only to the possibilities of 'extended accountability networks' but also to their very real limitations. Policy guidance and procedural guidelines and 'best practice' texts[39] advised concessions to greater openness, stressing the need directly to inform persons affected of listing and of the procedure for delisting and talking also of 'publicly-releasable' information concerning reasons for listing. A further cautious step towards transparency was taken with the provision that the statement of case submitted by the designating state might be disclosed to a state whose nationals, residents or entities had been listed and, further, that, with the prior consent of the designating state, the SC could decide on a case-by-case basis to release the information to other parties. At this point it must be assumed that, under pressure, the SecC had conceded the need to respect due process. Important structural changes were made with the installation of an Executive Directorate (CTED)

[37] Report from the UN HRC, A/HRC/4/88 9.3.07 (April 2007); Report from the Watson Institute Targeted Sanctions Project, *Strengthening Targeted Sanctions through Fair and Clear Procedures* (2006, available on line); the Chesterman report for the Austrian Government and IILJ, *The United Nations Security Council and the rule of law* (2008, available on line); B Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights' (2006) International Organizations Law Review 437.

[38] M Bothe, 'The Security Council's Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards' (2008) 6 J Int Crim. Justice 541; L van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 Leiden Journal of International Law 797; H Keller and A Fischer, 'The UN Anti-terror Sanctions Regime under Pressure' (2009) 9 HRLR 257.

[39] Security Council, *Counter-terrorism Best Practice* (2003), citing Guidelines from the UN Financial Action Task Force, available on line.

and a 'focal point' set up in the secretariat to receive delisting applications directly from individuals.[40] This had the significant effect of by-passing the possibility of state refusal to act. By 2008 a CTED working group was in place to keep under review issues raised by counter-terrorism measures and more especially the human rights aspects of in the context of resolution 1373 (1999).[41] Yet there was still no provision for disclosure of the *reasons* for listing and states continued to have a veto; they could 'continue to provide additional information which shall be kept on a confidential basis within the Committee unless the submitting State agrees to the dissemination of such information.'[42]

5. A UN 'ombudsperson'

The appointment of an ombudsperson to handle de-listing and 'receive requests from individuals and entities seeking to be removed from the Consolidated List' went some way to meet demands for accountability. The clear intention was to introduce a measure of independence into delisting procedure and the Resolution called for 'an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions.'[43] This specification was clearly satisfied by the appointment of Judge Kimberley Prost from the International Criminal Court. Her remit was to check and update the information available to the CPC and to provide an analysis of, and observations on, all relevant information available to her.

Judge Prost envisaged decision-making as a three-stage process: information gathering; dialogue and report; committee discussion and decision.[44] She expressed the hope that, at the report stage, there would be 'an open discussion about the case' before the committee made its decision. Her own concern for transparency was demonstrated by publication of the standards applicable to her recommendations: namely, whether there is 'sufficient information to provide a reasonable and credible basis for listing.' At the same time she revealed that she was negotiating with the states most concerned 'a long-

[40] S/RES/1730 (2006).
[41] See S/RES 1963 (2010) and CTED, *Thematic discussion of the Counter-Terrorism Committee on the human rights aspect of counter-terrorism in the context of resolution 1373* (1999) (2010).
[42] S/RES/1617 (2005), which collected up listing and delisting procedures; S/RES/1526 (2004) at [17].
[43] By S/RES 1904 (2009).
[44] First Report of the Office of the Ombudsperson pursuant to SC resolution 1904 (2009), document S/2011/29 at [23].

term solution to the problem of access to closed material', which she clearly found frustrating - ombudsmen are normally given access to secret files. [45]

Two years later, detailed procedures for delisting specifying notice, reasons and a measure of publication have been published on her website in a statement that marks her achievements.[46] A new, wider Resolution greatly strengthens the position of the ombudsperson by broadening her mandate.[47] A monitoring team is to be put in place to support the SC and ombudsperson. The listing and de-listing procedure is formalised, openly published and accessible and the SC has to compile and so far as possible make accessible on its website 'a narrative summary of reasons for listing'.[48] States are exhorted to cooperate fully with and to relay information regularly to the SC and ombudsperson and the monitoring team has to make regular reports on implementation of SC decisions. This begins to look like an incipient accountability process. But the ombudsperson's de-listing decisions are not exactly final - they can still be overruled by a unanimous resolution from the Security Council[49]- and Judge Prost has confirmed that responsibility for standard-setting and for decisions 'rests exclusively with the SecC'. Creation of the Office has not 'altered the structure of the composite decision-making nor changed its character, which remains administrative, though it ha[s] introduced a new process.'[50]

These reforms are not enough to satisfy those who believe that accountability requires an independent and preferably external judicial hearing, such the EU General Court, which has asserted vigorously that: 'the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.' [51] It is too soon to jump to this conclusion. The Office has so far completed 19 investigations, resulting in the delisting of 16 individuals and 24 entities (see S/2012/590). In sharp contrast to a majority of

[45] Remarks of Kimberley Prost, Ombudsperson to the 1267 Al Qaida/Taliban Sanctions Committee, 25 Oct. 2010 (available on line).
[46] Office of the Ombudsperson, *Procedure for requests for delisting submitted to the Office of the Ombudsperson for the Security Council's 1267 Committee* (2011).
[47] Art. 14 of S/RES/1989 (2011).
[48] Document S/2011/29 above n. 44 at [50-53].
[49] Art. 23 of S/RES/1989 (2011).
[50] Procedure for delisting, above n. 46 at [56].
[51] Case T-85/09 *Kadi v Commission and Council* (judgment of 30 September 2010) at [128].

ombudsmen, who network vigorously, the ombudsperson has not yet started to network; she is not yet affiliated, for example, to the International Ombudsman Institute or dynamic European Network of Ombudsmen.[52] In time, the UN ombudsperson may well emerge as a forceful member of an influential accountability network.

6. National level: the United Kingdom

UN member states have very different asset-freezing regimes and very different experiences of terrorism. The UK is, however, clearly a leading actor. It has direct experience of terrorism and takes counter-terrorism very seriously. It participated as a permanent member of the SecC in framing the UN resolutions on asset-freezing and has argued consistently in key cases for minimal discretion in implementing SC decisions. It is a powerful player in the EU Council. It has taken part in listing at every level and was responsible for many of the cases considered in this article. Its domestic legislation sets in place draconian counter-terrorism measures. Moreover, the UK conforms closely to the classical accountability ideal-type. The government operates in the framework of a time-honoured system of parliamentary government and there is an established tradition of judicial review bolstered by the Human Rights Act 1998. Decision-making takes place in a lively political context, with media interest and debate in which the public and civil society groups participate vigorously.

A steady flow of legislation has been introduced by successive governments to deal with terrorism, a term defined broadly by section 1 of the Terrorism Act 2000. The measures range from control orders, which effectively amount to detention without trial and on which debate and criticism has centred,[53] to forfeiture of property, asset-freezing orders, travel restrictions and sundry minor offences of encouraging or applauding terrorism. The 2000 Act dealt with proscription of persons and bodies engaged in terrorism, a power vested in the Home Secretary, and introduced a criminal regime covering the

[52] N Diamandouros, 'The work of the European Ombudsman and the European Network of Ombudsmen' (October 2011), available on line.

[53] See H Fenwick and G Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56 McGill LJ 863. Control orders are subject to reform at the time of writing: see *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, 2011) and the Terrorism Prevention and Investigation Measures Bill introduced in the House of Commons on 23 May 2011.

funding of terrorism, authorising forfeiture of 'terrorist property' by order of a court. These freezing orders were superseded by the Anti-terrorism, Criminal and Security Act 2001 (ACSA), which authorised executive freezing orders made by HM Treasury. Treasury orders embodying listing and delisting decisions must be laid before Parliament, with ACSA orders requiring affirmative resolution. For all these measures the government is accountable to Parliament, which has not only to pass the necessary legislation but also provides for scrutiny and oversight through its committees.

The burden of scrutinising counter-terrorism legislation has fallen mainly on the Joint Committee on Human Rights (JCHR), which has conscientiously reported on every bill, sometimes several times, publishing sixteen reports in the last full parliamentary session. In the case of ACSA, however, neither of the JCHR reports specifically covered asset-freezing[54] and, although committee reports were frequently cited in debate, only sixteen hours were allowed to debate a bill of 126 clauses. David Feldman, then adviser to the JCHR, suggests that 'the speed with which the legislation went through made it difficult, if not impossible, to ensure that the working of particular provisions would be periodically reviewed and that certain provisions would cease to have effect after a set period unless reactivated by Parliament.'[55]

Decision-makers are also accountable to the courts. The leading case of *Ahmed and al-Ghabra*,[56] was a challenge to freezing orders made by HM Treasury in implementation of Resolutions 1373 and 1267 in reliance on the United Nations Act 1946.[57] The Supreme Court decision touched on but did not directly decide the issue of the primacy of UN resolutions. Quashing the orders as *ultra vires*, the Supreme Court invoked the key common law principle of legality, according to which interference with a fundamental right requires express statutory provision.[58] The constitutional resonance of this judgment was considerable.

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[54] JCHR, *Anti-terrorism, Crime and Security Bill*, HL 37, HC 372 (2001-2); *Anti-terrorism, Crime and Security Bill: Further Report*, HL 51, HC 420 (2001-2).
[55] D Feldman, 'Parliamentary Scrutiny and Human Rights' [2002] PL 323, 346.
[56] *HM Treasury v Ahmed and al-Ghabra* [2010] UKSC 2.
[57] The Terrorism (United Nations Measures) Order 2006 SI 2006/2657; the Al-Qaida and Taliban (United Nations Measures) Order 2006 SI 2006/2952.
[58] *R v Home Secretary ex p Simms* [2000] 2AC 115.

New legislation was now necessary, providing an opportunity to consolidate the disparate regimes governing asset-freezing - resolutions made under the United Nations Act 1946, some still in being though technically invalid; the ATCSA regime; powers under the Counter-terrorism Act 2008; a Resolution 1373 regime governed by temporary legislation and, for Al Qaida and the Taliban, a Resolution 1267 regime governed by new regulations made (for reasons that are not entirely clear) under the European Communities Act 1972.[59] But the opportunity was not taken; the Government would not withdraw before heavy criticism from the House of Lords Constitution Committee.[60] The Terrorist Asset-Freezing etc. Act 2010 (TAFA) covers only the 1373 regime, the government justification being that the 1267 regime was 'already implemented across the EU by a directly applicable EU regulation.'[61] Not only does this complexity leave much additional leeway to the authorities engaged in proscription and asset-freezing - as amply demonstrated by *Al Gabrah* – but it also complicates judicial accountability machinery. There are now three disparate regimes: judicial review; appeal under ss.26 and 27(3) of TAFA to the High Court 'on the grounds available in judicial review'; and appeal to the Proscribed Organisations Appeals Commission (POAC).

POAC, a three-person tribunal presided over by a High Court judge with the status of the High Court, was established by the Terrorism Act 2000 to hear appeals against proscription and some freezing orders, with the aim of protecting sensitive information. Procedural rules place the tribunals under a obligation to 'secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.'[62] The governing legislation specifies that proceedings can take place 'without the appellant being given full

[59] Respectively the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 and the Al Qaida and Taliban (Asset-Freezing) Regulations 2010, SI 1197/2010.
[60] Constitution Committee, *Terrorist Asset-Freezing etc Bill*, HL 25 (2010-11) at [10]-[18]. See also Lord Pannick at second reading: HL Deb, col 1259 (27 July 2010). The JCHR met similar intransigence when it asked for the standard of proof to be raised to the civil test of balance of probabilities: see JCHR, *Legislative Scrutiny: Terrorist Asset-Freezing etc Bill (Second Report); and other Bills*, HL 53, HC 598 (2010/11).
[61] HL Deb, col 1251 (27 July 2010) (Lord Sassoon).
[62] Rules 4 and 37(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003 as amended in 2007.

particulars of the reasons for the decision which is the subject of the appeal.'[63] In practice POAC provides a two-part, 'open' and 'closed' procedure. In the open session, the suspect and his chosen representatives are present; 'closed material', which for security reasons has not been disclosed to the suspect, is presented in a 'closed session' where the applicant is not present and his interests are represented by a 'special advocate', appointed by the Attorney-General from a list of security-vetted counsel.[64] These 'closed material procedures' are hardly a model of accountability.[65]

POAC is not without teeth, however. When the Iranian Organisation des Modjahedines (OMPI), set up to oppose the regime of the Shah of Persia, if necessary by force, was proscribed in the UK in 2001, it applied to the Home Secretary for delisting on the ground that it had deliberately ended all its previous terrorist activity and associations and had publicised this fact. The Home Secretary issued a reasoned decision of refusal. OMPI appealed to POAC, which required him to:

> explain the reasons for the continued proscription, set out why the matters raised by the Applicants did not lead to the conclusion that the organisation ought to be de-proscribed, permit the Appellants to adduce material in support of their case… to disclose all relevant material (i.e. both evidence on which the Secretary of State positively relies and all "exculpatory" material).[66]

POAC went on to declare the decision 'perverse in the public law sense of that term'; i.e., it failed the classic English public law test of '*Wednesbury* unreasonableness'.[67]

Secret evidence and special advocate procedure was originally introduced by the British government in response to concern expressed by the ECtHR at the lack of procedural guarantees in executive deportation decisions.[68] It has since been the subject of a notably incoherent jurisprudence from British and European courts. After much dithering, a 'minimum core' principle was established according to which detainees are 'entitled to procedural protection commensurate with the gravity of the potential

[63] The Special Immigration Appeals Commission Act 1997 and Rules, above.
[64] Treasury Solicitor's Office, *Guide to the Role of Special Advocates and the Special Advocates Support Office (Open Manual)*, available on line.
[65] On the legality of closed material procedures, see *Al Rawi and others v The Security Service and others* [2011] UKSC 34; *Home Office v Tariq* [2011] UKSC 35.
[66] POAC Appeal No PC/02/2006 at [62].
[67] Established in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
[68] *Chahal v United Kingdom* (1996) 23 EHRR 413.

consequences';[69] what this formula means in practice has been left undefined. In *Bank Mellat (No 1)*, an Iranian bank contested the legality of a Treasury Order[70] barring it from operating within the UK financial sector, with drastic consequences for its international business. The 'minimum core' principle was 'read across' from control order to asset-freezing cases but interpreted to mean only that sufficient disclosure must be made 'to ensure that the Bank had the opportunity of giving effective instructions about the essential allegations against it.[71]

Bank Mellat (No 2),[72] which dealt with the substantive issues, in one sense provides a paradigm of legal accountability in that the Court of Appeal did scrupulously examine the Treasury case for action and assessed its proportionality. But the Court went on to rule by a majority that the Bank had no right to a hearing. As Elias LJ observed in a vigorous dissent, neither judicial review with its limited powers of reviewing fact, nor the mere fact that the Treasury Order had to be laid before Parliament was any substitute for a hearing:

> [T]he need for an affirmative resolution is not an effective control to remedy the failure to give a hearing; it is designed to ensure political accountability, not to be a substitute for a fair procedure.[73]

The Court had, in other words, confused two separate accountability questions and forums.

Criticism of special advocate procedure generally focuses on the effect on individual rights.[74] From the standpoint of this article, however, it should be read from the

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[69] *Home Secretary v MB and Others* [2007] UKHL 46; *Home Secretary v AF, AM and AN* [2008] EWCA Civ 1148; *A and others v. United Kingdom* (2009) 49 EHRR 29; *Home Secretary v AF and another* [2009] UKHL 28.

[70] The Financial Restrictions (Iran) Order 2009, SI 2009/2725, valid for one year, was made in terms of Sch. 7 of the Counter-Terrorism Act 2008, which required that the Order be laid before Parliament. The Order expired before judgment in the Court of Appeal.

[71] *Bank Mellat v. HM Treasury* [2010] EWCA Civ 483 (Lord Neuberger MR, Maurice Kay and Sullivan LJJ).

[72] *Bank Mellat v HM Treasury* [2011] EWCA Civ 1 (Maurice Kay, Elias and Pitchford LJJ).

[73] [2011] EWCA at [97].

[74] See, e.g., CAC, *The operation of the Special Immigration. Appeals Commission (SIAC) and the use of Special Advocates*, HC 323 I and II (2004/5); JCHR, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL 157/HC 790 (2006/7) at [194]; M Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 CJQ 314 and 'Update on procedural fairness in closed proceedings' (2009) CJQ 448.

standpoint of the courts' value as an accountability forum. As Lord Brown observed in a case concerning the use of closed material procedure in a civil claim for damages against the security services:

> A closed procedure in the present context would mean that claims concerning allegations of complicity, torture and the like by UK Intelligence Services abroad would be heard in proceedings from which the claimants were excluded, with secret defences they could not see, secret evidence they could not challenge, and secret judgments withheld from them and from the public for all time.[75]

A Green Paper promoted by the Justice Minister in response underlines the point. Undertaken with the purported object of ensuring that national security work is 'robustly scrutinised, and that the bodies that undertake this work are as credible and effective as possible', the Green Paper deplores the effect of current limits on disclosure on public accountability:

> By their very nature [security] cases involve information which, under current rules, cannot be disclosed in a courtroom. This has rendered the UK justice system unable to pass judgment on these vital matters: cases either collapse, or are settled without a judge reaching any conclusion on the facts before them. The Government is clear that this situation is wrong. It leaves the public with questions unanswered about serious allegations, it leaves the security and intelligence agencies unable to clear their name, and it leaves the claimant without a clear legal judgment on their case.[76]

The Paper talks of a better balance between the requirements of justice and security and purports to 'modernise judicial, independent and parliamentary scrutiny…to improve public confidence that executive power is held fully to account.' These are likely to be weasel words in the context of proposals to extend the range of closed material procedures, however.

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[75] *Al Rawi,* above n. 655, Lord Brown at [83].

[76] Ministry of Justice, *Justice and Security*, Cm 8194 (2011). See the Justice and Security Bill 2012 currently before Parliament, a response to *Tariq* and *Al Rawi* above n.65.

Occasionally, on the other hand, special advocates have assumed the function of participants in an accountability network. When in 2004 the Commons Constitutional Affairs Committee (CAC) announced an inquiry into spread of special advocate procedure,[77] nine special advocates submitted a joint memorandum of evidence, triggering an offer from the Attorney-General to set up an 'open discussion' to explore possible changes with them.[78] Again, when the JCHR undertook a full survey of counter-terrorism measures, it heard evidence from experienced special advocates. It recorded that it had 'found their evidence most disquieting, as they portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure.'[79] In general, however, special advocates form part of a system that obscures public accountability and diminishes trust in courts.

7. The European Union

In contrast to the UK, the responsibility for securing a measure of accountability in asset-freezing cases has largely fallen on EU courts. This reflects the fact that, prior to the Lisbon Treaty, foreign policy, security and defence and justice and home affairs were governed by the Treaty of European Union and did not fall under the 'First Pillar' competences of the EC Treaties. Consequently, the Council exercised the rule-making power by the adoption of 'common positions defining the approach of the Union to a particular matter' and 'framework decisions' for the purpose of approximation of national laws and regulation, empowered by TEU Art.34. The European Parliament (EP) was left with a very restricted role; it had to be consulted, kept informed and could question or make recommendations to the Council but took no direct part in lawmaking (Art. 36).

The measures taken by the EU to implement UN resolutions were complex and had the effect of creating two disparate asset-freezing regimes. The first, which derives its authority from Common Position 2001/931 (CP 931), was passed specifically to

[77] HC 323 I and II (2004/5), above n. 74. Special advocates and closed material are used in financial restrictions proceedings under the Counter-terrorism Act 2008 and other instruments concerned with the freezing of terrorist assets in control orders cases under the Prevention of Terrorism Act 2005.
[78] HC 323 at [79]-[80].
[79] HL 157/HC 790 at [194].

implement Resolution 1373;[80] it deals generally with terrorism and is applicable 'to persons, groups and entities involved in terrorist acts' as defined and listed in the Annex. CP 931 provides for listing and delisting decisions to be taken directly by the Community. The first lists were adopted without parliamentary input in 2001 by 'written procedure', minimising scrutiny by Member States, as they were simply circulated and adopted without debate in the Council unless objection was raised. CP 931 also introduced a requirement for the Council to review listed names at regular intervals and at least once every six months to ensure that there were grounds for keeping them on the list (Art. 1.6). Ironically, the effect of this apparently benign requirement has been to facilitate automatic relisting of suspects in response to annulment by the Luxembourg Courts, sometimes even in the course of litigation.

The 1267 regime deals specifically with Usama bin Laden, the Al-Quaida and the Taliban, and is governed by Council Regulation 881/2002.[81] Making specific reference to the obligation to implement Security Council resolutions, Regulation 881 authorizes freezing within the Community 'further to a designation by the UN authorities'. In other words, decisions are seen as made by the SC and transmitted to the EU authorities, which – or so they argue - have minimal discretion to reject them. In this regime the Luxembourg Courts have uncontested competence.

The Lisbon Treaty ends a great deal of the legal complexity by winding up the 'pillar' structure. General responsibility for internal security rests with the European Council and Council. Regulations are made by the 'ordinary legislative procedure', giving the EP powers of co-decision (TFEU Art. 75). A lengthy report on counter-terrorism policy from the Committee on Civil Liberties, Justice and Home Affairs suggests that the EP may

[80] Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ 2001 L 344 p. 93.

[81] Council Regulation No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 139/9 (29.05.02) is rooted in CP 2002/402 CFSP l139/44 (27.05.02) and UN Resolution 1390(2002). An EC Regulation was used under the pretext that the measures involved economic distortion. On competence, see C-402/05 *Yassin Abdullah Kadi v Council and Commission* (*Kadi 2*)2008] ECR I-6351 at [121-236]; C Eckes, 'Test Case for the Resilience of the EU's Constitutional Foundations International Sanctions against Individuals: A Test Case for the Resilience of the European Union's Constitutional Foundations' (2009) 15 EPL 351, 356-364.

wish to take advantage of its new powers.[82] The report stresses that 'accountability and responsibility are essential factors for the democratic legitimacy of counter-terrorism policies' and also emphasises that 'mistakes, unlawful actions and violations of international law and human rights must be investigated and corrected, and justice be done.' It asks for an evaluation by a panel of independent experts of ten years of EU counter-terrorism policies and calls on the Commission:

> to carry out a study to establish if counter-terrorism policies are subject to effective democratic scrutiny, including at least the following issues:
>
> > a. for each measure it must be established if either national parliaments or the European Parliament had full rights and the means of scrutiny, such as access to information, sufficient time for a thorough procedure, and rights to modify the proposals; the evaluation must include an overview of the legal basis used for each policy measure;
> > b. all existing measures must be subjected to a retrospective proportionality test.

In addition, the EU and its Member States are told 'to modify the procedures regarding terrorist lists, and make sure they are fully in line with all relevant court rulings.'

TEU Article 35 limited the competence of the Court of Justice (hereafter ECJ) in Justice and Home Affairs to making preliminary rulings on the legality, validity and interpretation of framework decisions and decisions and then only where a Member State had opted into the jurisdiction. It specifically prohibited review of 'the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.' The Lisbon Treaty regularises the competence of the Luxembourg Courts in both actions for annulment and damages,[83] except for the area of the Common Defence and Security Policy (CDSP) where jurisdiction remains limited. Competence is,

[82] Draft report on the EU Counter-Terrorism Policy: main achievements and future challenges (LIBE/7/04829/2010/2311(INI)) (rapporteur: Sophia in 't Veld). A vote on the proposed resolution has been adjourned.
[83] See now Case T-341/07 *Sison v Council* (judgment of 23 Nov. 2011).

however, specifically conferred to review the legality of decisions 'providing for restrictive measures against natural or legal persons adopted by the Council' (TFEU Art. 275).

It is fair to say that the Luxembourg Courts at first showed little sympathy for the targets of asset-freezing and considerable deference to the Council as EU legislature, following its lead in prioritising the public interest in fighting terrorism over human rights. In *Kadi 1*, for example, the CFI (in)famously applied the primacy rule strictly, reasoning that 'the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations' trumped any individual's interest in 'having a court hear his case on its merits'.[84] The importance of the appeal in *Kadi 2*[85] cannot be overstated. maintaining that respect for human rights was a 'condition of the lawfulness of Community acts', the Court opened its doors to legal accountability with the assertion that:

> … the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[86]

From that point on, the CFI set out to fashion appropriate due process principles, as it had already begun to do in the 1373 regime.[87] In the context of accountability, two points are of special relevance. First (in sharp contrast to the English Court of Appeal in *Bank Mellat*) the CFI rejected the argument that listing decisions were general legislative acts so that principles of natural justice were inapplicable. Instead it neatly divided legislation into two categories, general and specific; the listing process, though formalised as regulations, was aimed specifically at individuals; it followed that the duty

[84] Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* (*Kadi 1*)[2005] ECR II-3649.
[85] [2008] ECR I-6351 at [283]-[285].
[86] [2008] ECR I-6351 at [326].
[87] Case T-228/02 *Organisation des Modjahedines des peuples d'Iran v Council* (*OMPI 1*) [2006] ECR II-4665.

to give reasons and right to a hearing were both applicable. The Court went on to undertake a fairly intensive review, based on the 'assessment of the facts and circumstances relied on as justifying the freezing measures at issue and to the verification of the evidence and information on which that assessment is based'. Concluding that the statement of reasons left uncertain 'how far the Council actually took into account the [national] decision, as it was required to do',[88] the CFI annulled.

OMPI 1 is interesting for a second reason. CP 931 requires listing of individuals to be based on:

> precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.[89]

'Competent national authority' means a 'judicial authority or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area'. This meant that, in *OMPI 2*,[90] which followed a British listing, the CFI had to accept the Home Secretary as a competent national authority. Yet it sharply criticised the Council for accepting the Home Secretary's assertions without reference to the judicial proceedings before POAC, where the Home Secretary's decision had been labelled 'perverse and unreasonable'. POAC's decision was 'of considerable importance' as the first ruling of a competent *judicial* authority on the lawfulness of the Home Secretary's refusal to withdraw the order, on which the Council had based both the initial decision to freeze the applicant's funds and all the subsequent decisions.[91] Thereafter the CFI has held this line, extending its review to the adequacy of the national proceedings. Thus when OMPI, delisted in the UK, was promptly relisted by the Council at the request of France, the CFI refused to accept the inquiry opened by the

[88] [2006] ECR II-4665 at [154]-[159].
[89] CP 931 Art. 1(4). Art. 1(5) exhorts the Council 'to ensure that names of natural or legal persons, groups or entities listed in the Annex have sufficient particulars appended to permit effective identification of specific human beings, legal persons, entities or bodies, thus facilitating the exculpation of those bearing the same or similar names'.
[90] Case T-256/07 *Organisation des Modjahedines des peuples d'Iran v Council* [2008] ECR II-2019.
[91] [2008] ECR II-2019 at [170-171].

French anti-terrorist prosecutor's office as the decision of a competent authority (or perhaps more correctly, as the competent decision of a national authority). There was no 'precise information' and no serious and credible evidence to support Council allegations had been provided; in the absence of material to review, the relisting decision must be annulled.[92] If arguably the CFI was here assuming an unjustified power of review of national courts, it was using its powers in a spirit of comity to fashion links in a 'horizontal network' as envisaged by Slaughter.[93] Similarly, in *Kadi 3*, the CFI brushed aside the objection that it was effectively reviewing the SecC, declaring its task was to ensure 'the full review of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council.'[94] This marked shift in stance is undoubtedly a reaction to governmental practices of constantly listing and relisting, showing scant respect for the rule of law.

The Treaty duty to give reasons has always played a central role in the Luxembourg Courts' jurisprudence. Central to effective judicial review, the duty possesses further accountability functions, pinpointed in a classic early ruling:

> In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 [now TFEU Art. 296)] is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, *to the Court of exercising its supervisory functions and to Member-states and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty*.[95]

The CFI has sharply criticised the UN sanctions regime, where the rights of the defence are observed only 'in the most formal and superficial sense', with no attempt made to

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[92] Case T-284/08 *Organisation des Mojahedines des peuples d'Iran v Council* [2009] ECR II-1429 at [57] confirmed by the ECJ in Case C-27/09 *French Republic v People's Mojahedin Organization of Iran* (judgment of 21 December 2011). See also Case T-348/07 *Stichtung Al Aqsa v Council* (judgment of 9 September 2010) overturned on appeal by the ECJ in Cases C-539/10P, 550/10P *Stichting Al-Aqsa v Council, Netherlands v Stichting Al-Aqsa* (judgment of 15 November 2012).
[93] Above, n.8.
[94] Case T-85/09 *Yassin Abdullah Kadi v Commission* (judgment of 30 September 2010) at [123] and [126].
[95] Case C-350/88 *Delacre v Commission* [1990] ECR I-395. See similarly the Opinion of AG Maduro in *Kadi 2* [2008] ECR I-6351 at [51]; *OMPI 1* [2006] ECR II-4665 at [141] (emphasis mine).

question evidence or findings.[96] In the EU, by way of contrast, the rights of the defence are effectively safeguarded not only by national and EU procedures and review by the national courts but if necessary by review in the Luxembourg Courts and ECtHR.[97] The standard of legal accountability varies with different courts, with a marked difference between the strict CFI and lenient ECJ.

EU decision-making in the field of counter-terrorism is by no means open and transparent nor are its listing and delisting procedures in any sense faultless and the case law constantly reveals decisions based on wholly inadequate evidence in defiance of basic due process protections. Moreover the Council of Ministers, like the UN SecC, is a political body made up of Member State delegates, where decisions are taken by consensus or majority vote. Nonetheless, EU decision-making does represent an improvement on UN procedure. Over the years, the Council has steadily softened its position: from CP 931, which contained a bare minimum of procedural protections to a standing Council Working Party installed in 2007 to monitor procedural safeguards. The contribution of the Luxembourg Courts to this progression has been substantial; they have acted as the primary standard-setters in establishing the due process principles to be applied.[98] On occasion the Council has responded negatively to specific rulings with immediate relisting but it has on the whole responded fairly positively to the Courts' general procedural pronouncements. Requirements on notification, a prescribed formula for the statement of reasons and a proper delisting procedure are at least partly responses to an increasingly concerned judiciary, which has steadily ratcheted up the intensity of its review.[99]

Part III: Accountability audit

The term 'multi-level decision-making' suggests a layered structure in which decisions are taken discretely at separate levels; in other words, an essentially pluralist and

[96] Case T-85/09 *Yassin Abdullah Kadi v Commission* (judgment of 30 September 2010) *Kadi 3* judgment at [171-2].
[97] *Kadi 3* judgment at [186].
[98] C Eckes and J Mendes, 'The Right to be Heard in Composite Administrative Procedures: Lost in between Protection? (2011) 36 EL Rev 651.
[99] See for a detailed account of the interplay between Courts and Council, M Eriksson, *In Search of a Due Process - Listing and Delisting Practices of the European Union*, a study made for the Fourth Freedom Forum available on line at: http://www.smartsanctions.se/

fragmented system of 'decision-making in concert'. Resolution 1373, which asked member states to 'work together… through increased cooperation' to prevent and suppress terrorist acts, invites just such a 'loosely coupled' system. In a disaggregated system, where decision-makers possess significant discretion, they can be made to answer for their actions in traditional accountability forums at each level; in other words, accountability can function properly on a horizontal basis. This article has shown the British government held accountable in respect of counter-terrorism decisions in both political and legal national accountability forums and in the EU, a transnational regime where the Luxembourg Courts have emerged as the primary accountability forum, we have seen the Council face strong accountability for listing and delisting.

Problems arise once vertical elements are introduced into the network, creating a hierarchical structure in which network participants work towards a single policy objective. From a UN standpoint, the plural counter-terrorism regimes are best envisaged as a hierarchy in which UN decisions are authoritative and other network actors simply implement them. This 'transmission belt' model was vehemently argued for by the UK before its own Supreme Court in *al Gabrah* and the CFI in *OMPI 2*, but decisively rejected on both occasions. A strong version of the primacy doctrine points to a true hierarchy, governed by a single system of law, or at least a regime with federal elements such as obtains in the EU, where national legal orders retain their sovereignty but accept the day-to-day primacy of EU law.[99b] Inside the EU, such a progression could in time limit member state autonomy in asset-freezing matters. At present, however, there is a semi-hierarchical structure or relationship of 'tight coupling', in which national and transnational actors cooperate in a network, retaining their legal sovereignty yet ceding some autonomy to the UN as a superior institution. The extent to which discretion had been fettered was the question on which the two Luxembourg Courts differed in *Kadi 1* and *Kadi 2*. The landmark decision of the ECJ in *Kadi 2* goes a long way towards disposing of the hierarchical model and installing a model of modified pluralism.

Where policy is set at the apex of the hierarchy – in the case of asset-freezing, the SecC – the minimal discretion of national and regional decision-makers renders horizontal

[99b] See Al Aqsa, above n.92 at [87-88].

accountability for individual decisions at lower levels of the network unworkable. The solution that appeals to international lawyers is to move accountability upwards, fuelling demands for an independent, external form of adjudication at UN level to hear complaints from victims of asset-freezing orders.[100] This is, however, a largely impractical solution, rejected by the SC in favour of the more user-friendly ombudsperson. The alternative position is that adopted by pluralists, who favour a non-hierarchical model of 'open networks', in which accountability for decision-making is kept at local levels.[101] This reduces problems of legal remedy but introduces the likelihood of serious disparity between regimes, opening the way to forum shopping.[102]

As this article has demonstrated, however, a composite decision-making process is neither linear nor necessarily structured as a system of autonomous levels; networks, as the very word suggests, are neither vertical nor horizontal and a composite decision-making network is best viewed as the 'interconnected effort of functionally interwoven actors'. Metaphorically speaking, the network acts as a team in which the ball is thrown from player to player, who work both together and separately. As shown in the OMPI affair, this can work very much to the advantage of governments, which can move decision-making from one level to another and thus side-step horizontally-arranged accountability machinery. As Harlow and Rawlings argued,[103] such practices need to be countered by the formation of 'accountability networks' capable of blocking escape routes and filling accountability gaps.

This article has shown that parliaments, though often overlooked in accounts of multi-level governance, can be highly effective horizontally. Their vertical reach is more limited and parliaments do not normally deal with individual cases, though there are exceptions. In the OMPI affair, for example, when the Court of Appeal upheld the POAC decision in a case brought by a group of parliamentarians,[104] the Home Secretary made

[100] Above n.38.
[101] See N Krisch, *Beyond Constitutionalism, The Pluralist Structure of Postnational Law* (Oxford University Press, 2010); M Koskenniemi and P Leino, 'Fragmentation of International Law. Postmodern Anxieties?' (2002) 15 Leiden Journal of International Law 553.
[102] Technically the practice of instituting litigation in the jurisdiction most favourable to the plaintiff or applicant.
[103] 'Promoting Accountability in Multi-Level Governance', above n.25.
[104] *Home Secretary v Lord Alton of Liverpool and Others* [2008] EWCA Civ 443.

a delisting order, referred to and approved by Parliament in June 2008.[105] Conscious that OMPI had been relisted by the EU Council in 2007, Andrew Mackinlay MP suggested that:

> the corollary of this evening's unanimous vote must surely be that the British Government will communicate to the EU that the House of Commons and [Lords] have unanimously decided that the proscription should be lifted, and will invite the EU to reassess its position. That would be the sensible and fair outcome of the debate.[106]

The UK subsequently abstained in the Council listing vote triggered by France.[107]

Inside the EU, IPEX, an incipient inter-parliamentary network, is in place, which acts as a 'platform for the mutual exchange of information between the national Parliaments and the European Parliament.' Under the stimulus of the Lisbon Treaty, which establishes new bases for participation by national parliaments in EU affairs, this network is capable of rapid development. The EP's intention to play an active role in shaping counter-terrorism policy has already been indicated.[108] In the UK, the well-respected House of Lords European Committee, which has already considered counter-terrorism policy and asset-freezing,[109] has recently adopted a position paper on developing *inter-parliamentary* scrutiny of EU foreign, defence and security policy with the cooperation and assistance of the COSAC secretariat.[110] It is not unknown for national parliaments to bring pressure to bear on governments as to their external behaviour: Denmark, for example, routinely mandates its government in the EU Council of Ministers while the Westminster Parliament can operate a 'parliamentary reserve' on voting in the Council. Parliaments occasionally generate cooperative action, as the Swiss Parliament did when, outraged by the failure of its Supreme Court to provide redress for a terrorism suspect hit by travel restrictions, it compelled its UN representative to

[105] HC Deb, vol 478, cols 98-118 (23 June 2008).
[106] Ibid., col. 109.
[107] HL Deb 22 July 2008, vol 703, cols 1650-1652.
[108] Above, n.822.
[109] EU Committee, *Adapting the EU's approach to today's security challenges – The Review of the 2003 European Security Strategy*, HL 190 (2008/9); *Money laundering and the financing of terrorism*, HL 132 (2008/9).
[110] EU Committee, *Future inter-parliamentary scrutiny of EU foreign, defence and security policy*, HL 85 (2010/11). COSAC is the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union.

protest to the SecC at the lack of due process protections.[111] But these are small beginnings and parliamentary accountability networks have far to go.

The conclusion of Harlow and Rawlings, writing in 2006, was that courts in the EU had not as yet coalesced into an accountability network. An incipient network was established by the formal device of 'preliminary reference' from national courts to the ECJ (now TFEU Article 267) but the structure teetered between a hierarchy with the ECJ at the apex, and a pluralist coalition of national courts fighting for national competence. There was much informal networking but EU courts did not yet function as a team. Five years later, in the context of asset-freezing, moves towards teamwork are observable. In *OMPI 2*, the CFI relied heavily on the POAC decision.[112] In *R(M) v HM Treasury*,[113] the House of Lords referred a question concerning payment of social security benefits to the spouses of listed persons to the ECJ, including a clear indication of the expected answer, which was duly received. *Kadi 2* was cited and considered by the ECtHR in *Al-Jedda,*[114] a case involving unlawful detention and violations of ECHR Article 5(1) by the UK during the Iraq security operation. The applicant relied heavily on *Kadi* 2, arguing that the underlying rationale of the two defences that the UK had been 'acting pursuant to the binding decision of the SecC' were the same. With copious citations from the UK House of Lords, the ECtHR adopted a solution very similar to the common law principle of legality, implying a presumption that the SecC would self-evidently not intend to impose any obligation on Member States to breach fundamental human rights principles; clear words would thus be necessary. This type of standardisation goes some way to iron out divergences caused by an 'open network' structure,[115] while the convergence of jurisprudence of important European courts on due process rights was a significant influence on reform at UN level.

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[111] Case 1A.45/2007 *Youssef Mustapha Nada v Secretariat d'Etat pour l'Economie* (14 Nov 2007) decided by the ECtHR as *Nada v Switzerland* [2012] ECHR 1691. The correspondence is published as A/62/891-S/2008/428.
[112] Above, text at n.900.
[113] *R(M) v HM Treasury* (Note) [2008] UKHL 26**;** Case C-340/08 *M and Others* (29 April 2010).
[114] *Al-Jedda v. UK* (App. no. 27021/08), (2011) ECHR1092 at [102] and [105].
[115] As with the example of proportionality discussed by A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73.

Tentative moves towards teamwork are presently countered, however, by two significant obstacles. The first problem lies in the inadequacy of the meagre concepts currently in use to deal with inevitable tendencies towards fission, notably the 'solange' principle introduced by the German Constitutional Court, according to which a court may accept another's ruling in a human rights matter 'so long as' it conforms with basic principle.[116] This doctrine, increasingly used in the management of judicial network relationships, may be used positively to promote conformity and 'levelling up'. It has been cogently argued, for example, that the jurisprudence of the German Constitutional Court was a significant unseen factor in pushing the ECJ to its celebrated *Kadi 2* decision.[117] Equally it may operate as a deference principle to undercut accountability, as it notably did in the *Bosphorus Airways* cases, where a timid ECtHR, constrained by its relationship with the ECJ, used the concept to shelter the wholly unwarranted acceptance by the ECJ of sequestration of a Turkish airline without due process, justified by compliance with UN asset-freezing rules.[118] Far more sophisticated and detailed principles are necessary in this area.

The second obstacle is procedural. The jurisdiction of courts is usually statutory or, in the case of international or transnational jurisdictions, established by treaty or convention. Whether the current jurisdictional framework is sufficiently flexible to provide 'effective judicial review' in the full sense of affording adequate and appropriate redress for victims of unlawful asset-freezing is a difficult question. The largely horizontal structure lends itself to relentless 'cat-and-mouse' games played by governments at the expense of individuals. It has taken five judicial hearings over ten years to get OMPI -finally?- delisted in the EU,[119] highlighting the lack of mandatory remedies to enforce decisions of the Luxembourg Courts. Kadi was listed by the UN at the behest of the US in 2001 and subsequently listed and relisted several times by the

[116] Introduced in *Internationale Handel gesellschaft mbh*, BVerfGE 37, 271 (1974) and [1974] 2CMLR 541, Case 11/70 [1970] ECR 1125.
[117] J Murkens, 'Countering Anti-constitutional Argument: The Reasons for the European Court of Justice's Decision in *Kadi and Al Barakaat*' (2009) 11 *Cambridge Yearbook of European Legal Studies* 15.
[118] Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communication and others* [1996] ECR I-3953; App no 45036/98 *"Bosphorus Airways" v Ireland* (2005) 42 EHRR 1). And see, C Costello 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 HRLR 87.
[119] See Case C-27/09P *French Republic v People's Mojahedin Organization of Iran* (judgement of 21 Dec 2011).

EU Council. Two years after the ECJ's seminal *Kadi 2* decision, the listing was finally annulled by the CFI; a year later, the appeal that keeps Kadi listed after ten personally fruitless years of litigation has not been heard.[120] Some procedural reforms have been introduced by the clearly infuriated courts to counter such games: pleadings can now be updated to counteract the effects of regular six-monthly re-listings and expedited procedures have been introduced.[121] But unless and until the grave problems of cost and delay involved in multiple judicial applications can be tackled, the accountability network cannot be said to be complete.

To sum up, this article suggests that the classical accountability paradigm has not been entirely displaced; indeed, in the United Kingdom it is Parliament rather than courts that have taken the lead. A slow process of network-formation is under way that might, if successful, give parliaments a greater vertical reach. A similar verdict can be reached in the case of courts which, at transnational level, have emerged as the primary accountability forum. A judicial network, undoubtedly under construction, has had some significant successes in the area of asset-freezing. It remains constrained, however, by procedural limitations that need to be confronted urgently. At UN level, vertical pressure from accountability networks has brought a measure of reform and change. But horizontal accountability is weak and the UN is not a sympathetic accountability forum for individuals. Whether the ombudsperson can redress this problem or emerge as an actor in a new accountability network of ombudsmen remains to be seen.

[120] Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649; Case C-402/05 *Kadi v Council and Commission* [2008] ECR I-6351; Case T-85/09 *Yassin Abdullah Kadi v Commission* (judgment of 30 September 2010); Cases C-584/10, C-593/10, C-595/10, *Council, Commission and United Kingdom v Kadi* (pending appeal).
[121] Article 62A of the Consolidated Rules of Procedure of the Court of Justice.