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*Secret Evidence in EU Security Law:
Special Advocates before the Court of Justice?*

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Secret Evidence in EU Security Law: Special Advocates before the Court of Justice?

Cian C. Murphy*

The aftermath of the *Kadi* judgment from the European Court of Justice has left jurists unpicking the many implications of the judgment for EU law.¹ In its judgment the Court refused to defer to the UN Security Council's decision to designate Mr Kadi as an individual 'associated with' Osama bin Laden and Al-Qaeda. Instead, it held that the failure to respect Mr Kadi's due process rights rendered unlawful the EU implementation of the sanctions against him. This decision has been reinforced by the judgment of the General Court in *Kadi II* which dismissed the brief statement of reasons given to Mr Kadi as insufficient to allow him to challenge the case against him. One of the more difficult questions the Court of Justice's review of the asset-freezing sanctions raises is how, if at all, the Court might review the any evidence presented to it.

This question will become more and more important in the coming years. At present the EU operates two systems of targeted sanctions against terrorism.² Both systems rely on designations takes outside of the EU institutions. EU Regulation 881/2002 establishes a system of designation of those suspected of involvement with Al-Qaida. Designation on the Al-Qaida list effectively happens at UN level with the EU system merely implementing decisions of the UN Al-Qaida Committee (a subcommittee of the UN Security Council). EU Regulation 2580/2001 establishes a separate system of designation wherein the EU lists individuals and entities based on decisions taken by 'competent national authorities'. In these cases the EU acts when a Member State has identified an individual or entity linked to

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¹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351. See, in general, CC Murphy, *EU Counter-Terrorism Law: Pre-emption & the Rule of Law*, Chapter Five (Oxford, Hart Publishing, 2012).

² See C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (2009, Oxford, OUP).

terrorism and it wishes to have the target designated across the EU. Two sets of cases, *Kadi* in respect of the Al-Qaida list, and *OMPI/PMOI* in respect of the general list, have afforded the EU courts the opportunity to consider the lawfulness of the designations and the processes by which individuals and entities are listed.³ The courts have been robust in their review of EU action in this field – though the question to date has largely been limited to whether or not review should be undertaken. As no evidence has been presented to the EU institutions the ECJ has not yet dealt with the question of how to treat any secret evidence that forms the basis of the case against the targets.

Nevertheless, it is clear that EU law will soon have to grapple in a very real way with the question. It arises not only in the context of counter-terrorism sanctions, but also in sanctions in relation to a wide range of situations in international law (eg nuclear non-proliferation in Iran). This brief paper gives an exposition of the problem and a critical evaluation of one proposed solution – the UK system of special advocates. It cautions against the transplant of the flawed UK model into the EU system where, to date, the courts have robustly upheld the rule of law.

I. The Ongoing *Kadi* Saga

Following the decision of the European Court of Justice in *Kadi I*, Mr Kadi was provided with a one-page ‘narrative summary’ that purported to explain to him his designation under the UN Security Council system of sanctions. After (a brief) consideration of Mr Kadi’s response to this letter the European Commission took the decision to maintain Mr Kadi’s listing. The EU General Court gave short shrift to the European Commission’s argument that this was sufficient to allow Mr Kadi to vindicate his due process rights – noting that the Commission itself did not have any evidence before it when it made the decision to maintain Mr Kadi on the sanctions list. Several questions arise as a result of the *Kadi II* decision. First, does the UN Security Council possess the evidence that formed the basis for the listing of Mr Kadi? Ginsborg and Scheinin suggests that this may well not be the case – noting that the US and Libya have, in recent years, both been members of the UN Security Council

³ See, most recently, Case T-85/09 *Kadi v Commission* [2010] ECR 0000; Case T-284/08 *People’s Mojahedin Organization of Iran v Council* [2008] ECR II-3487.

and that it is highly unlikely that the former would be willing to share any evidence or intelligence with the latter.⁴ Second, regardless of whether or not the Security Council possesses the evidence that is the basis for Mr Kadi's listing, would the designating state – the US – be willing to release that information to the European Court of Justice? Although such release might seem unlikely there has been some discussion of the possibility within the US Government.⁵ Third, if the US was willing to release the information, under what circumstances would it do so and what disclosure of the information would it permit to the litigants in *Kadi II*? The EU courts have indicated that it is unlikely to be enough for the EU institutions themselves to consider the evidence – they must also present the evidence for the court's assessment. Fourth, as a consequence, how should the European Court of Justice address the question of evidence that is security-sensitive but which nonetheless forms the basis for restrictive measures against individuals? This evidence, referred to here as 'secret evidence', is the subject of a lively debate in Anglo-American constitutional, administrative and criminal procedural law.⁶ However, it has not yet been considered in detail in EU security law. In her Opinion in the case of *French Republic v OMPI* Advocate General Sharpston sought to do just that. The case arose as the appellant Member States sought to have the ECJ rule on certain points of law raised in the litigation before the EU General Court. As a legal dispute the case had become moot – the Council had delisted the People's Mujahedin Organisation of Iran (OMPI) after the General Court ruling. The French Republic, however, was concerned about the implications for Member State national security practices if the only way to maintain a listing was to disclose the evidence that was the basis for the listing to the EU courts and therefore to the litigants before it.

⁴ L Ginsborg & M Scheinin, 'Judicial Powers, Due Process and Evidence in the Security Council 1267 Terrorist Sanctions Regime: The *Kadi II* Conundrum', EUI Working Papers RSCAS 2011/44, fn 72.

⁵ Several of the Wikileaks US Diplomatic Cables hint in this direction. See cable reference 09BRUSSELS41 (13 January 2009 copy with author): 'We must confront the possibility that working with the Council on designations may entail enabling the EU court to access unclassified or even classified information to review the legality of the EU listing... Assuming the U.S. classified material necessary to support an EU designation decision is not amenable to declassification, the agreement could perhaps be used to facilitate information sharing and the provision of evidence in the event of anticipated EU judicial challenges. However, the Council itself does not yet have a consensus view on whether its own classified information can be shared with the EU courts.'

⁶ See the other contributions to this volume, but also, K Roach, 'The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations' in A Lynch, N McGarrity and G Williams, eds, *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (London, Routledge, 2010).

II. The Sharpston Opinion

In her Opinion Advocate General Sharpston notes that ‘both the General Court and the Court of Justice have anticipated that the need may arise for specific procedures governing confidential evidence to be introduced’.⁷ In *OMPI* the General Court held that it was unlawful to designate an organisation as ‘terrorist’ if that designation was based on secret evidence that was not disclosed. On appeal, the French Republic argued that the evidence in question was classified and therefore could not be disclosed to the General Court. As the General Court may only take into account materials that have been disclosed to the parties to the case the French Republic argued it could not disclose the material to the General Court without disclosing it to OMPI and therefore compromising French national security.⁸ In light of this problem the Advocate General argues that amending the General Court’s Rules of Procedure merited ‘serious consideration’. The amendments should ‘make provision for the production of evidence that is truly confidential for consideration by that Court in a way that is compatible with its character’ without causing ‘unacceptable violence’ to due process rights.⁹

Is it appropriate, therefore, for the EU to consider the use of special advocates or some similar system of approaching secret evidence? The General Court judgment in *OMPI* already highlights the first problem with such a system: the evidence is likely to be held by national law enforcement and security agencies. Even if it is disclosed to the Council the Member State holding the evidence may not be willing to risk disclosure to the target of EU action through judicial review. However, the Advocate General makes the minimum requirement at the administrative stage in the EU listing process clear. She regards ‘the availability of a non-confidential summary as an irreducible minimum guarantee in a Union governed by the rule of law’. Without such a summary ‘it is impossible for the rights of the defence to be safeguarded’.¹⁰ The Advocate General acknowledges that the national authorities involved in designation may vary from Member State to Member State and that

⁷ C-27/09 P *French Republic v People’s Mojahedin Organization of Iran*, Opinion of Advocate General Sharpston of 14 July 2011 (hereafter ‘Sharpston Opinion’), para 178-180.

⁸ Sharpston Opinion para 171.

⁹ Sharpston Opinion para 186.

¹⁰ Sharpston Opinion para 216.

in some instances open evidence may be used whereas in others the evidence may be closed. She held that if there was not a judicial authority involved in designation at national level, or if the evidence at national level was not disclosed, then the Council should be more cautious in its decision-making as to whether or not to designate the individual or entity at EU level.¹¹

When it comes to the review by the General Court and the Court of Justice of any designation based on secret evidence the Advocate General turns to the decision of the European Court of Human Rights in *A v United Kingdom*.¹² According to the Advocate General's summary

in order for the requirements of the Convention to be satisfied, it is necessary that as much information about the allegations and evidence against each applicant be disclosed as is possible without compromising national security or the safety of others, that the party concerned be 'provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate' and that 'any difficulties caused to the defendant by a limitation on his rights [be] sufficiently counterbalanced by the procedures followed by the judicial authorities'.¹³

Sharpston once again uses the term 'irreducible minimum requirement' in respect of the above principles. This is the high point of the Opinion as it confirms that at the very least the 'gist' of the evidence should be disclosed to the subject of the proceedings.

What is not clear from the Opinion is whether or not the Advocate General is endorsing a system of special advocates, as used in the UK, for EU courts. The only reference to special advocates is in a footnote to the Opinion. However, she appears to be cautiously accepting of the use of a special advocate system. The footnote sets out the operation of the system before observing that although 'the system has been adapted since its introduction in order to meet objections made, that does not mean that it is now without its critics'. While the Advocate General does acknowledge a report of the UK Parliament's Joint Committee on Human Rights that is highly critical of special advocates she emphasises that the criticisms

¹¹ Sharpston Opinion para 220-221.

¹² *A v United Kingdom* [2009] 49 EHRR 695.

¹³ Sharpston Opinion para 244.

‘relate essentially to the operation of the system rather than its core structure’.¹⁴ Given that the system of special advocates has been in place since 1997 and is still, as recently as November 2011, the subject of severe criticism, it is difficult to accept it as a model for the EU.¹⁵ A brief exposition of the problems with special advocates in closed hearings (called closed material proceedings in the UK) serves to demonstrate the reasons for caution.

III. The Problem with Special Advocates

In the UK, the use of special advocates in closed material proceedings has been the subject of rigorous judicial examination, academic critique and review by civil society. The range of views varies from endorsement (UK Government) through cautious acceptance (European Court of Human Rights and some members of the UK judiciary) to denunciation (other members of the UK judiciary, Parliamentarians, and civil society groups).¹⁶ It is clear that despite their proliferation there remain problems with special advocates as a remedy for the due process restrictions in closed material proceedings. The fundamental flaw was put rather eloquently by a 2009 JUSTICE report. It drew on Eripides’ *Medea*: ‘he who decides on something without hearing the other side is not just, even if he makes a just decision’.¹⁷ This is the central problem with the operation of special advocates and closed material proceedings. At precisely the point at which the accused’s participation is most important, both to ensure the legitimacy of the process and the effectiveness of counter-terrorism, he is excluded from the process. At that point, no matter how skilled or conscientious the special advocate is, he has become part of a system to which the accused is subject rather than in which the accused participates.

One reason for this is that special advocates cannot be held accountable to those whose interests they seek to represent. This restriction was introduced by the Special Immigration Appeals Commission Act 1997, which introduced special advocates into UK law, and has been replicated in other statutes. Section 6(4) of the SIAC legislation states that the special advocate ‘shall not be responsible to the person whose interests he is appointed to

¹⁴ Sharpston Opinion, fn 89.

¹⁵ Joint Committee on Human Rights, *Justice and Security Green Paper: Letter to the Secretary of State for Justice*, 9 November 2011.

¹⁶ For a summary see C Walker, *Terrorism and the Law* (Oxford, OUP, 2011) pp 267-69.

¹⁷ E Metcalfe, *Secret Evidence* (London, JUSTICE, 2009) p 7.

represent'.¹⁸ This is a fundamental change to the role of a lawyer that has implications not just for the legitimacy and effectiveness of the system but also for questions of professional ethics.¹⁹ Notwithstanding the lack of accountability special advocates tend to be highly qualified and diligent professionals. The former Independent Reviewer of Terrorism Legislation, Lord Carlile, reported that he received no complaints about the use of special advocates whom he described as 'skilled and conscientious, and certainly useful'.²⁰ The system did encounter something of a crisis in 2004-2005 when a mass resignation of special advocates was threatened over their use in cases of preventive detention where personal liberty was at stake. Although two special advocates did resign the mass resignation was averted.²¹

Special advocates have therefore been said to 'occupy an interstitial space somewhere between an amicus curiae and an ordinary legal representative'.²² This is problematic. If the special advocate is closer to an amicus curiae then the subject of the state action goes effectively unrepresented in the closed material proceedings. It is clear from those special advocates who have spoken publicly about their role that they do not see themselves as amici curiae.²³ However, because of the restrictions on their role nor are they an ordinary legal representative. As a result the relationship is not easily defined – which is a concern given the severity of the interference with the rights of those subject to the proceedings. Although the legal culture amongst special advocates may be respectful of the rule of law, that culture faces significant resistance from the UK Government. As it is the latter that ultimately decides on the rules of the closed material proceedings (through legislation) attempts by special advocates to uphold the rule of law have been hampered on several fronts.

¹⁸ See also s 7 of the Schedule to the Prevention of Terrorism Act 2005; s 68(2) Counter-Terrorism Act 2008.

¹⁹ A Boon and S Nash, 'Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems', (2006) 9 *Legal Ethics* 101.

²⁰ Lord Carlile, *Second Report of the Independent Reviewer of Terrorism Legislation Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (London, TSO, 2007) para 49.

²¹ SIAC itself had to survive the resignation in 2002 of Brian Barder, one of the first lay members to be appointed, following decisions of both the Court of Appeal and House of Lords to overturn the decision of SIAC in *Rehman* [2001] UKHL 47. B Barder, 'On SIAC' *London Review of Books*, 18 March 2004, pp 40-41.

²² John Ip, 'The Rise and Spread of the Special Advocate', (2008) *Public Law* 717, p 735.

²³ See discussion in House of Commons Constitutional Affairs Committee, *Report on The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, HC Paper No 323-I (2004-2005).

First, special advocates cannot, except in certain very limited circumstances, communicate with the subject of the proceedings after they have seen the closed evidence. The only communication that is permitted is with the permission of the court, which must notify the Secretary of State, who then has the opportunity to object to the communication. As any disclosure to the court or the Secretary of State may indicate case strategy special advocates have rarely sought permission to communicate with those being represented. The individual may write to the special advocate but the latter is not permitted to reply except to acknowledge receipt. The green paper, *Justice & Security*, has proposed to encourage special advocates to communicate with those they represent by putting in place a ‘Chinese wall’ between the Government counsel in the case and those appointed to clear communication between the special advocate and the person they represent.²⁴ It is difficult to see how such a Chinese wall could operate in practice and the proposal does not remedy the concern that the special advocate may have to disclose strategy to the judge who will ultimately decide the case. An incidental restriction is that special advocates cannot act in subsequent proceedings if closed materials they have seen in one case might give rise to a leak of information to an individual in a subsequent one. The measures taken to avoid leaking or ‘tainting’ are therefore quite extensive.

Second, in a similar vein, courts in closed materials proceedings may hand down closed judgments. Of course, special advocates might derive benefit from reading closed judgments of relevance to their case. However, without knowing what is in a particular closed judgment it is difficult for special advocates to identify relevant precedents. To remedy this the Home Office is exploring the possibility of developing closed head notes for such judgments with searchable keywords.²⁵ Nevertheless, there remains the problem of the absence of any academic discourse on such judgments. If the academy plays a role in upholding the rule of law and cultivating a culture of legality it is in subjecting case law to critical appraisal so as to highlight problems with the law both as a system of rules and as it operates in broader context. The veil of secrecy over closed judgments makes such appraisal impossible and impoverishes the culture of legality as a result.

²⁴ HM Government, *Justice and Security: Green Paper* (London, TSO, 2011), para 2.33.

²⁵ HM Government, n 24 above, Appendix F.

Third, special advocates do not have instructing solicitors in the usual manner. This places an onerous burden on the special advocate in preparing the case – in particular when they can no longer communicate with the individual that is the subject of the proceedings or his ordinary legal representatives. The problem has in part been resolved by the introduction of the Special Advocates Support Office. The Government has proposed that special advocates be offered ‘sufficient resources in terms of independent junior legal support’ in light of the likely extension of their use to more complex proceedings.²⁶ The difficulty in addressing the closed materials may be exacerbated by the late delivery of those materials – though the Government denies there is a systemic problem in this respect.²⁷ In addition, much of the time special advocates spend in closed proceedings is aimed at attempting to make more material openly available. This is a valuable role but it means that the material is not being challenged on substance – rather the special advocate is performing a form of meta-advocacy that may leave the case against the individual standing.

Fourth, on a related point, there are limits on the ability of a special advocate to challenge the national security evidence presented against those whose interests they are representing. In the past special advocates were unable to call expert witnesses to challenge the state’s evidence. While special advocates may now call expert witnesses they may not call current or former members of security agencies. There are further restrictions (security vetting) that would appear to limit the effectiveness of such witnesses for the special advocate.²⁸ *Justice & Security* proposes to offer additional training for special advocates on intelligence analysis and assessment. This proposal seeks to improve the rigour of the special advocate’s examination of closed material.²⁹ However, it does not address the fundamental imbalance in the use of expert evidence in closed material proceedings. A further problem in this respect is the lack of clear rules on the probative value and the rules of evidence to be used in relation to closed materials.³⁰

²⁶ HM Government, n 24 above, para 2.27.

²⁷ HM Government, n 24 above, Appendix F.

²⁸ HM Government, n 24 above, Appendix F.

²⁹ HM Government, n 24 above, para 2.24.

³⁰ Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates* (2011), para 17.

These restrictions indicate that no matter how skilled the special advocate he or she will face significant disadvantages in their effort to ensure that rule of law principles are upheld. The difficult choice faced by those who operate the legal system is whether or not to co-operate with a system that is ultimately contrary to the rule of law. Despite its problems the system of special advocates will be available in all civil litigation in the UK if the Justice and Security Bill 2012 becomes law. However, the above problems remain, and Advocate General Sharpston's musings on exporting the system to Europe does not suggest how they might be resolved.

IV. Exporting the Problems to Europe?

In many respects the problems for the EU in relation to special advocates may be even greater than the problems for the UK. All of the flaws of closed material proceedings at national level are writ large when transposed to the supranational legal order of the EU. An initial problem with the solution proposed by the Advocate General is that the multi-level nature of governance in the EU system of targeted sanctions may render the rules rather arcane (one hesitates to use the hackneyed 'Kafkaesque'). The Opinion sets out in detail a system of review that varies depending on the decision-making process at national level. Asking first the Council, and then the General Court, to ascertain if the national proceedings are judicial or non-judicial, and based on open or closed evidence, is likely to complicate already complex litigation. Although complexity may be unavoidable it nonetheless impairs transparency and increases the difficulty of challenging a listing for the individuals and entities targeted.

A further potential problem is the ability of courts to make appropriate assessments about evidence. SIAC, for example, includes an intelligence expert and an immigration expert as well as a High Court judge. Appeals to the Court of Appeal are limited to points of law. The Commission is therefore a specialized tribunal with the appropriate competence to assess the claims made by intelligence services. It is difficult to see how the European judiciary, acting in the best possible faith, could be said to have these skills. Although the EU courts have expertise in dealing with complex sets of facts, such as in anti-trust litigation, they do not have a history of subjecting criminal justice evidence or security intelligence to scrutiny.

While the criticism that courts ‘are in no position to act as risk assessors’³¹ goes too far there is certainly a difficulty in requiring a *de facto* constitutional judiciary to assess evidence based on intelligence. The differences in the legal profession across the EU may also pose challenges.³² There is no reason to believe that lawyers in the UK legal system are more skilled or more diligent in their pursuit of justice than lawyers in other legal systems.³³ Nonetheless, experience may play a role. Because of the zealous pursuit of counter-terrorism by successive UK governments there are many advocates in that Member State with experience of dealing with secret evidence. The same may not be true of advocates from all Member States. It is therefore difficult to conceive of EU special advocates that could perform an equivalent role to special advocates in the UK.³⁴

As a result of these limitations the proposal that the EU would adopt the UK model, even if the problems with that model could be solved, is not convincing. Thus, while some alteration to the Rules of Procedure for the General Court and the Court of Justice might be necessary, the use of special advocates does not seem advisable. A further question posed by the Sharpston Opinion relates to the current absence of *any* EU system for dealing with secret evidence. If the Advocate General endorses the principle in *A v United Kingdom*, then not only is she explicitly requiring disclosure of a gist of the evidence to the target of the sanctions, she may be implicitly requiring disclosure of the whole case to someone acting on his behalf (ie the special advocate). This system would likely cause the Council, or at least some of its members, such as France, much consternation. As it is the Council itself must approve any amendments to the Rules of Procedure there is the distinct possibility that a system could be adopted that is not favourable to applicants.³⁵ Any derogation from the ordinary Rules of Procedure should be approached with caution – both at the stage of

³¹ T Poole, ‘Courts and Conditions of Uncertainty in Times of Crisis’, (2008) *Public Law* 234, p 247.

³² For a discussion of some differences in the legal profession across the EU see the Opinion of Advocate General Maduro and the judgment of the European Court of Justice in C-305/05 *Ordre de barreaux francophones et germanophone, Ordre français des avocats du barreau de Bruxelles, Ordre des barreaux flamands, Ordre néerlandais des avocats du barreau de Bruxelles v Conseil des Ministres* [2007] ECR I-5305.

³³ For a discussion of the role of institutional actors see D Dyzenhaus, ‘The state of emergency in legal theory’, in VV Ramraj, M Hor and K Roach, eds, *Global Anti-Terrorism Law and Policy* (Cambridge, CUP, 2006) p88.

³⁴ Indeed, anecdotal evidence suggests that much of the sanctions litigation in the EU is being run from London law firms and chambers, such as Brick Court Chambers, which has provided counsel for Mr Kadi, for OMPI, and for applicants challenging several other sanctions systems (<http://www.brickcourt.co.uk>).

³⁵ See Article 281 TFEU and Protocol (No 3) to the Treaty on the Functioning of the European Union on the Statute of the Court of Justice of the European Union.

devising the rules and applying them. However, it is difficult to disagree with the Advocate General's assessment that some action will have to be taken on this matter before too long.

V. Secret Evidence in Europe

It is clear that although *Kadi* remains the leading case it is by no means the whole story on sanctions in the EU. The proliferation of sanctions litigation is apparent from the case-list before the EU courts. The *Kadi* reasoning is being applied in new areas – extending the courts' counter-terrorism reasoning into the wider field of security law. Thus *Kadi I* has been confirmed by the ECJ in the Iranian sanctions case of *Bank Melli Iran*.³⁶ The decision of the General Court in *Fulmen*, concerning sanctions against an Iranian electrical engineering company, also involved a high degree of scrutiny following the *Kadi* logic.³⁷ Indeed, the list of cases concerning the Iranian sanctions is rather a long one.³⁸ Furthermore, the sanctions litigation is broader than both counter-terrorism and nuclear non-proliferation. There are, at present, cases pending before the EU courts concerning sanctions against Belarus, Cote d'Ivoire, Egypt, Syria, Tunisia, and Zimbabwe.³⁹ There is therefore an emerging EU security jurisprudence being developed by the EU courts.

These cases will raise questions as to the standard of judicial review and, in time, the role of secret evidence and how the courts address it. The ECJ declined to follow Advocate General Sharpston's lead in its judgment in the *French Republic v OMPI*. However it may be required to at least comment on the UK model when a reference from the UK Court of Appeal reaches it.⁴⁰ The question referred in *ZZ v Secretary of State for the Home Department* is simple but of great significance in this area. The Court of Appeal has asked whether, in a

³⁶ Case C-548/09 P *Bank Melli of Iran v Council* ECJ Judgment 16 November 2011.

³⁷ Case C-280/12 P *Council v Fulmen* (application lodged 6 June 2012).

³⁸ See, for example, T-57/12 *Good Luck Shipping v Council* OJ C 109 14.04.2012, p 23; T-58/12 *Nabipour & Others v Council* OJ C 109 14.04.2012, p 23; T-63/12 *Oil Turbo Compressor v Council* OJ C 98 31.03.2012, p 27; T-56/12 *IRISL Maritime Training Institute and Others v Council* OJ C 109 14.04.2012, p 22; T-53/12 *CF Sharp Shipping Agencies Pte v Council* OJ C 89 24.03.2012, p 29; T-42/12 *Bateni v Council* OJ C 98 31.03.2012, p 23; T-656/11 *Morison Menon Chartered Accountants and Others v Council* OJ C 58 25.02.2012, p 14. For a full list see the European Court of Justice website (<http://curia.europa.eu>).

³⁹ The cases are too numerous to list in full here. A search of the Curia database on 30 June 2012 for cases pending before the Court of Justice and the General Court related to the common foreign and security policy returned 85 results – almost all of which were challenges to sanctions systems.

⁴⁰ The European Court of Justice declined to discuss the matter in its judgment following Advocate General Sharpston's Opinion C-27/09 P *French Republic v People's Mojahedin Organization of Iran* Judgment of 21 December 2011.

case concerning the exclusion of an EU citizen from a Member State on national security grounds, EU law requires that the individual

is informed of the essence of the grounds against him, notwithstanding the fact that the authorities of the Member State and the relevant domestic court, after consideration of the totality of the evidence against the European Union citizen relied upon by the authorities of the Member State, conclude that the disclosure of the essence of the grounds against him would be contrary to the interests of state security?⁴¹

Resolution of the reference in *ZZ* may therefore have broader implications for EU security law. The Opinion and Judgment in *Kadi I* still tower over EU law in the field of counter-terrorism. The invocation by Advocate General Maduro of the words of Israeli Supreme Court Justice Aahron Barak is prescient in the current context: ‘it is when the cannons roar that we especially need the laws... There is always law which the state must comply with. There are no “black holes”’.⁴² The *Kadi I* Opinion and Judgment represent a high watermark in the development of judicial protection. On the other hand, the UK system of special advocates was born from a desire to comply in the barest possible way with a decision of the European Court of Human Rights and has been corrosive for the culture of legality in that Member State. It would be a retrograde step, in a post-‘war on terror’ world,⁴³ for the EU to adopt a system that has been the subject of such criticism within its home Member State.

VI. Conclusion: ‘Force Yields Place to Law’

How then should the EU courts deal with secret evidence? The former UN Special Rapporteur, Martin Scheinin, has advocated reform along the lines of ‘best practice’.⁴⁴ This has been described as ‘legal and institutional frameworks that serve to promote and to protect human rights and the rule of law in all aspects of counter-terrorism’. Best practice is not just about complying with the ‘irreducible minimum requirement’ of human rights law

⁴¹ Case C-300/11 *ZZ v Secretary of State for the Home Department* OJ C 252/20 27.8.2011.

⁴² Opinion AG Maduro in C-402/05 P, *Kadi* [2008] ECR I-6351.

⁴³ Murphy, n 1 above, p 236.

⁴⁴ M Scheinin, *Ten Areas of Best Practice in Countering Terrorism: Report of the Special Rapporteur on the promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, A/HRC/16/51.

but also about developing ‘principles that go beyond these legally binding obligations’. In respect of the evidence used as the basis of designation for suspected terrorists best practice is said to require that sanctions are used where there are ‘reasonable grounds’ for belief that the individual or group has been involved in terrorism. In relation to judicial review ‘best practice’ requires that the target has the right to judicial review ‘with due process rights applying to such review *including disclosure of the case against him, her or it*, and such rules concerning the burden of proof that are commensurate with the severity of the sanctions’. The analysis in this paper suggests that the UK system of special advocates does not fulfil the requirements of best practice but that the EU system of judicial review may be developing in this direction – *if* the strong position taken to date endures. So long as the prevailing culture is one of control, or security, then formal rules will only ever serve to check but not eliminate threats to the rule of law. EU counter-terrorism is by no means above reproach.⁴⁵ However, the EU rule of law remains robust in the field of targeted sanctions. In the EU, in this field, ‘force yields place to law’.⁴⁶

Any consideration of EU law in the field of national security must recall that the EU is hardly a typical security actor. It has no army, navy, air force or police force. Nevertheless EU counter-terrorism law is a vibrant area of European law that is proving to be the focal point for the development of broader EU security law. The idea of European security is ‘a complex constellation’ which can be said to involve ‘national cultures, institutional norms, political agendas, local perceptions and global needs’. At the heart of the project is ‘an attempt to standardize and create a systematic juridical, institutional and technical approach to the threats that Europe faces today’.⁴⁷ This description by Burgess is an apt snapshot of the difficulty of describing European security or, as he puts it, European securities. The heterogeneity of the different EU systems and the different perceptions of security within Europe should caution against any attempt to crudely transplant a counter-terrorism power or safeguard from one Member State into another or, through the EU, into all other Member States. Unless the special advocate system is proven to operate satisfactorily in its home Member State the EU should seek another solution to the challenge of secret evidence.

⁴⁵ On the contrary it demonstrates many of the traits of the pre-emptive shift. See Murphy, n 2 above.

⁴⁶ Euripides *Medea* [525-562].

⁴⁷ JP Burgess, ‘There is No European Security, Only European Securities’, (2009) 44 *Cooperation and Conflict* 309, p 310.