Terrorism Lists and Freezing of Assets – Getting Behind Appearances

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Introduction – The Relevance and Importance of the Criminal Charge Question

Counter Terrorism Financing (CTF) asset freezing entails the suspension of access to financial assets of persons or organizations who and which are considered to be engaged in committing or facilitating the commission of terrorist acts. The listing-decisions that precede the asset freezes also entail the prohibition of making assets available to the target individual or organization. Doctrinally, asset freezes are temporary administrative law measures with preventive security purposes, issued non-judicially and not reliant on criminal standards such as a conviction or indictment and which can therefore be issued in procedures which do not have to approximate the fair trial standards when a criminal charge is involved. During the first years of its operation, the question was raised whether asset freezes weren't actually of criminal nature and resulted in a confiscation or other criminal penalty. This was based on three main arguments: asset freezes are open-ended in duration, amount to intrusive financial isolation and show flagrant due process *lacunae* in their application.

The *legal* relevancy of the criminal charge qualification lies in comparing its procedural consequences with the right to judicial protection and a fair hearing (encompassing the right to a notification of the listing decision) and the right to a statement of reasons for listing as established in the EU case-law with reference to the 'civil' part of asset freezing in accordance with article 6(1) ECHR.[1] The legal relevancy in relation to article 6(1) involves the difference in the rigor to which fair trial-standards will be applied and to which extent exceptions will be weighed under the (general) proportionality-principle of the ECHR. This concerns specifically the equality of arms and adversarialness of the proceedings (under which I, as the ECtHR indirectly does, subsume investigations), the standards on the disclosure of evidence and the role of the courts in the proceedings and the 'legal test' they will apply.[2]

The rights relevant to the current state of the art of asset freezing procedures which follow from article 6(2) and 6(3) (which *specify* article 6(1)) are the presumption of innocence (placing the burden of proof on the prosecution therefore), the right to be informed of the charges, i.e. a prompt and intelligible notification of the prosecution and the right to examine the sources of evidence. From the perspective of the ECtHR itself the procedural differences found in this comparison may turn out to be of relative importance however. This follows, first, from the fact that Strasbourg organs have construed the obligations appearing from paragraphs 2 and 3 widely, which has led to their application by analogy in civil cases.[3] Similarly, the ECtHR has accepted lessened procedural safeguards when no hard core criminal offence and light penalties are involved.[4]

The reasoning of the proponents of seeing asset freezing as a criminal charge has never really caught on nonetheless. Academic analyses came to the conclusion that asset freezes bear a 'criminal connotation',[5] are 'quasi-criminal',[6] possess 'hybrid nature'[7] or have 'both criminal and civil elements',[8] which does not seem really helpful. These assessments were moreover part of a wider human rights-argumentation for adoption of some form of due process in response to the lack thereof and in response to the argumentation that asset freezes are administrative measures of an inherently political nature and therefore only marginally reviewable by the courts.[9] Besides this latter notion a set of factors of politico-legal nature made and still make that no definitive answer to the question asset freezing as criminal charges has been provided in literature, policy papers or in case-law. These factors make answering the question whether the legal instruments of asset freezing involves a 'criminal charge' cumbersome as the positions from which this question can be answered and how to weigh the possible factors involved are numerous. The debate on the criminal character of asset freezes has almost come to a standstill since recent due process-improvements

in the EU and the UN.[10] Still, as I will hope to show, this does not mitigate the academic and practical relevancy of assessing asset freezes from the perspective of 'criminal' procedures.

The *Engel*-Criteria Applied

For the sake of argument we will apply the *Engel*-criteria.[11] In so doing we see that the 'domestic' classification is explicitly administrative.[12] The second criterion, the nature of the 'offence', can only be answered with ambiguous results however. In relation to the main elements of these criteria it can be observed that the regime is of a generally binding character, with a pre-dominantly[13] preventive effect, which is consistently classified in the EU and UN as administrative in nature.[14] Sanctions, on the other hand, do impose a strong stigma as the target is said to be 'involved in terrorism'. The conduct leading to the listing and asset freezing may although not yet amount to a criminal act as established in a court of law even though the allegations on which the listing is based implicate criminal conduct. Asset freezes are nevertheless typically not based upon a finding of guilt of an offence.[15] The standard of proof as explicated by the Financial Action Task Force (FATF) for both regimes for listing is that of "a reasonable basis for suspecting that person are terrorists or terrorism supporters".[16] From the EU's and UN's perspective delisting is considered to be "appropriate" wherever the criteria for listing are "no longer met", which amounts to the person or entity concerned "affirmatively" showing to have severed all possible (alleged) terrorist connections or other involvement in terrorism.[17]

Asset freezes are instituted by a public body which has indirect statutory powers of enforcement through the Member State's obligation of implementing the listing decision. The third criterion, the severity of the 'penalty' which the person risks incurring,[18] equally does not result in straightforward answers as asset freezes are temporary in nature, yet in practice have been in force for ten years in relation to particular targets, i.e. since a few weeks after the 9/11 attacks. Asset freezing may have draconian and long-lasting effects which brought the General Court (GC) to submit in relation to Kadi who had been under an asset freezes for ten years that "[i]n the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one".[19] Furthermore, if both the second and third criteria are by themselves not sufficient to amount to the criminal aspect, they still can have a cumulative effect.[20]

This short '*Engel*'- analysis, in my view, shows nevertheless that asset freezes are not criminal *in nature*, even though asset freezes indeed do bear 'criminal law connotations'. That asset freezes are not criminal *in nature* lies specifically in that its doctrinal appearance withstands the aforementioned arguments of the asset freezes being open-ended in duration and the intrusive financial isolation, specifically as these arguments do not directly substantiate a predominant punitive *intent* of asset freezes. This assessment is moreover in line with comparable, contra-mafia measures which in ECHR case-law were not found to form a criminal charge.[21] Even though these measures were highly intrusive they did not represent a punitive *intent* and were explicitly not based on criminal offences.[22] Furthermore, the ECtHR accepted that these preventive measures were necessary in the fight against the mafia. The comparison is nevertheless imperfect. This is the case particularly on the point of the last of the three main arguments on whether asset freezes weren't of a criminal nature: the due process *lacunae* in asset freezing. This is of importance as this last argument influences the assessment of the first two. That is to say, similar to the argument of due process *lacunae* and the question on the appreciation of asset freezing as criminal charges, the ECtHR's invocation of the necessity of contra-mafia measures implicates two notions that influence its appreciation of 'preventive measures'. The first is the margin of appreciation the court affords to its Member States to meet the ECHR's obligations. The second is the set of reasons for using procedures which are subpar the standards inherent to criminal

proceedings. The same line of reasoning by the ECtHR led it e.g. to find traffic offences classified as "regulatory" following "decriminalization," and despite the petty offences and fines, to be still criminal in nature.[23] This reasoning boils down to the sincerity in and proportionality of denying a criminal law classification and attempting to operate an instrument subpar criminal justice standards, i.e. not only procedural standards, but, as we will see, also substantive law standards. The ECtHR's line of reasoning implies then taking into account politico-legal factors in the legal assessment.

Some Politico-Legal Factors Influencing the Classification of Asset Freezing

Politico-legal factors have influenced the legal classification of asset freezing and they present an indication of whether asset freezing necessarily and proportionally remains subpar criminal justice standards. A first, influential factor is presented by the varied (politico-legal) background of asset freezes itself and the influence of national considerations and international jurisdictions engaged in multi-level asset freezing regimes. In these regimes no central, concrete and unifying definition of terrorism has yet been provided, i.e. the UN as well as the EU,[24] and it remains difficult to come to a system in which intelligence is disclosed to other Member States, to the sanctioning committees in the UN and the EU, to the EU courts and the UN's sanctioning committee's ombudsperson and to those targeted themselves.

Furthermore, case-files submitted to the sanctioning committees at UN- and EU-level can be derived from a large range of type of proceedings albeit that some basic conditions have been defined by the EU courts.[25] Blacklisting and asset freezing, in its variants of traditional, economic comprehensive sanctions and, more recently smart sanctions against e.g. dictators of rogue states, are moreover of a political nature. It is easy to see the legal and conceptual gap between a fair trial within criminal proceedings as a response to a hard-core criminal offence on the one hand and a fair trial in judicial review proceedings involving a listing decision in which e.g. a member of a military junta is named as part of a political conflict between the target-state and the sender-state on the other hand.

A third factor is that asset freezing is about more than responding to terrorism financing. It targets several types and forms of terrorist individuals and organizations and on different grounds moreover. This third factor encompasses first the differences in targets of the (national, regional and international) lists and which role asset freezing has in disrupting 'terrorism': as part of a war-like strategy, or as part of a criminal justice approach. The third factor further encompasses the different purposes of asset freezes. The typical goals of asset freezes are preventing the use of assets for the use for terrorist attacks as well as shutting down the financial key nodes. An additional, traditional goal of financial as well as economic sanctions is to induce a change in behavior of those targeted so as to stimulate a de-listing. It is remarkable that this goal is unmentioned in current policy papers on CFT, while in practice it appears to be used against targets such as charities which have shown questionable funding activities and which can become de-listed having e.g. replaced several board members. A similar approach appears however to be dysfunctional when dealing with terrorist operatives which may not even be induced to change their behavior when threatened with 'targeted killing'. The instrument of asset freezing is used against both types of targets however. Additional goals are that asset freezes are diplomatic tools in engaging other countries in the war on terror and have symbolic and deterrence value for upper-world donors whose reputation may be damaged when designated as involved in terrorism (financing).[26] The symbolic nature may also lie in publicly defaming a militant organization which uses terroristic methods, or labeling a leader of a terrorist network as responsible for a terrorist attack while the individual concerned does not have a banking account. The freezing-action following a listing decision merely provides (financial) teeth to the dog barking at the 'terrorist'. These additional goals would not be relevant in a comparison between asset freezing and the criminal charge-concept if a decisive

substantive standard would be available for applying asset freezes - just as criminal penalties, while punitively responding against misconduct can have several secondary goals while its proportionality (i.e. its maximum) is directly and inherently defined by the criminal conduct against which it responds. Yet, such an 'inherent' standard has not satisfactorily been laid down in the law on asset freezing and the instrument of asset freezing is too varied to deduce one from its politico-legal background or *ratio*[2728] even though echoes of this substantive law notion can be seen in procedure-related issues. This can be seen when it is argued that the decision-maker is under a duty to determine firstly whether the evidence before it contains all the relevant information to be taken into account in order to assess the situation; secondly, whether that evidence is capable of substantiating the allegation that the person or organization concerned participates in terrorism,[29] and thirdly, that the evidence requirement to be met is that there should be material which must be enough to indicate to a person who may have a funds-freezing order made against him the essential allegations that he needs to counter.[30]

The aforementioned factors have prevented the argument of asset freezing being a criminal sanction from playing a significant role. The varied politico-legal background withstands classifying *it* as a criminal charge. This background has also influenced the EU case-law and how the due process *lacunae* have been addressed by the courts. The courts clearly felt the need to balance human rights concerns about the lacking safeguards against arbitrary asset freezing decision-making with the security interests so strongly felt during the first years after 9/11, and had to take into account the international law obligations to implement the aforementioned UN Security Council Resolutions based on Chapter VII of the UN Charter.[31] The courts also understood that asset freezes are more effective when following an internationally binding listing decision which is not hindered by the conundrum of national objections against implementing international listing decisions. These objections could be submitted if the listing decisions, previously part of transnational security law, could be set off against national criminal justice regimes and the many views on what reasonable evidence standards and norms, fair trial guarantees and questions of proportionality of asset freezes *vis-à-vis* the conduct against which the listing decisions react. Additionally, the UN and EU both did and do not have a criminal justice regime to substitute their international asset freezing-regime. With qualifying asset freezes as of a criminal law nature, the courts would effectively have struck down an entire regime which was said to be essential to CT. Consequently, a human rights approach was applied with a view to closing the flagrant due process *lacunae* in the sanctions regimes, while leaving a range of legal questions effectively unanswered: the legal test used for reviewing the lawfulness of the listing decisions; the requirements on the proceedings used for creating case-files for the sanctioning committees and the sanctioning committees' and the courts' assessment of the eventual outcome of these proceedings; the minimum rules on disclosure of intelligence to the individuals and organizations and to the courts concerned in the light of (overriding) security considerations or of conduct of national/Community international relations and the legally relevant considerations for applying asset freezes and correspondingly the type of (past) conduct as a basis for (preventive) asset freezes.[32]

Taking into account the previous considerations and given the general facts that the ECtHR sees itself as subsidiary to the national systems, and will only hold them accountable for complying with EU law when the protection of ECHR rights was manifestly deficient,[33] it would appear it would not rule that asset freezing entails a criminal charge.

The Unsatisfactory Outcome of the Politico-Legal Influence

The aforementioned situation is unsatisfactory however. This follows from two considerations. The first is that the current level of due process is negatively influenced by (what we can summarize as) the lack of a

constitutional framework on how to decide questions such as the proper legal classification of asset freezes, with the EU and UN both having an interest in not having asset freezes to be declared a criminal charge and international courts having to deal with this question. The second consideration concerns asset freezing and the legality principle. The factors which have influenced the courts' assessment of asset freezing and induced their procedural approach and balancing security considerations with human rights considerations are undeniably of even greater influence in questions of substantive law and the *lex certa*-principle, i.e. in its stringent criminal law context and form as opposed to the far more lenient administrative law context and form in this respect. Deciding on the substantive remit of legal instruments is primarily and largely a matter for the legislator and involves political appreciation which is outside the constitutional task, powers and expertise of courts.

At this point however a circular reasoning appears. Precisely because of a politico-legal *status quo*, asset freezing differs strongly from criminal law when it comes to providing foreseeability on when someone will be subjected to a 'financial measure'. Even if it could be maintained that this is in itself justifiable, given the particular nature of asset freezing, this is still problematic given the suboptimal level of due process, which is suboptimal because of that *same* politico-legal background.

Behind Appearances - Revisiting the Criminal Charge-Question

When we look behind the procedural appearances, by observing how they have come into existence, we can note that what has caused the current state of due process in asset freezing may have had greater influence on the substantive law of asset freezing. This substantive law was one of the causes for not being *able* to unambiguously answer the question of the proper classification of asset freezes, the level of procedural safeguards and, more importantly, the lack of an inherent standard for assessing the proportionality of an asset freeze. This makes the current instrument of asset freezing flawed in that it can be used systematically for different purposes than it formally is supposed to and this for longer periods moreover. The suboptimal level of due process in asset freezing does not to the full extent compensate for this flaw.[34]

When we return to the question of asset freezing entailing perhaps a criminal charge, the sincerity in and proportionality of denying a criminal law classification and the ECtHR perhaps one day having to answer this question, the conclusion can be drawn that the question of the classification "as preventative or punitive, protective or confiscatory, civil or criminal" indeed seems now to be "an open one" in the light of foremost the aforementioned *legal* relevancy of the criminal charge-question. Even if asset freezings remain to be classified as administrative in nature, the combination of the 'legality' and due process level of asset freezes implies that courts, from the perspective of their tasks, powers and expertise, have to remain vigilant at least *so long as* at EU- and at UN-level the aforementioned range of legal questions remain effectively left unanswered and at some may point may become inclined to play the criminal charge card.

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1. See on freezing of assets: eucrim 4/2010, pp. 141-142, eucrim 3/2010, p. 96, eucrim 4/2009, pp. 138-139, eucrim 3/2009, p. 74, eucrim 1–2 / 2009, p. 14, eucrim 1-2/2008, pp. 33-35, eucrim 3–4 / 2007, pp. 105-108 and eucrim 3-4/2006, pp. 66-68.↩
2. ECtHR *Imbrioscia/Switzerland* (J. of 24.11.1993, 13972/88, § 36).↩
3. ECtHR *Dombo Beheer B.V/ The Netherlands,* (J. of 27-10-1993 - 14448/88, § 32). *Ch. Rozakis*, The Right to a Fair Trial in Civil Cases, Judicial Studies Institute Journal, 2004, 96-106 (96).↩
4. ECtHR *Jussila/Finland* (J. of 23.11.2006 - 73053/01).↩
5. White Paper prepared by the Watson Institute, Strengthening Targeted Sanctions through Fair and Clear Procedures, 2006, p. 13, www.watsoninstitute.org.↩
6. *I. Cameron*, UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights, Nordic Journal of International Law, 2003, pp. 159-214 (159).↩
7. *C. Eckes*, EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual *Sanctions*, 2010, p. 137.↩

8. *D. Marty*, UN Security Council Black lists: Introductory Memorandum, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 19.3.2007, http://assembly.coe.int.↩
9. T-315/01 *Kadi I*, [2005] ECR II-3649, §§ 149 and 167. See *Eckes,* op. cit., pp. 141-147.↩
10. See however *M. van den Broek/M. Hazelhorst/W. de Zanger*, Asset Freezing: Smart Sanction or Criminal Charge?, Merkourios Utrecht Journal of International and European Law, 2010, pp. 18-27.↩
11. ECtHR *Engel and others/The Netherlands* (J. of 8.6.1976 - 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, § 82).↩
12. See eg UNSCR 1822 (2008) and Council for the European Union, 'Working methods of the Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism', 28 June 2007 (Council Doc. 10826/1/07 REV 1), http://www.register.consilium.europa/.↩
13. More on this *infra*.↩
14. ECtHR *Öztürk/ Germany* (J. of 21.2.1984 - 8544/79, § 53).↩
15. ECtHR *Benham/The United Kingdom* (J. of 10.6.1996 19380/92, § 56).↩
16. *FATF*, Interpretative Note to Special Recommendation III: Freezing and Confiscating Terrorist Assets, 2003, http://www.fatf-gafi.org.↩
17. See for the UN *Security Council Committee Established Pursuant to Resolution 1267(1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Guidelines of the Committee for the Conduct of its Work as amended on 26 January 2011, http://www.un.org/sc/committees/1267/. See for the EU *Council for the European Union*, Working methods of the Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, 28 June 2007 (Council Doc. 10826/1/07 REV 1), http://www.register.consilium.europa/.↩
18. ECtHR *Campbell and Fell/The United Kingdom* (J. of 28.6.1984 - 7819/77, 7878/77, § 72).↩
19. T-85/09, *Kadi II,* § 150.↩
20. ECtHR *Bendenoun/France* (J. of 24.2.1994 - 12547/86 § 47).↩
21. Eg. ECtHR *Raimondo/Italy* (J. of 22.2.1994 – 12954/87).↩
22. ECtHR *Labita/Italy* (J. of 6.4.2000 – 26772/95, § 195).↩
23. ECtHR *Öztürk/ Germany* ibid, § 49.↩
24. *E. Symeonidou-Kastanidou*, Defining Terrorism, European Journal of Crime, Criminal Law and Criminal Justice, 2004, pp. 14–35↩
25. T-341/07, *Sison v. Council*, (Sison II), [2009] ECR II-3625, PMOI.↩
26. *J. Roth/D. Greenburg/S. Wille*, Monograph on Terrorist Financing: Staff Report to the Commission National Commission on Terrorist Attacks upon the United States, Washington, DC: National Commission on the Terrorist Attacks Upon the United States, p. 14.↩
27. *I. Tappeiner*, The Fight against Terrorism: The Lists and the Gaps, Utrecht Law Review, 2005, pp. 97–125.↩
28. *I. Cameron*, The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions, Report to Council of Europe, 2006, p. 8.↩
29. See Opinion of Advocate General Sharpston delivered on 14 July 2011 in C-27/09 P *French Republic v People's Mojahedin Organization of Iran*, § 88.↩
30. Ibid, § 136.↩
31. *P. De Sena/M.Ch. Vitucci*, The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values, The European Journal of International Law 2009, pp. 193-228.↩
32. *Cf. F. Meyer,* EU Terrorism Lists in the Eye of the Rule of Law, eucrim 1–2 / 2008, p. 87 and *F. Spaventa*, Case T-256/07, People's Mojahedin Organization of Iran v. Council, judgment of the Court of First Instance of 23 October 2008, Case T-284/08, People's Mojahedin Organization of Iran v. Council, judgment of the Court of First Instance of 4 December 2008, Common Market Law Review, 2009, pp. 1239–1263.↩
33. ECtHR *Bosphorus/Ireland*, (J. of 30.6.2005 - 45036/98).↩
34. It is noteworthy that the procedural and proportionality safeguards in the contra-mafia measures-case were higher than the current standards in asset freezing. *Cf.* eg ECtHR *Arcuri/Italy* (J. of 5.7.2001 – 52024/99, §§ 1-2).↩

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