



European
University
Institute

ACADEMY OF EUROPEAN LAW

EUI Working Papers

AEL 2009/10

ACADEMY OF EUROPEAN LAW

CHALLENGING THE EU COUNTER-TERRORISM MEASURES THROUGH THE COURTS

edited by Marise Cremona, Francesco Francioni and Sara Poli

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ACADEMY OF EUROPEAN LAW
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

Challenging the EU Counter-terrorism Measures through the Courts

EDITED BY MARISE CREMONA, FRANCESCO FRANCIONI AND SARA POLI

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

The author(s)/editor(s) should inform the Academy of European Law if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1831-4066

© 2009 Marise Cremona, Francesco Francioni and Sara Poli (editors)

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

This collection of papers examines the implications of the European Court of Justice's approach to UN-related counter-terrorism measures against individuals (so-called 'smart sanctions'), as expressed by its ruling in Case C-402/05P *Kadi v Council and Commission*, in which it annulled an EC act implementing a UN Security Council resolution. The impact of this seminal judgment on the EC legal order, on its relationship with the UN Charter, and on the case-law of the European Court of Human rights is the theme of this collection. The papers represent a range of views both critical and supportive of the different aspects of the Court's ruling and include a survey of the already extensive literature commenting on the CFI and ECJ rulings in *Kadi*.

Keywords

European law - human rights - international agreements - terrorism - United Nations

TABLE OF CONTENTS

Introduction.....	1
<i>Marise Cremona, Francesco Francioni and Sara Poli</i>	
Are the Effects of the UN Charter under EC Law Governed by Article 307 of the EC Treaty?	5
<i>Giorgio Gaja</i>	
The <i>Kadi</i> Case: What Relationship between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?	11
<i>Christian Tomuschat</i>	
Kadi and the Vicissitudes of Access to Justice.....	19
<i>Francesco Francioni</i>	
Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ <i>Kadi</i> Judgment: A Misplaced Argument Hindering the Enforcement of International Law in the EC.....	31
<i>Riccardo Pavoni</i>	
Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the <i>Kadi</i> Case.....	39
<i>Enzo Cannizzaro</i>	
The Impact of the <i>Kadi</i> Judgment on the International Obligations of the EC Member States and the EC	47
<i>Nikolaos Lavranos</i>	
Is the ECJ Ruling in <i>Kadi</i> Incompatible with International Law?	57
<i>Martin Scheinin</i>	
EC Competence, ‘Smart Sanctions’ and the Kadi Case	71
<i>Marise Cremona</i>	
Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order	99
<i>Takis Tridimas</i>	
The Potentially Competing Jurisdiction of the European Court of Human Rights and the European Court of Justice	123
<i>Annalisa Ciampi</i>	
Le Conseil de sécurité, les sanctions ciblées et le respect des droits de l’homme	131
<i>Luigi Condorelli</i>	
The <i>Kadi</i> Rulings: A Survey of the Literature.....	139
<i>Sara Poli and Maria Tzanou</i>	
Bibliography	163

Introduction

Marise Cremona, Francesco Francioni and Sara Poli

EU counter-terrorism measures, freezing the assets of individuals or entities suspected of financing terrorism, have been at the centre of considerable academic interest, centred on the challenges to their validity before the Community courts.¹ Such an attention was triggered by the fact that the Community judicature was confronted with a very thorny issue: it had to decide whether the obligations under a multilateral Treaty of the status of the UN Charter, whose principles are recognized by the EU Member States (and also by the EU Treaty) as fundamental to the preservation of peace and international security, should take unqualified precedence over those of the EC/EU Treaties, even if they encroach upon European fundamental rights. The opportunity was offered by an annulment action brought by Mr Kadi, targeted by a Community restrictive measure, implementing a Security Council resolution which provided a blacklist of individuals and entities to be sanctioned with asset freezing. The courts had to decide whether the EC regulation at stake should be annulled either for lack of competence or for breach of human rights of the targeted subject.

The restrictive measures concerned in this legal action are described as ‘smart sanctions’ since they are selectively targeted at individuals posing a threat to peace and security. The list of suspected subjects is drawn up by the Sanction Committee, a body accountable to the UN Security Council (UNSC). The basis for inclusion in the list is the individual’s behaviour, in particular the provision of financial support to terrorism. The targeted individuals are not sanctioned as a result of their link with the territory of a state which threatens peace and security; hence the categorization as ‘individual sanctions’.

In 2005 and 2008 the CFI at first instance and the Court of Justice on appeal adopted two different positions on the legality of the impugned Community measure and more broadly, on matters which lie at the heart of the constitutional foundations of the EC legal order. The two courts took different views, first of all on the position of the EC legal order within the broader international system, under the UN Charter; secondly on the position of fundamental human rights in the hierarchy of the EU norms, and thirdly on the scope of judicial review of Community measures giving effect to a UNSC resolution. To the surprise of many legal writers, the Court of Justice, following Advocate General Poiares Maduro’s opinion, quite radically departed from the CFI judgment on two issues. Firstly, it held that within the EC legal order the supreme laws of the land are the fundamental human rights derived from its own constitutional principles. EU counter-terrorism measures are bound to comply with due process rights even if this results in a failure effectively to implement the UN Security Council resolution. Secondly, the Court asserted full jurisdiction to review the legality of an EC measure implementing a UNSC resolution, even if that act did not seem to leave any discretion to UN members.

In December 2008 a workshop was organized by the Academy of European Law together

¹ See the judgment of the Court of First Instance, T- 315/01 *Kadi v. Council/Commission* [2005] ECR II-3649 and the appeal before the ECJ, in joined cases C-402/05 P and C-415/05 P of judgement of 3 September 2008, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union*, nyr.

with the Robert Schuman Centre at the EUI to discuss the impact of the two *Kadi* rulings,² with special attention to that of the Court of Justice. The aim of our workshop was essentially to study the implications of the *Kadi* rulings for the EU legal order and the UN sanction system. By contrast, we did not consider the position of domestic courts *vis-à-vis* a UNSC resolution imposing individual sanctions.

The papers presented in this workshop revolve around the following questions. What are the ‘constitutional implications’ of the *Kadi* rulings? By this expression we mean the impact that the two judgments exert on the relationship between the EC/EU law and the law under the UN Charter. What is the status of the UN Charter and of UNSC resolutions within the EC legal order? What does the Court’s judgment tell us about EC competence to adopt smart sanctions and the level of human rights protection guaranteed by the Community Courts? Moreover, what influence is the ECJ’s judgment likely to have on the case-law of the European Court of Human Rights on measures implementing UN sanctions?

It is now necessary to briefly present the papers included in this collection.

Giorgio Gaja’s essay reflects on the status of the Charter within the Community legal order. The writer’s view is that the importance and uniqueness of this Treaty is such that it is not appropriate to consider that Article 307 of the TEC, governing the relations between obligations under *prior* Treaties and obligations under EC law, also applies to the UN Charter. He contends that the latter has a distinctive position with respect to any other ‘prior Treaty’.

According to Christian Tomuschat, the *Kadi* rulings demonstrate the existence of a conflict between the legal order under the auspices of the United Nations and the EU legal order. He criticizes the reasoning of the ECJ leading to the conclusion that, if core elements of the Community system are affected, Community law prevails over any requirements resulting from the UN legal order. His most important point is that although the position of the Court, whereby it distances itself from international law, can be explained by the lack of adequate human rights protection in the UN sanction machinery, the Court can be criticized for promoting European standards as world standards, regardless of what consequences this approach might produce for the functioning of the anti-terrorism regime.

A similar criticism to the judgment of 3 September 2008 for sending ‘its strong human rights message within the limited confines of the Community legal order’ is made by Francesco Francioni, whose paper is specifically concerned with the right of access to justice and to a fair hearing as invoked by the applicant. He maintains that human rights standards with respect to the right to be heard must be considered as part of the United Nations human rights system and as such binding also upon the Security Council. He examines in detail the shortcomings of the present system of international review of targeted sanctions, which does not meet the minimum standard of fair hearing and can lead to a systematic denial of justice. Thus, he concludes, the right to be heard may be fulfilled if individuals subject to targeted sanctions, aliens included, were to be given the possibility to challenge the applicability of the sanctions before domestic courts and Community courts.

² These rulings should be distinguished by those revolving around the legality of sanction measures against individuals targeted at EC/EU level. The latter category of restrictive measures differ from the former since the list of individuals is not ‘imported’ from the UN but is created ‘in-house’ by the EU Council, upon request of a Member State.

Riccardo Pavoni's position, criticizing the ECJ for its disregard of the planet of international law, goes in the same direction as the previous authors. He focuses on the Court's argument that UN members enjoy 'a free choice among the various possible models for transposition of UNSC resolutions into their domestic legal order' (para. 298). He criticizes the methodology followed by the Court in justifying its power to review EC legislation giving effect to UNSC resolutions. More precisely, he argues that the Luxembourg judges should have reviewed the EC Regulation at stake on the basis of the customary international law of human rights or UN Charter obligations, at least those reflecting customary rules.

The first part of Enzo Cannizzaro's paper addresses an issue similar to that discussed by Pavoni, criticizing the Court's ambiguous approach *vis-à-vis* the effects of SC resolutions within the EC legal order. Further critical remarks focus on the part of the ruling in which the Court limits its competence to review the legality of SC resolutions under international law.

Nikolaos Lavranos takes a rather different view from the previous authors and clearly supports the Court's position. His paper focuses on Article 307 of the EC Treaty but takes a 'European constitutional law' perspective. He contends that as far as the aim of fighting terrorism is concerned, including imposing sanctions against individuals, there is no conflict or incompatibility between the UN and EC/EU obligations of Member States. Rather, there are parallel obligations arising out of different sources of law. This does not mean that Member States should blindly implement the SC resolutions. Under EC law, they are required to implement these acts in such a way as to comply with European human rights standards. Lavranos shares the ECJ's view that primary EC law (to which he adds the European Convention of Human Rights) requires that Member States fill the gaps in the UN sanction system in terms of human rights protection. Lavranos' positive comments on the ECJ's judgment link up with those made by Ciampi and Tridimas.

A middle-ground view between those of Tomuschat and Lavranos is taken by Martin Scheinin. In his paper he addresses the question of whether the ECJ ruling in *Kadi* is compatible with international law or not. He argues that the outcome of the case is in line with international human rights law, as expressed in United Nations human rights treaties, and that the ECJ ruling in *Kadi* should be seen as an affirmation of a high degree of coherence between EU law and international law. He also adds that the outcome in the *Kadi* case enjoys support in institutional United Nations law, i.e., the *Kadi* ruling has not been badly received within the UN.

Marise Cremona scrutinizes the CFI and ECJ rulings as far as the legal basis of the contested measure is concerned. Firstly, she examines the historical development of economic and smart sanctions in EC/EU practice, and shows that EC competence to adopt these restrictive measures has always been problematic. She then compares the approach of the Advocate General and the Courts in their analyses of competence and legal basis. The *Kadi* judgment is in line with other recent judgments in which the Court stresses both the autonomy of the EC legal order with respect to the Common Foreign and Security Policy and the ability of the Community legal order to respond to new security challenges. She argues that the reliance on Article 308 in the ECJ's judgment is not wholly convincing but that to base individual sanctions solely on Articles 301 and 60 EC would stretch the limits of implied powers too far. A new or amended explicit legal base is needed, and would be provided by the Treaty of Lisbon.

The paper presented by Takis Tridimas deals with the consequences of the ECJ position in *Kadi* on the standard of human rights protection of individuals. He argues that this ruling

places fundamental rights at the top of the hierarchy of EU norms. He criticizes the CFI's interpretation of the right to property, to a fair hearing and to effective judicial review in the light of *jus cogens*. He supports the ECJ's position since it safeguards due process rights and ultimately is in line with the rule of law. Finally, Tridimas compares the CFI's approach in *Kadi* with that adopted in cases where the Court had to adjudicate on the legality of Community-based sanctions. In these cases, since the EC was not acting under 'circumscribed powers', the CFI annulled the contested EC measures. However it is noteworthy that it did not quash the contested measures for breach of substantive rights but for violating the applicant's due process rights.

Annalisa Ciampi's essay concerns the relationship between the European Court of Human Rights and the ECJ after the *Kadi* appeal. She examines whether the ECJ judgment may create a sort of competition between the ECJ and the ECtHR in protecting fundamental human rights. Some doubt as to which of the two courts is genuinely defending human rights in Europe is legitimate since the very assertive position of the ECJ in safeguarding due process rights violated by sanctions decided at UN level contrasts with the 'light touch' of the ECtHR in relation to the United Nations and the Security Council in the *Behrami* ruling. The author sets out different scenarios of individual applications before the ECtHR to check the extent to which the Strasbourg Court could be inspired by the ECJ in adjudicating cases of alleged human rights violations arising out of the implementation of UN sanctions. She concludes her analysis by emphasizing that there is a need for judicial protection of human rights at regional level, while awaiting reform of listing/delisting procedures.

Luigi Condorelli's work sets the *Kadi* case in the broader framework of international human rights law. In this respect, his paper complements Tridimas' contribution. Condorelli argues that the UNSC should respect human rights and that the current system of UN sanctions does not meet these standards. He considers that respect for these rights can at present only be guaranteed by domestic (and Community) courts. In Condorelli's view, they should refuse to apply the UNSC resolution. This author also discusses the conditions under which those who are subject to individual sanctions could bring an action directly against the UN in order to have the restrictive measures withdrawn or to obtain damages.

Finally, the contribution by Sara Poli and Maria Tzanou reviews a number of the comments published by legal writers on the CFI and ECJ *Kadi* rulings from both an international and an EU legal perspective. This survey examines the comments made by experts in these two disciplines with the aim of making an overall assessment of these two landmark judgments.

Are the Effects of the UN Charter under EC Law Governed by Article 307 of the EC Treaty?

Giorgio Gaja*

1. When examining the effects that the UN Charter, or actions taken by UN organs on the basis of the Charter, have under EC law, the European Court of Justice (ECJ) considered that Article 307 of the EC Treaty applies to relations between that treaty and the UN Charter since the UN Charter is one of the treaties concluded by Member States with third states before the EC Treaty entered into force for those Member States. In *Centro-Com*¹ the ECJ was confronted with certain national measures implementing a Security Council resolution that affected the common commercial policy by restricting exports to Serbia and Montenegro. The Court noted that ‘in substance’ the referring national court had raised

the question whether national measures which prove to be contrary to the common commercial policy provided for in Article 113 [now 133] of the Treaty and to the Community regulations implementing that policy are nevertheless justified under Article 234 [now 307] of the EEC [now EC] Treaty, since by those measures the Member State concerned thought to comply with its obligations under an agreement concluded with other Member States and non-member countries prior to entry into force of the EEC [EC] Treaty or accession by that Member State.²

The Court found that

national measures which prove to be contrary to the common commercial policy provided for in Article 113 [now 133] of the Treaty and to the Community regulations implementing that policy are justified under Article 234 [now 307] of the Treaty only if they are necessary to ensure that the Member State concerned performs its obligations towards non-member countries under an agreement concluded prior to entry into force of the Treaty or prior to accession by that Member State.³

The task of making this assessment was left to the national court. The ECJ did not query the reference to Article 307 as the legal basis for that assessment. The approach suggested by the referring national court was thus found appropriate, at least implicitly.

In *Kadi*⁴ the ECJ took a similar line. With regard to an action for annulment of an EC regulation implementing a Security Council resolution that provided for restrictive measures against persons and entities associated with Osama bin Laden, Al-Qaeda and the Taliban, the ECJ recalled what it had stated in *Centro-Com* with regard to Article 307.⁵ The existence of an obligation under the UN Charter had been invoked in order to assert the validity of an EC regulation conflicting with higher rules of EC law. The Court noted that ‘Article 297 EC implicitly permits obstacles to the operation of the common market when they are caused by

* Professor of International Law, University of Florence; Member of the International Law Commission.

¹ Judgment of 14 January 1997, Case C-124/95, ECR I-81.

² *Ibid.*, para. 54.

³ *Ibid.*, para. 61.

⁴ Judgment of 3 September 2008, Joined Cases C-402/05 P and C-415/05 P.

⁵ *Ibid.*, para. 301.

measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security'.⁶ Considering Articles 307 and 297 together, the Court then found that these articles 'cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union'.⁷ The Court concluded on this point that 'Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights'.⁸

2. Technically, the UN Charter falls within the category of 'agreements' referred to in Article 307. With the exception of the Federal Republic of Germany, all the Member States were members of the UN before joining the European Community, and thus had 'rights and obligations arising from' the Charter towards non-member states at that time. However, even if the requirements for applying Article 307 appear to be met, it does not seem appropriate to consider that the relations between obligations under the UN Charter and obligations under EC law are governed by this provision. These relations cannot be identical to those generally concerning the relations of obligations under treaties concluded by Member States before accession to the EC and obligations under the EC Treaty.

Various elements demonstrate the inadequacy of Article 307 for governing the relations between obligations under the UN Charter and obligations under EC law.

First of all, there is the fact that the Federal Republic of Germany was not a member of the UN when it became one of the founding Members of the European Community. Even though this state had accepted 'the obligations set forth in Article 2 of the Charter' by a declaration made in London on 3 October 1954,⁹ one cannot say that this meant that all the obligations under the UN Charter or resulting from acts of UN organs were binding on the Federal Republic of Germany before the date of its admission to the UN. Therefore Article 307 may not be invoked with regard to many obligations of the Federal Republic of Germany under the UN Charter and binding acts of UN organs. It is clear that some alternative basis needs to be found in order to avoid reaching the unreasonable conclusion that the Federal Republic of Germany, unlike all the other Member States, cannot derogate from any of its obligations under EC law when it seeks to implement its obligations under the UN Charter which are not covered by Article 307.

A second reason for considering Article 307 as inadequate is the content of the obligation set out in paragraph 2. In short, this provision intends to bring the pre-existing agreements with third states into harmony with the EC Treaty. According to the first sentence, '[t]o the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take appropriate steps to eliminate the incompatibilities established'. This

⁶ *Ibid.*, para. 302.

⁷ *Ibid.*, para. 303.

⁸ *Ibid.*, para. 304.

⁹ The United Kingdom, France and the United States took note of this declaration, in terms that could be viewed as an acceptance of the fact that the Federal Republic of Germany would acquire obligations under Article 2 of the UN Charter. The other NATO member states associated themselves in Paris a few weeks later, on 23 October 1954.

provision, as was recently stated by the ECJ in *Commission v. Austria*¹⁰ and *Commission v. Sweden*,¹¹ requires that Member States, in order to free themselves from obligations under treaties that are inconsistent with the EC Treaty, take initiatives that may even go beyond suspension of the treaties in question. A similar obligation would be inconceivable with regard to the UN Charter. While Member States are not relieved of their obligations under EC law when they act in their capacity as members of the UN, it would be clearly excessive to impose on them an obligation to seek amendments to the UN Charter in order to remove any possible inconsistencies.

Finally, if all the agreements with third states were put into one and the same category, the derogations from their obligations under EC law that are allowed in order to enable Member States to comply with their obligations under those agreements would be subject to identical restrictions. When reaching its conclusion with regard to Article 307 in the passages of the *Centro-Com* and *Kadi* judgments quoted above, the ECJ appeared to assume that the same restrictions apply to all the derogations for the purpose of complying with obligations under the agreements covered by Article 307. There was no indication that a special regime would govern the relations between the UN Charter and the EC Treaty.

3. The Court of Justice considered that certain pre-existing treaties concluded by Member States were not the source of obligations to be temporarily tolerated notwithstanding their possible inconsistency with EC law, but were part of the necessary context in which the European Community is placed. Since only the Member States could be party to GATT 1947 and to the European Convention on Human Rights, the ECJ availed itself of the Member States' participation in these treaties to assert that certain legal effects arose from them also for the European Community. The Court implied that those effects represented a durable feature. This occurred with GATT 1947 in *International Fruit Company*¹² and with the European Convention on Human Rights first in *Nold*¹³ and later, more explicitly, in *Hauer*.¹⁴ The Court did not take an entirely identical approach with regard to these treaties, in view of its reluctance to state in as many words that the European Convention was binding on the European Community.¹⁵ However, several judgments of the Court considered that the EC was in substance bound by these treaties. Significantly, this conclusion was not based on Article 307.

Although the EC is now a party to GATT 1994 and an express reference to the European Convention on Human Rights is contained in Article 6 of the TEU, the judicial precedents concerning GATT 1947 and the European Convention have not altogether lost their significance. They show that, with regard to certain treaties that are part of the international setting in which the EC is placed, an approach other than that outlined in Article 307 should be taken.

¹⁰ Judgment of 3 March 2009, Case C-249/06.

¹¹ Judgment of 3 March 2009, Case C-205/06.

¹² Judgment of 12 December 1972, Joined Cases 21-24/72, ECR 1219.

¹³ Judgment of 14 May 1974, Case 4-73, ECR 491. The applicant had referred to the European Convention (see para. 12), but the Court mentioned 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.

¹⁴ Judgment of 13 September 1979, Case 44/79, ECR 3727.

¹⁵ The European Convention was first mentioned by the Court as part of the standard for the protection of fundamental rights only after the Convention had been ratified by France. Moreover, in the judgements referred to in the previous two notes, the Court considered that the role of the treaties for the protection of human rights was simply to 'supply guidelines'.

4. The UN Charter clearly deserves special attention under EC law, given its position as a treaty concluded by Member States before accession and not open to the European Community. This is primarily because of the paramount importance that the Charter has within the international community. The Court of Justice acknowledged that the Security Council resolutions considered in *Bosphorus*¹⁶ and *Ebony*¹⁷ aimed at protecting ‘fundamental’ interests of the ‘international community’. A paragraph in the *Kadi*¹⁸ judgment develops this point further:

it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

The importance of the Charter for the European Community is reflected in a number of provisions both in the EC Treaty and in the TEU.

As was noted above,¹⁹ in *Kadi* the Court referred to the adoption of derogating measures under Article 297 of the EC Treaty, which does not explicitly mention the UN but does so implicitly, since it uses the same wording as Article 39 of the UN Charter when referring to the obligations that a Member State ‘has accepted for the purpose of maintaining peace and international security’.²⁰ Article 301 does not refer to the UN Charter either, but again, does so implicitly when it provides for ‘action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries’. This provision was introduced into the EC Treaty to regulate the adoption of economic sanctions, a significant part of which are represented by those mandated by the Security Council.²¹ Furthermore, Article 302 provides that the Commission shall ‘ensure the maintenance of all appropriate relations with the organs of the United Nations’. This text also refers to other international organizations, but the United Nations is the only organization that is specifically mentioned.

In a wider, but clearly pertinent, context, one finds in Article 11 of the TEU a statement that the first of the objectives of the common foreign and security policy is ‘to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter’. Moreover, the second sentence of Article 19, paragraph 2, of the TEU provides as follows:

Member States which are also members of the United Nations Security Council will concert and keep the other Member States fully informed. Member States which are permanent members of the Security Council will, in the execution of

¹⁶ Judgment of 30 July 1996, Case C-84/95, ECR I-3953, para. 26.

¹⁷ Judgment of 27 February 1997, Case C-177/95, ECR I-1111, para. 38.

¹⁸ *Supra* note 4, para. 294.

¹⁹ *Supra*, para. 1.

²⁰ As was stated by S. Bohr, ‘Sanctions by the United Nations Security Council and the European Community’, 4 *EJIL* (1993) 256, at 265, ‘this form of paramountcy of the UN Charter was the inspirational source of Article 224 of the Treaty of Rome’. According to P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundation* (2004), at 443, ‘Article 297 is *lex specialis* to Article 307 in the area of implementation of Security Council resolutions’.

²¹ This includes the EC regulation involved in the *Kadi* case.

their functions, ensure the defence of the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.

The overall picture that these provisions present, from the perspective of the European Community, is that the United Nations plays an essential role in the international community and that the European Community and its Member States intend to contribute to the exercise by the United Nations of its functions.

5. Should one observe the relations between the obligations under the UN Charter and those under the EC Treaty as here suggested, one may reach the conclusion that exemptions from obligations under the EC Treaty that are allowed in order to comply with obligations under the Charter may be wider than those that are admissible with regard to obligations under other treaties. Compliance with obligations under the UN Charter is positively valued by the EC Treaty and the TEU. This is not to say that there could not be any restriction to derogations from obligations under EC law when there is a conflict with an obligation under the UN Charter and that, as a consequence, any infringement of fundamental human rights resulting from a Security Council resolution would be consistent with EC law. However, any reason for a restriction would have to be balanced against the value inherent in the full compliance of EC Member States with their obligations under the UN Charter as a contribution to the proper exercise by the world organization of its functions.

The *Kadi* Case: What Relationship between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?

Christian Tomuschat *

1. Introduction

The two cases of *Kadi*¹ and *Yusuf*² as well as the later *Ayadi*³ case, adjudicated by the two European Community Courts,⁴ have stirred up both reflection and emotion among legal scholars. The facts are well known. What legal protection does a person enjoy if he finds himself – are there any women on the list?⁵ – all of a sudden on a Consolidated List established by one of the Sanctions Committees of the Security Council as a suspected terrorist or sympathizer of terrorism and whose assets become thereupon inaccessible overnight by virtue of a freezing order, not just for one day, but perhaps for weeks, months or even years? It is not only the tragedy that an individual hit by such measures of constraint must endure that has attracted the attention of international lawyers. The conundrum of the three cases is the conflict that they encapsulate between the legal order of the European Union and the law of the United Nations. Under the latter, hardly any legal constraints limit the action of the Security Council. No direct remedy that could be filed against a resolution of the Security Council deemed unlawful by one of its addressees is available. Not even states can institute proceedings against the Security Council, and individuals have no place whatsoever as holders of rights within the institutional framework of the Charter.

The targeting of individuals through Security Council resolutions is a recent phenomenon. Back in 1945, the framers of the Charter proceeded from the assumption that the Security Council would deal almost exclusively with states, in any event not with individuals. *De jure* this situation remains unchanged. The Security Council continues to address its orders mainly to states, sometimes also to other subjects of international law and sometimes even to groups that do not enjoy personality under international law – but human beings as such are never addressed individually. The Security Council does not attempt to directly impose specific duties upon them. Many reasons dictate that solution, among them the fact that the Security Council lacks an enforcement mechanism of worldwide scope. Therefore, it confines itself to imparting orders to states, which are then required to take the appropriate implementation measures.. But the Security Council has taken to identifying by name those persons that should be hit by the sanctions it has determined. Thus, the states to which the relevant determinations are addressed have no freedom of choice. They are bound to implement, name by name, on the basis of specific legislative acts as a rule, the lists which the Security Council has established. Inevitably, the question arises as to who can be made

* Professor of International Law, Humboldt University of Berlin.

¹ *Kadi and Al Barakaat v. Council and Commission*, Court of First Instance, case T-315/01, 21 September 2005; Court of Justice of the European Communities, case C-402/05 P, 3 September Advocate General Maduro, opinion of 16 January 2008.

² *Yusuf and Al Barakaat v. Council and Commission*, Court of First Instance, case T-306/01, 21 September 2005.

³ *Ayadi v. Council*, case T-253/02, 12 July 2006.

⁴ A judgment on appeal was rendered only in *Kadi*.

⁵ I have found no female name on the list that is easily accessible through the internet.

accountable if the Security Council has based its findings on faulty evidence. Is it the state – or an international organization replacing it – that has to bear responsibility, notwithstanding its lack of discretionary leeway in implementing the decisions of the Security Council, or must the blame be put on the Security Council? The former alternative is much more advantageous for the individual victim inasmuch as the Security Council is located at astronomic heights above any challenge by mortals. Only if the implementing machinery can be called into question does the victim have any chance of successfully asserting the rights which he feels have been infringed by his placement on a list of suspicion.

We know that such a conflict arose between the three applicants Kadi, Yusuf, and Ayadi, and we also know that the Court of First Instance as well as the Court itself experienced considerable difficulties in finding the correct answers to clarify the legal position. The existence of a conflict of laws could not be denied. Should the determinations of the Security Council prevail without any modification or reservation, or was the European Community entitled to insist on respect for basic human rights which, in its view, had not been complied with by the Security Council?

2. The Point of Departure

From the viewpoint of the Charter, no major difficulties arise. The Charter provides that resolutions of the Security Council under Chapter VII are binding (Articles 25, 41). Additionally, Article 103 states that in the event of a conflict between the obligations of a member of the United Nations and its obligations under any other international agreement, the obligations under the Charter shall prevail. Thus, the Charter gives unreserved primacy to its stipulations. However, technically it addresses only members of the Organization (see Article 48 of the Charter). On the other hand, the European treaties have refrained from comprehensively regulating the effect of other rules of international law within the European legal order. It can be deduced from Article 300(7) EC that international treaties concluded by the European Community are hierarchically subordinated to the EC Treaty itself; by contrast, according to the jurisprudence of the Court of Justice, they prevail over enactments of secondary law.⁶ Other judgments have established the proposition that general rules of international law are also to be considered as part and parcel of community law, similarly taking precedence over acts of secondary legislation.⁷ In principle, therefore, the European legal order can be said to open its gates to international law according to a monist conception of the mutual relationship.

3. The Binding Effect of the UN Charter on the EC/EU

Yet the European treaties remain silent about the effect, within the European legal order, of treaties to which the European Community is not a party. If one applies the maxim: *pacta tertiis nec prosunt nec nocent*, as enshrined in both Vienna Conventions on the Law of Treaties (Article 34), one can easily argue that the law of the Charter and the secondary law derived therefrom can have no bearing on the European legal order.⁸ Yet things are not so

⁶ See recently *Intertanko*, case C-308/06, 3 June 2008, para. 42.

⁷ *Poulsen and Diva Navigation*, case C-286/90, [1992] ECR I-6019, para. 9; *Racke*, case C-162/96, [1998] ECR I-3655, para. 45.

⁸ Article 34 of the 1986 Vienna Convention II states a proposition that requires careful examination. The personality of an international organization does not have the same degree of autonomy as the sovereignty of a state. Still, the states parties to the statute of an organization are the masters of that organization. The comments

simple. The Charter is not a treaty like any other treaty. It embodies the fundamental principles of today's international legal order. Moreover, all of the Member States of the European Union are at the same time members of the United Nations inasmuch as membership of the world organization today is almost universal, with the sole exceptions of Kosovo and Taiwan.

Thus, the first question to be answered is: Does the Charter have a directly binding effect on the European Community/European Union (EC/EU) as a subject of international law? The Court of First Instance deals at length with this issue.⁹ Referring to its earlier decision in *Dorsch Consult*,¹⁰ it states quite categorically (para. 192) that¹¹

unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter.

But it then proceeds to derive the binding force of the Charter from the EC Treaty where the Member States have expressed their will to abide by the commitments arising for them at UN level. While it remains that the Court does not recognize the Charter as the source of those commitments (para. 207), it eventually subordinates the EC legal order to the UN legal system by applying the doctrine of 'functional succession' as resorted to in *United Fruit*¹² in respect of the GATT. On the whole, therefore, the Court of First Instance can be deemed to advocate the unity of the international legal order, a truly monistic concept of international law in accordance with the general orientation of the jurisprudence of the ECJ.

This concept also underlies the holding of the Court of First Instance that the powers of the Security Council are limited by any applicable rules of *jus cogens*. If indeed the international legal order constitutes an integrated whole, the necessary inference is that the Security Council does not operate in a vacuum. The general rules that the international community has embraced as the foundation of its existence must also then apply to the Security Council. The Security Council does not lead an existence outside and above the law. In sum, one may conclude that the Court of First Instance presents a logically coherent concept.

Curiously enough, the ECJ itself does not squarely address the question as to whether the EC/EU is directly bound by the Charter. Before coming to that question, it first of all heralds that

the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty. (para. 285)

Initially, no hint is made as to the legal reasons that would support the proposition that the Community is placed under a legal obligation to abide by United Nations law, the issue

(Contd.) _____

by Emmanuel Klimis, in O. Corten and P. Klein, *Les Conventions de Vienne sur le droit des traités*, Vol. II, (2006), at 1417-1423, do not perceive the issue.

⁹ *Kadi*, paras 177-208.

¹⁰ Case T-184/95, [1998] ECR II-667, para. 74.

¹¹ All the references are to the *Kadi* case.

¹² Joined cases 21/72 to 24/72, [1972] ECR 1219, para. 18.

which the ECJ had to deal with in the case at hand. At a later stage, such reasons are provided, albeit in very general terms. Thus, in paragraph 291 the ECJ observes that the European Community must respect international law in the exercise of its powers, yet its reference to the two earlier judgments of *Poulsen and Diva Navigation*¹³ and *Racke*¹⁴ is not really to the point, since general rules of international law must of course be binding on international organizations which cannot have a better status than states, the main actors in international law. Likewise, the statement in paragraph 292 to the effect that the powers under Articles 177 to 181 EC in the field of development cooperation must be exercised in observance of the undertakings given in the context of the United Nations and other international organizations¹⁵ is not very helpful: if commitments have been entered into, they must of course be complied with. All of a sudden then (para. 293), the ECJ speaks of ‘the undertakings given in the context of the United Nations in the sphere of the maintenance of international peace and security’, underlining that the Community must

attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

This holding sounds like a full-fledged endorsement of the special position of the United Nations within the architecture of today’s international law, without any regard for arguments that would fit into the traditional classes of legal reasoning. In particular, the *pacta tertiis* rule is totally left aside. The ECJ appears to recognize the overriding importance of the system of the United Nations with its pivotal institution, the Security Council.

However, the ECJ is not entirely happy with this result. Returning to its introductory remarks on the ideological foundations of the European legal order, it downgrades in the following its acceptance of the emanations of the political process at the United Nations. In paragraph 296, it avoids the words ‘abide’ or ‘comply’, but says instead that the Community must, when implementing a Security Council resolution, ‘take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations’ Furthermore, the ECJ suddenly mixes up two different issues; on the one hand, the actual issue of substantive law, the emerging conflict of laws, and the issue of how to implement commitments resulting from the United Nations system. Logically, the first question is to what extent the European legal order owes deference to the United Nations system. Are there any core values which Europe must defend against interference by the United Nations? Is there a need to draw boundary lines in order to check the decision-making processes at the Security Council? Only thereafter, as a second step, would the question arise as to what procedural means should be used to defend the assumed core values.

Regarding the first issue, the ECJ makes very blunt statements, demonstrating that it puts little faith in the conformity of the UN system with the rule of law and human rights.

¹³ *Supra* note 7.

¹⁴ *Supra* note 7.

¹⁵ Case C-91/05, *Commission v. Council*, 20 May 2008, para. 65.

According to paragraph 303 of the judgment, which reiterates the language used in paragraph 285, there can be no derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as the foundation of the Union. This sentence can be read in the most diverse ways. Does the ECJ require that those principles must be maintained to their full extent as understood within the European system, or do the Luxembourg judges only wish to protect the core substance of those principles? According to the former reading, the judgment would be more radical than even the *Solange I* jurisprudence of the German Constitutional Court.¹⁶

Following this, when dealing with the methodology of implementation, the ECJ abandons the position it had affirmed in paragraph 293 by belittling the hierarchical position, within the European legal edifice, of the UN Charter which it equates with a treaty concluded by the Community. Hypothetically, it inquires as to ‘what place obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy’ (para. 305), coming eventually to the conclusion that they could not affect the primary law of the Community.

This is a curious mixture of arguments moving in totally opposite directions. On the one hand, the ECJ takes note of the specific role of the United Nations within the framework of the international legal order. It acknowledges that the Charter and the organization brought into being by it, the United Nations, are the core elements of the system for the protection and maintenance of international peace and security and that, accordingly, deference is owed to them. In fact, their paramount importance has been recognized by all the Member States of the EC/EU through their acceptance of Article 103 of the Charter. Since the Member States are all bound by their obligations under the Charter, they of course cannot escape those commitments by establishing an international organization or other entity to which they transfer certain elements of their sovereign powers. Thus, for instance, NATO, although not a member of the United Nations, is bound by the principle of non-use of force laid down in Article 2(4) of the Charter. Pursuant to the jurisprudence of the European Court of Human Rights both in *Matthews*¹⁷ and in *Bosphorus*,¹⁸ individual states cannot completely shed their responsibility for complying with their obligations under the European Convention on Human Rights through their involvement in the European Community.¹⁹ On the other hand, however, the Court eventually embraces a dualist model where the law of the Community prevails over any requirements resulting from the UN legal order if some core elements of the Community system are affected. In that second part of its reasoning, the ECJ openly disregards Article 103 of the Charter, which is not even mentioned. In this respect, it follows Advocate-General Maduro who deals with this provision in an extremely light-handed way in paragraph 39 of his opinion.

4. Grounds for Defending the Autonomy of the European Legal Order

Whatever the answer to the question of the binding effect of the Charter on the EU/EC, the decisive criterion for the Court is the necessity of defending basic human rights against disproportionate interference by the Security Council. Of course, the EC/EU cannot invoke its ‘sovereignty’, the classic tool of states, when defending its human rights *acquis* since its

¹⁶ 37 *Entscheidungen des Bundesverfassungsgerichts* 271, 29 May 1974.

¹⁷ Judgment of 18 February 1999, Application No. 24833/94, §§ 32-34.

¹⁸ Judgment of 30 June 2005, Application No. 45036/98, §§ 154-156.

¹⁹ See also *Behrami and Saramati*, decision of 2 May 2007, Applications 71412/01 and 78166/01, § 145.

area of jurisdiction cannot be classified as ‘sovereignty’, which is a term reserved to states. In substance, however, no relevant difference can be seen between ‘sovereignty’, on the one hand, and ‘competence’, on the other. If contradictory claims are made by entities wielding public power, the ensuing conflicts must be resolved. Today, such conflicts are more often than not fought with substantive arguments. Thus, in *Solange I* the German Constitutional Court criticized in exactly the same way as the ECJ the lack of adequate human rights guarantees in Community law. For the ECJ, the dualist construction of the relationship between the two competing legal orders is rendered necessary by the perceived inadequacy of the mechanisms for the protection of human rights within the UN system. However, is the alleged lack of adequate protection real, or does the ECJ ride roughshod over international mechanisms that have their own logic and justification?

It must be openly acknowledged that the machinery available at UN level for the protection of individual human rights falls short of the demands consecrated by the relevant human rights treaties, the International Covenant on Civil and Political Rights as well as the existing regional treaties. As a general rule, for the defence of private (civil) rights, judicial protection is provided for.²⁰ No such judicial mechanism exists at the United Nations. The UN Administrative Tribunal²¹ has a limited mandate only as an institution entrusted with adjudicating disputes between the world organization and its staff. Obviously, the Security Council is not eager to be placed under judicial review. Although the establishment of an administrative tribunal tasked with reviewing decisions of one of the sanctions committees, i.e. within a limited area *ratione materiae*, would not amount to subjecting the Security Council generally to judicial oversight, such a measure would have high symbolic value as a first step towards the introduction of a system of constitutional justice at the United Nations. Reflection on whether to embark on such a course has already proved abortive: the Security Council is not prepared to accept such a mechanism.²²

Is the current system of diplomatic protection of such poor quality that indeed it cannot be recognized as a substitute for judicial review proper? Martin Scheinin focuses on this issue in greater detail, but it cannot be totally eclipsed here because the alleged defects of the mechanism provide the justification for the ECJ’s rejection of the mechanism as satisfying the criteria of due process and thereby its insistence on the autonomy of the European legal order. It seems that the ECJ dealt fairly hastily with the requirements of due process, stating quite categorically that only a judicial mechanism meets the appropriate standard. One may call that holding into question. On the other hand, the considerations advanced by the Court of First Instance are not fully satisfactory either. It concludes too quickly that the limitations on access to justice are inherent in a system organized under the auspices of the Security Council. Contrary to the view held by the Court of First Instance (para. 284), the mechanism in operation should at least be able to ensure that there has been no error of assessment of the facts and evidence relied on by the Security Council. On the other hand, the potential of a procedure of diplomatic protection, where the affected individual has the support of his/her state, has not been sufficiently explored.²³ The ECJ states:

In that regard, although it is now open to any person or entity to approach the

²⁰ ICCPR, Article 14 (1); ECHR, Article 6(1).

²¹ Established by UN GA Resolution 351(IV), 1949.

²² See Fassbender, ‘Targeted Sanctions Imposed by the UN Security Council and Due Process Rights’, 3 *International Organizations Law Review* (2006) 437, at 438.

²³ See Tomuschat, ‘Comment on the *Kadi* Judgment of 21 September 2005’, 43 *CMLR* (2006) 537.

Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the ‘focal’ point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto (para. 323).

The fact that a body with power of determination does not enjoy judicial independence should not be rated as an obstacle to its being recognized as being able to ensure due process. It is true that the guarantee of access to justice in matters concerning monetary rights counts among the guarantees that are considered indispensable in Europe. But, as the establishment of the mechanism of the Sanctions Committee precisely shows, there is simply no universal agreement that this should be so. Due process and judicial procedure are not synonyms. However, the ECJ has clearly diagnosed two of the major defects of the applicable mechanism, namely the veto right which each one of its members – all the members of the Security Council are represented – enjoys and the lack of means for the individual to effectively assert his/her rights, albeit subsequent to the listing decision. The Guidelines of the Sanctions Committee provide (section 4(a)) that decisions shall be made ‘by consensus of its Members’. This is the adequate procedure for the listing of a person. But it may become grossly unfair if a request for delisting must be decided upon. Pursuant to this rule, a person may be kept on the list even if all the other 14 members of the Security Council have pronounced themselves against retention of the name concerned on the list. As far as the right to be heard is concerned, great strides have been made in that the individual concerned was authorized, by Security Council resolution 1730 (2006), to submit a petition for delisting directly to the so-called ‘Focal Point’ of the Sanctions Committee.²⁴

Procedural details are not the main subject-matter of this contribution. They were only discussed because the distancing from international law opted for by the ECJ requires explanation. One may agree that it is not incumbent on a court to reflect on the wider repercussions of its decisions – although a good judge always takes such repercussions into account. Obviously, what the ECJ has done, namely to indirectly denounce the procedure of the Sanctions Committee as falling short of adequate human rights standards and therefore to deny the legal validity of the Regulations designed to give effect to the Security Council resolutions, can also be done by other judges anywhere in the world. Thomas Franck has called the approach taken by the ECJ the ‘texasization’ of the European Union,²⁵ referring to the judgment of the US Supreme Court in *Medellín v. Texas*.²⁶ Others might feel tempted to apply the ironic adage in a new European version: *Am deutschen Wesen soll die Welt genesen*, as: European standards shall be world standards. This was the unquestioned *Leitmotiv* of the opinion of Advocate-General Maduro, who did not pay much heed to the functioning of the anti-terror regime but focused solely on the applicable European human rights principles, deeply immersed *dans le bonheur européen*. *Le bonheur européen* - can it sometimes be parochial, *campanilistico*?

²⁴ Generally, it seems that thinking in stereotypes is prevalent in the discussion on the necessity of judicial protection. A procedure in a group of 15 experienced diplomats the factual bases of which are highly transparent can easily be more effective than a procedure before a judge who knows very little about the background and the context. Empirical studies would be needed to clarify the issue.

²⁵ Panel discussion at New York University, 17 September 2008, <http://globaladminlaw.blogspot.com/2008/10/nyu-kadi-panel-discussion-in-full.html>.

²⁶ 552 U.S. (25 March 2008).

5. Concluding Observations

One may fear that the anti-terror regime established by the Security Council may suffer a shock from which it will not be able to recover easily. On the other hand, one may also nurture the hope that the judgment of the Court will stimulate efforts to improve the existing mechanism of listing and delisting up to a point where only one major defect will remain – namely, that the procedure applied by the Sanctions Committee lies in the hands of diplomats and not of judges. An ultimate possibility would be to grant access to a judge at domestic level so that judicial review would occur at the implementation stage and not at the stage of law-making through the Security Council. However, how should national judges be able to assess the relevant evidence – which is not before them? The new European Regulation that will have to be put into force to replace the Regulation declared tainted by legal error in the judgment of 3 September 2008 has not yet been elaborated. In the *Kadi* case, where the ECJ granted three months for an adjustment of the situation, the remedy has consisted of prolonging the freezing period by a specific Commission act.

On the whole, the ECJ seems to lose faith in international law as soon as its own interests are seriously affected by following the path of international normativity. One may well understand that the Court has denied the GATT direct applicability, given the fact that many other countries see the agreements assembled under the roof of the WTO rather as a political arrangement than as a bundle of firmly binding legal agreements. In *Kadi*, however, the Court and its Advocate-General have distanced themselves quite resolutely from a mechanism of international cooperation which could by no means be characterized as an untenable sub-standard quagmire. Even more dramatic is the recent case of *Intertanko*,²⁷ where the Court, by denying the direct applicability of the UN Law of the Sea Convention, also deviated from an international consensus in order to pursue its self-defined policies. Human rights should never suffer. Yet, the EC/EU and its Court should rather attempt to remain within the agreed international frameworks instead of opting for the construction of a fortress Europe.

²⁷ *Supra* note 6.

***Kadi* and the Vicissitudes of Access to Justice**

Francesco Francioni*

1. Introduction

The central question raised by the European Court of Justice's judgment in *Kadi* and *Al-Barakaat*¹ is whether individuals and entities that have been blacklisted by the Security Council for their alleged association with terrorist activities or organizations may be totally deprived of their right of defence and access to justice in order to challenge in points of law and fact the counter-terrorism measures adopted by the Security Council. Before I address this question in the discussion below, it is useful to point out several paradoxes that surround the *Kadi-Al Barakaat* saga.

The first paradox is that the 'targeted sanctions' were meant to meet the human rights concerns raised by the blunt instrument of state sanctions, which indiscriminately impaired all members of the targeted society, including children, women and even opponents of the government responsible for the policies that were at the origin of the sanctions. But, ironically, the new brand of individualized Security Council sanctions have raised even more human rights concerns due to the lack of transparency in the listing procedure, lack of due process of law and, most important, the serious deficiency in remedial process and access to justice, which is the object of this discussion.

The second paradox stems from the very matrix of the Security Council counter-terrorist measures. These measures do not belong to the category of criminal sanctions: they are measures adopted under Chapter VII of the United Nations Charter. Therefore, they are security-oriented measures and have been implemented as such in domestic law.² Thus, if they reflect the responsibility of the Security Council in its 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression' a plausible argument could be made that suspected terrorists who threaten the lives of innocent peoples must be treated as enemies of the peace, and then be subject to the exceptional measures permitted by the law of armed conflict, including requisition of property, limitation of movement and personal freedom. This paves the way towards the fundamental ambiguity over what should be the proper law under which the measures implementing the Security Council's sanctions are to be reviewed. The *Kadi* saga and similar cases which have arisen in the past five years show that the only legal parameters under which these measures have been reviewed are the universal or regional principles of human rights. But if one is to be consistent with the letter and spirit of Chapter VII, the question arises as to how far human rights guarantees can extend to situations in which the Security Council ascertains a threat to the peace or breach of the peace. In this type of situation, where even the use of armed force may be authorized to counter the threat to or breach of the peace, there is a

* Professor of International Law and Human Rights, European University Institute.

¹ See *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union*, joined cases C-402/05 P and C-415/05 P, judgement of 3 September 2008, *Official Journal* C 285 of 8 November 2008, p. 2.

² See Italian Legislative Decree n 109 of 22 June 2007, No. 19, 'Misure per prevenire, contrastare e reprimere il finanziamento del terrorismo e l'attività dei Paesi che minacciano la pace e la sicurezza internazionale, in attuazione della direttiva 2005/60/CE' (Measures to Prevent, Hinder and Suppress Financing of International Terrorism and the Activities of Countries Threatening International Peace and Security, Implementing EC Directive 2005/60), *Gazzetta Ufficiale* n. 172 of 26 July 2007.

point beyond which humanitarian law, and not human rights law, applies. The case law of the International Court of Justice³ and of human rights courts, including the European Court of Human Rights, indicate that international human rights law continues to be applicable even in situations of armed conflict.⁴ However, the degree to which one can be satisfied with this extension of human rights remains subject to the principle of humanitarian law as *lex specialis* and, most importantly, remains for the time being confined to situations of local conflicts. Much doubt remains as to whether the same jurisprudence can be maintained in situations of international conflict of a wider dimension, including the fight against global terrorism.

This point is not elaborated in the *Kadi* decision, nor in the similar cases brought before the Human Rights Committee.⁵

Another point that is missing in the *Kadi* judgment and in the otherwise well-articulated opinion of the Advocate General⁶ is the relevance of the international standards on the rights of aliens in the implementation of targeted sanctions. To the extent that the sanctions apply to aliens and aliens' property, as is the case of *Kadi*, it is not only the body of human rights law that comes into play but also the customary law on the treatment of aliens and the more exacting treaty law on the protection of aliens' property that may be applicable to the specific case. It is regrettable that neither in *Kadi* nor in other similar cases has this specific issue been discussed, given the implications that the breach of aliens' rights may have from the point of view of international responsibility for breach of minimum standard of treatment of aliens.

Having clarified these preliminary points, I will now turn to an examination of the substantive questions that are the object of this brief contribution: 1) whether the modalities of listing-delisting within the Security Council satisfy the international standard of fair hearing and access to justice; 2) whether adequate and effective mechanisms exist under international law to provide diplomatic or judicial protection to victims of possible abuses; and 3) whether, in the final analysis, judicial review of Security Council sanctions or implementing measures is permissible and desirable, and under which legal standards.

2. The Modalities of 'Listing' and 'Delisting'

The mechanism of targeted sanctions has become a generalized system of implementation by

³ See Advisory Opinion on the *Legality of the Threat or Use Nuclear Weapons*, 8 July 1996 *I.C.J. Reports*, 1996, p. 226; Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 9 July 2004, *I.C.J. Reports*, 2004, p. 136; *Case concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgement of 19 December 2005, available at <<http://www.icj-cij.org/docket/files/116/10455.pdf>> (last visited on 22 May 2009); *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, order on the request for the indication provisional measures of 15 October 2008, available at <<http://www.icj-cij.org/docket/files/140/14801.pdf>> (*ibid.*), where the Court found the UN Convention on the elimination of racial discrimination applicable also in a situation of armed conflict.

⁴ See, for the Strasbourg Court, *Case of Isayeva v. Russia*, Application No. 57950/00, judgement of 24 February 2005; *Case of Mezhidov v. Russia*, Application No. 67326/01, judgement of 25 September 2008.

⁵ See *Sayady and Vinck*, Communication n. 1472/2006, CCPR/C/94/D/1472/2006, decision of 22 October 2008. The complexity of the above outlined legal framework places the Security Council in a difficult position. And at the same time it confers on this political organ of the United Nations a wide range of new normative and quasi-judicial function in determining the names of persons and entities to be placed in the lists of suspected terrorists. The consequent accumulation of executive powers in the Security Council is something that was not envisaged in the original scheme of the UN Charter and is not, at present, submitted to a proper system of checks and balances to prevent abuses and excesses of power.

⁶ Opinion of Advocate General Poiares Maduro of 16 January 2008 in case C-402/05 P.

the Security Council of Charter Article 41, i.e. of ‘measures not involving the use of armed force’ to be employed in connection with an ascertained threat or breach of the peace. They may consist of asset freezes, trade embargoes, breaks in communications, travel bans and limitations of movement, as well as the prohibition of export of arms and other sensitive material. As pointed out above, the moral and political justification underlying the rapid development of these types of individualized sanctions rests on the rather convincing argument that in order to confront international crises and threats to the peace it is better to target the responsible individuals or entities rather than blindly and indiscriminately afflict the entire population, including innocent people, of a targeted state.⁷ The origin of targeted sanctions can be found in the law and practice of the United States, which, since the post-World War II period have systematically resorted to this method in order to seek reparation for allegedly unlawful acts of expropriation of their nationals abroad and to respond to situations of international crisis.⁸ At a multilateral level, the method of targeted sanctions was inaugurated by the Security Council in connection with the fight against terrorism. In 1999, acting under Chapter VII, the Security Council introduced the method of listing persons connected to the Taliban of Afghanistan,⁹ followed in 2000 by a similar listing of persons connected to Osama bin Laden and Al-Qaeda.¹⁰ A sanctions Committee has since been established pursuant to these resolutions, with the specific mandate of listing the targeted persons and updating the listing.¹¹ By Resolution 1390 of 2002¹² the Security Council targeted sanctions were extended, including the freezing of assets of persons suspected of being associated with terrorism, travel bans and export controls on the sale and transfer of arms and other material of military relevance. With subsequent resolutions the sanctions have further been extended and exceptions have been provided for, namely provisional access to funds to satisfy the basic needs of addressees and their extraordinary expenses.¹³

Other sanctions committees have been established besides the anti-terror Committee in order to counter situations that present a threat to peace and security. Among them are the committees administering sanctions against Sierra Leone,¹⁴ Iraq,¹⁵ the Ivory Coast,¹⁶ Liberia,¹⁷ as well as North Korea and Iran to counter their respective nuclear plans, and against individuals involved in Lebanon in the assassination of President Hariri, for the investigation and prosecution of which an ad hoc tribunal was constituted in March 2009 in the Hague.

Although each sanctioning committee follows its own operational rules, the institutional setting and the procedures share common features: composition of the committees is the same as

⁷ For a favourable position of the Human Rights Council on targeted sanctions, see *Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while countering Terrorism*, UN Doc. A/HRC/4/88 of 9 March 2007.

⁸ For an analysis of the United States practice, E. Zoller, *Peaceful Unilateral remedies: An Analysis of Countermeasures*, Dobbs Ferry, 1984; B. E. Carter, *International Economic Sanctions*, Cambridge, 1988.

⁹ UN Doc. S/RES/1267 (1999).

¹⁰ UN Doc. S/RES/1333 (2000).

¹¹ *Ibid.*, para. 16.

¹² UN Doc. S/RES/1390 (2002).

¹³ UN Doc. S/RES/1452 (2002). See also Resolutions 1455 (2003), 1526 (2004), 1617 (2005) and 1735 (2006).

¹⁴ UN Doc. S/RES/1171 (1997).

¹⁵ UN Doc. S/RES/1518 (2003).

¹⁶ UN Doc. S/RES/1572 (2004).

¹⁷ UN Doc. S/RES/1532 (2004).

Security Council membership; information in support of listing comes from member states, international organizations and agencies, such as the Office of the High Commissioner on Human Rights, and 'other relevant sources'; information is gathered and received in the absence of examination of the interested party, although the designating state is encouraged, but not required, to consult with the state of nationality of the targeted individual or entity;¹⁸ the request of listing does not presuppose the existence of criminal investigations or proceedings against the persons proposed for listing; the procedure is preventative and not judicial, although nothing stops the state of nationality or residence from providing the opportunity of fair hearings to the persons designated for listing.¹⁹ In the case of the Taliban and Al-Qaeda Committee the listing procedure appears more guarantee-oriented: the request for listing must be accompanied by a 'statement of the case', which must contain reference to 'specific findings demonstrating the association or activities alleged', the 'nature of the supporting evidence', and 'documents that can be supplied'. These guarantees, however, are more formal than substantial. There is no exhaustive list of what may constitute 'supporting evidence'. The Committee is authorized to consider as supporting evidence not only the results of official investigation, acts of the police and of the judiciary, but also generic and unconfirmed evidence resulting from press reports. Besides, the requirement for providing the statement of the case applies only to designating states and not to international organizations and agencies. This leaves an almost unlimited latitude of discretionary powers to the Committee when it has to decide whether to accept or reject a request of listing.

Once the listing has been made, what remedies are available to correct errors of abuses? Originally no procedure was contemplated for delisting persons and entities whose names had been erroneously included in the blacklist. This deficiency became apparent when the Swedish Government requested the delisting of three individuals and an entity for whom no sufficient evidence had emerged to support their inclusion in the list. In the absence of an institutional review process the case was resolved through diplomatic consultations between Sweden and the designating state, which led to the delisting of two of the targeted individuals. In the aftermath of this case, the Security Council requested the adoption by the sanctions committee of appropriate procedures for delisting.²⁰ Under the guidelines adopted by the anti-terror Committee, delisting may be requested by the national state or the state of residence of the listed person or entity acting in the exercise of diplomatic protection; the request triggers bilateral consultations with the designating state, which may lead to the withdrawal of the request or to its transmission to the sanctions Committee. The Committee then decides by consensus. Until the end of 2006 the individual concerned had no opportunity to participate in the delisting procedure. By Resolution 1730 of 19 December 2006 the Security Council provided for the constitution of a *Focal Point* to be set up and administered by the Secretary-General in order to receive and consider individual applications for delisting. Individual application to the *Focal Point* represents an alternative to diplomatic protection but does not

¹⁸ See paras. 2 and 3 of Res. 1617 of 2005.

¹⁹ In Italy the procedure leading to the designation for listing has been regulated by Legislative Decree 22 June 2007, n. 109 (*supra*, note 2), which has established an 11 member inter-ministerial committee for financial security, chaired by the Director General of the Treasury, which has the competence for presenting requests for listing to the UN or the EU. As is evident from its title, this Decree has been adopted in order to implement EC Directive 2005/60.

²⁰ For a detailed analysis of these guidelines see A. Atteritano, 'Targeted sanctions e tutela giurisdizionale', in F. Francioni et al. *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Milano, 2008, p. 428 ff.

replace it. Once the request is received, the *Focal Point* must decide whether it is admissible.²¹ If it is admissible, it is transmitted to the designating state and to the national state or state of residence. Bilateral consultations follow with the support of the *Focal Point*. Within a time limit of three months the consultations must be completed, unless an extension is requested by the participating states. At the end of this procedure the application for delisting may be rejected or submitted, either jointly or separately, to the sanctions Committee, which must decide. A special feature of the procedure is the criterion of negative consensus. Not only is consensus required for the removal of a name from the list, but silence and inaction by the concerned parties once the three-month consultation period has expired entails the rejection of the individual application unless within a month of the expiration one or more members of the Committee request that the application be brought to the attention of the Committee. It is evident that these very tight time limits are meant to facilitate the setting aside of uncertain applications.

Some improvements in the listing and delisting procedure were introduced by Security Council Resolution 1822 (2008),²² especially with regard to the explicit reference in its Preamble to the need to combat terrorism ‘...in accordance with ... applicable international human rights, refugee and humanitarian law’, and the possibility of making public selected parts of the ‘statement of the case’ for listing and notifying the listed individual or entity.²³ But this has not changed the inherent character of the procedure, which remains eminently political and subject to the rule of consensus.

Another case that has contributed to the progressive evolution of the delisting procedure is the *Ayady* case,²⁴ in which the Court of First Instance of the European Community found that Member States are under an obligation to act in diplomatic protection at the UN in support of a national who claims to have been wrongly or unjustifiably listed. This pronouncement goes beyond the mere discretionary ‘right’ of diplomatic protection under international law and introduces a responsibility to protect. This position of the Court is all the more problematic and may have far-reaching effects in as much as a plurality of states are enabled to exercise diplomatic protection under Article 20 of the EC Treaty and 46 of the EU Charter of Fundamental Rights.

3. Due Process and Access to Justice: An Assessment

To what extent are the individual rights of access to justice and to fair hearing – as contemplated in the Universal Declaration on Human Rights,²⁵ in the European and American Conventions,²⁶ and in the Covenant on Civil and Political Rights²⁷ – guaranteed in the above described deliberating process?

It is evident that under this procedure the individual does not learn of the sanction until its

²¹ To be admissible, a request must be new, or, if it is not new, it must include new information and new reasons for delisting.

²² Resolution adopted by unanimous vote 30 June 2008. See text in *Rivista di diritto internazionale*, 2008, n.3, p. 920

²³ *Id* Para 12.

²⁴ See *infra*, note 29.

²⁵ See Article 8

²⁶ See Article 6, Article 13 and Article 25, respectively.

²⁷ See articles 2 (3)(a), 9(4), 14(1)

adoption and application. There is no prior communication, no request for clarification or counter-argument, and no hearing whatsoever. The reason, of course, is the surprise effect short of which suspected terrorists could easily transfer their funds to financial heavens or rogue states. Nevertheless, the surprise effect comes at the expense of procedural fairness. This deficiency has led some states to implement the sanctions of the Security Council subject to a short suspension period during which the targeted person is notified of the measure and afforded the opportunity to present observations and be heard.²⁸ This type of legislation has provoked criticisms on the part of the sanctions Committee, which has insisted on the immediate freezing of assets upon the inclusion of the name of an individual or entity in the list.²⁹

At the same time, even with a prior notification and suspension procedure, the possibility of effective defence by the addressee of the sanctions is seriously impaired by the absence of an individual right of access to documents. This right is guaranteed under the Aarhus Convention³⁰ but does not exist in the United Nations system. Obviously, this due process deficit should be addressed *ex ante*, by affording a fair hearing to the targeted individual or entities before the request for listing is made by the designating state. Yet this appears to be quite unrealistic, given the importance attached to the confidentiality of the process of targeting people suspected of being associated with terrorism.

The situation does not appear to improve if we move from the *ex ante* procedural due process to the consideration of *ex post* judicial protection. In the discussion about possible remedies against abuses or errors of listing, much reliance has been placed on the role of the national state or state of residence in their exercise of a sort of diplomatic protection on behalf of the listed individual or entity. As pointed out above, the Court of First Instance of the EC in the *Ayadi* case³¹ went as far as proclaiming an obligation for Member States to resort to diplomatic protection on behalf of a person claiming to have been wrongfully listed. But however commendable this proclamation may be in terms of improving the remedial process, its legal basis and enforcement prospects remains a question mark. As to the legal basis, the Court seems to have derived the obligation from Article 6 of the EU Treaty, which contains a generic commitment of the Union to human rights, democracy and the rule of law. Diplomatic protection has never been recognized as an individual right³² and is not guaranteed by the

²⁸ This is the system in force in Switzerland, where the addressee of the sanctions is given 30 days to present observations, during which the measure remains suspended. For a detailed discussion of the Swiss regulation see N. Birkhauser, 'Sanctions of the Security Council against individuals – Some Human Rights Problems', available at <<http://www.statewatch.org/terrorlists/docs/Birkhauser.PDF>> (last visited on 22 May 2009).

²⁹ In relation to the suspension procedure adopted by Switzerland in order to allow the listed person to present observations and defences, the Committee has reacted in the following critical terms: '... The Committee wishes to clarify that such procedure is not in conformity with Member States' obligations under Chapter VII of the Charter of the United Nations. For this reason, the Committee urges States to ensure that assets can be frozen as soon as the Committee adds the name of an individual or an entity to the list'. See Letter sent by the President of the Sanctions Committee under Resolution 1267 to the President of the Security Council of 1 December 2005, UN Doc. S/2005/760.

³⁰ See *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, available at <<http://www.unece.org/env/pp/documents/cep43e.pdf>> (last visited on 22 May 2009).

³¹ *Ayadi v. Council of the European Union*, case T-253/02, judgment of 12 July 2006, *Official Journal* C 224 of 16 September 2006, p. 34, paras. 146-149.

³² See, consistently, the International Law Commission's Draft Articles on Diplomatic Protection, adopted in 2006, available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf> (last visited on 22 May 2009).

European Convention on Human Rights, which is expressly referred to by Article 6. But even if one were to concede that Article 6 provides an adequate legal basis for an obligation to exercise diplomatic protection, the scope of the obligation would be limited to Member States of the EU and to listed persons who are nationals or residents of those states. However, most importantly, how could individuals enforce such an obligation? In such a politically sensitive area as that of the fight against terrorism it is very plausible that a state may be reluctant to resort to diplomatic protection of a listed national or resident. In this case the individual, or private entity, does not have *locus standi* before the Community judge to compel the reluctant Member State to fulfil its presumptive obligation. The infraction procedure under Article 226 may not be triggered by an individual but only by the Commission, which enjoys a discretionary power in this respect and has the sole competence for the relative procedure before the Court. Further, the infraction procedure under Article 226 is contemplated only in relation to breaches of obligations arising out of the EC Treaty, while the obligation to exercise diplomatic protection is derived by the Court from EU Treaty Article 6.

Such are the vicissitudes of access to justice even under the diplomatic protection scheme proposed by the Court of First Instance.

Does the establishment of the already mentioned *Focal Point* on the basis of Resolution 1730 (2006) substantially improve the opportunity of access to justice for individuals affected by the listing? The new organ can receive applications for delisting directly from the targeted individuals and entities or through their state of nationality or residence. Resolution 1730 leaves to each state the decision of whether to allow its citizens or residents to address delisting requests directly to the *Focal Point*.³³ This is certainly progress towards the goal of guaranteeing individual access to justice against arbitrary or wrongful acts of listing. However, the *Focal Point* is not a judicial body and does not meet the minimal conditions for the exercise of judicial functions. First, although it is pre-constituted and not ad hoc for each procedure, it is essentially an administrative body set up by the Secretary-General within the administrative structure of the UN Secretariat. This feature is not in itself preclusive of the essential quality necessary to administer justice in an independent and impartial manner. The international standards on access to justice permit that remedial process be provided by administrative organs, different from a court of law, as long as the organ is independent and impartial, and that it decides in accordance with rules of law and follows a pre-established procedure.³⁴ The problem with the *Focal Point* is rather that it is not empowered with competence to adopt a binding decision on the merits of the individual claim. The function of the *Focal Point* is essentially facilitative in the sense that, after receiving the application and transmitting it to the state of nationality or residence and to the designating state, it provides institutional support for bilateral consultations between these states. The final decision on requests for delisting belongs to the sanctions Committee. But since the latter decides by consensus, a negative vote of a member, notably of the designating state, may block the delisting procedure. Little room is left for the legal justification of what may essentially be a political decision.

4. Avenues of Judicial Protection

³³ A note to Res. 1730 reads as follows: '... [a] State can decide that, as a rule, its citizens or residents should address their de-listing requests directly to the focal point. The State will do so by a declaration addressed to the Chairman of the Committee that will be published on the Committee's website'.

³⁴ See, in this sense, the consistent jurisprudence of the Strasbourg Court inaugurated with the Commission's decision in *X v. UK* of 19 December 1973 and confirmed thereafter. See C. Focarelli, *Equo Processo e convenzione europea dei diritti dell'uomo*, Padova, 2001, p. 46 ff.; F. Francioni, 'Access to Justice under Customary International Law', in *Access to Justice as Human Right* (Francioni ed.), Oxford, 2007, p. 30 ff.

Given the above-described deficiencies of access to justice at the international level, what are the possible means of judicial protection available to persons who believe that they have been unjustly harmed by targeted sanctions?

One possibility is to give national courts the power of filling the gap of judicial protection left open at the international level by resorting to a case-by-case review of the applicability of the sanctions to the individual complainant. This approach is based on two logical premises. The first is that, given the fundamental commitment of the United Nations Charter to ensuring respect and protection of human rights,³⁵ we cannot presume that the Security Council has intended to radically depart from such a commitment in the pursuit of its strategy to combat terrorism. On the contrary, the fight against terror is the fight for the vindication of human security and human rights against indiscriminate violence and brutality and for the defence of the most fundamental human right, the right to life. The second premise is that, although the sanctions are adopted by the Security Council, their national implementation is ensured by specific measures or policies of the member states. It is the member state which can coercively seize the property, freeze funds and enact measures limiting the free circulation of the listed person. Allowing the national judge to examine, in the light of fundamental rights, whether or not in a particular case the application of the sanction is justified in respect of an individual applicant who asks to be heard, does not seem inconsistent with the general duty of all members of the United Nations ‘... to accept and carry out the decisions of the Security Council in accordance with the ... Charter’.³⁶ One should not neglect the importance of the phrase ‘... in accordance with the ... Charter’, because the Charter places respect for and protection of human rights among the purposes and principles of the Organization. From this perspective, the role of the national judge would not be that of reviewing the legality of the decisions of the Security Council or second guessing their well-foundedness and appropriateness. It would simply entail the possibility of giving the listed person the chance of being heard, of having his/her case re-examined in light of the evidence provided by the applicant, and of deciding whether the application of the sanction to the specific case is the result of error or of abuse in the listing procedure. The already-mentioned Swiss implementing legislation applies this principle by way of *ex ante* guarantee and temporary suspension of the effects of the sanctions. I see no logical reason why the same guarantee could not be applied *ex post* once the sanction has been implemented in relation to the targeted person, with possible devastating effects on his/her reputation, private life and economic freedom.

I do not believe that this approach is precluded by the primacy clause of Charter Article 103. The national court would not put into question the prevalence of the Security Council’s decision with regard to national law: it would review the correct applicability of the Security Council decision against those very principles of the United Nations Charter, which the Security Council is bound to respect in the exercise of its functions. Among these principles is the principle according to which every person who is accused of and punished for some alleged wrongdoing has the right to be heard before an independent court of law or other independent and impartial administrative body, to defend him/herself, to provide evidence of his/her innocence, and, if necessary, to request a temporary suspension of the afflictive measure, taking into account all circumstances of the case.

I am not convinced that these considerations can be outweighed by objecting that allowing national courts to step in and review the applicability of a given sanction to a particular person

³⁵ See Articles 1 (2) (3) and 55.

³⁶ See Article 25 UN Charter.

would entail the risk of nullifying the effects of the Security Council decisions. This conclusion presupposes a misuse or abuse of judicial protection, which can hardly be presumed. National courts in these situations have the role of ultimate guarantor of the individual right to be heard. To use the words of the European Court of Human Rights, they are called to safeguard the ‘essence of the right’³⁷ to a fair hearing, consistently with international human rights standards and in a situation where no other avenue for defence is available.

The precautionary approach suggested herewith appears all the more compelling when we consider that, in the event of an unfortunate error or abuse in the listing of an innocent person who has nothing to do with a terrorist association or activities, that person has no reasonable prospect of reparation for the injury suffered at the economic, personal or reputational level. The reason is well known: acts of the United Nations are shielded by immunity pursuant to Article 105 of the Charter³⁸ and to the 1946 Convention on the Privileges and Immunities of the United Nations.³⁹ Thus a national court would not be able, in the present state of the law, to adjudicate a claim for damages of a victim of wrongful sanctions against the United Nations once the sanctions have been concretely implemented. One may wish for the development of a practice leading to a restriction of such immunity. But for the time being this road seems to be precluded. On the contrary, independently of the applicability of the immunity rule *ratione personae*, human rights courts also continue to show deference towards the United Nations by insulating even member states from the responsibility for breaches of human rights committed in the performance of a United Nations mandate.⁴⁰

In advocating this prudent approach, I would like to stress that it is based on the rejection of the non-rebuttable presumption that Security Council decisions are unconditionally applicable in the domestic forum, even if they lead to the manifestation of injustice or a radical denial of justice. This is not consistent with the role that the United Nations Charter gives to human rights as one of the fundamental purposes of the Organization. At the same time, it is not consistent with the equally important international standards on the treatment of aliens, applicable when the listed person is an alien, who must always be afforded access to domestic remedies lest the territorial state incur international responsibility for the ‘denial of justice’.

5. The Role of the European Court of Justice

The position advocated in the previous section might appear consistent and even corroborated by the decision of the European Court of Justice in *Kadi*. This judgment, together with the previous opinion of Advocate General Maduro, has been hailed by many commentators as a landmark decision marking a constitutional moment in the vindication of fundamental rights as a parameter in establishing the legality and validity of executive and legislative acts adopted in execution of Security Council measures. Naturally, no one can disagree with the words of Advocate General Maduro when he states that ‘[t]he right to effective judicial protection holds a prominent place in the firmament of fundamental rights’.⁴¹ Echoing the language used by the

³⁷ See *Ashingdane v UK*, Application No. 8225/78, judgment of 28 May 1985, paras. 57 and 59.

³⁸ ‘The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes’.

³⁹ 21 *UNTS* 1418. See Article II, Section 2.

⁴⁰ Such as peace-keeping and international administration of territories in post-conflict situations. See the case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Application no. 71412/01, decision on the admissibility of 2 May 2007.

⁴¹ See para 52 of the Opinion delivered on 16 January 2008 in Case C-402/05 P.

European Court of Human Rights, he adds that '[w]hile certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the very essence of that right'.⁴² The problem I find with the approach taken by the Advocate General and by the Court is that the legal parameter upon which the judicial review is conducted remains exclusively a European Union law parameter rather than the international human rights standards under which the Security Council and all organs of the United Nations should be held accountable. Moreover, the judgment does not review the Security Council's sanctioning measure itself. It limits the object of its review and the consequent annulment on the part of the Community Regulation implementing the Security Council's sanction by way of including the applicants' names in the list of targeted persons. But why should the European Court of Justice take such a formal and inward-looking approach with regard to fundamental rights and in particular the right of access to justice? Here we are dealing with a manifest deficiency in the United Nations mechanism of targeted sanctions. We have seen that this mechanism lacks transparency, and, most importantly, does not provide persons who may have been victims of wrong listing the opportunity of a fair hearing and remedial process. The diplomatic protection cannot be triggered as a matter of right. The *Focal Point*, despite all best intentions, remains a mechanism of inter-governmental consultation where no effective remedy is possible. Under these conditions, why should the European Court not aim directly at the source of the problem: the Security Council's resolutions and the process of listing and delisting. The human rights parameters to be adopted in conducting such a judicial review are the human rights standards of the United Nations system itself and not only the fundamental rights principles that the European Court seems to hold on to as the jealous dowry of the closely knit European family. Of course, there may be a wide overlap between European principles of fundamental rights and international human rights standards historically derived from the United Nations Charter and elaborated through more than 60 years of standard setting. The principle according to which no one can be deprived of the very essence of access to justice to challenge measures that impact on his/her sphere of liberty or property is at the same time part of European law, of international human rights law and of the customary law on the treatment of aliens, which, we may recall, is in large part a response to the unacceptable practice of the 'denial of justice'. It is the widely shared sentiment of the inalienability of this fundamental right that has stimulated worldwide concern and dissatisfaction over the present system of listing and delisting and of the lack of legal means to challenge Security Council counter-terrorism measures.

It may be inappropriate to speak in this context of the absence of remedial process in the Security Council's listing mechanism as a defect amounting to a violation of *jus cogens*. No authority exists to support the view that the human right to a fair hearing and to judicial protection against acts impacting on personal freedom and property is sanctioned by peremptory norms of *jus cogens*.⁴³ However, since the whole concept of *jus cogens* remains undefined and insufficiently supported in judicial practice, one way to signal its emergence in international law is the intensity of the reaction by civil society, the academic community and the judiciary to the fundamental injustice of depriving blacklisted persons of any means to challenge the legal and factual basis of their listing. The reaction in this respect has been one of intense and widespread criticism of a practice by the Security Council, which has been

⁴² *Ibid.*

⁴³ For an explicit rejection of this view, see the judgment of the Court of First Instance in *Kadi*, case T-315/01, judgement of 21 September 2005, *Official Journal* C 281 of 12 November 2005, p. 17. See also B. Conforti, 'Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado', in *Il Diritto dell'Unione Europea*, 2006, p. 333 ff.

perceived as a systematic denial of the essence of access to justice for persons who claim to have been wrongly or unjustifiably placed on the terror lists. Whether or not this negative reaction signals the emergence of a peremptory norm of *jus cogens* on the right to a fair hearing and judicial protection, it is clear that it indicates that something is deeply wrong on moral, political and legal grounds with a system of individualized sanctions that leaves the addressees without the most elementary right of defence and redress.

The transformation of the United Nations system into a more democratic polity may pass through the recognition of the right of fair hearing and access to justice for persons whose reputation, liberty and property have been attacked by their inclusion in the terror lists. This may be a long time coming. In the meantime the European Court could have contributed to the modernization and democratization of the Security Council's sanctioning system by squarely addressing the problem at its roots and affirming that the Security Council measures must also conform with the fundamental principles of human rights as established by the United Nations Charter, the Universal Declaration of Human Rights, and international human rights law, both treaty and customary law. Had the Court based its judicial review on public international law – which forms part of European Union law – the Court would also have paved the way for the possibility to review the sanctions under principles of international humanitarian law, which, as pointed out above,⁴⁴ may be applicable in the context of Security Council measures under Chapter VII and are not part of the fundamental human rights architecture of the European Union.

It is regrettable that the strong human rights message sent by the Court has been framed within the limited confines of the Community legal order and within a dualist logic of separation between international law and the 'domestic' legal system of the Community. The unwitting result is that the vindication of human rights may thus appear to be made in the name of and for the benefit of a cosy regional club of European states rather than for the promotion of human rights and the rule of law worldwide. One may hope that the *Kadi* judgment will nevertheless have a positive impact in terms of stimulating reform and improvement of due process and access to justice in the Security Council's mechanism of listing and delisting. But the European Court certainly missed an opportunity to robustly reaffirm in this case that, even in the difficult fight against terrorism, international and national institutions are bound to respect the fundamental right to access to justice as a matter of international law and not only of European Union law.

⁴⁴ See *supra*, Introduction.

Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ *Kadi* Judgment: A Misplaced Argument Hindering the Enforcement of International Law in the EC

Riccardo Pavoni*

1. Introduction

Discretion in the implementation of UN Security Council (SC) resolutions in domestic legal systems featured prominently among the arguments put forward by the appellants in the European Court of Justice's (ECJ) *Kadi* proceedings¹ as grounds for the annulment of the 2005 Court of First Instance's (CFI) decisions² upholding the lawfulness of Council Regulation (EC) No. 881/2002 and thus of the appellants' listing thereunder as suspected terrorist supporters. As is well-known, the disputed Regulation implemented SC Resolution 1390 (2002) in the European Community (EC). In particular, the measures imposed the freezing of funds and economic resources of persons and entities associated with the Al-Qaeda network or the Taliban, as designated by the Sanctions Committee established by SC Resolution 1267 (1999).

The appellants took the view³ that the CFI erred in law when it assumed that SC resolutions are to be *automatically* transposed into the domestic and EC legal orders; SC resolutions would rather afford substantial *latitude* in performing the obligations resulting therefrom. Therefore, when carrying out SC resolutions targeting individuals, UN Members would be allowed to 'improve the finding of facts'⁴ underlying them, as well as create 'an appropriate legal remedy'⁵ available to listed individuals. The ECJ was quite receptive to this line of thinking and held that:

[T]he Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter... leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.⁶

At first sight, this holding is simply a truism, as long as it applies to the UN Charter the traditional principle according to which it is exclusively for states, with rare exceptions, to determine *how* international law obligations are incorporated into their legal systems. As the ECJ had already stated in previous decisions, the only exception to this principle is represented

* Associate Professor of International Law, University of Siena

¹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission*, Judgment of 3 September 2008, paras. 251, 254 and 260.

² Case T-306/01 *Yusuf and Al Barakaat v Council and Commission* [2005] ECR II-3533, and Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

³ *Kadi and Al Barakaat*, above n 1, para. 251.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*, para. 298.

by a treaty which, interpreted in the light of its subject-matter and purpose, specifies the legal means that contracting parties are to use for realizing it in good faith and full execution.⁷ In other words, states are free to include in the text of an agreement provisions which, either expressly or implicitly, establish the means for its domestic implementation, by clarifying for example that the agreement is self-executing or that it is likely to produce direct effect in domestic legal systems. This exception is rare; it mainly relates to certain bilateral agreements and is by no means triggered by any UN Charter provisions.

However, it is submitted that the apparently innocent holding recalled above played a considerable role in the overall economy of the 2008 *Kadi* judgment. It is also submitted that the same holding, and the reasoning underlying it, was both unnecessary for the conclusion eventually reached by the Court (i.e. that the ECJ was empowered to review the lawfulness of EC legislation implementing SC resolutions, and that the disputed Regulation was inconsistent with fundamental rights as protected by the EC) and a dangerous precedent for future ECJ cases involving SC resolutions and international law in general.

Although the ECJ did not specify which model for carrying out SC resolutions prevails in the European Union (EU), it clearly emerges from the well-established practice of adopting *ad hoc* common positions within the common foreign and security policy (CFSP) mirrored by subsequent EC regulations, that the EU adheres to the generally followed technique of fully transforming such resolutions into domestic legislation. This implies that SC resolutions are not considered as a source of directly applicable or self-executing international obligations. As a consequence, my background assumption is that the ECJ's view was also that SC resolutions do *not* generally enjoy direct effect, namely that they do *not* create individual rights enforceable before the courts.

But did all this have anything to do with the *Kadi* case? That is, what were the objectives of the Court when it emphasized the freedom of UN Members to choose the technique for giving effect to SC resolutions that best suits their legal systems?

2. The Place and Nature of the 'Freedom-to-Implement Argument' in the *Kadi* Judgment

The structure of the 2008 *Kadi* judgment discloses that, in the Court's view, freedom to choose the model for implementing SC resolutions was a key argument. Indeed, the paragraph setting out this argument (para. 298) appears as the 'watershed paragraph' in the part of the decision⁸ inquiring as to whether the principles governing the relationship between the UN legal order and the EC legal order preclude judicial review of the disputed Regulation by the EU courts in the light of fundamental rights as protected by the EU. Paragraph 298 is in fact located midway between (what were regarded as) international law considerations militating in favour of judicial review and EC law principles to the same effect. Indeed, in the following paragraph, the Court pointed out that its human rights-based review of the disputed Regulation was not ruled out by 'the principles governing the international legal order under the United Nations',⁹ which it had allegedly illustrated in the preceding passages of its decision.

In reality, the ECJ had *not* advanced international law arguments in the previous paragraphs in

⁷ Case 104/81 *Kupferberg* [1982] ECR 3641, paras. 17-18, reiterated in Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paras. 34-35 and 41.

⁸ *Kadi and Al Barakaat*, above n 1, paras. 290-309.

⁹ *Ibid.*, para. 299.

support of its power to review EC legislation implementing SC resolutions. Rather, it had mainly recalled its case law¹⁰ upholding the existence of a *European* principle of respect for international law with the consequent duties of consistent interpretation of European legislation and faithful implementation of international obligations, including those stemming from SC resolutions adopted under Chapter VII of the UN Charter. In the end, the absence of any UN Charter obligation establishing specific means for carrying out SC resolutions remains the only argument which may be labelled as one of international law. However, this is at best a diluted international law argument, as the choice of legal means for giving effect to international obligations in domestic systems may also be viewed as a matter not generally regulated internationally rather than one where state freedom is sanctioned by an international law principle. At any rate, the argument at hand by no means renders justice to the striking absence in the 2008 *Kadi* decision of international law reasoning capable of endorsing the Court's power to review EC regulations carrying out SC resolutions in respect of their compatibility with human rights. On the contrary, I think that the Court misused this argument, given that it served the purpose of unduly depriving the decision of any international law basis.

3. Freedom to Choose the Legal Means for Carrying Out SC Resolutions, Autonomy of the EC Legal Order and the ECJ's Choice of the Appropriate Yardstick of Legality for EC Implementing Legislation: What Happened to Customary Human Rights Law?

As a matter of fact, the first purpose of the ECJ's emphasis on the freedom to choose the legal means for implementing SC resolutions was most likely to reinforce its stance in favour of the autonomy of the EC legal order *vis-à-vis* that of the UN, and at the same time to corroborate its key ruling that it is empowered to review EC regulations implementing SC resolutions in the light of fundamental rights as recognized *in the EC*.¹¹ This would not entail reviewing the SC Resolution *as such*, something which – the Court said – would be impermissible.¹²

It is clear that positing the existence of two separate and distinct layers of legislation – a SC resolution, on the one hand, and an EC implementing regulation, on the other, the latter being the expression of a largely free and unfettered choice on the part of the EC – greatly facilitates the findings based on the autonomy of the EC legal order and on the absence of any review of SC resolutions arising from the review of implementing legislation.

Leaving aside for the moment the artificiality and flaws of this construction, it is now especially important to note that the autonomy advocated by the ECJ looks like – if I may for once make use of these popular labels – *radical dualism*. Indeed, it cannot be overlooked that the ECJ refrained from reviewing an EC legal act in the light of *applicable international law*: Why not review the EC Regulation at stake on the basis of the customary international law of human rights or UN Charter obligations, at least those reflecting customary rules?

The Court's radically dualistic approach consisted in deeming that the appropriate conditions of lawfulness for EC secondary legislation were only to be found in hierarchically higher rules originating in the EC legal system itself (i.e. EC human rights law). This approach was not inadvertently selected. It was instead the result of a precise and deliberate methodological

¹⁰ Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9, and Case C-162/96 *Racke* [1998] ECR I-3655, para. 45.

¹¹ *Kadi and Al Barakaat*, above n 1, paras. 282-285, 316-317, 326.

¹² *Ibid.*, paras. 286-287.

choice on the part of the Court. This is evident when one takes into account that all of the primary arguments put forward by the appellants were mostly grounded upon international law and that the EC law argument based on the primacy of EC human rights, which eventually won the day, was an alternative argument.¹³ It is also somewhat ironic that the grounds of appeal based on this EC law argument was saved by the Court from the United Kingdom's plea of inadmissibility due to its untimeliness.¹⁴

In my view, the Court's methodological choice was both unfortunate and unjustifiable. Customary international law is not extraneous to the EC. It is not a body of rules that the ECJ and the political institutions may apply *à la carte* and on a voluntary basis. Since its *Racke* decision, the ECJ has made it clear that customary rules are 'binding upon the Community institutions and *form part of the Community legal order*'.¹⁵ Thus, customary law is a source of EC law and a yardstick of legality for EC secondary legislation. Autonomy of the EC *vis-à-vis* the international legal order and freedom to select the model for implementing SC resolutions have nothing to do with this and are, for that matter, only slogans detracting attention from the well-established principle of EC law that I have now recalled.

Yet it is necessary to briefly consider two possible bases for defending the ECJ's approach. First, the existence of customary international rules protecting the fundamental rights at issue in the *Kadi* case might be doubted, while the same rights are well-entrenched in EC law. Accordingly, the Court's perception might have been that reliance on EC law was the only exit strategy to avoid upholding the validity of an EC legal act that was grossly inconsistent with EC non-derogable constitutional principles. Admittedly, what exactly is or is not customary law in the field of human rights is an unsettled issue, one which is still addressed according to a variety of diverging approaches in legal scholarship. However, I believe that had the ECJ stated that the glaring and substantial violation of the rights of defence and access to justice by the contested Regulation was inconsistent with customary law, no international lawyer seriously committed to human rights would cry shame.

Secondly, reliance on international law norms as the yardstick of legality for the disputed EC Regulation might have implied reviewing the underlying SC Resolution, thus jeopardizing the Court's key holding that this would be impermissible. In other words, it would be untenable to rule that the Regulation violates customary human rights law, while at the same time insisting that this does not affect the validity of the underlying SC Resolution. The SC is arguably bound by customary human rights law, whereas it is definitely *not* bound by EC human rights law. But the alleged incompetence of the ECJ to review, at least indirectly, SC resolutions is highly questionable, as it runs counter to widespread contrary practice of domestic courts and is not sustained by any compelling logical argument. A potential finding by the ECJ that an SC resolution is incompatible with customary human rights would not affect the *erga omnes* validity of that resolution in international law; it would exhaust its effects in the EC legal order. Further, what is in this respect most puzzling in the 2008 *Kadi* judgment is that the Court *did* exercise a degree of judicial review over SC resolutions relating to targeted/individual sanctions. It did so (inadvertently?) when it found that the UN system of targeted/individual sanctions as established under the pertinent SC resolutions did not fulfil the equivalent human rights protection (or 'Solange') test.¹⁶

¹³ *Ibid.*, paras. 250-261.

¹⁴ *Ibid.*, paras. 275, 278-279.

¹⁵ *Racke*, above n 10, para. 46, emphasis added.

¹⁶ *Kadi and Al Barakaat*, above n 1, paras. 321-325.

An elementary question thus remains: What is the practical difference between the two alternatives at stake, i.e. reviewing the disputed Regulation on the basis of EC law rather than customary international law? I may be accused of unwarranted formalism, given that in the end the cause of human rights was essentially endorsed by the *Kadi* decision as the ECJ (though conditionally) annulled the contested Regulation in respect of the appellants and called upon the political institutions to provide them with the procedural guarantees capable of justifying their continuing terrorist listing. The most obvious reply is that reliance on international rules would have boosted the persuasiveness and authoritativeness of the *Kadi* decision as an international law precedent. Conversely, the choice made by the Court to exclusively apply EC law reduces the international stature of the *Kadi* precedent almost to nil. This is neatly demonstrated by a recent domestic decision¹⁷ relating to SC sanctions targeting individuals associated with Al-Qaeda, which was made by the Swiss Federal Tribunal after Advocate General (AG) Maduro had delivered his conclusions in the *Kadi* and *Yusuf* cases¹⁸ (though before the ECJ's judgment) and largely anticipated the EC law approach then followed by the Court. The Federal Tribunal flatly denied that the AG's analysis could induce it to exercise full review over SC resolutions, as the AG was merely giving reasons specifically grounded upon EC law.¹⁹

Further factors militating in favour of the international law alternative will be apparent when discussing the second purpose of the Court in advancing the argument based on the discretion enjoyed in the implementation of SC resolutions.

4. The 'Freedom-to-Implement Argument' and Permissible Complementary Legislation: How Wide is the Scope for Manoeuvre?

There can be no doubt that the second reason for setting out the argument on the freedom to choose the model for giving effect to SC resolutions may be traced to the ECJ's intention to endorse the existence of a certain scope for manoeuvre available to UN Members when transposing those resolutions into their legal systems. As indeed shown by the Court's findings, this scope for manoeuvre (or discretion, or latitude) would authorize the integration of complementary procedural human rights protection into the implementing legislation or practice. Non-observance of these procedural safeguards would affect the validity of the implementing legislation and might lead to the removal of persons from the Community counter-terrorist list. But is this justified by the lack of provisions in the UN Charter imposing the direct applicability/direct effect of SC resolutions? If the SC did not intend to provide 'ordinary' human rights protection to black-listed suspected terrorists, if in other words these complementary measures were not at least implicitly contemplated by the text of the relevant SC resolutions, then this is not a matter of permissible implementing legislation but rather one that violates binding SC sanctions potentially engaging the international responsibility of the EC and/or of its Member States. This is all the more so, when the inevitable consequences of breaching this human rights protection is delisting contrary to UN decisions. This was eventuality clear to AG Maduro when he posited that the ECJ's annulment of measures

¹⁷ Swiss Federal Tribunal, *A c Segreteria di Stato dell'Economia*, No. 1A.48/2007, Judgment of 22 April 2008, available at www.bger.ch.

¹⁸ Opinions of AG Maduro in Case C-402/05 P *Kadi*, and in Case C-415/05 P *Al Barakaat*, respectively delivered on 16 January 2008 and 23 January 2008.

¹⁹ *A c Segreteria di Stato dell'economia*, above n 18, para. 5.4 ('Contro questi giudizi sono invero pendenti gravami dinanzi alla Corte di giustizia delle Comunità europee e, nelle conclusioni, l'Avvocato generale ne postula l'accoglimento. Egli adduce tuttavia motivazioni specifiche fondate sul diritto comunitario...').

implementing SC resolutions on account of their incompatibility with EC human rights law ‘is without prejudice to the application of international rules on State responsibility’.²⁰

The argument of scope for manoeuvre was thus patently mistaken: freedom to choose the model for carrying out SC resolutions does *not* mean freedom to choose the measures and remedies to be included in the implementing legislation. There exist several recent judicial precedents involving SC resolutions where this distinction is correctly set out and which disavow the contrary approach followed by the ECJ. First of all, I believe that *in this respect* the CFI’s *Kadi* decision was essentially right. The CFI stated that, when implementing the SC Resolution at stake, the EC institutions ‘acted under circumscribed powers’,²¹ with ‘no autonomous discretion’;²² ‘they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration’.²³ This holding is in line with the binding nature and primacy of SC resolutions under international law, and of course must be read jointly with the *jus cogens* limit to the validity of SC resolutions that the CFI advocated further in its decision.²⁴ However, the crucial point for our purposes is that the CFI’s position is frequently misunderstood as endorsing the *automatic* (or direct) application of SC resolutions in the EC legal order, as a manifestation of a monistic approach. It seems to me that all this has nothing to do with direct applicability or monism. In the context of the CFI’s ruling, automatic application (an expression that the CFI itself never used) may only refer to *faithful* implementation and does not at all affect the free choice of the EC with respect to the technique for carrying out SC resolutions.

Second, in this respect it is also worth recalling that one of the reasons given by the European Court of Human Rights in its *Behrami* decision for not subjecting to its scrutiny acts and omissions of the contracting parties to the European Convention on Human Rights (ECHR) covered by SC Chapter VII resolutions was that this would be ‘tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself’.²⁵ Here too, this holding – *taken in isolation* – is correct.

Third, the most pertinent precedents are offered by three identical decisions²⁶ delivered in 2008 by the Swiss Federal Tribunal and involving challenges brought against the blacklisting of individuals and entities associated with the former Iraqi regime in accordance with SC Resolutions 1483 (2003) and 1518 (2003). In addressing the appellants’ claim that Switzerland enjoyed substantial latitude in the implementation of the SC resolutions at hand, the Federal Tribunal first recalled that such resolutions must be strictly observed by UN Members and that this prevents them from delisting individuals *proprio motu* on account of the violation by the UN terrorist listing machinery of procedural guarantees enshrined in the UN Covenant on Civil and Political Rights, the ECHR and the Swiss Constitution.²⁷ The Tribunal then upheld, using

²⁰ Opinion in *Kadi*, above n 18, para. 39.

²¹ *Kadi*, above n 2, para. 214.

²² *Ibid.*

²³ *Ibid.* See also paras. 258 and 285.

²⁴ *Ibid.*, para. 230.

²⁵ *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Nos. 71412/01 and 78166/02, Decision of 2 May 2007, para. 149, available at www.echr.coe.int/echr.

²⁶ Swiss Federal Tribunal, *A c Département fédéral de l’économie*, No. 2A.783/2006; *A c Département fédéral de l’économie*, No. 2A.784/2006; *D c Département fédéral de l’économie*, No. 2A.785/2006, Judgments of 23 January 2008, available at www.bger.ch.

²⁷ *Ibid.*, paras. 9.1, 9.2 and 10.1.

almost identical words, the *very same* principle resorted to by the ECJ in the 2008 *Kadi* judgment and discussed in this paper, i.e. that UN Members are free to choose the means for transposing SC resolutions into their legal systems.²⁸ It resolutely refrained, however, from attaching to this principle the far-reaching legal consequences devised by the ECJ. The Federal Tribunal indeed qualified²⁹ the ‘freedom’ of implementation enjoyed by Switzerland with the need to respect the UN counter-terrorist list as drafted by the UN. As a matter of fact, Switzerland had already taken various measures pursuant to its ‘freedom’ of implementation, such as granting listed individuals and entities the right to be heard before impounding their economic resources and transferring them to the Development Fund for Iraq, as well as the right to a judicial remedy against the impoundment decision.³⁰ Further, before transferring the appellants’ assets to the Iraqi Fund, Swiss authorities were under a duty to grant them a final and short period of time for bringing a delisting request to the UN Sanctions Committee under the improved procedures established by SC Resolution 1730 (2006).³¹ But the Federal Tribunal’s critical point is crystal clear: all such domestic measures and remedies may never encompass the power to remove an individual or entity from the counter-terrorist list on a unilateral basis, i.e. with no such action being previously taken by the UN. The Swiss Federal Tribunal’s approach is therefore more orthodox than that of the ECJ when it comes to arguing from the perspective of freedom of choice which SC resolutions to leave to UN Members at the level of domestic implementation.

The outstanding question is whether there exists a way out for the EC capable of removing any shade of international wrongfulness from its *Kadi* case law and practice. Going back to the central theme of this paper, it seems to me that the only option which was (and continues to be) available to the EC for that purpose would be to provide solid international law foundations to such case law and practice. As a matter of principle, exclusive reliance on EC internal law, even on its ‘regional *jus cogens*’, does not preclude the wrongfulness of this practice.³² In *Kadi*, the ECJ was probably aware of this and, unlike the CFI, astutely refrained from taking any position on the issue of whether the EC is formally bound, either under international or EU law, by UN Charter obligations.³³ Yet this is another unfortunate aspect of the decision, contributing to the striking absence of treatment of the international law dimension in the case. The ECJ cannot shield itself behind the uncertain status of SC resolutions in the Community and leave to the Member States the burden of rebutting accusations of inconsistency with international law.

5. Conclusion

²⁸ *Ibid.*, para. 10.2 (‘la Suisse est libre de choisir le mode de transposition en droit interne des obligations qui résultent de la résolution 1483(2003), ainsi que les modalités du transfert des avoirs gelés’).

²⁹ *Ibid.* The Tribunal introduced the argument at stake with ‘sous cette réserve’. It referred to the reservation, set out in preceding (paras. 9.1, 9.2, 10.1) and following (para. 11.2) paragraphs of the decision, consisting in the absence of power to delist individuals and entities from the UN list with no prior input from the UN Sanctions Committee.

³⁰ *Ibid.*, para. 10.2.

³¹ *Ibid.*, para. 12 (para. 11 of *D c Département fédéral de l’économie*).

³² See Art. 27 of the 1969 and 1986 Vienna Conventions on the Law of Treaties, as well as Art. 3 of the 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts. The same principle is generally considered as implicit in the current ILC Draft Articles on Responsibility of International Organizations: for further significant remarks see G. Gaja, First Report on Responsibility of International Organizations, Doc. A/CN.4/532, at 19-20.

³³ *Kadi and Al Barakaat*, above n 1, paras. 305-308.

In this paper, my purpose has *not* been to criticize the conclusion reached by the ECJ on the merits of the *Kadi* case. I am wholly convinced that anyone who is subjected to harsh sanctions with no prior respect for her/his due process rights is entitled to remedy and relief. Rather, my intention has been to clarify that a different and preferable methodological approach was available to the ECJ, i.e., reviewing the contested EC Regulation on the basis of customary international law. On a political level, this would have shielded the ECJ from any charge of undue Euro-centrism and unwanted exportation of democracy and human rights; it is indeed difficult to resist the overall impression of a certain unfriendliness by the Court towards pure international law arguments, whereas its rulings may be labelled as part of a supposed trend towards the Europeanization of international law. Legally, the resulting decision would have appeared much more firmly grounded, thus capable of setting a significant precedent in international law. Yet, by only invoking EC human rights standards, the ECJ defeated the precedential value of its findings in international law.

In addition, the ECJ unduly supported its Euro-centric approach by relying on the freedom to choose the legal means for carrying out SC resolutions, while at the same time it avoided ruling on whether such resolutions are binding for the EC. I have submitted that this was a misplaced argument aimed at emphasizing the separation of the EC and international legal orders, thus strengthening the Court's unfortunate decision not to review the contested EC Regulation (and indirectly the underlying SC Resolution) on the basis of international law. The argument was also misplaced in that it was relied upon by the Court as a justification for a scope for manoeuvre when carrying out SC resolutions that would encompass the unilateral inclusion of procedural guarantees in the implementing legislation and the unilateral delisting of suspected terrorists in cases of non-compliance with those guarantees. But non-direct application of SC resolutions does not mean that states and international organizations are allowed to deviate at will from their text and spirit.

It will be apparent that the thrust of my analysis is quite consistent with the CFI's approach in its 2005 *Kadi* decision. To a certain extent, this is true. Indeed, I do believe that the CFI was on the right track when it saw the question before it as one of indirectly reviewing the SC Resolution at stake and accordingly inquired about the limits to reviewing SC resolutions posed by UN Charter obligations. To view the implementing EC Regulation as a self-standing piece of legislation, completely detached from its international origin, is pure fiction. The CFI was also correct when it said that discretion in the implementation of SC resolutions may not imply alter their content at will, thus compromising their effectiveness and uniform application in breach of international law. However, I firmly disagree with the CFI when it maintained that the exclusive international law limit to the Chapter VII powers of the SC are those arising from *jus cogens* norms. Rather, I concur with legal scholarship asserting that the SC is bound by customary international law as a whole, including first and foremost customary human rights law. In my view, the *jus cogens* limit was an astute choice made by the CFI in full awareness that the ensuing review would yield a negative response, i.e., that the SC resolution did not violate any peremptory norm of international human rights law. Moreover, the CFI's support for an exclusively *jus cogens*-based review, in light of the primacy enjoyed by SC resolutions over international *treaty* law according to UN Charter Article 103, is also extremely controversial.

As already briefly mentioned, the point remains that in the *Kadi* case there was room available for declaring the SC resolution and associated EC Regulation inconsistent with customary international law *as part of the law of the EC*. Most likely, the resulting decision would still be labelled as an example of judicial activism on the part of the ECJ. However, in my opinion this would be sound judicial activism, one which is consonant with the central role of domestic and regional courts in the application and, if need be, progressive development of international law.

Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the *Kadi* Case

Enzo Cannizzaro *

1. In this short contribution I will address two of the controversial issues raised by the ECJ's decision in *Kadi*. The first concerns the effect of Security Council resolutions within the European (EC) legal order; the second, closely related to the first, concerns the competence of the European Court of Justice to review the legality of SC resolutions under higher international standards. I will examine these two issues in the order just described, and only to the extent that they are interrelated. If consideration of the first issue were to lead to the conclusion that SC resolutions produce no effect within the EC legal order, there would be no need to consider the second issue. The simple fact that EC institutions enacted EC law to provide the opportunity for SC resolutions to have effect would be legally irrelevant and would entail no change in the procedure of monitoring compliance with fundamental rights.

2. The relevance of SC resolutions within the EC legal order is quite an old question, mostly answered in the negative by the prevailing scholarly opinion.

The issue can be examined from two different angles. First, one could ask whether the relevance of SC resolutions might derive from their status as binding international law for the EC. Second, even if SC resolutions were not internationally binding for the EC, they could nonetheless be indirectly relevant within the EC legal order by virtue of reference made to them by rules of Community law.

These two options roughly correspond to two different approaches, adopted respectively by the CFI and by the ECJ in their decisions in *Kadi*.

In its decision of September 2005,¹ the CFI seemed to assume that SC resolutions are part of international law, which binds the EC. In paragraph 203, the Court said:

in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community.

As is well known, the CFI traced consequences from this assumption in terms of both its competence to control the legality of SC resolutions in light of higher international law and its lack of jurisdiction to control the legality of the resolutions in light of higher Community law.

It is worth noting that the CFI did not proceed further with this reasoning and did not identify more precisely the legal order in which this binding effect is produced. Nor is this revealed by the Court's reasoning, which is consistent with both options, i.e. it could be read as being in accord with the proposition that the EC is bound to observe SC resolutions under international law or, equally, with the proposition that the obligations flow solely from an implicit rule of Community law.

* Professor of European Union Law. University of Rome 'La Sapienza'.

¹ Judgment of 21 September 2005 Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, [2005] ECR, II-3649

In its decision of September 2008,² the ECJ abstained from expressly addressing the issue. However, the decision contains a number of arguments which are not always entirely consistent. At first reading, the underlying conceptual basis of the decision is given by the full autonomy of the EC legal order from international law. Consequently, the ECJ's analysis focuses on the lawfulness of Community law in implementing SC resolutions, and not on SC resolutions as such.³ If one looks under the surface, however, this impression might change. Within the tortuous line of reasoning in the decision there are occasional passages which shape a more variegated framework for the relationship between UN law and the Community legal order.

3. Attention must be devoted, first, to the section in which the ECJ rules out the possibility that the judicial review of domestic law implementing SC resolutions must be limited by virtue of international obligations deriving from the UN Charter. This conclusion is somewhat surprising. If UN law had no legal relevance within the EC legal order, the possible existence of such an obligation would be equally irrelevant and should not be considered by the ECJ. However, in paragraph 298, the Court goes on to say:

It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

The meaning of this proposition is mysterious and, to some extent, disquieting. Its most natural reading is that domestic judicial review of EC law implementing SC resolutions is permitted because the Charter of the UN does not contain the obligation to give direct effect to SC resolutions within municipal legal orders.

This interpretation, however, would appear highly questionable. Even if the Charter imposed on the Member States the obligation to give full effect to SC resolutions within their municipal legal order, this would certainly not entail a prohibition on subjecting the implementing domestic law to judicial review. Were the UN Charter to be construed as preventing any form of control over the internal lawfulness of domestic law implementing SC resolutions, the question would probably arise, in many contemporary legal orders, as to the lawfulness of the Charter itself.⁴

It is common knowledge that, in the context of well-established case law, the lack of direct

² Judgment of the Court (Grand Chamber), of 3 September 2008, Joint Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, n.y.r.

³ See, in particular, para. 326 of the decision.

⁴ In this regard, the ECJ might have been reminiscent of its case law on the relations between Community rules and national legal orders. As is well known, the ECJ has constantly held that national rules which, in whatever way, hinder the full effect of Community rules are inconsistent with the Treaty and must be set aside by national judges (see judgment of the Court of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, [1978] ECR 629). It would be simplistic, however, to apply this logical scheme to the relationship between international law and municipal law. Even if a treaty contained an obligation to apply directly its provisions in the municipal order of the states parties to it, this would not automatically entail that the treaty provisions of domestic implementing law are automatically granted immunity from internal judicial review.

effect of international law has been used defensively, in order to exclude its use as a standard of legality of conflicting EC secondary law. In *Kadi*, however, the ECJ seems to use the same argument offensively. The lack of direct effect of SC resolutions seems to be the decisive element which prevents international law from interfering with the functioning of the system of guarantees set up by the Founding Treaties. One is left with the question of what devastating effect international law would have on the Community legal order if it were simply provided with direct effect.

Be that as it may, the use of this argument seems to prove what the ECJ seeks to exclude: namely that there are effects potentially produced within the EC legal order in relation to the existence of SC obligations. It would be highly incoherent to consider, even hypothetically, whether the UN Charter requires the granting of immunity to domestic law that implements SC resolutions, if one did not assume, in the first place, that such a hypothetical principle could produce domestic effect.

4. The ECJ seems to uphold the view that obligations flowing from SC resolutions fall under Article 307 TEC. Member States would therefore be enabled to disregard inconsistent EC law, including even obligations deriving from the founding treaties. In a quick passage, the ECJ seems to go even further and contend that SC resolutions also limit the exercise of the competence conferred to the EC.⁵

This assumption was probably inspired by the consideration that all the Member States are today under the obligation to abide by SC resolutions. It might seem absurd that all the Member States can disregard Community law in order to comply with SC resolutions while the Community encounters no limits in relation to SC resolutions in exercising the competence bestowed upon it by the Member States.

In spite of its intuitiveness, this argument does not seem fully convincing. Article 307 can hardly be construed as a limit to the exercise of EC competence in correspondence with international commitments of the Member States. Since Article 307 concerns also, and perhaps primarily, international obligations undertaken only by some of the Member States, this would mean that engagements of a single Member State could condition the exercise of EC competence. Moreover, if one construed Article 307 as a limit to the exercise of EC competence in accordance with SC resolutions, Member States would be under an obligation to remove the cause of the conflict and secure the unimpeded exercise of EC competence.

This incongruity could be remedied if one assumed that international obligations binding for all the Member States, and falling within the scope of exclusive EC competence, are part of Community law *qua* international law binding the Community.⁶

It is noteworthy that, from this perspective, the status and domestic effect of these rules would drastically change. Whilst single Member States can disregard provisions of the Treaty in order to comply with international agreements concluded prior to their entry into the Community, international agreements concluded by all the Member States, once becoming international law binding the Community, could limit the exercise of Community competence but cannot, as a rule, justify a derogation from the founding treaty. As we will see in the next paragraphs, this is precisely the kind of effect which the ECJ attributed to SC

⁵ See, in particular, paras 302-303.

⁶ This perspective has been advocated expressly by some commentators. See, for example, L. M. Hinojosa Martínez, *Bad Law for Good Reasons: The Contradictions of the Kadi Judgment*, *supra*, note 5, at 344.

resolutions in *Kadi*.

5. A further interesting passage of the decision is where the ECJ refers to the possible existence of a system of human rights protection within the UN, as an element capable of alleviating the severity of domestic judicial scrutiny.⁷

Interestingly, the ECJ did not seem to conceive of such an element as part of the judicial activity of balancing interests. It seems rather to represent a limit to the Court's competence: a premise for recognizing a certain, albeit not unfettered, autonomy of an external legal order in discharging its functions, including the function of judicial review.

This is an updated and revised version of the classic *Solange* argument, forged in ECJ style, which stresses the need to consider rules coming from another legal system not in isolation but rather as part of a comprehensive legal system and, therefore, primarily subject to the dynamics of that legal system.

Recourse to this technique by Member States' constitutional courts is commonly believed to have encouraged, in the past, the development of an autonomous body of Community fundamental rights. In spite of the undeniable differences between the two situations, and even considering the lack of homogeneity among the Members of the UN in relation to human rights issues, one might argue that an analogous attitude by domestic judges might gradually favour the emergence of a body of fundamental rights constituting a limit to SC action within the UN system. This development would be very welcome in light of the dramatic evolution the UN legal system is presently undergoing, and would likely transform a classic interstate organization into an entity which possesses powers the exercise of which could deeply affect the situations of individuals. By setting up the UN, the states could hardly have meant to endow it with the unlimited power to govern individual situations without some form of restraint which, in their municipal legal order, accompanies the wielding of public authority.⁸

Without going too far into shaping the functioning of this mechanism, I wish only to point out one of its implications that is of relevance for the current analysis. By accepting recognition of the primary competence for a hypothetical mechanism for the protection of human rights within the UN, and by accepting its own competence to be curtailed in respect thereof, the ECJ seems to conceive of the UN system as being connected to the Community legal order, in the sense that it pursues objectives and discharges functions which fall within the Community's set of values and interests. It is only to avoid any impediment to the achievement of these objectives and therefore any interference with the way in which the UN absolves its functions, that it is conceivable for the ECJ to admit the existence of a limit 'to judicial 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.'⁹

5. Passing now to the second aspect which falls within the scope of this study, the question arises as to the competence of the ECJ to review the legality of SC resolutions under international law.

It is opportune here to recall a passage of the decision which has already become famous

⁷ See. Paras 318 ff. of the decision.

⁸ For a more in-depth analysis of this argument, I refer to my article *A Machiavellian Moment? The UN Security Council and the Rule of Law*, in 3 IOLR (2006), 189.

⁹ According to the concise and clear expression employed in para 326.

among commentators.

[I]t must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such. With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*. However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law¹⁰.

In the Court's wording here the idea of the full and unreserved autonomy of the Community legal order is pervasive. This conclusion falls into two parts: first the ECJ says that the object of judicial review is Community law and the fact that these rules were enacted in order to give effect to SC resolutions changes neither the object nor the standard of judicial review;¹¹ second, it says that SC resolutions cannot be judicially reviewed in the light of higher Community law nor in that of higher international law. Finally, the ECJ stressed that judicial review of implementing domestic law does not touch upon the effect of SC resolutions in international law, which is a truism on the one hand, but which also has a rhetorical effect on the other, and tends to play down the consequence of the ECJ's somewhat dramatic tone.

Not surprisingly, the prevailing view among commentators is that this passage is inspired by a radical dualism.¹² By severing the link between SC resolutions and Community implementing law, and by narrowing down the scope of judicial review to Community law only, the ECJ undoubtedly intended to play down the systemic implications of its decision. By affirming the autonomy of Community law and its separation from international law, the ECJ has, in other words, defused the potential conflict between international obligations and fundamental domestic values.

The price to be paid, however, is very high, from a variety of perspectives.

Philosophically, this conception shaped by the ECJ tends to seal the Community legal order, conceived as *insula felix*, and to safeguard it from the evil influence of the outer world. Whilst it was probably appropriate at a time in which international law was mainly considered as the legal form of *realpolitik*, today it is much less appropriate, since domestic legal orders, including the Community legal order, can benefit from the positive influence of international law in a variety of cases.

¹⁰ Paras 286-288.

¹¹ See, in particular, para 326.

¹² See, for example, L. van de Erik and N. Schrijver, *Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat*, in 5 IOLR (2008), 329, at 336.

This conception also seems at variance with previous case law, inspired rather by the constant search for a balance between the need to open the Community order to principles and values of the law of nations and the need to safeguard internal values and principles. Nor is it fully consistent with other parts of the *Kadi* decision itself, where, as seen above, the ECJ seems to conceive of the UN as a legal order which is somehow interconnected with the Community legal order.

This criticism addresses, in particular, the part in which the ECJ imperatively excludes domestic judges from being able to control the legality of international 'ordinary' law in the light of international peremptory law. In a conceptual framework based on the premise of the radical irrelevance of international law in domestic legal orders, this conclusion appears correct. There is no point in assessing the legality of something which is legally irrelevant.

As shown above, however, in other parts of the decision the ECJ refers to the effect produced, directly or indirectly, by SC resolutions within the Community legal order. Yet, the precondition for the production of these effects is that SC resolutions must constitute valid international law; that is to say that they must conform to both procedural and substantive rules whose observance constitutes the condition of their validity in the legal order in which they are primarily designed to produce their effect.

The existence of these effects is manifestly inconsistent with the idea that the ECJ does not have the competence to pass on the international validity of SC resolutions in the light of a higher international standard. If a court of justice is called upon to appreciate the effect produced by international rules, directly or by means of reference made to them by a domestic source of law, the same court is implicitly empowered, as a preliminary matter, to pass on the international validity of these rules.¹³

Even from a judicial policy perspective, the course taken by the ECJ appears unconvincing. The empirical observance of the relationship between international law and domestic law shows that the influence between these two dimensions of legal experience is necessarily mutual. Domestic legal orders can benefit from influence coming from international law and vice versa. *Kadi* is the typical example of how domestic judges can contribute to the evolution of international law by promoting a development that remains consistent with the basic values and principles of their own domestic order. In such a situation, indeed, the ECJ had an exceptional opportunity to lay down the conditions with which international organizations must comply in order to be recognized as entities entitled to govern individual activities directly. By refusing to review SC resolutions in the light of international *jus cogens*, the ECJ missed an opportunity to have a say in the process of development of this concept.¹⁴

Nor can the self-restraint exhibited on this occasion by the ECJ be considered as deference towards the cultural diversity reflected in the universal composition of the UN.¹⁵ Even in that regard, a balance must be struck between the tendency of domestic courts towards self-restraint, which entails the recognition of the autonomy of the international legal order,

¹³ This argument has been developed in particular by P. Palchetti, *Può il giudice comunitario sindacare la validità internazionale di una risoluzione del Consiglio di Sicurezza?*, 91 *Rivista di diritto internazionale* (2008), 1085.

¹⁴ Analogous observations have been made by a number of commentators. See, for example, A. Gattini, in 46 *CMLRev.* (2009), 213.

¹⁵ This argument is mostly referred to in order to stress the need for domestic judges to avoid imposing their own view about individual rights upon decisions made at an international level. See, for example, L. M. Hinojosa Martínez, *Bad Law for Good Reasons: The Contradictions of the Kadi Judgment*, *supra*, note 5, at 344.

governed by interests and values distinct from those developed in the internal legal experience, and the opposite tendency to judicial activism, which, if uncontrolled, could amount to a sort of legal imperialism of domestic values. It would be wholly inappropriate for a court of justice of one among the manifold and variegated components of the international community unilaterally to impose its view about what *jus cogens* should be, and to shape it upon its own domestic set of fundamental individual rights. To claim a role in the complex process of developing that concept, and to lay down some minimum conditions in order to acquiesce to the establishment of international institutions with the power to govern individual situations, is quite a different thing. In this sense, too, this finding of the Court appears highly infelicitous in the context of a decision inspired by the commendable attempt to assert the rule of law over and above the harsh realities of present international life.

The Impact of the *Kadi* Judgment on the International Obligations of the EC Member States and the EC

Nikolaos Lavranos*

1. Introduction

The main aim of this contribution is to explore the impact of the ECJ's *Kadi* judgment¹ on the international obligations of EC Member States and the EC/EU. More specifically, the focus will be on Article 307 EC, which states that rights and obligations of the EC Member States arising out of pre-accession to international agreements shall not be affected by the EC Treaty. This provision has been construed by some EC Member States as allowing them to deviate from their EC law obligations, notably, fundamental rights obligations, in order to fulfill their obligations arising out of UN Security Council resolutions.

However, before proceeding with the analysis, it is important to emphasize that the analytical framework of this contribution is based on a strictly European constitutional law perspective. Accordingly, the starting point of this analysis is the acceptance that the EC legal order is a separate, autonomous, *sui generis* legal order that exists next to, but not subordinated to, the international legal order.² As a result, the EC legal order has autonomously determined its internal hierarchy of norms. According to the long-standing jurisprudence of the ECJ, international agreements and binding decisions of international organizations (IOs), which have become an integral part of the Community legal order, are placed below primary EC law, i.e. the EC Treaty, the European Convention of Human Rights (ECHR)³ and general principles of Community law.⁴ Therefore, such 'communitarized' international law obligations must be in conformity with the higher ranking norms, in this case primary EC law and the ECHR.

Moreover, due to the fact that the legal status and effect of international obligations that have become an integral part of the Community legal order are not explicitly regulated in the EC or EU Treaties, the ECJ, acting as the 'gatekeeper' between the European and international legal orders, has been determining the internal legal effect of 'communitarized'

* Academic Research Director EU Law, Hague University, The Hague.

¹ ECJ case C-402/05 P, *Kadi*, judgment of 3 September 2008.

See for a selection of commentaries on the *Kadi*-judgment: G. Harpaz, Judicial Review by the ECJ of UN 'smart sanctions' against terror, *European Foreign Affairs Review* (2009), pp. 65-88; T. Tridimas/J. Guitierrez-Fons, EU law, International law and economic sanctions against terrorism: The Judiciary in distress?, *Fordham International Law Journal* (2009)(forthcoming); T. Tridimas, Terrorism and the ECJ: The Empowerment and democracy in the EC legal order, *European Law Review* (2009)(forthcoming); N. Lavranos, Case-note on *Kadi*, *Legal Issues of Economic Integration* (2009), pp. 157-183; A. Gattini, Case-note on *Kadi*, *Common Market Law Review* (2009), pp. 213-239; S. Heun-Rehn, *Kadi* und Al Barakaat – Der EuGH, die Gemeinschaft und das Völkerrecht, *European Law Reporter* (2008), pp. 322-338.

² In accordance with the seminal ECJ judgments case 26/62, *Van Gend & Loos* [1963] ECR 1; case 6/64, *Costa v. ENEL* [1964] ECR 585.

³ The ECHR is the only exception of an international treaty that has been promoted to quasi-primary EC law status. See to this effect eg: ECJ case C-112/00, *Schmidberger* [2003] ECR I-5659.

⁴ See eg: N. Lavranos, *Decisions of International Organizations in the European and domestic legal orders of selected EU Member States*, Groningen 2004.

international obligations through its jurisprudence.⁵ In addition, according to Article 220 EC,⁶ the ECJ and CFI must ensure that the Law is observed. This includes, in particular, also safeguarding the autonomous nature of the Community legal order⁷ as well as fully protecting fundamental rights⁸ and the rule of law.⁹ Furthermore, Article 292 EC,¹⁰ as understood by the ECJ in *Opinion 1/91*,¹¹ *MOX plant*¹² and *Kadi*,¹³ excludes the possibility that an international agreement can modify in any way the ‘very foundations of the Community legal order’.¹⁴

As a result, the ECJ is applying – to use this simplistic category for once – a ‘dualist’ approach towards binding international obligations. In other words, ‘communitarized’ international obligations of the EC and/or its Member States are conditioned by the Community legal order and the jurisprudence of the ECJ. This means that international obligations binding on the EC and/or its EC Member States, whether prior or subsequent to the entering into force of the E(E)C Treaty, must always be in compliance with primary EC law, the ECHR and, ultimately, the very foundations of the Community legal order.

Thus, the UN Charter and UN Security Council resolutions – as far as they are binding on the EC and have become an integral part of the Community legal order through EC implementing measures – are situated in the EC hierarchy of norms below primary EC law, and therefore, cannot be in conflict with the latter.

In short, this European constitutional law perspective, which is in line with the ECJ’s point of view, is diametrically opposed to the international law perspective adopted by the CFI’s *Kadi* and *Yusuf*-judgments.¹⁵ Therefore, it is important to keep the European constitutional law perspective in mind because it determines to a large extent the way that Article 307 EC must be understood.

⁵ See further on the ‘gatekeeper function’ of the ECJ: F. Snyder, *The Gatekeepers: The European Courts and WTO law*, *Common Market Law Review* (2003), pp. 313-367.

⁶ Article 220 EC reads as follows:

The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty.

⁷ See eg: ECJ case C-459/03, *MOX plant* [2006] ECR I-4635. See also: N. Lavranos, *The scope of the exclusive jurisdiction of the Court of Justice*, *European Law Review* (2007), pp. 83-94.

⁸ See eg: ECJ case C-260/89, *ERT* [1991] ECR I-2925.

⁹ See eg: ECJ case 294/83, *Les Verts* [1986] ECR 1339.

¹⁰ Article 292 EC reads as follows:

Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

¹¹ ECJ Opinion 1/91, *EEA* [1991] ECR I-6079.

¹² ECJ case C-459/03, *MOX plant* [2006] ECR I-4635.

¹³ ECJ case C-402/05 P, *Kadi*, judgment of 3 September 2008, *supra* note 1.

¹⁴ *Ibid*, para. 282.

¹⁵ CFI case T-306/01, *Kadi* [2005] ECR II-3533; case T-315/01, *Yusuf* [2005] ECR II-3649. See for a detailed analysis: N. Lavranos, *Judicial Review of UN sanctions by the CFI*, *European Foreign Affairs Review* (2006), pp. 471-490.

2. Misunderstandings and Misconceptions of Article 307 EC

From the outset, it should be noted that Article 307 EC consists of three paragraphs (the first two are relevant for our purposes) and contains several rights and obligations that must be distinguished from each another.¹⁶ Furthermore, a distinction must be made between the rights and obligations arising out of Article 307 EC for the EC Member States and those arising for the EC.

Regarding the EC Member States' obligations, it must first be recalled that Article 307(1) EC contains a 'stand-still' clause for pre-1958 international agreements (indeed for all pre-accession agreements) of EC Member States, which shall not be affected by EC Treaty obligations. This could be misunderstood as a *carte blanche* for the EC Member States to continue fulfilling their international obligations arising out of pre-1958 accession agreements by disregarding conflicting EC law obligations. In particular, this misunderstanding seems to have been based on the fact that the ECJ had accepted in *Centrom-Com*¹⁷ that derogations – even from primary EC law – may be allowed.¹⁸

But that is clearly a misunderstanding and a misconception of the first paragraph of Article 307 EC as becomes clear if we look at Article 307(2) EC as interpreted by the ECJ.

According to the ECJ, Article 307(2) EC imposes an obligation on the EC Member States – not on the EC institutions – to take all appropriate measures to eliminate the incompatibilities (to the extent that they exist) between the European and international legal order – in favour of Community law!¹⁹ Indeed, this obligation goes as far as denouncing the international agreement, if an adjustment of the international agreement should prove impossible or fail.²⁰

¹⁶ Article 307 EC reads as follows:

(1) The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

(2) To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

(3) In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

See for an analysis on Article 307 EC: P. Manzini, The priority of pre-existing treaties of EC Member States within the framework of International law, *European Journal of International Law* (2001), pp. 781-792.

¹⁷ ECJ case C-124/95, *Centrom-Com* [1997] ECR I-81.

¹⁸ *Ibid.*, paras. 56-61.

¹⁹ See eg: ECJ case C-62/98, *Commission v. Portugal* [2000] ECR I-5215.

²⁰ See also the recent Opinion of Advocate General Kokott in case C-308/06, *Intertanko* of 20 November 2007 in which she summed up the ECJ jurisprudence on Article 307 EC as follows:

'77. Accordingly, the Community can in principle require the Member States to take measures which run counter to their obligations under international law. This is already demonstrated by Article 307 EC, which governs inconsistencies between pre-existing international agreements and Community law. Even if the Member States' obligations under pre-existing agreements are initially unaffected by conflicts with Community law, the *Member*

In its *Kadi* judgment the ECJ went even one step further by substantially restricting the scope for invoking Article 307 EC. First, the ECJ emphasized that Article 307 (and 297) EC

*do not authorize any derogation from principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) TEU as a foundation of the Union.*²¹

Second, the ECJ stressed that Article 307 EC

*may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community courts of the lawfulness of Community measures as regards their consistency with those fundamental rights.*²²

Applying this to UN sanctions, it means that if we accept that the complete lack of independent review at the UN level is incompatible with primary EC law and the ECHR, then EC Member States are obliged to establish an appropriate independent review system at the UN level or, if that is impossible, at the European level, in order to bring their UN law obligations into conformity with their obligations arising out of primary EC law, the ECHR and, ultimately, the very foundations of the Community legal order.

In short, rather than arguing that the automatic implementation of UN Security Council resolutions supersedes primary EC law by virtue of the fact that the UN Charter is a pre-1958 agreement, it must be concluded that EC Member States are obliged to correct in one way or another the lack of judicial review at the UN level.²³

Moreover, it should be noted that the scope of application of Article 307 EC is further limited by the principle that exceptions must be interpreted narrowly – at least in EC law. Accordingly, any incompatibilities between international law and EC law must be eliminated by the EC Member States as quickly as possible, so that a potential non-application of EC law is only of a temporary nature, and to ensure that the supremacy and *effet utile* of Community law is restored as soon as possible.

Finally, a close reading of the ECJ's line of reasoning regarding Article 307 EC reveals an important new aspect, namely, the introduction of a new supra-constitutional law level termed the 'very foundations of the Community legal order' which is placed at the apex of the hierarchy of norms of the Community legal order and which enjoys an even higher status than primary EC law. This follows from the fact that rather than reversing its remark made in its *Centro-Com* judgment, i.e. allowing Member States to derogate from primary EC law, the ECJ introduced this new level of core fundamental constitutional values from which no derogation is possible. In other words, while derogations from primary EC law within the context of Article 307 EC and in the light of the *Centro-Com* judgment apparently remain still possible, the ECJ signalled to the EC Member States that such derogations can never affect the very foundations of the Community legal order.

Regarding the EC's obligations under Article 307 EC, it should first be recalled that the EC must, obviously, respect international law as much as possible, but only to the extent that it

(Contd.) _____

States must nevertheless take all appropriate measures to put an end to such conflicts. This may even require the denunciation of international agreements. Member States cannot in principle invoke agreements concluded after accession as against Community law. [emphasis added].

²¹ ECJ, *Kadi*, para. 303 9 [emphasis added].

²² ECJ, *Kadi*, para. 304.

²³ See further: N. Lavranos, *supra* note 15.

is consistent with primary EC law.²⁴ Second, it is to be noted that the EC itself is not bound by pre-1958 agreements.²⁵ Third, Article 307 EC contains *only a duty* on the part of EC institutions not to impede the performance of the obligations of EC Member States, which stem from pre-1958 agreements and which *confer rights on third states*.²⁶

Of course, one may already question in the present context whether the UN Charter *confers rights on third states*. One could construe a right of third states in the sense that all UN members must faithfully implement UN Security Council resolutions in accordance with Articles 24, 25 UN Charter. But even if such a construction was accepted, it is hard to see how the ‘conditioned’ implementation of SC resolutions by introducing an independent review system at the domestic level could affect in any way such a right of third states.

Another question is whether any rights of the UN Security Council – if they exist at all – would be affected in our context. But this question does not have to be answered because Article 307 EC refers only to the rights of third states and not to the rights of international organizations or their (subsidiary) organs.

However, assuming for the sake of argument that rights of third states are involved in this situation, the next question to be answered would be this: Is the EC ‘impeding’ the obligations of EC Member States arising out of the SC resolutions by requiring the existence of an effective judicial review system for the listing and delisting procedure? This would only be the case if there was a ‘conflict’ or ‘incompatibility’ between UN law and EC law obligations of EC Member States. But it is submitted that for the following reasons this is clearly not the case.

In the first place, it should be remembered that both the UN Security Council as well as the EU Council have identified the fight against terrorism as an aim and a task of the UN²⁷ and EC/EU²⁸ respectively. Consequently, both international organizations have adopted an innumerable amount of counter-terrorism measures, largely in synchronization, such as the freezing of funds of suspected individuals and organizations, and the imposition of travel restrictions, etc.²⁹

²⁴ ECJ, *Kadi*, para. 291:

‘291. In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers (*Poulsen and Diva Navigation*, paragraph 9, and *Racke*, paragraph 45), the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.’

²⁵ ECJ case 812/79, *Burgoa* [1980] ECR 2787. See also: P. Craig/G. de Burca, *EU Law*, 3rd ed., Oxford 2008, p. 205.

²⁶ *Ibid.*

²⁷ In 2006 the UN has adopted a Global Counter-Terrorism Strategy, available at: <http://www.un.org/terrorism/>.

²⁸ Also the EU has adopted a Counter-Terrorism Strategy, available at: <http://www.consilium.europa.eu/showPage.aspx?id=1195&lang=en>.

²⁹ As regards the UN see for instance: UN Security Council Resolution 1267 (1999), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement>; and the most recent UN Security Council Resolution 1822 (2008), available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N08/404/90/PDF/N0840490.pdf?OpenElement>.

See generally regarding the UN’s counter-terrorism policy: R. Uruena, International Law as Administration: The UN’s 1267 Sanctions Committee and the Making of the War on Terror, *International Organizations Law Review* (2007), pp. 321-342.

As regards the EU see for instance: Council Framework Decision on Combating Terrorism (2002/475/JHA), OJ 2002, L 164/3, available at: http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf;

Accordingly, from the point of view of the EC Member States – also UN members – there is a legally binding obligation to fully and effectively implement these measures as required by Articles 24, 25 UN Charter and the relevant EC law provisions. Therefore, rather than speaking of any ‘conflict’ or ‘incompatibility’ between UN law and EC law obligations, one has to speak of parallel, similar, legal obligations of the EC Member States arising out of two different sources of law. This is further underlined by the fact that the synchronization between UN and EC measures has been perfected and accelerated by the automatic copying of the UN Sanctions Committees’ listings by EC Regulations.³⁰ Thus there is no conflict between European and international law obligations as far as the *aim of fighting international terrorism* is concerned.

In second place, a ‘conflict’ or ‘incompatibility’, if at all, would thus be limited to the question of whether, and if so, to what extent the EC implementing measures must contain an independent review system for the listing and delisting of targeted individuals.

From the outset, it should be emphasized that neither the UN Charter nor the specific SC resolutions prohibit the establishment of domestic review systems of the UN members. Nor do these instruments prescribe the legal status, or affect the way UN freezing sanctions must be implemented in the domestic legal systems of the UN members. In this context it is interesting to note that the more recent SC resolutions on Counter-Terrorism illustrate an incremental improvement regarding the respect of procedural rights of those listed.³¹

Besides, it is important to recall that the EC/EU is not a member of the UN. Therefore, the EC/EU cannot be bound by UN Security Council Resolutions ‘*in the same way* as the Member States’ as was argued by the CFI.³² Consequently, as a result of the non-UN membership of the EC/EU, the EC has the discretion to create an independent review system in order to compensate for the non-existence of such a system at the UN level.

Indeed, because primary EC law and the ECHR so require, the EC and its Member States are actually obliged to establish such an independent review system at the domestic level, i.e. either at the European or national level, so as to avoid any incompatibilities with primary EC law and the ECHR. In this context, reference can also be made to the *Evans Medical* judgment in which the ECJ emphasized that

when an international agreement *allows, but does not require*, a Member State to adopt a measure which *appears to be contrary to Community law*, the Member State *must refrain from adopting* such a measure.³³

Based on these reasons, the requirement of primary EC law and the ECHR to provide for independent judicial review for the listing and delisting of suspected terrorists cannot in any way be construed within the scope of Article 307 EC as impeding the legal obligations of the EC Member States arising out of the UN Charter and UN Security Council resolutions.

(Contd.) _____

and the most recent up-dated terrorist list: Council Common Position (2009/67/CFSP), OJ 2009, L 23/37.

See generally regarding the EU’s counter-terrorism policy: C. Beyer, The European Union as a Security Policy Actor: The Case of Counterterrorism, *European Foreign Affairs Review* (2008), pp. 293-315.

³⁰ See eg: Council Regulation (2580/2001) OJ 2001, L 344/70.

³¹ See for a detailed analysis: M. Scheinin’s contribution in this volume. See also generally: D. Halberstam/E.Stein, The UN, the EU and the King of Sweden: Economic sanctions and individual rights in a plural world order, *Common Market Law Review* (2009), pp. 13-72.

³² CFI, *Kadi*, para. 193.

³³ ECJ case C-324/93, *Evans Medical* [1995] ECR I-563, para. 32 [emphasis added].

To be sure, in its *Kadi* judgment the ECJ explicitly accepted that freezing measures imposing substantial limitations on the right to property are justified for the fight against terrorism, and therefore, cannot ‘*per se* be regarded as inappropriate or disproportionate’.³⁴

Moreover, it should be stressed that the ECJ did not remove Mr Kadi from the UN or EC freezing list, but merely annulled the relevant EC regulation imposing restrictive measures as far as Mr Kadi is concerned. In fact, the ECJ did not at all judge the correctness of Mr Kadi’s listing. Indeed, it should be added that Mr Kadi has been listed again after the EC Commission enabled him to present his comments regarding his listing.³⁵

What the ECJ did do was to remind the EC institutions and Member States that they cannot – unlike in the *Behrami*³⁶ case before the ECtHR – hide behind the UN Security Council and escape judicial review.

In sum, it cannot be said that the requirement of establishing an independent review system at the domestic level for the listing and delisting imposed by primary EC law and the very foundations of the Community legal order creates any ‘conflicts’ or ‘incompatibilities’ with UN law obligations. Indeed, by satisfying this requirement the EC Member States merely fulfil their existing obligations to effectively protect fundamental rights, which are also part of their *international law obligations* – arising out of the ICCPR, ECHR and possibly even out of *jus cogens*.

As a result, the EC Member States cannot rely in any way on Article 307 EC in order to set aside their primary EC law and ECHR obligations.

3. Conclusions

This contribution illustrates that Article 307 EC cannot be (ab)used by the EC Member States as a justification for setting aside their basic, fundamental EC law obligations. Indeed, with its *Kadi* judgment the ECJ made it very clear that membership of the EC and the obligations arising thereof, restrict and modify the (pre-)existing international law obligations of the EC Member States in that their international conduct in the areas falling within the EC’s competences must always be consistent with the very foundations of Community law, primary EC law and the ECHR.³⁷ Any incompatibilities with their European and international law obligations must be eliminated as soon as possible and in favour of Community law by either modifying the international agreement or, ultimately, denouncing it.

³⁴ ECJ, *Kadi*, para. 363.

³⁵ Commission Regulation No. 1190/2008, OJ, L 322/25 of 2.12.2008.

³⁶ ECtHR, *Behrami v. France*, Application no. 71412/01 and *Saramti v. France, Germany and Norway*, Application no. 78166/01, Admissibility decision of 2 May 2007.

³⁷ See also: A. Gattini, *supra* note 1, pp. 224-225, who remarked:

The *Kadi* judgment is a direct, if late, offspring of the *van Gend en Loos* and *Costa/Enel* jurisprudence, and, without wanting to sound too rhetorical, one might even venture to say that similarly to those decisions it will be a landmark in the history of EC law. *For, in unmistakable terms, the Court maintained that every international agreement, even one which is previous in time, universal in character and political in scope, like the UN Charter, can not impinge on the constitutional Community order. In this way the Court definitely broke the shackles of Article 307, which had consciously been laid on the EC by the State parties in order to keep it anchored in the shallow waters of the archipelagos of international treaty law, and happily sailed off in uncharted waters.*[emphasis added].

This point has been unequivocally stressed again by the ECJ in its most recent judgments on Article 307 EC concerning pre-accession Bilateral Investment Treaties (BITs) between EC Member States and third countries.³⁸ In these judgments the ECJ established that Article 307 EC obliges EC Member States to eliminate even hypothetical, not yet materialized, incompatibilities between a pre-accession agreement and EC law.³⁹

Moreover, because of the autonomous nature of the Community legal order and the task of ensuring that the law is observed, the ECJ exercises – at all times – full judicial review of all measures of the EC institutions and its Member States – even those that have been adopted for the purpose of implementing obligations arising out of international agreements and/or decisions of international organizations, such as SC resolutions.⁴⁰ In this sense, it is true that the ECJ is ‘exporting’ to the global level and indeed imposing on non-EC member states (and international organizations) European fundamental rights standards and values. Is this bad? I don’t think so. For once, European ‘value imperialism’ may serve a good cause, which is to increase the overall level of fundamental rights protection in the world. The daily news from all parts of the globe – sadly – demonstrates that the world is in need of more and better fundamental rights protection rather than less.

Accordingly, the ECJ must continue to be a crusader for promoting European fundamental rights universally. This is even more so, since in its *Behrami* judgment the ECtHR decided not to play this frontrunner role any longer but rather showed excessive and misguided deference towards the UN Security Council, NATO and EC Member States, which also happen to be Contracting Parties to the ECHR.⁴¹

³⁸ Case C-205/06, *Commission v. Austria*, and case C-249/06 *Commission v. Sweden*, Grand Chamber judgments of 3 March 2009.

³⁹ Th. Eilmansberger, *Bilateral Investment Treaties and EU law*, *Common Market Law Review* (2009), pp. 383-429.

⁴⁰ See in particular: B. Kunoy/A. Dawes, *Plate Tectonics in Luxembourg: The Ménage à Trois between EC law, International Law and the European Convention on Human Rights following the UN sanctions cases*, *Common Market Law Review* (2009), pp. 73-104.

⁴¹ In the *Behrami*-judgment the ECtHR pointed out that:

‘149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the *Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself.* This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim. [emphasis added].

This echoes the CFI’s view in its *Kadi*-judgment, when it argued that:

‘284 Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 282 above, to check indirectly the appropriateness and proportionality of those measures. *It would be impossible to carry out such a check without trespassing on the Security Council’s prerogatives under*

(Contd.) —————

Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted vis-à-vis the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security. [emphasis added].

See for critical analysis of the Behrami-judgment: K.M. Larsen, Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test, *European Journal of International Law* (2008) pp. 509-531; M. Milanovic/T. Papic, As Bad as it Gets: The ECtHR’s Behrami and Saramati Decision and General International Law, *International and Comparative Law Quarterly* (forthcoming).

Is the ECJ Ruling in *Kadi* Incompatible with International Law?

Martin Scheinin*

1. Introduction

This article discusses the *Kadi* ruling by the European Court of Justice¹ from the perspective of public international law. Its main thesis is that instead of using *Kadi* as evidence of a conflict between the normative orders of the European Union and the United Nations, it is more useful to speak about tensions that exist within both legal orders. While the form in which those tensions express themselves, and perhaps even the outcomes of efforts to resolve the tensions may differ, the existence of a tension between the imperative of taking decisive and effective measures against terrorism, and the obligation to respect the fundamental rights of the individual while doing so, is a factor creating unity between the two normative orders. While complete harmony may not have been obtained through the first wave of cases litigated in EU and UN fora, this should not be seen as evidence of the two legal orders being irreconcilable or developing in two different directions. Rather, the existing discrepancies between the two regimes should be seen as a challenge that needs to be met through increased attention to the uniting factors, with a view to fully utilizing the existing potential for harmonizing interpretation.

The three next sections of this contribution seek to demonstrate the following: the outcome in the *Kadi* case is compatible with international human rights law, as expressed in United Nations human rights treaties (section 2); the ECJ ruling in *Kadi* should be seen as an affirmation of a high degree of coherence between EU law and international law (section 3); and the outcome in the *Kadi* case also has much support in institutional United Nations law (section 4). The last section (section 5) of the paper discusses whether there is a feasible alternative to a coherence-based reading of *Kadi*.

2. Sayadi and Vinck v. Belgium

In order to illustrate the main point of the paper, the much less well-known case of *Sayadi and Vinck v. Belgium*,² decided by the United Nations Human Rights Committee acting under the International Covenant on Civil and Political Rights less than two months after the ECJ ruling in *Kadi*, is first presented and discussed. While the Human Rights Committee may not have got it right in all respects when it comes to applying human rights within a broader United Nations law framework, the case provides evidence of the existence of the same tensions as in EU law between counter-terrorism obligations and human rights obligations, and also demonstrates that there is a prospect of harmony between the UN and EU legal orders.

In 2002, a criminal investigation was launched in Belgium against two Belgian nationals,

* Professor of Public International Law, EUI. The author also serves as United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

¹ *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, Joined Cases C-402/05 P and C-415/05 P, European Court of Justice (Grand Chamber), 3 September 2008.

² *Nabil Sayadi and Patricia Vinck v. Belgium* (Communication No. 1472/2006), Final Views by the Human Rights Committee, 22 October 2008.

Mr Sayadi and Ms Vinck. Soon thereafter Belgium informed the 1267 Sanctions Committee of the Security Council³ that the individuals were, respectively, the director and secretary of Fondation Secours International, reportedly the European branch of the Global Relief Foundation, an American association that had one month earlier been put on the sanctions list. Within a period of eight days in January 2003, the two persons were listed as terrorists by the Security Council, by the EU Council, and by Belgium, without giving them access to the information used as a basis for their listing. As a consequence the assets of the two individuals, a married couple with four children, were frozen, preventing them from working, travelling, moving funds and defraying family expenses.⁴

After two years the criminal investigation still had not led to prosecution. In February 2005, a Belgian court ordered the government to seek the delisting of the persons. In December 2005 the individuals managed to obtain a judicial dismissal of the criminal investigation against them.⁵ While the Belgian government sought at the UN level the delisting of the individuals, it was unable to obtain the unanimous approval of its request within the 1267 Sanctions Committee,⁶ even during 2007-2008 when Belgium was a member of the Security Council and for part of that time even Chair of the 1267 Sanctions Committee.

In May 2009, Mr Sayadi and Ms Vinck were still on the Consolidated List.⁷

Marko Milanovic has extensively criticized the Human Rights Committee for not acknowledging that the case involved a potential conflict between the Covenant on Civil and Political Rights and Belgium's obligations under the United Nations Charter.⁸ It is certainly true that the Committee could have been more thorough in this issue than it was. But basically the Human Rights Committee adopted the same approach as Advocate General Miguel Poiares Maduro and the European Court of Justice in *Kadi*: that the Committee was merely assessing the compatibility of Belgium's measures relating to the listing of the two individuals by the UN, rather than examining the lawfulness of the listing itself:

10.3 Although the parties have not invoked article 46 of the Covenant, in view of the particular circumstances of the case the Committee decided to consider the relevance of article 46. The Committee recalls that article 46 states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. However, it considers that there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of

³ The United Nations listing of the Taliban, Al-Qaida and associated terrorists in a so-called Consolidated List, is based on Security Council Resolution 1267 (1999), as developed through a number of subsequent resolutions and currently codified into Resolution 1822 (2008). The body deciding on the listing of individuals and entities is usually referred to as the 1267 Sanctions Committee, an intergovernmental body composed of the diplomatic representatives of the fifteen members of the Security Council.

⁴ *Sayadi and Vinck* (footnote no. 2), paras. 2.1-2.3.

⁵ *Idem*, para. 2.5.

⁶ As explained in paragraph 4.3 of the Committee's Views, consensus on de-listing can be obtained through the no-objection procedure implying de-listing in the absence of objections within 48 hours (counted in working days). This was, however, blocked when unspecified 'members' of the Sanctions Committee within the established time limit expressed reservations about Belgium's petition.

⁷ In the list, as available on 17 May 2009 on the UN website (<http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>) and dated 20 April 2009, Mr Sayadi and Ms Vinck appear in section C of the list, i.e. as individuals associated with Al-Qaida.

⁸ Marko Milanovic, 'Sayadi: The Human Rights Committee's Kadi (or a pretty poor excuse for one...)', available on *EJIL: Talk!* at <http://www.ejiltalk.org/index.php>

the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution. Consequently, the Committee finds that article 46 is not relevant in this case.⁹

Through this somewhat artificial or stretched distinction between the UN imposing the sanctions and Belgium merely implementing them, the Committee avoided questions such as whether Security Council powers under Chapter VII of the Charter trump human rights obligations of member states through the application of Article 103 of the Charter, or whether member states are under the UN Charter itself allowed or even obliged to find a way to implement UN sanctions in a way that does not conflict with human rights, or whether there could be an in-between position that a threat to peace and security that has been identified by the Security Council and resulted in a Chapter VII resolution that is mandatory to all member states, constitutes a valid reason for declaring a state of emergency pursuant to article 4 of the Covenant and then proceeding to derogation from some but not all Covenant rights.

In their individual opinions, Committee members did engage in some discussion on these or related matters.¹⁰ For instance Yuji Iwasawa, who is currently the Chair of the Human Rights Committee, engaged in harmonizing interpretation in his concurring individual opinion where he basically said that while Belgium was compelled to comply with its Charter obligations, it could have done so through measures that were less intrusive to human rights than those chosen. According to Iwasawa,

The State parties to the Covenant are obliged to comply with the obligations under it to the maximum extent possible, even when they implement a resolution of the United Nations Security Council... The State party could have acted otherwise while in compliance with the resolutions of the Security Council of the United Nations.

Similarly, in his concurring individual opinion on the merits, Nigel Rodley held that 'the course of action adopted by the State party was not compelled by Security Council resolutions, notably resolution 1267 (1999)'. Rodley listed a number of criteria that in his view are applicable when assessing the permissibility of measures by states in the implementation of their Charter obligations and concluded that 'the answers vary according to the conditions being faced'. For him,

It is not easy to see why nearly a decade after the first resolution 1267 (1999) and seven years after 9/11 the Council could not have evolved procedures more consistent with the human rights values of transparency, accountability and impartial, independent assessment of fact.

While the dissenting and concurring individual opinions shed some light upon the differing schools of thought within the Human Rights Committee, the Committee itself was blunt and straightforward in simply applying the distinction between the UN imposition of sanctions

⁹ *Sayadi and Vinck* (footnote no. 3). See, however, the dissent to the admissibility of the case by Committee member Ruth Wedgwood: 'The only actions taken by Belgium were in accordance with the binding mandate of the Security Council.'

¹⁰ Ivan Shearer (dissenting) referred to the primacy of UN Charter obligations pursuant to Article 103 of the Charter: 'Human rights law must be accommodated within, and harmonized with, the law of the Charter as well as the corpus of customary and general international law.' He held that Belgium had acted in good faith in trying to have the applicants delisted, and therefore he found no violations of the Covenant. However, Shearer commented favorably on the ECJ ruling in *Kadi*, and stated that 'there can be said to exist a certain margin of appreciation vested in States when giving effect to binding decisions of the Security Council.'

and the role of the member state in implementing them.

The present author, in his capacity as United Nations Special Rapporteur on human rights and counter-terrorism, has argued for a distinction between the Security Council imposing targeted sanctions through its listing of terrorists, and member states having to comply with human rights when implementing those sanctions. Applying a kind of ‘Solange’ approach, the conclusion then was to call for national-level judicial review over the implementation of the sanctions, not over the validity of the Security Council measures themselves:

The Special Rapporteur is of the view that if there is no proper or adequate international review available, national review procedures – even for international lists – are necessary. These should be available in the States that apply the sanctions.¹¹

Obviously, I do not think the Human Rights Committee was ‘wrong’ in framing the question as it did. True, a broader discussion would have been interesting for us academics to read. However, as the Committee was deciding on a human rights case brought to it by two individuals, it may have been wise to set aside the broader issues by simply insisting on the somewhat artificial distinction between the imposition and the implementation of the sanctions. Hence, the present author finds Milanovic’s strong criticism of the Committee to be unjustified.

Of course, the Committee could have faced the broader UN law issues head-on. Whether its 18-member composition could ever have come even close to agreement on those issues is another matter. Here, it is worth noting that Belgium did provide an opportunity for the Committee to address the UN law issues. As paraphrased by the Committee, Belgium argued:

4.12 ... Moreover, the measures to combat the financing of terrorism were adopted by the Security Council under Chapter VII of the Charter of the United Nations. The existence of a threat to international peace and security is an exceptional circumstance justifying restrictions on the enjoyment of the individual rights established in international human rights instruments. Article 103 of the Charter provides that ‘in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’¹²

Moving then to the merits of the case of Mr Sayadi and Ms Vinck against Belgium, the Human Rights Committee examined their claims that Belgium had violated a number of ICCPR provisions, including Articles 12 (freedom of movement), 14 (fair trial), and 17 (privacy).¹³

¹¹ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, A/61/267 (2006), para. 39. Incidentally, this paragraph was quoted by Advocate General Miguel Poiares Maduro in his Opinion in *Kadi* (paragraph 38 and footnote 46).

¹² *Sayadi and Vinck* (footnote no. 3). See, also, paras. 6.3 and 8.1, and also para 6.4 where Belgium addresses the question of whether the derogation powers of states under article 4 of the Covenant are applicable in respect of UN Security Council resolutions adopted under Chapter VII. Further, Belgium made a number of objections to the admissibility of the case, arguing, inter alia, that the case before the Human Rights Committee constituted ‘the same matter’ as Belgium’s request for delisting was pending before the Sanctions Committee which constituted another international procedure for investigation or settlement (para. 4.5). Also, Belgium argued that for the purpose of the sanctions, the applicants did not fall within the ‘jurisdiction’ of Belgium (paras. 4.11 and 6.1).

¹³ Paragraph 10.4.

The Committee found a violation of the right to freedom of movement (Article 12), considering that the travel ban implemented by Belgium upon the two individuals was not merely a permissible restriction on freedom of movement but an actual violation of this human right. Of course, the answer could have been different had the Committee considered that the threat to peace and security identified by the Security Council constituted a state of emergency and triggered Belgium's right to derogate from Article 12. And certainly the answer would have been different had the Committee based itself on the premise that the listing of the authors was in conflict with Belgium's human rights obligations otherwise stemming from Article 12. But Article 103 of the UN Charter resolved that conflict in favour of the Charter obligation to keep the individuals under a travel ban.

10.7 The Committee notes that the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a 'restriction' covered by article 12, paragraph 3, which is necessary to protect national security or public order. It recalls, however, that the travel ban results from the fact that the State party first transmitted the authors' names to the Sanctions Committee. ... The Committee finds that the State party's arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee (see paragraph 9.2 above). It also notes that the authors' names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists and for the resulting travel ban.

10.8 ... Moreover, on two occasions the State party itself requested the removal of the authors' names from the sanctions list, considering that the authors should no longer be subject, *inter alia*, to restrictions of the right to leave the country. The dismissal of the case and the Belgian authorities' requests for the removal of the authors' names from the sanctions list show that such restrictions are not covered by article 12, paragraph 3. The Committee considers that the facts, taken together, do not disclose that the restrictions of the authors' rights to leave the country were necessary to protect national security or public order. The Committee concludes that there has been a violation of article 12 of the Covenant.

In short, the Committee held that as Belgium initiated the listing of the two individuals, the chain of causality between that act and the consequence of the continuing travel ban meant that the interference with the authors' freedom of movement was attributable to Belgium. And because Belgium itself had tried to have the individuals delisted, the travel ban was not necessary and constituted a permissible restriction on the freedom of movement.

The Human Rights Committee also found a violation of the right to privacy, as enshrined in Article 17 of the Covenant. The reasoning is similar to the one applied in respect of freedom of movement, albeit phrased under the notion of 'attack', rather than 'restriction'. This is because unlike ICCPR Article 12, Article 17 does not contain a genuine limitations clause but merely a prohibition against unlawful or arbitrary attacks.

10.13 The Committee takes note of the authors' argument that the State party should be held responsible for the presence of their names on the United Nations sanctions list, which has led to interference in their private life and to unlawful attacks on their honour and reputation. It recalls that it was the State party that communicated all the personal information concerning the authors to the Sanctions Committee in the first place. The State party argues that it was obliged to transmit the authors' names to the Sanctions Committee (see paragraph 10.7 above). However, the Committee notes that it did so on 19 November 2002, without waiting for the outcome of the criminal investigation initiated at the request of the

Public Prosecutor's Office. Moreover, it notes that the names are still on the lists in spite of the dismissal of the criminal investigation in 2005. Despite the State party's requests for removal, the authors' names and contact data are still accessible to the public on United Nations, European and State party lists. The Committee therefore finds that, in the present case, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists. The Committee concludes that the facts, taken together, disclose that, as a result of the actions of the State party, there has been an unlawful attack on the authors' honour and reputation. Consequently, the Committee concludes that there has been a violation of article 17 of the Covenant.

Somewhat surprisingly, the Human Rights Committee did not find a fair trial violation. This was partly because of the success the authors had had before Belgian courts in obtaining a judicial order for the Government to initiate delisting and a dismissal of the criminal investigation against them. Where the present author disagrees with the Committee is the latter's view that the sanctions against the two individuals, as implemented by Belgium, for their severity did not reach a level that would have triggered the application of the notion of 'a criminal charge' under ICCPR Article 14, and hence requiring full fair trial guarantees in accordance with, *inter alia*, paragraphs 2 and 3 of the provision.

In my 2006 thematic report to the General Assembly as UN Special Rapporteur, I argued for that conclusion. The domestic classification of sanctions against persons put on a terrorist list as 'administrative' should not prevent their consideration as a matter of international law as criminal sanctions, if they for their severity are comparable to criminal punishments. For instance, if the 'temporary freezing' of a person's assets lasts for years and is never reconsidered, then it should be taken as analogous to the confiscation of property and trigger the application of procedural guarantees required in the consideration of a criminal charge against an individual.¹⁴

The Human Rights Committee came to a different conclusion through somewhat truncated reasoning. After paraphrasing the positions of the complainants and the respondent state, the Committee first gave two good arguments for finding that the notion of 'criminal charge' was applicable and then, without even presenting the counter-arguments, just stated the opposite conclusion:

10.11 With regard to the allegation of a violation of article 14, paragraphs 2 and 3, and article 15, ... it takes note of the arguments of the authors, who consider that the sanctions imposed on them are criminal in nature and that the State party launched a criminal investigation in addition to enforcing the sanctions (see paragraph 5.9). The Committee also takes note of the State party's arguments that the sanctions cannot be characterized as 'criminal', since the assets freeze was not a penalty imposed in connection with a criminal procedure or conviction (see

¹⁴ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, A/61/267 (2006), para. 35: 'In particular, the Special Rapporteur notes the question of whether the nature of the sanctions — civil or criminal — determine the procedural safeguards, including which standards of proof, shall apply. The Analytical Support and Sanctions Monitoring Team of the 1267 Sanctions Committee supports the idea that the Committee's Consolidated List is not a criminal list and that indictment by a court of law is not a precondition for inclusion on the list, because the sanctions do not impose a criminal punishment or procedure such as detention, arrest or extradition, but instead apply administrative measures. However, it is generally accepted that the determination of whether the charges are criminal or civil depend on the seriousness of the sanction or punishment. If the sanctions linked to inclusion on the list are permanent, then no matter how they are qualified, they may fall within the scope of criminal sanctions for the purposes of international human rights law.'

paragraph 6.2). Moreover, the State party maintains that placement on the list was a preventive rather than a punitive measure, as was apparent from the fact that the persons affected could obtain authorization for an exemption from the freeze on their assets and from the travel ban (see paragraph 6.4). The Committee recalls that its interpretation of the Covenant is based on the principle that the terms and concepts in the Covenant are independent of any national system or legislation and that it must regard them as having an autonomous meaning in terms of the Covenant. Although the sanctions regime has serious consequences for the individuals concerned, which could indicate that it is punitive in nature, the Committee considers that this regime does not concern a ‘criminal charge’ in the meaning of article 14, paragraph 1. The Committee therefore finds that the facts do not disclose a violation of article 14, paragraph 3, article 14, paragraph 2, or article 15 of the Covenant.¹⁵

3. Recapitulation and Comparison with *Kadi*

When addressing the conduct by Belgium in the UN listing as terrorists of Mr Sayadi and Ms Vinck, and the refusal to delist, the Human Rights Committee applied a distinction between the UN imposing the sanctions and a member state implementing them. By doing so, the Committee managed to push aside the question of whether there was a conflict between Charter obligations and human rights treaty obligations pursuant to the ICCPR, or whether the threat to peace and security identified by the Security Council in a Chapter VII resolution constituted valid grounds for derogation from some of the provisions of the ICCPR. The individual opinions by several members of the Committee add some nuances to the Committee’s line of argumentation.

As the right to property, albeit enshrined in the Universal Declaration of Human Rights, is not covered by the ICCPR, the consequences of the listing were not assessed as a potential violation of that human right. Instead, the Human Rights Committee found violations of the freedom of movement and the right to privacy, as the measures taken in respect of the two individuals were too sweeping or too intrusive to be compatible with Articles 12 and 17 of the ICCPR.

Interestingly, no violation of the right to a fair trial (Article 14) was found, partly because the applicants had had some success before Belgian courts, but ultimately because the Committee accepted the national (and UN) qualification of the sanctions as administrative ones and therefore not as triggering the application of full fair trial guarantees required in the consideration of a ‘criminal charge’. On this point the Committee clearly departed from the position taken by the present author in his UN capacity as Special Rapporteur on human rights and counter-terrorism.

Incidentally, this happens to be exactly the same point where the European Court of Justice also missed an opportunity to explain why its *Kadi* ruling was in conformity with universal

¹⁵ *Sayadi and Vinck* (footnote no. 3). In three individual opinions appended to the Committee’s decision to declare the case admissible also under articles 14 and 15, six members of the Committee expressed more categorical positions than the Committee’s subsequent final views on the non-applicability of the notion of ‘criminal charge’: ‘Nor do we understand on what basis it believes that articles 14 and 15 could be relevant to actions that the State party quite rightly maintains are administrative, not criminal’ (Nigel Rodley, Ivan Shearer and Iulia Motoc). ‘While it is true that freezing of the authors’ financial assets is part of the fight against terrorism, this measure clearly does not serve the purpose of sanctioning the authors for their allegedly illegal behaviour but rather aims at preventing them from continuing their alleged support of terrorist activities, and thus is of administrative character’ (Walter Kälin and Yuji Iwasawa). And ‘... the sanctions regime imposed by the Security Council is not a criminal proceeding’ (Ruth Wedgwood).

human rights. Instead of looking at the severity of the sanctions for the conclusion that the sanctions amounted to a criminal charge and triggered full fair trial rights, the ECJ based itself on the EU law notion of ‘rights of the defence’ which for its scope of application is broader than the human rights law notion of ‘criminal charge’. The different treatment of the issue of the right to a fair trial by the ECJ and the Human Rights Committee demonstrates that there would have been good legal arguments that the two bodies could both have applied, thereby strengthening the coherence between universal human rights and fundamental rights as enshrined in EU law. This time they both chose differently, resulting in an ostensible differentiation between the two bodies of law.

In the wide discussion on the ECJ ruling in *Kadi*,¹⁶ one strong trend has been to depict the ECJ as defending a *European* perception of human rights¹⁷ and therefore refusing to apply the UN legal order where human rights are less prominent, or represented in the form of lower substantive standards. While this may reflect some of the wording of *Kadi*, it is submitted here that the narrative of a conflict between a human-rights-oriented European legal order and a human-rights-ignorant UN legal order is false. The Human Rights Committee case of *Sayadi and Vinck*, discussed in the previous section, bears witness to the presence of exactly the same tensions *within* the UN legal order as are said to exist between a European and a UN legal order. Both the ECJ and the Human Rights Committee chose not to dispose of the two cases through the identification of a norm conflict but through a reconciliation approach based on the distinction between the UN imposing the sanctions and the EU and member states implementing them, also by taking into account human rights considerations. This demonstrates that not only the same tensions, but also the same tools for resolving the tensions, are available in the two legal orders.

After this positive assessment of harmony or consistency at the level of principle it must be noted that there were also important differences between the two decisions. Where the Human Rights Committee found violations of the freedom of movement and the right to privacy, the European Court of Justice found a violation of the right to property – a right not covered by the ICCPR albeit present in international human rights law in general – and the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights. While the right to a fair trial is covered by the ICCPR, the Human Rights Committee held that the severity of the sanctions did not reach the severity that would have triggered the application of the notion of a ‘criminal charge’. To the present author, it appears that the EU Charter on Fundamental Rights would have allowed the ECJ to identify the rights breached in a manner closer to the categories present in international human rights law.

These differences in construction or interpretation are not irreconcilable, in particular as it is widely known that human rights bodies or international courts have a tendency to find one or two clear violations of human rights and then subsume other grievances under those findings by saying that it is not ‘necessary’ to address the additional claims or that those claims do not raise issues ‘separate’ from those where violations were already established. This said, particularly in the area of the right to a fair trial one is tempted to make the observation that both the Human Rights Committee and the European Court of Justice chose to deviate, in opposite directions, from a middle path that would have allowed for making the same finding under international human rights law and within EU law.

¹⁶ See, the contribution by Poli and Tzanou in this volume.

¹⁷ See, e.g., the contribution by Lavranos in this volume.

An effort to harmonize the interpretation of EU law and international law, rather than defending some sort of European feeling of superiority, is nevertheless visible in the way in which the ECJ summarizes the interaction between international law and EU law in the question of whether the implementation of UN sanctions can be made subject to judicial review at national or EU level:

299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300 What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.¹⁸

True, paragraph 299 is formulated negatively. But its basic tenet is that as a matter of international law (or United Nations law) the mandatory nature of Chapter VII resolutions leaves, despite the priority clause of Article 103 of the Charter, room for judicial review of national or EU level measures aimed at the implementation of those resolutions. It is submitted here that this position is correct as a matter of international law, and that therefore the ECJ ruling in *Kadi* is not incompatible with the UN Charter or more generally with international law.

Paragraph 300, in turn, is related to the role of the ECJ within the internal legal order of the EU. Although its opening words ('What is more, ...') could be read as an affirmation of the primacy of EU law in respect of international law within the EU legal order, they need not be read as representing more than an introduction of an additional argument after harmony with international law has already been secured.

Human rights are universal, not 'European' in nature. Hence, the insistence of the European Court of Justice to secure compliance with human rights in the implementation of the 1267 sanctions regime is an affirmation of, and not a departure from, the imperative of the EU having to comply with international law.

4. The Same Outcome also Flows from United Nations Law

The ECJ ruling in *Kadi* lists a whole range of shortcomings in the UN listing and delisting procedures under the 1267 sanctions regime.¹⁹ The procedure of the 1267 Sanctions Committee is diplomatic and intergovernmental, to the degree that any delisting decision requires consensus. The affected individuals do not have standing before the Committee, and their access to the reasons and evidence for the listing remains restricted. There is no judicial or otherwise independent review of the listing.

As noted by the ECJ, the listing and delisting procedures have been subject to piecemeal reforms by the Security Council itself, including through incremental improvements in the

¹⁸ *Kadi* (footnote no. 1).

¹⁹ *Kadi* (footnote no. 1), paras. 322-325.

status of the affected individual.²⁰ However, the ECJ does not include in its discussion the latest set of improvements, introduced through Security Council Resolution 1822 (2008). This resolution does introduce new improvements, such as the notification of listed individuals and the mandatory review of all entries on the list by June 2010. Although this resolution was described as a ‘milestone’ by the departing Chair of the 1267 Sanctions Committee - which happened to be Belgium²¹ - it did not remedy the fundamental flaws of the 1267 sanctions regime. Under Resolution 1822 the listing and delisting are still made by the 1267 Sanctions Committee, a body composed of diplomatic representatives of the 15 member states of the Security Council. The decisions – both for listing and delisting – are based on political consensus, rather than judicial or quasi-judicial examination of evidence. The nature of the Security Council as a political body, and its composition strongly reflecting security interests of the five permanent members, justifies scepticism over whether the members will ever be willing to share with each other the actual evidence that someone is a terrorist. All in all, the problems in the 1267 sanctions regime listed by the ECJ in *Kadi* were not fixed by Resolution 1822.

However, Resolution 1822 is important in another respect. It can be seen as a first affirmation by the Security Council itself that there is room for, if not even an obligation for, national or EU level judicial review over the implementation of the sanctions imposed by the 1267 Sanctions Committee. Hence, this resolution should be seen as a tool for constructing coherence between institutional United Nations law, international human rights law and, for the EU region, also EU law.

The preamble of Resolution 1822 includes a human rights clause:

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee, and humanitarian law, threats to international peace and security caused by terrorist acts, stressing in this regard the important role the United Nations plays in leading and coordinating this effort, ...

What is new in this formulation, compared to earlier Security Council counter-terrorism resolutions, is that the ‘need’ to comply with human rights is at least implicitly attributed also to the United Nations itself and not only its member states.²² Until Resolution 1822, the message that the Security Council was giving to member states was that it could be ignorant of human rights as member states have an obligation to take human rights into account when implementing Security Council resolutions, although at the same time those resolutions are mandatory and enjoy primacy under Article 103 of the United Nations Charter.

Resolution 1822 does not stop at implying that the United Nations itself should comply with human rights. It also includes a nuanced paragraph on the obligation of member states to

²⁰ *Kadi*, para. 320 makes reference up to Resolution 1735 (2006) by the Security Council.

²¹ Jan Grauls (Belgium), speaking in the 6043rd meeting of the Security Council, 15 December 2008 (S/PV.6043). The speaker continued: ‘One cannot ignore the international context in which these developments have taken place. The reality is that Security Council sanctions regimes find themselves increasingly under pressure and have recently been questioned, especially in light of the need for fair and clear procedures for listing, de-listing and the granting of humanitarian exemptions. I do believe that the Al-Qaida/Taliban Committee has made significant progress in this regard. However, it is also my belief that all of us must remain committed to continuing to ensure that due, and probably even more, attention is given to these concerns.’

²² Compare it with the traditional formulation of the human rights clause in Security Council Resolution 1456 (2003) para. 6: ‘States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law’.

implement the sanctions by calling for ‘adequate procedures to implement fully’ all aspects of the measures imposed by the 1267 Sanctions Committee.²³ Read together with the human rights clause in the preamble of the resolution and the paragraph where the Security Council ‘encourages’ the 1267 Sanctions Committee ‘to ensure that fair and clear procedures exist’,²⁴ a situation has been created whereby the legal framework of the 1267 sanctions regime should be understood to leave room for national or EU level judicial review over the implementation of the sanctions imposed by the 1267 Sanctions Committee through the inclusion of a person on the Consolidated List. Such a review is called for as long as the UN sanctions regime itself does not provide for fair and clear procedures that could be considered by member states to constitute an equivalent level of human rights protection.

This construction gets further support from the 2008 resolution by the United Nations General Assembly on human rights while countering terrorism, adopted without a vote on 18 December 2008. This resolution, which because of the consensus and the legal argumentation in it, can be understood as a form of state practice, is explicit in affirming that there is room for national level judicial review over the implementation of the terrorist list emanating from the 1267 Sanctions Committee:

18. Emphasizes the United Nations terrorism related sanctions are a significant tool in countering terrorism and have a direct impact on targeted individuals and entities, recognizes the need to continue ensuring that fair and clear procedures are strengthened in order to enhance the efficiency and transparency of the United Nations terrorism related sanctions regime and welcomes and encourages the Security Council’s continued enhancement of efforts in support of these objectives;

19. Urges States, while ensuring full compliance with their international obligations, to include adequate human rights guarantees in their national procedures for the listing of individuals and entities with a view to combating terrorism;²⁵

On the whole, and also in respect of institutional United Nations law, the ECJ did the right thing in *Kadi*. And so did the Human Rights Committee in *Sayadi and Vinck*.

5. Alternative View: The 1267 Sanctions Regime is *ultra vires* and Should be Replaced by Improving the 1373 Regime

For the present author, the above assessment of the existence of tensions within both international law and EU law, and the realistic prospect of reaching coherence through a reconciliation approach, is the most attractive construction *de lege lata*. The law may be imperfect and reflect internal tensions but that does not preclude reaching coherent outcomes in its application.

However, not all academic authors or other actors will be satisfied with a reconciliation approach. Therefore, this last section of the paper discusses what in the author’s view could be the second-best options.

Security Council Resolution 1267 (1999) did not create from scratch a full-fledged regime

²³ Resolution 1822 (2008), para. 27.

²⁴ *Idem*, para. 28. It should be noted that resolution 1822 itself does not establish the rule that individuals can be delisted only through consensus. This is prescribed in the Guidelines of the 1267 Sanctions Committee itself, available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf (as amended 9 December 2008).

²⁵ A/RES/63/185.

of UN terrorist sanctions. In the chronological list of Security Council resolutions, this resolution carries the title 'On the situation in Afghanistan'.²⁶ The resolution, adopted under Chapter VII of the UN Charter, was territorial in nature, urging the Taliban regime of Afghanistan to hand over Osama bin Laden and targeted it with 'smart sanctions' if it failed to do so. In order to apply its Chapter VII powers, the Security Council had to identify a risk for international peace and security. So it did, with reference to the failure of the Taliban to comply with earlier Resolution 1214 (1998). Resolution 1267 can be seen as a temporary emergency measure, using Chapter VII powers to address a specific threat to peace and security. The specific circumstance of the Taliban exercising *de facto* power in Afghanistan justified the targeting of the Taliban and not a state, for sanctions. Paragraph 6 of the resolution established the 1267 Sanctions Committee and among its functions listed:

- (d) To make periodic reports to the Council on information submitted to it regarding alleged violations of the measures imposed by paragraph 4 above, identifying where possible persons or entities reported to be engaged in such violations;

It was only through a series of subsequent resolutions that this response to a threat that was limited in time and space was converted into a regime that includes a global list of persons associated with the Taliban or Al-Qaeda and subjects them to sanctions with indefinite duration, irrespective of whether they had any means of facilitating the apprehension of Osama bin Laden.

In legal doctrine, there is wide support for a narrow understanding of the judicial or quasi-judicial powers that the Security Council can exercise under Chapter VII. Such powers are said to be difficult to reconcile with the legal order of the UN Charter. In cases of doubt, a legal determination by the Security Council should be interpreted as possessing preliminary rather than final character.²⁷ Although it is said that 'peace takes precedence over justice' in the Charter, human rights norms should be taken as guidance for the exercise of Chapter VII powers, and their 'complete disregard' will constitute a violation of the Charter.²⁸

If a reconciliation approach is pushed aside in favour of an understanding that United Nations law requires the absolute primacy of the Consolidated List, interpreted as a mandatory member state obligation under Chapter VII and Article 103, then the whole 1267 sanctions regime may fall. It is submitted that if the current Consolidated List is to be interpreted as a Charter obligation falling under the Chapter VII powers of the Security Council and enjoying primacy in respect of member states' human rights treaty obligations in the meaning of Article 103, then the resolution should be seen as having been adopted *ultra vires* and therefore being without legal effect.

If the Consolidated List is to be rescued as a matter of *lex lata*, then it should be seen only as creating a rebuttable presumption that a person or entity falls under the criteria of Resolution 1267 (as amended) and may, through proper procedures, become a target for sanctions by a member state. However, the Security Council listing as such must not be granted the status of evidence by national courts which will be bound by national and international provisions on due process when deciding on the implementation and lifting of sanctions against individuals or entities.

²⁶ See, <http://www.un.org/Docs/scres/1999/sc99.htm>

²⁷ Jochen Frowein and Nico Krisch, 'Introduction to Chapter VII' in Bruno Simma (ed.), *The Charter of the United Nations: a Commentary*, Oxford and New York, Oxford University Press, 2002, p. 708

²⁸ *Idem.* p. 711.

As a matter of *de lege ferenda*, the 1267 regime is in need of an urgent reform. At first sight several options for such a reform may appear attractive, among which the inclusion of a quasi-judicial review body as a part of the decision-making by the Security Council itself, rather than to subject Security Council decisions themselves to independent external review. However, all such efforts to further improve the 1267 regime are likely to fail and not to pass the test of adequate or equivalent protection implied by the ECJ in *Kadi*²⁹ when it listed the shortcomings of the 1267 sanctions regime. This is because member states will not be willing to share the real evidence triggering the proposal to list someone as a terrorist, usually sensitive security data, with the members of the Security Council and with the members of an independent review body applying due process, including the right of the affected person to be heard. ‘We have information’ may be a sufficient basis for listing by a Committee of the Security Council, composed of diplomats. But it will never allow for due process.

For this reason the only solution to resolve the tension within United Nations law through a reform of the terrorist listing regime is the repeal of Resolution 1267 (as amended) and its replacement with national or EU level terrorist listing pursuant to Resolution 1373 (2001) which was adopted in the aftermath of 9/11 and created a comprehensive framework for counter-terrorism measures that are imposed by member states but monitored by the Counter-Terrorism Committee of the Security Council.³⁰ There may be many things that need to be fixed in national or EU level terrorist listing regimes based on Resolution 1373, but within them the fundamental issue of securing due process in listing and delisting is possible to solve through securing appropriate procedural guarantees at the national or EU level where the actual individualization of the sanctions is made. The Security Council or its subsidiary bodies with expertise in countering terrorism would not become obsolete, as they could provide expertise to national and EU level actors in the proper implementation of the obligations stemming from Resolution 1373.

Besides, this solution would also be in line with what the doctrine of United Nations law says about the powers of the Security Council.

²⁹ *Kadi* (footnote no. 1), paragraph 256 paraphrases the arguments by the applicant (Mr Kadi), that refer both to ‘adequate’ and ‘equivalent’ protection of fundamental rights. The same line of thought is implied in the reasoning of the ECJ itself when it first lists the shortcomings of the Security Council’s internal re-examination procedure (paras. 321-325) and then concludes that because of these remaining shortcomings ‘the Community judicature must ... 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.’

³⁰ This proposal has been made in Iain Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’, *Nordic Journal of International Law* 72: 159–214, 2003 (see, in particular, section 6.6).

EC Competence, 'Smart Sanctions' and the Kadi Case

Marise Cremona*

1. Introduction

This contribution examines the issue of Community competence to adopt restrictive measures, such as the freezing of funds against individuals or entities, in particular in the implementation of sanctions decided upon by the UN Security Council. We are thus concerned with so-called 'smart sanctions', those directed at groups or at individuals, whether or not members of a third country government or ruling regime, which have become more commonly used in the last decade, in particular by the UN Security Council as part of its counter-terrorism policy since 1999.¹ The focus here is on Community, as opposed to Union, competence, although we will as a result touch upon the issue of the relationship between Community and Union powers. The core of the paper is a critique of the different approaches to this issue taken by the Court of First Instance, the Advocate General and the European Court of Justice in the *Kadi* case,² and some conclusions on the implications of this judgment, but we will begin by putting that specific competence debate into the context of the evolution of Community competence to adopt sanctions at all.

2. An Ongoing Competence Debate: The Treaty Plays Catch-up

The competence of the EC to adopt economic sanctions, using its economic power to achieve political objectives, has been controversial since the 1970s and to some extent we can see a reiterated process taking place over the years: an expansionist use of Treaty provisions followed by Treaty revision to provide a firmer legal basis for the action, followed by further expansion in practice. Until recently this debate was conducted at political level; it is only recently that the Court of Justice has had to consider the competence question specifically, although in some earlier cases it did so impliedly. Although in the *Kadi* case the sanctions in questions were adopted in implementation of a UN Security Council resolution and the obligations on the EU and its Member States in that regard became an important issue in that case, where the issue of EC competence is concerned the presence or absence of a UNSC resolution has not been regarded as material. Indeed the earliest examples of the use of a Community instrument to impose economic (trade) sanctions against a third country took place where there was no UNSC resolution and it might be that it was precisely the absence of the binding Security Council measure that suggested the need for a binding EC act to ensure uniformity in the EC Member States' response.³

* Professor of European Law, European University Institute.

¹ See UN Doc S/RES/1267 (1999); UN Doc S/RES/1333 (2000); UN Doc S/Res/1368 (2001); UN Doc S/Res/1373 (2001).

² Joined cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, judgment of 3 September 2008.

³ Since the focus of this paper is the issue of competence, we will not enter here into the question of the legality of autonomous trade sanctions in terms of international law, and the relevance in this respect of the existence of a bilateral trade agreement between the EC and the State concerned; see inter alia case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655 and PJ Kuyper, 'Trade Sanctions, Security and Human Rights

A. *Before the Treaty on European Union*

Thus initially the debate was whether Article 113 (now Article 133) EC, the legal base for the common commercial policy, could be used as a legal base for trade sanctions against individual third countries.

The occupation of the US Embassy in Teheran in 1980 led, in the absence of a UN Security Council resolution, to a European Political Cooperation (EPC) decision to take coordinated action in the form of economic sanctions. Sanctions were agreed by Ministers but no formal EC Regulation was adopted and they were implemented at national level. There was some difficulty in getting all Member States to implement the agreed measures: in the absence of either a mandatory UNSCR or a mandatory EC Regulation, the UK Parliament refused to abrogate existing contracts with Iran, for example.⁴ Since competence in trade matters lies exclusively with the Community⁵ and there was no Community act authorising the specific trade sanctions, the Member States at the time were acting under a derogation contained in the general import and export Regulations. Under Article 11 of the export regulation⁶ and Article 18 of the then-applicable import regulation,⁷ Member States were permitted to take measures restricting exports and imports to and from third countries on grounds, inter alia, of public policy and public security.⁸

Then in 1982 it was agreed, after much debate, to use Article 113 as the legal basis for a Community instrument imposing economic sanctions against the Soviet Union (again in the absence of a UN Security Council resolution) following the imposition of martial law in Poland.⁹ The political reason is not mentioned explicitly in the Regulation, the Preamble merely stating that 'the interests of the Community require that imports from the USSR be reduced'. Later in 1982, Article 113 was again used to impose economic sanctions against Argentina following the invasion of the Falkland Islands.¹⁰ Here for the first time, as well as mentioning consultation between the Member States pursuant to Article 224 (now Article 297 EC), there is a reference in the Preamble to the UNSC resolution and the EPC discussions:

Whereas the serious situation resulting from the invasion of the Falkland Islands by Argentina, which was the subject of Resolution 502 of the Security Council of the United Nations has given rise to discussions in the context of European political cooperation which have led in particular to the decision that economic

(Contd.) _____

and Commercial Policy' in M Maresceau (ed) *The European Community's Commercial Policy after 1992: The Legal Dimension* (Kluwer, 1993).

⁴ E Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002) 41.

⁵ Opinion 1/75 (re OECD Understanding on a local cost standard) [1975] ECR 1355; Case 41/76 *Donckerwolcke and Schou* [1976] ECR 1921.

⁶ Regulation (EEC) 2603/69 establishing common rules for exports OJ 1969 L 324/25, Art 11; in addition, under Art 10 of this Regulation, until 31 December 1992 the principle of freedom of export established by the Regulation was not to apply 'to exports which are at present restricted by the Member States pursuant to a decision taken in European Political Cooperation'. For an interpretation of Art 11 see Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* [1995] ECR I-3189, and Case C-83/94 *Criminal proceedings against Leifer, Krauskopf and Holzer* [1995] ECR I-3231.

⁷ Regulation (EEC) 926/79 on common rules for imports OJ 1979 L 131/15; this regulation is no longer in force. The current import regulation (Reg (EC) 3285/94 OJ 1994 L 349/53) contains a similar provision in Art 24.

⁸ Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-0081.

⁹ Regulation (EEC) 596/82 OJ 1982 L 72/15; see Denza (n 4 above) 42.

¹⁰ Regulation (EEC) 877/82 OJ 1982 L 102/1.

measures will be taken with regard to Argentina in accordance with the relevant provisions of the Community Treaties¹¹

The debate over the use of Article 113 EEC for economic sanctions was part of a wider debate over the scope of the common commercial policy, the extent to which that provision could be used as a basis for measures which are not traditional trade instruments and for purposes which do not have a strictly trade-based rationale. In Opinion 1/78 the Court took the view that the common commercial policy was not limited to traditional trade instruments: the fact that Article 113 required the development of a 'policy' based on 'uniform principles' suggested to the Court that it was intended to go beyond the administration of customs duties and quantitative restrictions.¹² In fact trade sanctions, being concerned with the volume of trade, could be seen as a traditional trade instrument albeit used for non-trade purposes; Regulation 596/82 for example, which imposed trade sanctions against the USSR, achieved this by reducing quotas.¹³ However economic sanctions tended to go beyond trade in goods to cover also services, investment bans and arms embargoes. Arms embargoes fall within the scope of Article 296 EC and are implemented directly by Member States; investment and services bans were argued to fall outside Article 113. Article 235 (now Article 308) was used as the legal base of the Regulation prohibiting the satisfying of Iraqi contractual claims as part of the economic sanctions regime against Iraq.¹⁴ However some sanctions Regulations which included measures relating to transport services were adopted on the basis of Article 113 alone.¹⁵ So, for example, Regulation 990/93 imposing sanctions on the FRY (Serbia and Montenegro) was based on Article 113 and included restrictions on transport services.¹⁶ The Court of Justice in the *Bosphorus* case interpreted a provision of this Regulation concerning the impounding of aircraft without alluding to the competence issue or the scope of Article 113.¹⁷

What of the political objectives of the sanctions measures? In the earliest examples of the use of Article 113 these were not alluded to, but as we have seen the 1982 Regulation imposing sanctions against Argentina refers in its Preamble to the EPC discussions and this

¹¹ The reference to the EPC is of interest also because at this time EPC had not been given a Treaty basis; this was to happen with the Single European Act in 1986.

¹² Opinion 1/78 (re International Agreement on Natural Rubber) [1979] ECR 2871, paras 44-45.

¹³ See above n 9; trade with the USSR, as a State-trading country and non-contracting party of GATT, was governed by quotas.

¹⁴ Council Regulation (EEC) 3541/92 of 7 December 1992 prohibiting the satisfying of Iraqi claims with regard to contracts and transactions, the performance of which was affected by United Nations Security Council Resolution 661 (1990) and related resolutions OJ 1992 L 361/1.

¹⁵ See for example Council Regulation (EEC) 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait OJ 1990 L 213/1; Council Regulation (EEC) 945/92 of 14 April 1992 preventing the supply of certain goods and services to Libya OJ 1992 L 101/53. See PJ Kuyper (n 3 above) at 394-396; I Macleod, I Hendry and S Hyett, *The External Relations of the European Communities* (Clarendon Press, 1996) at 353-4. Restrictions on financial movements, investment and payments, on the other hand, were normally implemented directly by the Member States; for an example see Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-0081.

¹⁶ Council Regulation (EEC) 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) OJ 1993 L 102/14.

¹⁷ Case C-84/95 *Bosphorus v Ministry of Transport, Energy and Communications* [1996] ECR I-3953. However in Opinion 1/94 [1994] ECR I-05267 at para 51 the Court of Justice rejected an argument put by the Commission (and citing *inter alia* Reg 990/93) that this practice demonstrated that the common commercial policy applied to transport services more generally, arguing that here transport services only played an ancillary role in rendering effective the restrictions on trade in goods.

became standard practice. This political rationale is not regarded as detracting from the trade nature of the measure.¹⁸ In *Werner*, which concerned the export of dual-use goods, the Court said that 'a measure ... whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives.'¹⁹ The *Bosphorus* case also indicates that the Court did not regard the political objective of the sanctions as an obstacle to the use of Article 113. It refers to the aim of the sanctions, in the context of an *effet utile* interpretation, as being to put pressure on the Federal Republic of Yugoslavia,²⁰ and goes on to argue that the interference with property rights represented by the impounding of the aircraft was not disproportionate when compared with 'an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina'.²¹

This approach was confirmed the following year in *Centro-Com*, which concerned the implementation by the UK of a Regulation imposing sanctions against Serbia and Montenegro (the precursor of the Regulation at issue in *Bosphorus*), also based on Article 113.²² In a well-known passage that is nevertheless worth citing here the Court describes the relationship between the foreign policy competence of the Member States acting through political cooperation and the common commercial policy which is exclusive Community competence:

The Member States have indeed retained their competence in the field of foreign and security policy. At the material time, their cooperation in this field was governed by *inter alia* Title III of the Single European Act [European Political Cooperation]. None the less, the powers retained by the Member States must be exercised in a manner consistent with Community law ... Consequently, while it is for Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by Article 113 of the Treaty. It was indeed in the exercise of their national competence in matters of foreign and security policy that the Member States expressly decided to have recourse to a Community measure, which became the Sanctions Regulation, based on Article 113 of the Treaty.²³

In this way the Court makes it clear that although there is no obstacle to the use of

¹⁸ Albeit in a different context, the Court had already held in Opinion 1/78 (n 12 above) at para 49, 'the fact that a product may have a political importance ... is not a reason for excluding that product from the domain of the common commercial policy.'

¹⁹ Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* [1995] ECR I-3189, para 10.

²⁰ Case C-84/95 *Bosphorus v Ministry of Transport, Energy and Communications* [1996] ECR I-3953, para 17.

²¹ *Ibid.*, para 26. Disentangling different objectives of a measure for the purpose of allocating a legal base is not always straightforward; for an example where the Court held that the trade objective was 'direct and immediate' whereas the environmental objective was 'indirect and distant', see Case C-281/01 *Commission v Council* (Energy Start Agreement) [2002] ECR I-12049, para 41. See generally P Koutrakos, 'Legal Base and Delimitation of Competence in EU External Relations' in M Cremona and B de Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing, 2008).

²² Council Regulation (EEC) 1432/92 prohibiting trade between the Community and Serbia and Montenegro OJ 1992 L151/4. This Regulation followed an EPC decision and implemented UN Security Council Resolution 757 (1992) imposing an economic embargo on Serbia & Montenegro.

²³ Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-0081, paras 24-28.

Community instruments to achieve foreign policy objectives, in so doing the Member States must respect Community law, including the limits of Community competence.

As this history demonstrates, sanctions were conceived from the start as a two stage process: first, an EPC decision providing the political direction, which would then be implemented by the Member States themselves and/or by the Community as the case may be. This continued to be the practice and was formalized by the Treaty of Maastricht.

B. The TEU and the Introduction of Articles 301 and 60 EC

The Treaty on European Union, as well as instituting the Common Foreign and Security Policy as the successor to EPC, established a specific legal basis for economic sanctions. Under Article 301 EC [formerly Article 228a] the interruption or reduction, in part or completely, of economic relations with one or more third countries²⁴ is to be decided by the Council acting by qualified majority vote on a proposal from the Commission. Article 301 also lays down as a precondition that the sanctions have been decided upon in a common position or joint action adopted under the Common Foreign and Security Policy (CFSP), thereby preserving the two-stage procedure and explicitly linking together the CFSP and Community powers (as we will see, different views may be taken as to the precise implications of this linkage). The new procedure was first used against Libya in late 1993 only a few weeks after the TEU entered into force,²⁵ and Article 133 [formerly Article 113] is no longer used as a legal basis for economic sanctions.²⁶

In addition to Article 301, the TEU also introduced a linked specific legal base for sanctions involving the freezing of capital movements: Article 60(1) EC [formerly Article 73g(1)] provides that the Council may take urgent measures on the movement of capital and payments if such action is deemed necessary ‘in the cases envisaged in Article 301’.²⁷ Apart from this *lex specialis*, and the reference to ‘economic relations’ with third countries, Article 301 does not specify the type of measure that might be taken. The doubts over the use of Article 113 [now Article 133] for sanctions involving services do not apply to Article 301.

The inter-pillar nature of the two-stage process for the adoption of sanctions means that the CFSP Common Position which forms the initial stage is able to encompass a range of measures, including those falling outside EC competence. Those aspects of the Common Position that are within EC competence are then implemented via Articles 301 and 60(1)

²⁴ We will continue to use the term ‘economic sanctions’ as a shorter expression although it should be noted that it does not appear in the provision.

²⁵ Council Decision (CFSP) 93/614 of 22 November 1993 on a common position under Article J.2 TEU with regard to the reduction of economic relations with Libya OJ 1993 L295/7; Council Regulation (EC) 3274/93 preventing the supply of certain goods and services to Libya OJ 1993 L295/1; and Council Regulation (EC) 3275/93 prohibiting the satisfying of claims with regard to contracts and transactions the performance of which was affected by the United Nations Security Council Resolution 883 (1993) and related resolutions OJ 1993 L295/4.

²⁶ The question might be raised whether it would still be possible for the Council to act under Article 133 or whether the introduction of Article 301 EC precludes its further use as a basis for economic sanctions; as we shall see, the Court of Justice in *Kadi* suggests that it could not be so used.

²⁷ Although the TEU in general entered into force on 1 November 1993, Art 60 did not come into force until 1 January 1994 and until that date the freezing of funds continued to be carried out by Member States as a direct implementation of the Common Position. It should also be noted that Art 60(2) EC allows Member States, as long as the Council has not acted pursuant to paragraph (1), to take urgent unilateral action against a third country in relation to capital movements and payments, subject to ex-post control by the Council. This Treaty-based authorization for Member State action is required, given the general abolition of restrictions on capital movements and payments by Art 56 EC.

EC, whereas other elements are implemented directly by the Member States. To take one example, a Common Position adopted in 2006²⁸ set out a range of restrictive measures to be adopted against Burma/Myanmar, involving a mix of Member State and EC competences: an arms embargo, a ban on technical and financial assistance related to military activities, a ban on the export of equipment which might be used for internal repression, suspension of non-humanitarian aid, the freezing of assets of members of the Government and associated natural or legal persons, a travel ban on such persons, suspension of high-level visits, restrictions on the attachment of military personnel to the diplomatic representations of Burma/Myanmar in Member States and a prohibition on granting credit to or acquiring Burmese state-owned enterprises. This was extended by a further Common Position in 2007 which imposed an import/export ban on certain goods, notably timber, coal and precious stones.²⁹ As far as the Community is concerned, these Common Positions are implemented by a Regulation adopted on the basis of Articles 301 and 60(1) EC, which covers the import restrictions and export ban, the ban on financing and technical assistance, the asset freeze, and the ban on investments and credit.³⁰ Other measures, including the arms embargo, the travel bans and the measures applicable to the Burmese diplomatic representations are implemented by the Member States.³¹

This example raises the issue of targeted sanctions, as members of the ruling regime and those associated with them are the targeted subjects of the travel ban and investment restrictions. Although we are in this paper primarily concerned with sanctions targeted at individuals, we will first briefly consider the possibility of territorial targeting of sanctions.

C. The Possibility of Limited Territorial Application of Trade Sanctions

The conditionality-based approach of the EU towards the then Federal Republic of Yugoslavia (FRY – encompassing Serbia and Montenegro), which included both positive incentives (the possibility of trade preferences, financial assistance and negotiation of agreements) and ultimately economic sanctions, prompted the EU from 1998-9 to try to find ways of reflecting the different positions of the constituent part of the Federation, first differentiating between Serbia and Montenegro and then differentiating Kosovo and even specific Serbian municipalities.³²

The Council explained its position in July 1999:

The Council examined the sanctions regime adopted by the EU. It underlined its continued intention to reach out to the Serbian people, who have suffered as a result of the detrimental policies of its leaders. ... The Council agreed that EU measures affecting the population (flight ban, discouragement of sporting links) will be the first to be lifted. The Council underlined the necessity to speedily exempt Kosovo and Montenegro from oil and other sanctions. The Council agreed the importance of supporting all forces in the FRY, notably municipalities, who demonstrate their commitment to democratic values. It agreed that ways and

²⁸ Council Common Position (CFSP) 2006/318 OJ 2006 L 116/77.

²⁹ Council Common Position (CFSP) 2007/750 OJ 2007 L 308/1.

³⁰ Council Regulation (EC) 194/2008 OJ 2008 L 66/1 (this Reg replaced Reg (EC) 817/2006 which implemented the 2006 Common Position).

³¹ For discussion of the Common Position as a legal basis for these, see further section (vi) below.

³² See further M Cremona, 'Creating the New Europe: The Stability Pact for South-Eastern Europe in the Context of EU-SEE Relations' *Cambridge Yearbook of European Legal Studies Volume II 1999*, 463 at 488-491; S Blockmans, *Tough Love: The European Union's Relations with the Western Balkans* (TMC Asser Press, 2007) 161-5.

means be identified to alleviate the situation of those forces, including by providing energy (electricity and petrol).³³

As a result several measures were taken designed to lift the burden of EU sanctions from those parts of the FRY, including Montenegro, which opposed the Milosevic regime. The first was to exempt Montenegro and Kosovo from both the oil embargo and the flight ban which were being applied to the FRY.³⁴ Second, in October 1999 the Council adopted a Common Position on support for 'democratic forces' in FRY, including 'developing dialogue with democratically oriented local leaders' and support for the 'Energy for Democracy' initiative.³⁵ This latter initiative extended the lifting of the oil embargo to deliveries of petroleum products destined for specific FRY municipalities.³⁶

As the Council conclusions quoted above make clear, this approach – which envisages the possibility of exempting certain territories within a state from the effect of sanctions imposed on that state under Article 301 EC – reflects a desire to avoid penalizing the population as a whole. This aim is also reflected in the development of sanctions targeted against natural or legal persons or entities, so-called 'smart sanctions', and it is the competence issues arising from these targeted sanctions to which we will now turn.

D. Smart Sanctions against Individuals Linked to a State Government or Regime

As Francesco Francioni points out in his paper in this collection, one of the ironies of the current situation is that targeted sanctions were introduced originally as a response to the criticism that sanctions against States were a blunt instrument affecting whole populations. The sanctions against Burma/Myanmar mentioned above illustrate the rationale and different types of targeted sanctions. The Preamble to Regulation 194/2008/EC explains that the 2006 Common Position

provided for the maintenance of the restrictive measures against the military regime in Burma/Myanmar, those who benefit most from its misrule and those who actively frustrate the process of national reconciliation, respect for human rights and democracy. ... The new restrictive measures target sectors which provide sources of revenue for the military regime of Burma/Myanmar.³⁷

Neither of the EC legal bases for sanctions, Articles 60(1) and 301 EC, expressly mentions individuals: they refer to the reduction of 'economic relations with one or more third countries'. However this concept has been broadly interpreted, in the first place to allow for targeted sanctions against natural and legal persons who are connected to a government or regime:

³³ Conclusions of the General Affairs Council, 19 July 1999, paras 6-7. See also Conclusion of the GAC 13 September 1999.

³⁴ Council Common Position (CFSP) 1999/604 of 3 September 1999 OJ 1999 L 236/1, implemented by Council Regulation (EC) 2111/1999 prohibiting the sale and supply of petroleum and certain petroleum products to certain parts of the Federal Republic of Yugoslavia (FRY) OJ 1999 L 258/12.

³⁵ Common Position (CFSP) 1999/691 of 22 October 1999 on support to democratic forces in the Federal Republic of Yugoslavia (FRY) OJ L 273/1. See also GAC Conclusions of 11 October 1999.

³⁶ Regulation (EC) 2421/1999 of 15 November 1999 amending Reg (EC) 2111/1999 OJ 1999 L 294/7. This Reg implements Common Position 99/691 (n 35 above) and lifts the oil embargo for the municipalities of Nis and Perot; later decisions added to the list of exempted municipalities. In practice, there were considerable difficulties in getting the deliveries through Serbia: see IP/99/940, MEMO/99/60 and MEMO/99/65.

³⁷ Regulation (EC) 194/2008, n 30 above.

entities which or persons who physically controlled part of the territory of a third country and against entities which or persons who effectively controlled the government apparatus of a third country and also against persons and entities associated with them and who or which provided them with financial support.³⁸

As we have seen, some of the measures targeted at individuals, such as travel bans, do not require action to be taken at EC level; however others – including asset freezes and investment bans – have been implemented through Community powers. The CFI in *Kadi* approved this Council practice, holding it to be 'not contrary to the letter of Article 60 EC or Article 301 EC' and 'justified both by considerations of effectiveness and by humanitarian concerns'.³⁹ However we should note the logic of this type of targeted sanction: the aim is to put pressure on a third state and this is done by taking measures against those people or entities who are either part of the government or closely connected with it, including commercial enterprises such as banks that may indirectly provide support.⁴⁰ It was when economic sanctions, including asset freezes, came to be used as counter-terrorism measures that the link between the individual and the state effectively disappeared.

E. Smart Sanctions against Individuals and Groups Not Linked to a State

Following the attacks on the United States of 11 September 2001, the extraordinary meeting of the European Council on 21 September declared terrorism to be a priority for the EU, and on 28 September the UN Security Council adopted Resolution 1373 (2001).⁴¹ A series of restrictive measures have been adopted as part of the EU's counter-terrorism policy, implementing Resolution 1373, and directed in particular at the financing of terrorism. Council Common Position 2001/931/CFSP applies to persons, groups and entities listed in the Annex who are said to be involved in terrorist acts.⁴² Those listed fall into two

³⁸ T-315/01 *Kadi v Council and Commission* [2005] ECR II-03649 at para 90, referring to the practice of the Council.

³⁹ Ibid. at para 91. In Case T-362/04 *Leonid Minin v Commission* [2007] ECR II-002003 at para 72, the CFI applied this reasoning to include an associate of Charles Taylor a year after his removal from power as President of Liberia on the ground that, in the view of the UN Security Council, 'the restrictive measures taken against Charles Taylor and his associates remain necessary to prevent them from using misappropriated funds and property to interfere in the restoration of peace and stability in Liberia and the region.'

⁴⁰ Thus for example the sanctions imposed in 2007 against Iran include certain banks among those whose funds are to be frozen, as being entities owned or controlled by entities identified as engaged in, directly associated with or providing support for nuclear proliferation: UNSC Resolutions 1737 (2006), 1747 (2007) and 1803 (2008) implemented in the EU by Council Common Position (CFSP) 2007/140 of 27 February 2007 concerning restrictive measures against Iran (OJ 2007 L 61/49) and Council Regulation (EC) 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103/1). In Joined Cases T-246/08 and T-332/08 *Melli Bank plc v Council*, judgment 9 July 2009, not yet reported, the CFI held in para 69, 'the fact that the purpose of the restrictive measures adopted by virtue of Regulation No 423/2007 is to stop all financial and technical assistance for the nuclear and missile-development activities of the Islamic Republic of Iran, which pose the risk of nuclear proliferation, necessarily means that those measures were adopted vis-à-vis a third State, with the result that they must be regarded as being compatible with the interpretation of Articles 60 EC and 301 EC given in *Kadi and Al Barakaat International Foundation v Council and Commission*.'

⁴¹ This is certainly not the place for even a summary account of the UN's counter-terrorism measures, nor for a summary of the EU's counter-terrorism policy. See further Scheinin in this collection; I Tappeiner, 'The Fight Against Terrorism: The Lists and the Gaps' (2005) 1 Utrecht Law Rev 97; B Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations' (2006) 3 International Organizations Law Rev 437; R Uruena, 'International Law as Administration: The UN's 1267 Sanctions Committee and the Making of the War on Terror' (2007) 4 International Organizations Law Rev 321.

⁴² Common Position (CFSP) 2001/931 of 27 December 2001 on the application of specific measures to combat

categories. In one group are those who are subject only to Article 4 of the Common Position: these are those who, although alleged to have links with terrorism, do not have any links *outside the EU*; we will return later to this category. In the other group are those with links outside the EU, who (as well as Article 4) are subject to Articles 2 and 3 of the Common Position, to the effect that the Community ‘shall order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed’. This provision has been implemented by Regulation 2580/2001/EC.⁴³ The Commission’s initial proposal was to base the Regulation solely on Article 308 EC,⁴⁴ but following discussion in the Council and the European Parliament, the Commission presented an amended proposal with an amended legal base of Articles 301, 60(1) and 308 EC and this was the legal base used.⁴⁵

This precedent was then followed in early 2002 when revising the sanctions regime against persons and entities associated with Usama bin Laden, Al-Qaida and the Taliban, following the fall of the Taliban regime in Afghanistan. A few years earlier, Resolutions 1267 (1999) and 1333 (2000) of the UN Security Council had required all States to freeze funds and other assets owned or controlled by the Taliban, Usama bin Laden and individuals and entities associated with him, including the Al-Qaeda organization. The list of those subject to these measures was determined by the Security Council’s Sanctions Committee. These resolutions were implemented in the EU by means of a CFSP Common Position and an EC Regulation based on Articles 301 and 60(1).⁴⁶ Since at that time the Taliban were in control of Afghanistan the use of these legal bases for the Regulation was founded on the principle discussed in the previous section, namely that the individuals and entities listed were in effective control of the territory of a third country, or were associated with those in effective control and provided them with financial support. Then in January 2002 a further Security Council Resolution, 1390 (2002), was adopted and in May that year the Council adopted a new Common Position, repealing earlier ones, and a new Regulation.⁴⁷ By January 2002, however, the Taliban regime in Afghanistan had fallen and so at the time the Regulation was adopted, the persons and entities listed did not have a direct connection with the territory or governing regime of a third country. The Commission thus proposed, and the Council agreed, to follow the precedent of Regulation 2580/2001/EC adopted a few months previously and to include Article 308 among the legal bases for the Regulation as well as Articles 301 and 60(1) EC.⁴⁸ In its proposal the Commission said,

Taking into account that these measures are imposed in view of their role in international terrorism, without there being a link between the persons and groups

(Contd.) _____

terrorism OJ 2001 L344/93. The list in the Annex is updated regularly.

⁴³ Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism OJ 2001 L344/70.

⁴⁴ COM (2001) 569, 2 October 2001.

⁴⁵ COM (2001) 713, 30 November 2001.

⁴⁶ Resolution 1267 (1999) was implemented by Council Common Position (CFSP) 1999/727 OJ 1999 L 294/1 and Council Regulation (EC) 337/2000 OJ 2000 L 43/1. Resolution 1333(2000) was implemented by Council Common Position (CFSP) 2001/154 OJ 2001 L 57/1 and Council Regulation (EC) 467/2001 OJ 2001 L 67/1.

⁴⁷ Council Common Position (CFSP) 2002/402 OJ 2002 L139/4, and Council Regulation (EC) 881/2002 OJ 2002 L 139/9.

⁴⁸ Art 308 provides for a residual competence to act in order to achieve a Community objective ‘in the course of the operation of the common market’. Action is taken unanimously by the Council, with consultation of the Parliament; Art 308 should only be used where no other valid legal base exists: case 45/86 *Commission v Council* [1987] ECR 1493.

concerned, and the new Government of Afghanistan, it is considered appropriate to adopt a new Regulation imposing such measures and to repeal the sanctions in relation to Afghanistan.⁴⁹

Was this the correct choice of legal base? Was Article 308 EC in fact really necessary? Could sanctions of this type have been based simply on Articles 301 and 60(1)? Or did the Regulation fall outside the scope even of Article 308 EC? Does the Community in fact lack the competence to adopt smart sanctions against individuals and entities that are not linked to the government or ruling regime of a third country? These questions were considered by both the CFI and the ECJ in *Kadi*, one aspect of that case being a challenge to the Council's competence to adopt Regulation 881/2002.⁵⁰ The CFI, Advocate General Poiares Maduro and the ECJ all held that the Community does have competence to adopt such sanctions, but they disagreed as to the precise legal basis and in particular on the need for, and basis for the application of, Article 308 EC. We will consider the arguments in section 3 below. Meanwhile, the Treaty of Lisbon would catch up with reality again by introducing two new legal bases for individual sanctions; we will look at these briefly in the final section.

F. Sanctions based on the TEU Alone

Before turning to the discussion of Community competence in the *Kadi* case, we should briefly mention the adoption of restrictive measures against individuals which are based solely on an EU instrument, normally a common position.

An initial issue concerns the scope of the CFSP common position. A common position under Article 15 TEU 'defines the approach of the Union to a particular matter of a geographical or thematic nature'; it may serve any CFSP objective, and these are defined broadly in Article 11 TEU. We do not then have the same constraints on the scope of the CFSP act as with an EC legal base, although its legal effects are more limited. The common position may thus go beyond the scope of the Community provisions it mandates and provide for other types of measure within the objectives of the CFSP, including arms embargoes and travel restrictions. Arms embargoes are dealt with by CFSP common position followed by national action, by virtue of the derogation from the Community regime in relation to armaments established by Article 296(1) EC.⁵¹ Travel restrictions are a classic form of 'smart sanction' directed at individuals, normally those associated with the government of the targeted country. To take the example of the travel restrictions imposed in the Common Position on Burma/Myanmar mentioned above,⁵²

Member States shall take the necessary measures to prevent the entry into, or transit through, their territories of: (a) senior members of the State Peace and Development Council (SPDC), Burmese authorities in the tourism sector, senior

⁴⁹ COM (2002) 117, 6 March 2002, para 2.

⁵⁰ C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, n 2 above. The applicants' original claim of lack of competence was aimed at earlier Regulations based on Articles 301 and 60 EC alone; when the action was extended to Regulation 881/2002, based on Articles 301, 60 and 308 EC, the applicants withdrew the plea based on lack of competence. The CFI nevertheless decided to consider the issue of its own motion and invited the Council and Commission to make submissions on the issue. On appeal to the ECJ the applicants argued the lack of a legal basis for the Regulation.

⁵¹ For a full discussion of this provision see P Koutrakos, *Trade, Foreign Policy and Defence* (Hart Publishing, 2001) ch 8.

⁵² See n 28 above. The Annex is regularly amended; for the most recent amendment, see Council Common Position (CFSP) 2009/351 of 27 April 2009 renewing restrictive measures against Burma/Myanmar OJ 2009 L 108/54.

members of the military, the Government or the security forces who formulate, implement or benefit from policies that impede Burma/Myanmar's transition to democracy, and members of their families, being the natural persons listed in Annex II; ...

This provision, as is clear from its wording, is to be implemented by the Member States. Under Article 62 EC, the Community may adopt measures on the crossing of external borders, including rules on short-term visas, and Regulation 539/2001 establishes a common list of third countries whose nationals require a visa to cross the external borders, among them Burma/Myanmar.⁵³ Why then is the travel ban in relation to certain Burmese nationals not to be implemented through a Community instrument? One possible reason is that despite the evolution of the Community acquis on visa policy, the decision to issue a visa to a specific individual is still a matter for each Member State. In addition, of course, not all Member States participate in the common visa policy.

Second, let us return to those individuals to whom Article 4 of the counter-terrorism Common Position 2001/931 applies, but who are not covered by Regulation 2580/2001/EC.⁵⁴ As far as they are concerned this is therefore a matter of Union, but not Community, action. Common Position 2001/931 was adopted under a joint second and third pillar legal base, Article 15 TEU (CFSP) and Article 34 TEU (JHA, Title VI TEU). Article 4 of this common position refers to Title VI:

Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of [the EU] Treaty, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.

Certain people and organizations listed in the Annex are subject only to Article 4 and therefore as far as they are concerned the legal base for the act is Article 34 TEU.⁵⁵ On what basis is the distinction made between those listed who are subject only to police and judicial cooperation, and those listed who are covered also by the Community asset freezing regulation? Although the criteria applied are not explicit in the legal act the distinction is essentially between those persons and organizations whose actions are external to the EU, and those whose actions are internal.⁵⁶ The exercise of Community powers based on Articles 301 and 60(2) EC depends on the adoption of a prior CFSP act and thus a foreign policy dimension, and the reference in those Articles to relations with third countries also indicates their character as externally-directed instruments. Targeted individuals and groups who do not have this foreign link are covered by internal security policy, and thus the third pillar; hence the already mentioned dual legal base for Common Position 2001/931. They are subject, not to Community-based sanctions, but to national internal security measures

⁵³ Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement OJ 2001 L 81/1.

⁵⁴ See n 42 above. For the most recent version of the Annex see Council Common Position 2009/468/CFSP of 15 June OJ 2009 L 151/45.

⁵⁵ Case C-355/04 P, *Segi et al. v Council*, [2007] ECR I-01657, para 11.

⁵⁶ E Spaventa, 'Fundamental Rights and the Interface between Second and Third Pillar' in A Dashwood and M Maresceau (eds) *Law and Practice of EU External Relations* (Cambridge University Press, 2008) 131-133.

subject to coordination as specified in Article 4 of the Common Position.⁵⁷

This distinction represents the practice of the Union, which is to consider terrorism a matter for all three pillars. As the UN Security Council has declared more than once,⁵⁸ international terrorism is a threat to peace and international security and the CFSP objectives specified in Article 11(1) TEU include the preservation of peace and strengthening international security as well as strengthening the security of the Union itself. The internal dimension of counter-terrorism, on the other hand, falls within the third pillar: thus, Article 29 TEU refers to the prevention and combating of terrorism in the context of the Area of Freedom, Security and Justice. There is no explicit bridge, such as is created by Article 301 EC, between the third pillar and Community competence. It is understandable that the Member States have not so far been willing to transfer to the Community responsibility for enacting penal legislation against those persons whose operations are restricted to Member State territory and jurisdiction.⁵⁹ Nevertheless it is somewhat arbitrary to try to distinguish between internal and external terrorism in this way. Indeed, those within the 'external' group covered by Community restrictions include both people or organizations with connections outside the EU who may conduct terrorist operations in the EU as well as externally, and people or organizations of EU nationality or residence who may be involved in terrorist operations outside the EU.

It should finally be noted that although adopted as a common position, the Court of Justice in *Segi* ruled that insofar as Common Position 2001/931 was intended to have legal effects in relation to third parties it must be subject to the possibility of a preliminary ruling by a national court and to annulment proceedings brought by the Commission or a Member State pursuant to Article 35(1) and (6) TEU.⁶⁰

What of Common Position 2002/402, linked to Regulation 881/2002 which was at issue in the *Kadi* case? In contrast to Common Position 2001/931, this common position does not contain a third pillar dimension. It is entirely 'external' in its scope, applying to those persons and entities identified in the list drawn up pursuant to UNSCR 1267(1999) and 1333(2000), and this list with its regular amendments is annexed to Regulation 881/2002. In addition to its provision for Community measures, the common position does however contain a ban on arms sales and a travel ban which are implemented directly by the Member States.

3. Smart Sanctions, EC Competence and the *Kadi* Case

In a recent article, Halberstam and Stein suggest that the legal base aspect of *Kadi* may be a 'tempest in a teapot'.⁶¹ The Court of First Instance, Advocate General Poiares Maduro and

⁵⁷ As far as measures adopted under the second and third pillars are concerned, the most serious questions concern the availability of judicial review, an issue which will not be discussed in this paper. See further S Peers, 'Salvation Outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgments' (2007) 44 Common Market Law Rev 883; E Spaventa (n 56 above).

⁵⁸ UN Security Council Resolutions 1368 (2001) and 1373 (2001).

⁵⁹ The Treaty of Lisbon would change this; see below section 5.

⁶⁰ Case C-355/04 P, *Segi et al. v Council* [2007] ECR I-01657, paras 52-54. In the Court's view this reasoning would apply at least to Article 4 of the common position and its Annex. In general common positions adopted under Title VI are subject neither to actions for annulment nor to the preliminary ruling procedure.

⁶¹ Or, as the English would say, a storm in a teacup. D Halberstam and E Stein, 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order'

the Court of Justice all agree that the Community has competence to adopt the Regulation; they only disagree as to the basis for that competence. In the case of the CFI and ECJ the difference seems even more arcane in that the two courts agree on the Treaty articles to use but disagree on the legal argument which founds that combined legal basis. It is clear that there was a strong motivation to decide in favour of competence, not just in order to be able to deal with the more interesting issues of judicial review. The Courts took seriously the need to try to give effect to the clear wish of the Community legislature, which was to be able to use Community instruments in order to give effect to the Member States' obligation under the UN Security Council resolution. As Community courts this was understandable and they try to achieve this while also taking seriously the limits of the Community's conferred powers. In doing so, however, they perhaps give insufficient weight to the inherent inter-pillar nature of sanctions regimes, the coordinating role of the Common Position and the fact that, as we have seen, it will frequently be the case that not all elements of a sanctions regime laid down in a CFSP Common Position will be implemented through Community instruments.

It is worth taking the argument over competence and legal base seriously since on any view the Community was here acting at the limits of its conferred powers, and the issues raised are important for the coherent development of an internal and external security policy involving implementation at different levels. In what follows we will look at the views of the CFI, the Commission, the Advocate General and the ECJ in turn and then make an assessment of the approach adopted by the Court of Justice.

A. *The CFI in Yusuf and Kadi*

In *Yusuf and Kadi*,⁶² the CFI found that the EC Treaty provided an adequate legal basis for Regulation 881/2002.⁶³ The CFI first held that neither Articles 301 and 60(1) EC nor Article 308 EC could, on their own, provide an adequate legal base. Articles 301 and 60(1) may be used to adopt measures against individuals as long as the measures 'actually seek to reduce, in part or completely, economic relations with one or more third countries.'⁶⁴ However, the CFI took the view that there must be a link with a third country in the form of a link to the governing regime of that country, which is itself the target of the sanctions. The substantive purpose of Articles 60 and 301 is to target countries not individuals or organizations.

The CFI also denied that Article 308 EC on its own could provide a legal basis, since the ultimate objective of the sanctions was the safeguarding of international peace and security, and this is not (the CFI said) an objective of the EC (as found in Articles 2 and 3 EC) but rather of the EU. Thus, the use of Article 308 alone would be tantamount to allowing the use of Article 308 (and thus Community instruments) to achieve any CSFP objective, thereby ignoring the fact that the EC and EU are linked but still separate legal orders with differentiated competences. The relevant paragraph is worth quoting, not least because of the contrast between this reasoning and that of the ECJ:

[It] appears impossible to interpret Article 308 EC as giving the institutions general authority to use that provision as a basis with a view to attaining one of the

(Contd.) _____

(2009) 46 Common Market Law Rev 13, at 36.

⁶² T-306/01 *Yusuf and Al Barakaat International Foundation* [2005] ECR II-03533; and T-315/01 *Kadi v Council and Commission* [2005] ECR II-03649.

⁶³ Council Regulation 881/2002/EC OJ 2002 L 139/9, implementing Council Common Position 2002/402/CFSP OJ 2002 L 139/4, see n 47 above.

⁶⁴ T-315/01 *Kadi v Council and Commission* [2005] ECR II-03649, para 89.

objectives of the Treaty on European Union. In particular, the Court considers that the coexistence of Union and Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, authorise neither the institutions nor the Member States to rely on the 'flexibility clause' of Article 308 EC in order to mitigate the fact that the Community lacks the competence necessary for achievement of one of the Union's objectives. To decide otherwise would amount, in the end, to making that provision applicable to all measures falling within the CFSP and within police and judicial cooperation in criminal matters (PJC), so that the Community could always take action to attain the objectives of those policies. Such an outcome would deprive many provisions of the Treaty on European Union of their due ambit and would be inconsistent with the introduction of instruments specific to the CFSP (common strategies, joint actions, common positions) and to the PJC (common positions, decisions, framework decisions).⁶⁵

Having ruled out the use of Article 308 on its own, the CFI then went on to argue that Article 308, when combined with Articles 60(1) and 301 EC, could indeed provide a legal base for the Regulation. The explicit *passerelle* or bridge written into Articles 301 and 60 EC referring to a Joint Action or Common Position adopted under the TEU was held to 'import' TEU objectives into the Community legal order in this specific field,⁶⁶ so that 'under Articles 60 EC and 301 EC, action by the Community is therefore in actual fact action by the Union, the implementation of which finds its basis on the Community pillar'.⁶⁷ Having earlier, in the passage quoted, stressed the separate nature of the EC and EU legal order, the CFI now refers to the single institutional framework for the three pillars of the Union and the requirement of consistency in its external action established by Article 3 TEU. Thus, the CFI argues, it is justifiable to use Article 308 in order to extend the possibility of using a Community instrument, beyond the scope of Articles 60 and 301 themselves, to impose economic sanctions on individuals, in order to achieve a CFSP objective. By attaching Articles 301 and 60 to Article 308, the CFSP objective imported by the former provisions into the EC Treaty takes the place of the requirement of the Community objective contained in the latter provision. Although based on this analysis of the relationship between the pillars and the significance of the bridge between them created by Article 301, the CFI is ultimately influenced by the need to respond to changing international threats:

In this context, recourse to Article 308 EC, in order to supplement the powers to impose economic and financial sanctions conferred on the Community by Articles 60 EC and 301 EC, is justified by the consideration that, as the world now stands, states can no longer be regarded as the only source of threats to international peace and security. Like the international community, the Union and its Community pillar *are not to be prevented from adapting to those new threats* by imposing economic and financial sanctions not only on third countries, but also on associated persons, groups, undertakings or entities engaged in international terrorist activity or in any other way constituting a threat to international peace and security.⁶⁸

The Court follows this up in the next paragraph with the reassurance that this reading does

⁶⁵ Case T-315/01 *Kadi*, n 62 above, para 120.

⁶⁶ *Ibid.* paras 123-4.

⁶⁷ *Ibid.* para 125.

⁶⁸ *Ibid.* para 133; emphasis added

not ‘widen the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole,’ but in the passage just quoted the Court has come very close to saying that the Community should be deemed to possess whatever powers it needs.

This is a conclusion that has attracted criticism as well as praise.⁶⁹ The link between Articles 301 and 60 EC, CFSP objectives as expressed in a Common Position, and Article 308 EC does indeed appear somewhat tenuous, and even more tenuous is the link to the operation of the common market that Article 308 EC also requires and which the CFI does not refer to.⁷⁰ The ECJ, while agreeing with the outcome of the CFI’s reasoning on competence, attempts a more rigorous analysis of the conditions for the application of Article 308 EC, with not wholly satisfactory results, as we shall see. Meanwhile, the Commission and Advocate General argued for the abandonment of Article 308 as a necessary component of the legal base.

B. The Commission’s Position

Interestingly, the Commission, having proposed the combined legal base of Articles 301, 60(1) and 308 EC for Regulation 881/2002 and having supported this position before the CFI,⁷¹ argued before the ECJ that recourse to Article 308 was unnecessary.⁷² The Commission submitted three arguments. First, a textual analysis of Article 301, arguing that the interruption of economic and financial relations with a third country necessarily affected individuals in that country, and therefore that the freezing of an individual’s financial assets would necessarily interrupt – in part – economic relations with a country (presumably the individual’s country of residence); thus the wording of Article 301 does not preclude its application to individuals. Second, the Commission argues for a purposive interpretation of Article 301, in that it was ‘clearly intended to provide a platform for the implementation by the Community of all measures adopted by the Security Council that call for action by the Community.’⁷³ Third, the Commission argued that as a result Article 301 acts as ‘a procedural bridge between the Community and the Union’ with the same scope as ‘the relevant Community powers’. The argument is therefore that Article 301 does not establish a fully autonomous legal base, but is a procedural provision somewhat similar to Article 300 EC (establishing the procedural framework for the conclusion of international agreements by the Community) enabling restrictive measures over the whole field of Community powers.

In the alternative, if this instrumental interpretation of Article 301 were not accepted, the

⁶⁹ For a critical approach see for example A Garde, annotation of cases T-306/01 and T-315/01, (2006) 65 Cambridge Law Journal 281; a more positive view is taken by Tomuschat, who calls this aspect of the judgments ‘an intelligent answer’ and ‘entirely persuasive’, comment at (2006) 43 Common Market Law Rev 537, at 540. For a comprehensive account of the reaction in the legal literature to the judgment, see Poli and Tzanou in this collection.

⁷⁰ The CFI in fact in another part of its judgment rejected an argument that implementation of the sanctions by the Community was necessary in order to preserve the free movement of capital within the EC and avoid distortions of competition (case T-315/01 *Kadi*, n 62 above, paras 75 and 105-113). On this aspect of Article 308, see further below at n 87.

⁷¹ Case T-315/01 *Kadi*, n 62 above, paras 74-77.

⁷² Case C-402/05 P *Kadi v Council and Commission*, n 2 above, paras 135-142.

⁷³ Ibid. para 136. The Commission points to the similarity of wording between Art 301 and Art 41 of the UN Charter: ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’

Commission proposed the use of Article 308 alone, based on Community rather than Union objectives.⁷⁴ It argued that the asset-freezing measures could be brought within the scope of the objectives of the common commercial policy and the provisions on capital movements since they are designed to produce effects on trade.

C. The Opinion of AG Poiares Maduro in Kadi

AG Poiares Maduro, in his opinion in *Kadi*, accepted the essence of the Commission's argument and took a different view from the CFI. In his view, Articles 60(1) and 301 EC alone would have provided a sufficient legal basis. These provisions are flexible as to the type of measure that may be adopted: 'the EC Treaty does not regulate what shape the measures should take, or who should be the target or bear the burden of the measures. Rather, the only requirement is that the measures 'interrupt or reduce' economic relations with third countries, in the area of movement of capital or payments'.⁷⁵ He then argued that such sanctions, by 'predominantly' targeting individuals and entities *within* a third country, inevitably affect relations *with* that third country. 'Economic relations with individuals and groups from within a third country are part of economic relations with that country; targeting the former necessarily affects the latter,' as this is a 'basic reality of international economic life'.⁷⁶ The Advocate General thus bases his argument on a broad interpretation of the existing legal base, influenced by *effet utile*. He nevertheless does not suggest simply implying into Article 301 a new dimension which would extend its expressly stated scope, but instead seeks to ground his argument in an interpretation of the words of the existing provision: the focus is on what meaning the words ('reduce, in part or completely, economic relations with ... third countries') might bear. In his view the reduction of such relations need not be the target or main purpose of the measures, but only the inevitable result of measures targeted at individuals.

D. The ECJ Judgment in Kadi

The ECJ offers a different reading which depends on finding that individual sanctions do in fact reflect a *Community* objective. Let us first of all consider the ECJ arguments concerning possible legal bases that would not require the addition of Article 308 EC.

First, the ECJ disagrees with the Commission and AG Poiares Maduro that Articles 301 and 60 would be a sufficient legal base, following the CFI on this point.⁷⁷ It holds that the restrictive measures in this case are 'notable for the absence of any link to the governing regime of a third country' and that 'the essential purpose and object' of the regulation is the fight against terrorism and not economic relations between the EC and each of the third countries where the individuals in question happen to be resident or to have funds. As the Court points out, certain of those countries of residence are Member States of the EU, which are certainly not third countries, even were the idea of a link based solely on residence (and not connection to the governing regime) to be accepted. In the ECJ's reading, then, the targeting of a third country is a direct requirement of Article 301 and not merely an incidental effect of a restrictive measure.

⁷⁴ Note that the Commission had proposed Art 308 as the sole legal basis for the earlier terrorist sanctions regulation, Regulation 2580/2001/EC, this being altered to Articles 301, 60(1) and 308 EC in a revised proposal: see n 45 above

⁷⁵ Case C-402/05 P *Kadi v Council and Commission*, Opinion of AG Poiares Maduro, 16 January 2008, para 12.

⁷⁶ *Ibid.* para 13.

⁷⁷ Case C-402/05 P *Kadi v Council and Commission*, n 2 above, paras 166-169.

Second, the Court also rejects the Commission argument that Article 301 is a kind of procedural provision which would allow its use over the whole range of Community competences. Interestingly, the ECJ holds that this would be to ‘reduce the ambit’ of Article 301 and that that provision should not necessarily be limited to ‘spheres falling within other material powers of the Community’ such as the common commercial policy and capital movements. Its view is thus that Article 301 is not ‘parasitic’ on other EC competences but rather establishes its own autonomous competence.

Third, likewise the ECJ rejects the suggestion that other competence provisions might be used, such as the common commercial policy, Article 133. The argument on Article 133 is interesting; the Court holds that a measure falls within the common commercial policy ‘only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned’.⁷⁸ In this case, the Regulation’s ‘essential purpose and object’ is combating international terrorism through freezing of the economic resources of individuals and entities; although trade effects might be the result, ‘it is plainly not its purpose to give rise to direct and immediate effects of that nature’.⁷⁹ This ruling is based on the case law dealing with the use of Article 133 for ulterior non-trade purposes; whatever the ulterior purpose (environmental protection for example), the immediate purpose must be to ‘promote, facilitate or govern trade’.⁸⁰ It shows that although Article 133 might have been an adequate legal base for economic sanctions based on trade restrictions (including transport services and perhaps investment and payments connected with trade) it cannot provide a legal basis for sanctions directed at individuals, even where their trading activities – if they exist – are inevitably indirectly affected. The Court’s approach here also suggests that Article 301 is not simply a *lex specialis* to Article 133, so that the latter can be used as a fallback where Article 301 does not apply.

Fourth, as far as capital movements are concerned, the Court gives a rather narrow interpretation of both Articles 57(2) and 60(2) EC.⁸¹ Article 57(2)⁸² does not refer to asset freezing as such but rather to direct investment, establishment, the provision of financial services and securities markets; however, a flexible interpretation of (for example) the provision of financial services might have been possible given that Article 57(2) does not specify a purpose for the action. Article 60(2) EC⁸³ is excluded by the Court since it refers

⁷⁸ Ibid. para 183.

⁷⁹ Ibid. paras 184-186.

⁸⁰ See for example Opinion 2/00 [2001] ECR I-9713; Case C-281/01 *Commission v Council* [2002] ECR I-12049.

⁸¹ Case C-402/05 P *Kadi v Council and Commission*, n 2 above, paras 190-193.

⁸² Article 57(2) provides that ‘... the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment - including investment in real estate - establishment, the provision of financial services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalization of the movement of capital to or from third countries.’

⁸³ Article 60(2) provides that ‘Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest. The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.’

only to the power of the Council to require a Member State to amend or abolish unilateral measures. It would be possible to imply into this provision a power to replace unilateral measures with a Community measure; however, this provision also refers to 'measures against a third country' so would suffer the same problem as Article 60(1).

Fifth, the ECJ implies that Article 308 cannot stand alone as a legal base, although it does not discuss this directly or comment on the CFI or Commission reasoning here. By holding that it was legitimate to include Articles 301 and 60 as legal bases alongside Article 308, on the grounds that the measures (as restrictive measures of an economic nature) were within their scope *ratione materiae*, the ECJ impliedly holds that Article 308 alone would not be enough.⁸⁴

What did the ECJ then say as to the possibility of using Article 308 in combination with Articles 301 and 60?

The ECJ disagrees with the CFI's analysis of the way in which Articles 301 and 60, together with Article 308, could act as a combined legal base. It rejects completely the idea that Article 308 could be used to adopt measures which have as their objective one of the objectives of the EU Treaty, of the CFSP. The ECJ holds that this would be contrary to the clear wording of Article 308, which refers to the objectives of the Community. The ECJ agrees with the CFI that the EC and EU are 'integrated but separate legal orders' and refers to the 'constitutional architecture' of the pillars but draws a different conclusion: this means that the bridge created by Articles 301 and 60 is between the EU/CFSP and those specific EC Treaty provisions and cannot be extended to other Treaty articles, and especially not to Article 308. That provision should not be used to widen the scope of Community powers beyond the provisions defining the tasks and activities of the Community. Although Article 3 TEU requires the Council and Commission to ensure consistency of the Union's external action across the pillars, this does not permit the Community's powers to be extended beyond the 'objects of the Community'.⁸⁵

Having decided that Articles 301 and 60 were a necessary but not a sufficient legal base, and having rejected the CFI's analysis of how Article 308 might supplement them, the ECJ then goes on to consider whether that combination of legal bases might be possible on other grounds. Pointing out that smart sanctions are an extension of the economic sanctions provided for in Articles 301 and 60, the Court holds that Article 308 could be used to extend the scope of those provisions as long as the two conditions established in Article 308 itself are satisfied: viz. (a) that the measure is necessary to fulfil an objective of the EC Treaty, and (b) it is adopted in the course of the operation of the common market.

(a) *Objective of the EC Treaty.* The ECJ holds that the objective of the Regulation is to impede the financing of terrorist activity and that this 'can be made to refer to' an EC objective. It does this first by defining the scope of Articles 301 and 60 in terms of economic measures but – crucially – with no mention this time of third countries as the target: 'they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP'; and second by identifying an 'implicit underlying objective' of Articles 301 and 60, 'namely that of making it possible to adopt such measures through the efficient use of a Community instrument'. It then concludes 'That objective may be regarded as constituting an objective of the Community

⁸⁴ Case C-402/05 P *Kadi v Council and Commission*, n 2 above, paras 212-216.

⁸⁵ *Ibid.* paras 198-204.

for the purpose of Article 308 EC.⁸⁶ So while rejecting the idea that Article 308 could serve EU objectives directly, the ECJ defines as an EC objective *the efficient use of a Community instrument to implement restrictive measures of an economic nature decided on under the CFSP*. The bridge has done more than import an EU objective into the Community legal order (as the CFI had suggested); it has in fact created a new Community objective – that of using a Community instrument to implement a CFSP decision. The distinction is a fine one but crucial for the Court’s purpose, which to ensure that Community competence is linked to Community objects.

(b) *The operation of the common market*. Here the ECJ is less explicit. It merely says that as the measures are economic in nature they ‘by their very nature offer a link to the operation of the common market’, and that a multiplication of unilateral measures ‘might well affect the operation of the common market’, ‘could have a particular effect on trade between Member States’, and ‘could create distortions of competition’.⁸⁷ If this were the case, it is hard to see why the Community action could not have been based on the internal market provisions suggested by the Commission, such as Article 57(2), possibly linked to Article 308. Indeed, it will be recalled that the Court had already held that given the ‘essential purpose and object’ of the Regulation, to combat international terrorism, ‘it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade’.⁸⁸ The link to the operation of the common market under Article 308 does not therefore have to constitute an immediate purpose of the measure, but may represent only an incidental effect. It may be argued that this attempt to identify a common market related objective as a pre-condition for using Article 308 was in fact misconceived; that the phrase ‘in the course of the operation of the common market’ is designed only to ensure that the measure is consistent with, and not obstructive of, the common market.⁸⁹ However the Court’s difficulty in fact demonstrates the problem with using Article 308 in the context of external relations. Its terms suggest that it may be used as a basis for exercising external powers only where those powers are linked to the (internal) operation of the common market in the fulfilment of Community objectives. However Community objectives have never been entirely internally-oriented and Article 308 has been used since the 1960s as a basis for external action, including the conclusion of international agreements, as well as other instruments whose link to the common market is hard to identify.⁹⁰

One final remark made by the Court to justify the use of Article 308 as an additional legal base is of interest. The Court pointed out:

Moreover, adding Article 308 EC to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals

⁸⁶ Ibid. paras 226-227.

⁸⁷ Ibid. paras 229-230.

⁸⁸ Ibid. para 183; see n 78 above.

⁸⁹ N Graf Vitzthum, ‘Les compétences législatives et juridictionnelles de la Communauté européenne dans la lutte contre le terrorisme - l’affaire Kadi’ [2008] *Zeitschrift für Europarechtliche Studien* 375 at 392.

⁹⁰ For an early example of an agreement based on Art 235 (now Art 308), see Council Decision (EEC) 77/585 of 25 July 1977 concluding the Convention for the protection of the Mediterranean Sea against pollution OJ L 240/1. See also the use of Art 308 as the only legal basis for the adoption of Regulation (EC) 976/99 on Community operations which contribute to the general objective of developing and consolidating democracy and the rule of law and respect for human rights and fundamental freedoms in third countries OJ 1999 L 120/1.

whereas, under Articles 60 EC and 301 EC, no role is provided for that institution.

This remark is, presumably deliberately, not included among the reasons why the use of Article 308 is necessary and indeed while the decision-making process and institutional balance are reasons for ensuring a correct legal basis, the Court has not gone so far as to prefer one decision-making procedure over another. Rather, the Court seems here to be addressing a possible objection to the use of a joint legal base: that the use of two legal bases may in some cases undermine the rights of the Parliament.⁹¹ In this case, on the contrary, the additional legal base has the effect of including at least a consultation of the Parliament.

The Court therefore agreed with the conclusions of the CFI, that the Community had competence to enact the Regulation and that Articles 301, 60 and 308 were the correct legal bases, while disagreeing with aspects of its reasoning. It therefore dismissed the grounds of appeal directed at this aspect of the CFI's judgment on the grounds that although its reasoning contained errors of law its judgment was justified on other legal grounds.

4. Smart Sanctions, the Objective of Article 301 and the Function of Article 308 EC

A. Competence, Conferred Powers and Objectives

In *Kadi* the issue of competence turned firstly on identifying the scope and limits of Articles 301 and 60 and secondly on the principles governing the use of Article 308. Underlying both is of course the principle of conferred powers. As has often been said, determination of legal base is to be based on 'objective factors which are amenable to judicial review and include in particular the aim and content of the measure'.⁹² Indeed, the aim and material scope not only of the legal act to be adopted but also of the power-conferring Treaty provision. It is striking how many layers of objectives and purpose result from the different attempts in this case to create a Community competence to adopt smart sanctions:

- Safeguarding international peace and security as a general CFSP-EU objective.
- Implementation of the UNSC resolutions on counter-terrorism as an EU (CFI) and EC (ECJ) objective.
- The purpose of Article 301 EC being to impose restrictive measures of an economic nature vis-à-vis third countries.
- The 'implicit underlying objective' of Article 301 being to implement actions decided on under the CFSP.
- The purpose of Article 308 EC being tied to the objectives of the EC Treaty.
- The purpose of Regulation 881/2002 being (i) to combat international terrorism, (ii) to implement UNSC Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) and more specifically (iii) to impose restrictive measures of an economic nature (iv) on specified individuals.

These different objectives and purposes inter-relate, not only because of the need to link the

⁹¹ See Case C-94/03 *Commission v Council (Rotterdam Convention)* [2006] ECR I-0001, at para 52, citing among others Case C-300/89 *Commission v Council* (the 'Titanium dioxide case') [1991] ECR I-2867.

⁹² See for example Case C-94/03 *Commission v Council (Rotterdam Convention)* [2006] ECR I-0001, at para 34.

specific purpose of the Regulation with the general objective of the Treaty Article(s) that is or are its proper legal base, but also because of the explicit link between the CFSP and Community powers in Article 301, and the potential use of the residual clause, Article 308, which is linked to EC Treaty objectives. At the heart of the case is an assessment of the core purpose of Article 301: is it essentially directed at relations with third countries or can its objective be defined in broader foreign policy terms (or both of these)? As we will see, the answer to this question is important not only to determine whether Article 301 alone is a sufficient legal base for ‘smart’ sanctions, but also to establish the extent to which Article 308 can be used to extend its substantive scope.

In its analysis of these connecting objectives and its reading of the EC Treaty, the Court is on the one hand cautious:

- in refusing to give a broader interpretation of Articles 301 and 60 to cover individual sanctions;
- in its interpretation of the scope of the common commercial policy;
- in its interpretation of the scope of Community powers under Articles 57 and 60(2) EC;
- in insisting on the need for both an EC objective and a link to the common market as a condition for the use of Article 308;
- in refusing to allow Article 308 to be used as a bridge for the implementation of EU objectives by way of EC instruments beyond the express scope of Articles 301 and 60.

On the other hand it is then prepared to give a broad reading to the scope of EC objectives when Articles 301, 60 and 308 EC are brought together. And having emphasized the non-trade, counter-terrorism purpose of Regulation 881/2001, the Court then links it to the operation of the common market by virtue of the economic and financial nature of the restrictions it imposes, and is rather ready to find a possible threat to the smooth operation of the common market were the sanctions to be imposed by individual Member State action (although in such a case they would have been coordinated through a CFSP common position). Thus, the ECJ’s approach to interpreting the scope of Articles 301 and 60, as well as of Article 308, is designed to stress the principle of conferred powers while at the same time finding that the necessary powers *have* in fact been conferred.

B. Article 308 and Union/Community Objectives: Assessing the CFI and ECJ Positions

The argument of the CFI on the use of Article 308 as a supplementary legal base is difficult to accept. The idea that Article 301 imports into the EC legal order the general EU objective of safeguarding international peace and security, and that this can then be extended via Article 308 to actions beyond those envisaged in Articles 301 and 60 challenges the principle of conferred powers. The link between the individual sanction and the powers given in Articles 301 and 60 is the nature of the action (what the ECJ calls the ambit *ratione materiae* of Articles 301 and 60): economic and financial restrictions. On the CFI view an instrument created with a view to a particular target (action against third countries) can by virtue of Article 308 be used with a different target (action against individuals) – because the two types of action share an underlying purpose (safeguarding international peace and security), that purpose *not being an explicit EC objective*.

The combination of Articles 301, 60 and 308 EC as proposed by the CFI (founded on CFSP objectives) raises questions as to the boundaries of the competence thereby opened up, especially when one considers the breadth and open-ended nature of those objectives. Even

if one accepts the extension of the explicit legal base in terms of its target by means of Article 308, could the same principle be used to extend the scope of Article 301 in different directions, beyond economic relations to restrictions of a different nature, for reasons of foreign policy? At what point does the link with Article 301's actual scope become too tenuous? By founding the use of Article 308 on EU objectives, firm anchorage to the Community framework is lost. The problems the CFI identifies with the use of Article 308 by itself – the blurring of the separation between the pillars and the loss of the distinctive nature of CFSP powers – do not seem to be removed by the additional reference to Articles 301 and 60.

It seems preferable to analyse Community competence in terms of Community rather than Union objectives; however the ECJ's application of Article 308 also poses problems.

The Court is somewhat vague about the way in which sanctions against individuals can become an EC objective: it identifies as a Community objective the use of a Community instrument to implement a CFSP decision: 'the efficient use of a Community instrument to implement restrictive measures of an economic nature decided on under the CFSP'. It then uses this as a basis for applying Article 308, but in doing so it declares it to be the 'implicit underlying objective' of Articles 301 and 60. We are here again faced with the limits to the use of Article 308. Where it is used on its own it is anchored to the EC Treaty framework by the requirement of a Community objective, and the Community objective may be derived from Articles 2 and 3 EC. However here the objective as proposed by the Court is not derived from Articles 2 and 3 directly (which is why Article 308 cannot be used alone in this case) but depends on an existing power-conferring provision, with Article 308 used to extend its scope. In this case then, the Community objective arises out of that provision (Article 301) and the measure adopted must seek to further that objective. Hence the Court's position that the Community objective which it identifies – the use of Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP – finds its expression in Articles 301 and 60. Is this really the underlying objective of Article 301? If it is, why is Article 308 necessary at all? Could not the necessary powers be implied directly, allowing Articles 301 and 60 to act as the sufficient legal base? Either economic sanctions against individuals can be derived as an objective of Articles 301 and 60, or they cannot. If they are, albeit implicit, then Article 308 should not be needed; if they are not then, since Article 308 has no objectives of its own, it cannot itself supply the missing objective.⁹³

C. Teleological Interpretations of Articles 301 and 60?

In response to these difficulties in the use of Article 308, AG Poiares Maduro proposed that Articles 301 and 60 would be an adequate legal basis on their own. But there are problems also with the Advocate General's argument: it is not possible simply to equate individual sanctions with the interruption or reduction of economic relations with a specific third country. The realities of economic life certainly mean that when sanctions are adopted

⁹³ AG Poiares Maduro makes this point (apropos of the CFI judgment) at para 15 of his Opinion: 'Article 308 EC ... is strictly an enabling provision: it provides the means, but not the objective. Even though it refers to 'objectives of the Community', these objectives are exogenous to Article 308 EC; they cannot be introduced by Article 308 EC itself. Hence, if one excludes the interruption of economic relations with non-State actors from the realm of acceptable means to achieve the objectives permitted by Article 301 EC, one cannot use Article 308 EC to bring those means back in. Either a measure directed against non-State actors fits the objectives of the CFSP which the Community can pursue by virtue of Article 301 EC, or, if it does not, then Article 308 EC is of no help.'

against a third country, with that explicit objective, that will entail the restriction of individual enterprises and persons within that country. We have seen the attempts made by the EU to mitigate some of those effects with targeted and territorially limited sanctions. Poiares Maduro then reverses this argument to the effect that when sanctions are adopted against individuals, then relations with the country in which that individual happens to live are inevitably interrupted. However although this may be an incidental effect it is not the directed intention of the act, and in cases where the individual is resident in an EU Member State even that incidental effect will not be present.⁹⁴ Poiares Maduro's interpretation of Article 301 is thus that it does not require the restriction of relations with third countries as a direct objective of the measure as long as it can be identified as a necessary, albeit incidental, effect. The problem here is that the wording of the Article does seem to suggest that third countries are indeed its target in the sense of objective as well as effect; the French version of Article 301 makes it clearer perhaps than the English that the act must be directed or aimed at a third country: 'une action de la Communauté *visant* à interrompre ou à réduire ... les relations économiques avec un ou plusieurs pays tiers'.⁹⁵

Halberstam and Stein argue that although the *specific intent* of Regulation 881/2001 may not be to restrict economic relations with a third country, it might be regarded as having that *general intent*, which 'implies more than the mere consideration of incidental effects' and that an 'expansive reading' of Article 301 which requires only a general intent towards third countries is in line with the history of Article 301, its purpose being to provide a firm legal basis for implementation of UNSC resolutions.⁹⁶ However true this latter point may be, and even if a general intent were regarded as sufficient for Article 301, there still seems to be a difficulty in finding even a general intent to target a third country in the case of the counter-terrorist sanctions. The impetus behind the UNSC regime is precisely the fact that the terrorist groups targeted are international and not associated with any specific country, EU Member State or otherwise. It would seem that although sanctions against individuals connected to a third country regime may be impliedly covered by Article 301 as a necessary means of restricting relations with that country, it does not seem possible to fit restrictive measures on individuals without such a link to a third country into the actual wording of Article 301.

It is of course by no means unusual for the Court to look beyond the actual wording of a Treaty provision to its underlying purpose. To take just one example from the field of counter-terrorism, in *Segi* the Court was prepared to interpret Article 35 TEU as giving it the jurisdiction to give a preliminary ruling on the validity of a common position adopted under Title VI TEU, on the ground that the intention of the provision (and of the preliminary ruling procedure in general) was to allow a review of validity of all measures designed to

⁹⁴ The Al Barakaat International Foundation, for example, is based in Sweden. As we have seen, Reg 881/2001 makes no distinction based on residence. The Advocate General argues (at para 13) that the Regulation is directed 'predominantly' at individuals and entities outside the EU, with the implication that those within the EU are only an incidental component and thus do not need to be covered by the legal base. However the balance between those within and those outside the EU is not established by the Regulation itself and could change at any time depending on the listing process within the UN system; it can hardly be said that the *predominant purpose* of the Regulation is to target individuals and entities within third countries even though that might happen to be the case on its initial adoption.

⁹⁵ Emphasis added. In the English the action is simply 'to interrupt or to reduce ... economic relations with one or more third countries'. Article 60(1) also reflects a sense of direction or purpose: the Council acts 'as regards' (à l'égard) the third countries.

⁹⁶ D Halberstam and E Stein, 'The United Nations, The European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 Common Market Law Rev. 13 at 41-42.

produce legal effects in relation to third parties.⁹⁷ Could not Article 301 be interpreted according to its teleology rather than its strict wording? The ECJ itself puts the history of Articles 301 and 60 in the context of the prior use of Article 133 to implement UN sanctions (and autonomous sanctions), 'entrusting to the Community the implementation of actions decided on in the context of European political cooperation'.⁹⁸ They are the extension of a practice which is now being extended further. What then is the teleology of Article 301? Is it essentially about the Community's relations with third countries or it is about implementing UNSC resolutions – and EU foreign policy decisions – by using efficient Community instruments? Is the *essential* purpose of Article 301 restrictive measures of an economic nature against third countries, or simply restrictive measures of an economic nature? The position of Article 301 (immediately following Article 300, on concluding agreements with third countries) and the context of Article 60, which is the movement of capital between countries, suggest the former, as perhaps does the prior use of Article 133 for the same purposes. Nevertheless the ECJ suggests the possibility of a different approach by identifying the provision as expressing an 'implicit underlying objective' defined in more general terms: *the efficient use of a Community instrument to implement restrictive measures of an economic nature decided on under the CFSP*.⁹⁹ Poiares Maduro, basing himself on an *effet utile* argument, says that he 'fails to see' why Article 301 should be interpreted more narrowly than the CFSP decision to impose economic and financial sanctions against non-State actors. For the Court though, this underlying objective is a precondition for the use of the flexibility clause, not a basis for implying powers directly from Article 301.¹⁰⁰ In its view Articles 301 and 60 do share with the Regulation a scope *ratione materiae*, in the sense of restrictive measures of an economic and financial nature, but this scope does not extend to individuals without any connection to the governing regime of a third country.

Although the Court refuses to use the underlying rationale of Article 301 as a basis for extending its application without the help of Article 308, the identification of this general objective suggests that it could perhaps be done. This would not be to argue that in some way the freezing of individuals' assets *is an example of* a restriction of economic relations with third countries. It would require an interpretation of Article 301 that places relations with third countries as an inessential element of the competence. It looks beyond not only the words of Article 301 but also beyond its immediate purpose, to what is deemed to be its underlying rationale. It also differs from the ECJ's preferred solution, combining Article 301 with Article 308: the difference between finding a competence within an explicit power-conferring provision and using the 'residual clause' that is Article 308, with all that follows in terms of different decision-making procedures.

D. Constitutional Considerations

Is it constitutionally preferable to derive Community competence from such an expansive reading of the substantive legal base, as compared with reliance on Article 308?

As the Court points out, including Article 308 in the legal base allows the European Parliament to play a role (albeit consultative only) whereas this is not possible under Articles 301 and 60 – and in this instance, that is all the more desirable as the measures are

⁹⁷ See n 60 above.

⁹⁸ Case C-402/05 P *Kadi v Council and Commission*, n 2 above, para 215.

⁹⁹ *Ibid.* para 226.

¹⁰⁰ *Ibid.* para 216.

specifically aimed at individuals.¹⁰¹ On the other hand Article 308 should only be used where the Treaty has not provided the necessary powers and its use in other cases where it is not strictly needed may distort the decision-making processes laid down in the specific power-conferring provision. The Member States, as drafters of the Treaty, laid down a procedure for economic sanctions linked to CFSP measures which was designed to allow for swift action (normally adopted on the same day as the Common Position). The addition of Article 308 not only involves the European Parliament, it results in unanimous voting in the Council, as opposed to qualified majority voting. In addition, as we have seen, the construction of the Community objective necessary for Article 308 rests on unstable ground and there are good constitutional reasons, as the Court itself recognizes, for taking care that Article 308 is not used as a substitute for Treaty amendment.¹⁰² Insofar as a power *can* be derived from an underlying EC Treaty objective, that objective, and therefore the power to act, is based on Articles 301 and 60 themselves and not Article 308; thus if there is a Community competence to adopt the Regulation it derives from Articles 301 and 60, and the very argument intended to establish the precondition for applying Article 308 tends to suggest that it is in fact unnecessary.

However there is no doubt that this alternative route to Community competence – to imply a very broad objective into Article 301 and then to extend its scope to measures with no reference to relations with third countries – pushes the concept of implied powers very far, probably too far if we take the concept of conferred powers seriously. The gap between the measure adopted and the measure originally envisaged is just too broad. In addition, the quasi-penal nature of individual sanctions militates against an extensive interpretation of Articles 301 and 60 to create what is effectively a new competence.¹⁰³ Thus a better conclusion, given the important implications of expanding the reach of economic sanctions to target individuals, is that the currently available legal bases do not provide a Community competence and that a (new or amended) explicit legal base is needed. Failing that, individual sanctions may be implemented by Member States themselves following a CFSP Common Position (in the same way as a visa or arms ban).

Why was this solution not chosen? The Court's willingness to find a path to Community competence tells us something about its vision of the relationship between the pillars and is in line with its recent case law on this point. In *Kadi* the Court insists that Article 308 cannot be used in order to achieve CFSP objectives, but then defines *Community* objectives in such a way as to allow the use of a Community instrument for counter-terrorism purposes. In the *Small Arms and Light Weapons* case the ECJ held that one effect of Article 47 TEU was to require the use of an EC development instrument to achieve objectives that are security-based as much as they are development-based.¹⁰⁴ In both cases Community competence prevails. In *Small Arms and Light Weapons* it prevails not only over a CFSP act but also over the possibility of a joint EC/CFSP legal base; in *Kadi* it prevails over the possibility of a CFSP act being implemented directly by Member States. In both cases the Court stresses both the autonomy of the EC legal order with respect to the CFSP and the ability of the Community legal order to respond to new security challenges.

There is a further constitutional irony here. Although a result that the Community had no

¹⁰¹ Ibid. para 235.

¹⁰² Ibid. paras 203 and 224; see also Opinion 1/94 [1996] ECR I-01759, para 30.

¹⁰³ See n. 89 above, at 389.

¹⁰⁴ Case C-91/05 *Commission v Council* [2008] ECR I-03651.

competence appears constitutionally more cautious, the possibility of judicial protection for individuals in the Community system would thereby have been much reduced. Unlike third pillar sanctions, sanctions based on the second pillar alone are not currently subject to judicial review by the Community Courts.¹⁰⁵ Both these points were recognized by implication by the Member States in drafting the Constitutional Treaty, and then the Treaty of Lisbon. This both amends the legal base to include an explicit reference to individuals, and provides for judicial review of such measures.

5. The Impact of the Lisbon Treaty

To complete the picture let us look briefly at the impact of the Treaty of Lisbon on the issue of Community competence to adopt smart sanctions.

A new provision on economic and financial sanctions, replacing Articles 301 and 60, will provide an explicit legal basis for sanctions against natural or legal persons, groups and non-State entities as well as States.¹⁰⁶ The current two-stage approach of CFSP decision followed by Community Regulation will be retained although the names of the legal acts will be changed. The proposal for the measure adopted under Article 215 TFEU will be a joint one from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy, and the Council will act by qualified majority vote. The European Parliament is to be informed but has no formal part in the process.¹⁰⁷ As far as individuals are concerned the Article provides simply for 'restrictive measures', leaving the choice of legal act and type of measure to the Council. The new Article will also provide that all acts adopted under this provision 'shall include necessary provisions on legal safeguards'.

Although the Treaty of Lisbon would retain the current exclusion of the Court's jurisdiction over the CFSP,¹⁰⁸ a significant exception is provided to allow judicial review of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of CFSP competence. The framing of this exception is wider than measures adopted under Article 215 TFEU and would include restrictive measures adopted by CFSP decision that are not implemented via the TFEU, but directly by the Member States, such visa bans.

In addition to this procedure, a new legal base has been added to Title V of Part III of the TFEU, on the Area of Freedom, Security and Justice (AFSJ), to be used in the context of preventing and combating terrorism.¹⁰⁹ These measures are not explicitly directly at third countries, they involve the freezing of assets belongs to individuals or non-State entities and they do not require a prior CFSP decision:

Where necessary to achieve the objectives set out in Article 67, as regards

¹⁰⁵ For judicial review of third pillar sanctions, see n 60 above; for discussion of the responsibilities of national courts faced with the lack of possibility of judicial review at Community level see Case T-253/02: *Chafiq Ayadi v Council* [2006] ECR II-02139, on appeal to ECJ as case C-403/06 P, pending.

¹⁰⁶ Article 215 Treaty on the Functioning of the EU (TFEU). This provision is in Part V of the TFEU, on external action.

¹⁰⁷ The measure adopted by the Council is thus not a 'legislative act' within the meaning of Art 289 TFEU; however the Council has discretion as to the form of measure and may adopt a 'legal act' in the form of a regulation, directive or decision: Arts 296 and 297(2) TFEU.

¹⁰⁸ Article 275 TFEU.

¹⁰⁹ Article 75 TFEU.

preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

The framework regulations are to be adopted by the ordinary legislative procedure (co-decision by the European Parliament and Council); implementation is then by Council act without Parliamentary involvement. Measures adopted on this basis are subject to judicial review as is normal for regulations and implementing decisions.¹¹⁰

The relationship between the two provisions, which have different decision-making procedures, is unclear. The scope of Article 75 TFEU is more defined, relating to capital movements and payments, and is restricted to individuals, whereas Article 215 TFEU provides for all types of restrictive measure and also measures against third countries. It could therefore be argued that Article 75 is a *lex specialis* as far as financial sanctions are concerned with other individualized sanctions (such as visa bans?) falling within Article 215. Or that Article 75 is to be used for measures which form part of the EU's counter-terrorism policy. On the other hand, Article 215 is found among the external relations provisions of the TFEU, whereas Article 75 is placed within the AFSJ; so although neither provision is expressly limited in this way it could be argued that Article 215 is intended to be used against persons engaged in activities outside the EU, whereas measures against those active (only?) in the EU should be based on Article 75.

The choice of legal base is significant, not least for the European Parliament. In addition, Article 215 presupposes a CFSP decision and the Treaty of Lisbon has established a principle of 'equal but separate' to define the relationship between the CFSP and other Union policies. Under Article 40 TEU:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

Thus it could be argued that a measure adopted under Article 75 TFEU which should have been adopted on the basis of a CFSP decision together with Article 215 TFEU 'affects' the procedural and institutional balance contrary to Article 40 TEU (and vice versa). A clear means of differentiating between the two will have to be found. What of the kind of measure envisaged in Article 4 of Common Position 2001/931/CFSP, i.e. a measure involving police cooperation? At present this common position is based on a joint second and third pillar legal base. Under the Treaty of Lisbon the third pillar dimension is covered by chapter 5 (police cooperation) of the AFSJ Title V in Part III of the TFEU, and action might be taken under Article 87 TFEU. Article 40 TEU suggests that it would no longer be possible to

¹¹⁰ Note the amendment of Art 230(4) EC (Art 263 TFEU) to broaden the standing rules for individuals.

adopt such a measure under the CFSP, the AFSJ provisions must be used instead.

Finally we may note that under the Treaty of Lisbon, Article 308 EC, which will become Article 352 TFEU, is amended so as to codify (albeit probably for different reasons) an aspect of the ECJ ruling in *Kadi*. Article 352(4) TFEU provides that it cannot be used 'as a basis for attaining objectives pertaining to' the CFSP, and that acts adopted under this provision are to respect the limits set out in Article 40(2) TEU (that is, they are not to affect CFSP powers). No attempt is made to define 'objectives pertaining to' the CFSP and one reform brought about by the Treaty of Lisbon is to gather together in one provision all the Union's objectives relating to external action without in this instance distinguishing between the CFSP and other external policies.¹¹¹ As the reference to Article 40(2) TEU makes clear, this particular provision is designed more to protect the specificity of the Union's CFSP powers from encroachment via the 'flexibility clause' than to prevent 'competence creep', an over-expansion of Union powers. We have seen that the autonomy of the Community legal order lies at the heart of the *Kadi* judgment, including those parts of it which deal with competence and legal base. As the Community legal order merges into the Union legal order the Court will be faced with defining its autonomy in new ways.

¹¹¹ Art 21 TEU; see also Arts 3(5) TEU and Art 205 TFEU.

Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order

Takis Tridimas*

1. Introduction

In the EU's flawed system of governance, democracy finds solace in judicial review. Perhaps no other case in the history of the EU illustrates this better than the judgment of the ECJ in *Kadi and Al Barakaat v Council*.¹ The judgment is important for a number of reasons. First, it shows how the European Community relates to the world beyond its borders. It is in fact the most important judgment ever delivered by the ECJ on the relationship between Community and international law. Secondly, it makes important pronouncements of principle in relation to the competence of the Community and the scope of fundamental rights protection under Community law. In its judgment, the ECJ held that the Community has competence to adopt economic sanctions not only against states but also against individuals. It also held that UN Security Council resolutions are binding only in international law and cannot take precedence over the Community's internal standards for the protection of fundamental rights. On the basis of those findings, the ECJ reversed the judgment of the CFI under appeal² and annulled the contested regulation which implemented a SC resolution.

In relation to competence and the reception of international law, the ECJ's approach is decidedly 'sovereignist'. In relation to fundamental rights protection, it is unmistakably liberal. The underlying values of the judgment are respect for liberal democracy and Community empowerment. These values are by no means unfamiliar to the ECJ but it has not expressed them so confidently since its seminal judgment in *Internationale Handelsgesellschaft*.³ The present author has attempted to analyse in detail the ECJ judgment in *Kadi* and the case law of the CFI on economic sanctions elsewhere.⁴ This paper seeks to highlight selective aspects of the judgment in *Kadi* focusing in particular on three issues: community competence, the reception of international law in the EU legal order, and the protection of fundamental rights. It also seeks to examine briefly the case law of the CFI on Community sanctions with particular reference to its judgment in *OMPI II*⁵ which was delivered after the ECJ's judgment in *Kadi*.

The origins of *Kadi and Al Barakaat* lie in counter-terrorism measures adopted by the UN Security Council. Before the collapse of the Taliban regime, the Security Council adopted two resolutions⁶ requiring all member states to freeze the funds and other financial resources owned or controlled by the Taliban and their associates. The Security Council also set up a

* Professor of Law, Queen Mary, University of London.

¹ Joined Cases C-402/05 P & C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission*, judgment of 3 September 2008.

² Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533

³ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁴ T. Tridimas and J.A. Gutierrez-Fons, EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress? (2008) 32 Fordham International Law Journal 901.

⁵ Case T- 256/07 *People's Mojahedin Organisation of Iran v Council (OMPI II)*, judgment of 23 October 2008.

⁶ Security Council Resolution 1267 (1999), 15 October 1999, and Resolution 1333 (2000), 19 December 2000.

Sanctions Committee which was responsible, inter alia, for drawing up a list of persons and entities whose funds would be frozen pursuant to the resolutions.⁷ Taking the view that action by the Community was necessary to implement these resolutions, the EU Council adopted two CFSP Common Positions⁸ which were, in turn, implemented by two Council Regulations⁹ adopted on the basis of Articles 60 and 301 EC.

After the collapse of the Taliban regime, the Security Council adopted two further resolutions¹⁰ which also provided for the freezing of funds but, this time, they were directed against Osama bin Laden, members of Al-Qaeda network, and the Taliban. Since they no longer controlled the government of Afghanistan, the resolutions in question targeted solely non-state actors. Those resolutions were also implemented at EU level. The Council adopted two new CFSP common positions¹¹ which were implemented respectively by Council Regulations 881/2002/EC¹² and 561/2003/EC¹³. This time, the Council relied as the legal basis for the adoption of the regulations not only on Articles 60 and 301 but also on Article 308 EC. The Sanctions Committee amended and supplemented the sanctions list a number of times and, each time, the amendments were introduced in Community law by respective amendments to the Community regulations.

In *Kadi* and *Al Barakaat*, the applicants were respectively a Saudi Arabian national and a Swedish national who had been included in the lists drawn up by the UN Sanctions Committee and, consequently, in the lists incorporated in implementing Community regulations. They brought proceedings before the CFI seeking the annulment of those regulations alleging breach of their fundamental rights, namely, the right to a fair hearing, the right to respect of property, and the right to effective judicial review.

2. EC Competence: The Revolving Door of Article 308 EC

The first issue that the Community judiciary had to grapple with was competence: Does the Community have competence to adopt economic sanctions against individuals? Both the CFI and the ECJ found that the contested sanctions could be adopted on the combined legal basis of Articles 301, 60 and 308, but reached that result on the basis of different reasoning. Advocate General Maduro opined that Articles 301 and 60 provided sufficient legal basis for the measure.

At first instance, the CFI held that, since the sanctions targeted individuals who were neither associated with the incumbent government nor had links with a particular territory, there was no sufficient link between the targeted individuals and a third country and therefore,

⁷ The Sanctions Committee was established by Resolution 1267 (1999).

⁸ Common Position 1999/727/CFSP concerning restrictive measures against the Taliban, OJ 1999, L 294/1, and Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP, OJ 2001, L 057/1.

⁹ Regulation (EC) No 337/2000, OJ 2000, L 43/1; Regulation (EC) No 467/2001, OJ 2001, L 067/1.

¹⁰ Security Council Resolution 1390 (2002) of 28 January 2002 and Security Council Resolution 1453 (2002) of 24 December 2002.

¹¹ Common Position 2002/402/CFSP, OJ 2002, L 139/4; and Common Position 2003/140/CFSP, OJ 2003, L 53/62.

¹² Council Regulation (EC) No 881/2002, OJ 2002, L 139/9.

¹³ Council Regulation (EC) No 561/2003, OJ 2003, L 82/1.

Articles 301 and 60 EC could not by themselves empower the Community to impose sanctions.¹⁴

It considered, nevertheless, that Community competence could be established with the assistance of Article 308 as a joint legal basis. It pointed out that Articles 60 and 301 EC are wholly special provisions in that they enable the Council to take action to achieve the objectives not of the Community but of the Union. Under Article 3 TEU, the Union is to be served by a single institutional framework and ensure the consistency of its external activities as a whole. Just as all the powers provided for by the EC Treaty may prove to be insufficient to allow the institutions to act in order to attain one of the objectives of the Community, so the powers to impose economic sanctions provided for by Articles 60 EC and 301 EC may prove to be insufficient to allow the institutions to attain the objective of the CFSP. There are therefore good grounds for accepting that, in the specific context contemplated by Articles 60 EC and 301 EC, recourse to the additional legal basis of Article 308 EC is justified for the sake of the requirement of consistency laid down in Article 3 EU.¹⁵

On appeal, Advocate General Maduro rejected the legitimacy of recourse to Article 308 but opined that Articles 60 and 301 EC are by themselves sufficient legal bases. First, he employed a textual argument. He pointed out that the only requirement provided for in Articles 301 and 60 is that the Community measures adopted thereunder must interrupt or reduce economic relations with third countries. The Treaty does not regulate what shape the measures should take, who should be the target or who should bear their burden.¹⁶ He reasoned that, by adopting sanctions against entities located in third countries, economic relations between the Community and these countries are also inevitably affected.¹⁷ Secondly, he argued that the CFI's restrictive reading of Article 301 deprived it of much of its practical use as it disabled the Community from adapting to modern, mutating threats to international peace and security.

The ECJ found the Advocate General's reasoning unconvincing. It held that the contested sanctions could not be adopted solely on the basis of Articles 60 and 301 EC since they did not bear any link to the governing regime of a third country. The essential purpose and object of the contested regulation was to combat international terrorism and not to affect economic relations between the Community and the third countries where the listed persons were located.¹⁸

The ECJ took the view that the contested sanctions could be adopted on the combined legal basis of Articles 60, 301 and 308 EC but for reasons different from those accepted by the CFI. It found the bridge rationale of the CFI lacking. First, it held that, although Articles 60 and 301 establish a bridge between the imposition of economic sanctions by the Community and CFSP objectives, such bridge does not extend to other provisions of the Treaty. Action under Article 308 can only be undertaken in order to attain one of the objectives of the Community which cannot be regarded as including the objectives of the CFSP.¹⁹ Secondly, the Court took the view that recourse to Article 308 would run counter to the inter-pillar

¹⁴ CFI judgment in *Kadi*, op.cit., n. 3, paras 93-97.

¹⁵ Ibid, paras 127-128.

¹⁶ Opinion of Maduro AG, op.cit., para 12.

¹⁷ Ibid, para 13.

¹⁸ ECJ judgment in *Kadi*, op.cit., n. 2, paras 166-169.

¹⁹ Ibid., paras 197-201.

nature of the Union. The constitutional architecture of the pillars, as intended by the framers of the Treaties, militated against any extension of the bridge to articles of the EC Treaty other than those which explicitly created a link.²⁰ Finally, employing the rationale of Opinion 2/94,²¹ it held that Article 308 EC, being an integral part of an institutional system based on the principle of enumerated competences, cannot serve as a basis for widening the scope of Community powers beyond the framework created by the Treaty provisions defining its tasks and activities.²²

Despite the above, the ECJ found that Article 308 was correctly included in the legal basis of the contested regulation. It reasoned that, although Articles 60 and 301 authorized only sanctions against states, recourse to Article 308 could be made to extend their limited ambit *ratione materiae*, provided that the other conditions for its applicability were satisfied.²³ Inasmuch as they provide for Community powers to impose economic sanctions in order to implement CFSP action, Articles 60 and 301 are the expression of an implicit and underlying Community objective, namely that 'of making it possible to adopt such measures through the efficient use of a Community instrument'.²⁴ This, the Court held, was a Community objective for the purposes of which the residual clause of Article 308 can be utilized. The Court also found that the second condition of Article 308, namely that the measure must relate to the operation of the common market, was also fulfilled so that it was possible to adopt the contested regulation on the basis of the combined basis of Articles 60, 301 and 308 EC.

The reasoning of the ECJ is problematic. The Court appears to draw a distinction between the ultimate objectives pursued by the underlying CFSP common position, which was to maintain international peace and security, and a separate, instrumental, objective of the contested regulation, namely to prevent certain persons associated with terrorism from having at their disposal economic resources. The distinction between objectives which coexist at separate levels allows Article 308 to be used as a revolving door. Whilst Article 308 could not be utilized to fulfil directly the first, it could be utilized to fulfil the second. The Community objective pursued, in fulfilment of which Article 308 could be resorted to, was not to combat terrorism but to make it possible to adopt the measures envisaged by Article 60 and 301 'through the efficient use of a Community instrument'.²⁵ This distinction however appears to put the cart before the horses: If Articles 60 and 301 only authorize the imposition of sanctions against states, as the Court proclaimed that they do, how can it be said that their objectives include the imposition of sanctions against individuals? In effect, the Court's reasoning confuses means with objectives and is self-contradictory. The ECJ indirectly allows Article 308 to be elevated to an inter-pillar legal basis, thereby undermining its earlier finding that Article 308 cannot be used to pursue CFSP objectives.

There is a second aspect of the Court's reasoning which appears unconvincing. The Court held that the second condition for the application of Article 308, namely that the measure must relate to the operation of the common market, was satisfied. It held that, if economic sanctions were imposed unilaterally by each Member State, the multiplication of national

²⁰ Ibid, para 202.

²¹ Opinion 2/94 on the Accession of the EC to the ECHR [1996] ECR I-1759.

²² ECJ judgment in *Kadi*, op.cit., para 203.

²³ Ibid, para 216.

²⁴ Ibid, para 226.

²⁵ Ibid.

measures might affect the operation of the common market. Such measures could affect interstate trade, especially the movement of capital and payments and the right of establishment. In addition, they could create distortions of competition, since any differences between state sanctions could operate to the advantage or disadvantage of the competitive position of certain economic operators.²⁶

This reasoning does not appear persuasive for the following reasons. The purpose of the sanctions is clearly not to regulate the common market but to combat terrorism. Any effects that they may have on free movement are incidental. In defining the scope of harmonization action under Article 95 EC, the ECJ has held that there must be a need to eliminate substantial or 'appreciable' distortions in competition.²⁷ In the present case, there is scant evidence that such distortions might arise in the absence of Community legislation and, in any event, the Court did not attempt to engage in any inquiry to determine the threshold of appreciability. Similarly, under established case law, a mere risk of disparities between national rules and a theoretical risk of obstacles to free movement or distortions of competition is not sufficient to justify the use of Article 95.²⁸ Although recourse to Article 95 EC is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.²⁹ It does not appear that the contested regulation in *Kadi* fulfils this test. As the CFI pointed out, the implementation of the SC resolutions by the Member States would not pose a serious danger of discrepancies in the application of sanctions. For one thing, the SC resolutions contained clear, precise and detailed definitions and obligations that left scarcely any room for interpretation. For another, the importance of the sanctions was so great that there was no reasonable danger of inconsistent application at the national level.³⁰ Taken at face value, the ECJ's rationale in *Kadi* suggests that the threshold which triggers the application of Article 308, a residual provision, is much lower than the threshold which triggers Article 95, the main internal market tool of the Treaty.

The final argument used by the Court also raises objections. The Court held that adding Article 308 to the legal basis of the contested regulation enables the European Parliament to take part in the decision-making process whereas Articles 60 and 301 provide for no such role for the Parliament. This argument echoes *Titanium Dioxide*³¹ and recognizes the democratic deficit in the imposition of sanctions. It is however not capable of triggering the application of Article 308 or any other legal basis where its substantive conditions are not fulfilled.³²

²⁶ Ibid, para 230.

²⁷ C-376/98 *Germany v Parliament and Council (Tobacco I case)* [2000] ECR I-8419, para 106.

²⁸ Case C-380/03 *Germany v Parliament and Council, (Tobacco II case)*, judgment of 12 December 2006, para 37; Joined cases C-154/04 and C-155/04 *The Queen, Alliance for Natural Health Nutri-Link Ltd v Secretary of State for Health* [2005] ECR I-6451 (*Vitamins case*), para 28.

²⁹ see e.g. *Tobacco II case*, op.cit., paras 39 & 41; Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, para 15; *Vitamins case*, op.cit., para 29.

³⁰ See CFI judgment in *Kadi*, op.cit., n. 3, para 113.

³¹ Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867.

³² Cf Case C-155/91 *Commission v Council (Waste Disposal Directive case)* [1993] ECR I-939 where the ECJ distinguished *Titanium Dioxide* and placed limits on the argument of democracy. The positioning of this argument in the body of the judgment in *Kadi* also appears somewhat odd. It is included in para 235 as a last, subordinate, argument added almost as an afterthought.

Despite the above criticisms, one can understand why, from a policy perspective, it appears preferable to take counter-terrorist action at Union rather than at Member State level. The making of counter-terrorist policy, its implementation via binding legal measures, and its actual enforcement stand a much higher chance of being successful if they are coordinated at supra-national level. Terrorist financing, in particular, transcends national frontiers and can be combated much more effectively by coordinated action rather than by isolated measures taken by individual states. At a micro-level, EU action enhances the Union's credentials as a powerful actor in foreign and security policy. It also serves the interests of Member States in a number of ways. It provides an efficient law-making mechanism for the adoption of anti-terrorism measures. It also neutralizes awkward questions or objections that might be aired under national decision-making processes, offering the opportunity for shifting the blame to the EU. In short, taking action at Union level is more efficient, politically expedient, and, most importantly, stands a higher chance to be effective. The EU can thus be seen as the natural home for counter-terrorist decision making.

From the legal point of view, as the Treaties stand at the moment,³³ the issue of Community competence is highly problematic and *Kadi* can justly be seen as a borderline case. In view of the language of Article 301, establishing Community competence requires a leap of faith. If such a leap is to be performed at all, it can be performed more persuasively by relying solely on Articles 60 and 301 rather than invoking Article 308. There are four arguments in favour of Community competence. First, as the Advocate General opined, the language of Article 301 does not exclude the imposition of sanctions against individuals. Secondly, a historical interpretation of the provision suggests that the authors of the Treaty had no intention to exclude such sanctions. Thirdly, a teleological and evolutionary interpretation favours competence to impose sanctions against non-state actors. Finally, such interpretation appears suited to the nature of Article 301 as a *pasarelle* provision which provides a bridge between the first and the second pillar.

As the CFI accepted, Article 301 was designed to enable the Community to comply with international commitments of the Member States, especially those undertaken under the auspices of the UN.³⁴ It is correct, as the ECJ pointed out, that an exact correlation between Article 41 of the UN Charter which authorizes the Security Council to adopt economic sanctions and Article 301 cannot be drawn. The fact, however, that Article 301 refers only to the imposition of economic sanctions on third countries does not mean that the authors of the Treaty purposefully excluded sanctions against non state organizations. At the time when that provision was introduced by the Treaty on European Union, smart sanctions simply did not exist as instruments of foreign policy.³⁵

³³ The discussion about competence would be otiose if the Lisbon Treaty came into force. Article 215(2) on the Functioning of the European Union (TFEU) expressly grants the Council power to adopt restrictive measures against individuals, groups and non-state groups on the basis of a CFSP decision. Such measures can be challenged by way of direct action: see Article 24(1) TEU, as amended by the Lisbon Treaty, and Article 275(2) TFEU.

³⁴ See CFI judgment in *Kadi*, op.cit., n.3, para 202.

³⁵ Article 41 authorises the UNSC to take measures which 'may include complete or partial interruption of economic relations'. Article 301, by contrast, refers to 'action by the Community to interrupt or to reduce in part or completely economic relations *with one or more third countries*' (emphasis added). This difference in terminology however is by no means conclusive. Prior to the introduction of Article 301 by the TEU, economic sanctions against third countries were imposed on the basis of Article 133 EC on the common commercial policy. That provision was designed to serve trade policy objectives and its use for the adoption of sanctions pursuing foreign policy objectives was controversial. With the insertion of Article 301 EC, the drafters of the TEU sought to avoid discrepancies between CFSP objectives and the implementing powers of the Community.

If applied consistently, a narrow interpretation of Article 301 EC would appear to lead to odd practical results. It would be possible for the Community to impose sanctions on non-state entities that finance a rogue regime or a rebel group that exercises *de facto* control over part of the territory of a country but, as soon as the rogue regime falls or the rebel group is defeated, the Community would no longer be able to renew the sanctions even if the targets continued to pose a substantial and imminent threat to the political stability of the country in question. This would hardly be compatible with the need to maintain international peace and stability, which is one of the key objectives of the CFSP and the underlying aim of Article 301 EC.³⁶ In short, a narrow interpretation of Article 301 would be based on a formalistic distinction between state and private action which would not do justice to the forces that shape the sources and exercise of political power.

Finally, from the humanitarian point of view, and also from the point of view of adverse legal repercussions, it would be odd if it was accepted that Articles 301 and 60 EC enable the Community to do *more*, i.e. impose comprehensive sanctions against countries which burden the whole of the population, but not *less*, i.e. adopt targeted sanctions against specific groups. It may be retorted that this is the language of political expediency rather than the language of law. Still, insofar as the purpose of Article 301 as a *pasarelle* is to provide the means to achieve objectives, the rationale of smart sanctions adds credence to a purposive and evolutive interpretation of that provision.

Thus, if it is to be accepted that the Community has competence, it is submitted that the appropriate basis should be found in Articles 310 and 60 and that recourse to Article 308 EC is superfluous. As Advocate General Maduro noted, Article 308 cannot serve as an inter-pillar bridge. It is strictly an enabling provision which provides the means but not the objective.³⁷ Either, a measure targeting non-state actors comes within the objectives of the CFSP, in which case it can be adopted under Article 301 EC, or it does not, in which case Article 308 cannot be used as its basis. Increasing the quantity of legal bases cannot improve their quality.

3. The Effect of SC Resolutions in the Community Legal Order

Once it was established that the Community had competence to adopt the contested sanctions, the next issue to consider was the effect of SC resolutions in the Community legal order. On this issue, the CFI and the ECJ took diametrically opposing views. The CFI adopted an internationalist approach. It accepted that whilst the Community is not bound by the UN Charter by virtue of international law, it is so bound by virtue of the EC Treaty itself.³⁸ It based such primacy on the combined effects of Articles 307(1) and 297 EC and the theory of substitution.³⁹ Article 307(1), which was central to the CFI's reasoning, seeks

(Contd.) _____

Article 301 did not refer to non-state actors since at the time of its introduction smart sanctions were not used as an instrument of foreign policy. See G Zagel, *Sanctions of the European Community: A Commentary on Art. 301 TEC*, Law of the European Union, Forthcoming Available at SSRN: <http://ssrn.com/abstract=862024> and P. Koutrakos, *EU International Relations Law*, Hart, 2006, at 423-4.

³⁶ A further argument in support of the view that Articles 301 and 60 EC are sufficient legal basis is that these provisions refer to 'third countries', as opposed to 'third states'. The term 'countries' is wider than 'states' and appears to encompass the population rather than solely the government or the concept of public power in the sense of *etat*.

³⁷ Op.cit., n. 1, at para 15 of the Opinion.

³⁸ CFI judgment in *Kadi*, op.cit., paras 192, 203-204.

³⁹ This theory posits that, where under the EC Treaties the Community assumes powers previously exercised by

to preserve the binding effect of international agreements concluded by Member States before they assumed obligations under the EC Treaties. The CFI pointed out that, at the time when they concluded the EC Treaty, the Member States were bound by their obligations under the UN Charter. Referring to *International Fruit*,⁴⁰ it held that, by concluding the EC Treaty between them, the Member States could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under the UN.⁴¹ It followed that the Community was under an obligation to respect Member States' obligations under the Charter. The CFI found that the binding effect of the Charter barred it from reviewing the validity of the contested regulation on the basis of Community law. Since the regulation implemented a SC resolution, review of the former would inevitably carry with it incidental review of the latter, which would be incompatible with the primacy of the Charter. The CFI accepted however that SC resolutions must observe the fundamental peremptory provisions of *jus cogens* and proceeded to examine whether the contested sanctions complied with them. By this construct, the CFI sought to reach a golden balance. It affirmed the primacy of the UN Charter over Community law whilst subjecting the Security Council to principles endogenous to the legal system at the apex of which it stands. This reasoning however is neither logically inevitable nor constitutionally secure.

The ECJ was less concerned with the primacy of the UN Charter and more preoccupied with reiterating the autonomy and constitutional credentials of Community law. Invoking *Les Verts*,⁴² it held that the Community is based on the rule of law and that neither its Member States nor its institutions can avoid review of the conformity of their acts with the EC Treaty as the Community's basic constitutional charter. It then stated that an international agreement cannot affect the allocation of powers fixed by the Treaties or the autonomy of the Community legal system.⁴³ It emphasised that fundamental rights form an integral part of the general principles of Community law and that compliance with them is a *sine qua non* for the lawfulness of Community action.⁴⁴ On that basis, it concluded that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty.⁴⁵ The ECJ's approach is firmly a sovereigntist one. Asserting the 'constitutional hegemony' ⁴⁶ of EC law, it did not allow the primacy of the UN Charter to perforate the constitutional space of the Community legal order making a clear-cut distinction between the international obligations of the Community and the effect of Community norms, no matter their source, within the Community legal order.

The ECJ's approach is preferable. In contrast to the argumentation of the CFI, neither Article 307 nor Article 297 EC appears capable of dislodging the jurisdiction of the

(Contd.) _____

the Member States in an area governed by an international agreement, the provisions of that agreement become binding on the Community. It was developed by the ECJ in Joined Cases 21-24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

⁴⁰ Op.cit., n. 39.

⁴¹ CFI judgment in *Kadi*, op.cit., n.2, para 188.

⁴² Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23.

⁴³ ECJ judgment in *Kadi*, op.cit., n.2, para 282 referring to Opinion 1/91 [1991] ECR I-6079, paras 35 and 71, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, para 123.

⁴⁴ Ibid, paras 283-284 and see further Opinion 2/94, op.cit., para 34, and Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 73.

⁴⁵ Ibid, para 285.

⁴⁶ The expression is borrowed from P.J. Spiro, *Treaties, International Law, and Constitutional Rights*, (2000) 55 *Stanford Law Review*, 1999.

Community courts to apply fundamental rights. Articles 307(1) and 297 are exceptional provisions of the Treaty which, under certain conditions, authorize Member States to depart from Community rules to serve international law commitments. But they do not impose on the Community an obligation to suspend the application of fundamental constitutional principles. It is simply not convincing to argue that all tasks that the Member States, or the Community in their lieu, are called upon to take at any time in the future as a result of SC resolutions are *simpliciter* exempted from the fundamental guarantees of Community law. As Advocate General Maduro stated, Article 307 may not grant SC resolutions with a ‘supra-constitutional’ status and render Community measures implementing UN law immune from judicial review⁴⁷. In the light of article 6(1) EU, under no circumstance may the Community depart from its founding principles, in particular, respect for human rights and fundamental freedoms. The case-law of the ECJ also demonstrates its serious commitment to the rule of law under which measures in breach of human rights are excluded from the Community legal order. Thus, neither Article 297 nor Article 307 may permit any derogations from the principles laid down in Article 6(1) TEU which form part of the very foundations of the Community legal order.⁴⁸

Notably, the ECJ distinguished the situation in *Kadi* from *Behrami and Saramati*.⁴⁹ In that case, the ECtHR had dismissed the complaint of the applicants that their Convention rights had been violated by action undertaken during the Kosovo conflict. The action had been undertaken by French, German and Norwegian nationals in the service of UNMIK and KFOR. The ECtHR found that the actions of the defendants states were directly attributable to the UN which by a Security Council resolution had delegated its powers to establish international security and civil presences to UNMIK and KFOR.⁵⁰ In a deferential judgment, the ECtHR attributed particular significance to the imperative nature of maintaining peace and security as the principal aim of the UN and the powers accorded to the SC under Chapter VII to fulfil that aim. In doing so, it appeared to concede that the aim of maintaining peace and security and the uniqueness of the UN takes priority or, at least, conditions heavily the aims of the ECHR. In *Kadi*, the ECJ dismissed the relevance of *Behrami* on two grounds. First, it held that the legal and factual setting of the case was fundamentally different and, secondly, it asserted the ideological autonomy of the Community legal order. The Convention is designed to operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level and provides only minimum protection.⁵¹ The EC Treaty, by contrast, has founded an autonomous legal order, within which states as well as individuals have immediate rights and obligations and on the basis of which the ECJ ensures respect for fundamental rights as a ‘constitutional guarantee’.⁵²

⁴⁷ ECJ judgment in *Kadi*, op.cit., n.1, para 304 of the ECJ’s judgment and see per Maduro AG at para. 25 of his Opinion.

⁴⁸ Ibid, paras 303-304.

⁴⁹ Joined Cases *Behrami and Behrami v. France* (71412/01), and *Saramati v. France, Germany and Norway* (78166/01) (2007) 45 EHRR SE10. For other cases where the Strasbourg Court examines the relationship between the Convention and the UN Charter or international more generally, see e.g. *Al-Adsani v the United Kingdom* (35763/97) (2002) 34 EHRR 11, *Banković and Others v Belgium and 16 Other Contracting States* (52207/99) (2007) 44 E.H.R.R. SE 5

⁵⁰ UNMIK was the United Nations Interim Administration Mission in Kosovo and KFOR was the security force established in Kosovo by UNSC Resolution 1244 (1999).

⁵¹ The EU Charter expressly views the Convention as providing a minimum threshold, see Article 52.3

⁵² See the Opinion of Maduro AG, paras 21 and 37; and the ECJ judgment at paras 316-317.

There is no denying that there are important differences between *Behrami* and *Kadi*. Whilst the former involved actions directly attributable to the UN, in the latter the Member States acted as sovereign actors giving effect to SC resolutions.⁵³ The ECtHR accepted as much in *Behrami*, by distinguishing the case from *Bosphorus*.⁵⁴ Furthermore, the distinct feature of *Kadi* is that the UN resolutions in issue were in fact not general but concrete and individual in nature, akin to national administrative acts, since they specified the persons to whom they applied. This made the availability of judicial review all the more imperative.

4. The Protection of Fundamental Rights

The different starting points of the CFI and the ECJ determined respectively the intensity of their fundamental rights inquiry. Since, under its reasoning, the primacy of the UN Charter prevented review of the contested regulation on the basis of EC standards, the CFI proceeded to assess whether the regulation complied with the principles of *jus cogens* and came to the conclusion that it did. The ECJ, by contrast, subjected the sanctions to unforgiving, full review on the basis of EC standards.

The CFI appears to adopt a distinct notion of *jus cogens*. Article 53 of the 1969 Vienna Convention on the Law of Treaties defines *jus cogens* as peremptory norms of general international law which are accepted and recognized by the international community of states as a whole as norms from which no derogation is permitted. In fact, the concept of '*jus cogens*' is far from clear. Although it is accepted that human rights fall within its scope, disagreement persists as to the precise rights which may be included thereunder. In *Kadi*, the applicant alleged that the contested regulation had breached the right to a fair hearing, the right to property and the right to an effective judicial review. Although these rights have long been recognized as fundamental in the Community legal order, it is by no means obvious that they can be considered as *jus cogens*. In *Kadi*, the CFI followed a broad understanding of *jus cogens*, encompassing under it all the rights pleaded by the applicants. In its reasoning, the function of *jus cogens* was not to exclude rights which would otherwise be applicable but to lower substantially the degree of judicial scrutiny by pushing well back the threshold of review.

The CFI found that none of the rights pleaded by the applicants had been violated. In relation to the right to property, it pointed out that the measure pursued an objective of fundamental public interest for the international community. Freezing of funds was a temporary precautionary measure which did not affect the right to property as such but only the use of financial assets. The CFI placed particular emphasis on the fact that the applicable rules provided a derogation from the freezing of funds necessary to cover basic expenses (e.g. foodstuffs, rent, and medicines) and thus, any degrading or inhuman treatment was avoided.⁵⁵

In relation to the right to be heard, the CFI drew a distinction between the right to a hearing before the Council and before the Sanctions Committee. Before the former, it held that such

⁵³ There are also obvious differences between *Kadi* and *Al Jedda*. Although in the latter the House of Lords accepted that the actions of the British troops was attributable to the UK and not to the UN, the factual setting and the legislative framework of the case were fundamentally different.

⁵⁴ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (45036/98) (2006) 42 EHRR 1.

⁵⁵ CFI judgment in *Kadi*, op.cit., n.2, para 241.

right was not applicable since the Council did not enjoy any discretion in implementing SC resolutions.⁵⁶ As regards the procedure before the Sanctions Committee, the CFI did acknowledge that any opportunity for the applicant to present his views on the evidence adduced against him was excluded. Nonetheless, the CFI took the view that this was an acceptable restriction given that what was at stake was a temporary precautionary measure restricting the availability of the applicant's property.⁵⁷

Finally, in relation to the right of judicial review, the CFI acknowledged that there was no judicial remedy available to the applicant since the Security Council had not established an independent international court responsible for ruling in actions brought against decisions of the Sanctions Committee. It accepted however that the resulting lacuna was not in itself contrary to *jus cogens*.⁵⁸

The CFI saw the judicialization of diplomatic protection as a way of compensating for the lack of sufficient remedies and turned to national courts to fill the gap of judicial protection left by its deference to the UNSC. It pointed out that it is open to the persons concerned to bring an action for judicial review based on domestic law against any wrongful refusal by the national authorities to submit their case to the Sanctions Committee for reconsideration.⁵⁹ Subsequently, in *Ayadi*⁶⁰ and *Hassan*,⁶¹ which were decided before the ECJ's judgment in *Kadi*, the CFI raised the standard by holding that the SC resolutions did not oppose to obligations stemming from general principles of EU law, pursuant to which the Member States must '*ensure, so far as possible, that the interested persons are put in a position to put their point of view before the competent national authorities where they present a request for their case to be reviewed*'.⁶² Thus, rediscovering the spirit of *Jégo-Quéré*,⁶³ the CFI required Member States to provide for judicial review of a refusal by national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals⁶⁴. It held that prompt state action before the Sanctions Committee is required, unless the state concerned puts forward sufficient reasons justifying its refusal to act, which are then submitted to the scrutiny of the judiciary. This 'judicialization' of diplomatic protection, however, falls well short of the requirements of the right to judicial protection as understood in Community law proper. The CFI's reasoning is, in effect, unconvincing because it creates a huge crater in the right to judicial protection.

In contrast to the judgment of the CFI, the ECJ's approach displays constitutional confidence and distrust towards any invasion on due process. Recalling the spirit of *les Verts*,⁶⁵ the Court began by stating that effective judicial protection is a general principle of Community law which emanates from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the ECHR. It also referred by way of supporting argument to Article 47 of the EU Charter of Fundamental Rights, thus continuing a recent tendency to view its provisions as a legitimate source of inspiration.⁶⁶

The Court held that the principle of judicial protection requires that the Community authorities must communicate to the persons concerned the grounds on which their names have been included in the sanctions list. The requirement to notify reasons serves both an instrumental and a rule of law-based rationale. It enables those affected to defend their rights and also facilitates the exercise of judicial review by the Court.⁶⁷ It agreed with the CFI that, in the circumstances of the case, advance communication to the appellants of the reasons for their inclusion in the sanctions lists or granting them in advance the right to be

⁵⁶ Ibid, paras 257-258.

⁵⁷ Ibid, paras 273-274.

heard would prejudice the effectiveness of the sanctions. A freezing of assets order can only be effective if it has an element of surprise and no advance warning is given. The Court also accepted that overriding public policy considerations may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard.⁶⁸ The ECJ thus impliedly recognized the need for protecting information derived from intelligence sources.

This did not mean, however, that the contested sanctions would be immune from judicial review. This point was developed further by Advocate General Maduro, who rejected the argument that the fight against terrorism is a 'political question' unfit for judicial determination. Whilst conceding that the ECJ operates in an increasingly interdependent world where the authority of other international bodies must be recognized, the Advocate General highlighted that the Community judiciary cannot 'turn its back on the fundamental values'⁶⁹ which it is bound to protect. Measures intended to suppress international terrorism cannot enjoy judicial immunity, the reason being that '*the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few*'.⁷⁰ This was echoed by the Court which found that it was the judiciary's task to apply '*techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice*'.⁷¹ Accordingly, the balance lay in mandating the Council to communicate inculpatory evidence against the appellants either concomitantly with the adoption of the contested regulation or within a reasonable period thereafter. Owing to the Council's failure to do so, the ECJ ruled that the applicants' right of

(Contd.) _____

⁵⁸ Ibid, paras 287-290.

⁵⁹ Ibid, para 270.

⁶⁰ Case T-253/02 *Ayadi v Council*, judgment of 12 July 2006.

⁶¹ Case T-49/04 *Hassan v Council and Commission*, judgment of 12 July 2006.

⁶² *Ayadi*, 147 *Hassan*, 117

⁶³ C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425, In that case the ECJ called upon Member States to fill the gap left by its restrictive interpretation of the conditions that must be fulfilled under Article 230(4) EC in order for individuals to have *locus standi* to seek judicial review of Community acts directly before the Community courts.

⁶⁴ *Ayadi*, 152 *Hassan*, 121

⁶⁵ Op.cit.

⁶⁶ ECJ judgment in *Kadi*, op.cit., n.2, para 335; Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice, OJ 2000 C 364, p. 1. The ECJ broke its silence and referred to the Charter for the first time in Case C-540/03 *Parliament v Council*, judgment of 27 June 2006, para 38. For subsequent references, see e.g. Case C-432/05 *Unibet* [2007] ECR I-2271, para 37; Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, judgment of 3 May 2007, para 46; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, judgment of 18 December 2007, para 91.

⁶⁷ Ibid, paras 336-337. This dual rationale has been reiterated in previous case law: See Case 222/86 *Heylens and Others* [1987] ECR 4097, para 15; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paras 462 and 463.

⁶⁸ Ibid, para 342.

⁶⁹ Opinion of AG Maduro in *Kadi*, para. 44

⁷⁰ Ibid, para. 45

⁷¹ ECJ judgment in *Kadi*, op.cit., n.1, para. 344

defence, particularly their right to be heard, had been violated. Further, since the Court was deprived from investigating the evidence supporting the freezing of assets, it could not exercise review and, as a result, the right to effective judicial protection had also been breached. The Court identified the source of violation as being both the statutory framework and the Council's practice. Neither the contested regulation nor the CFSP Common Position which formed its basis provided for a procedure for the notification of evidence; furthermore, at no time did the Council inform the appellants of such evidence.

A distinct feature of the ECJ's reasoning, which differentiates its approach from that of the CFI, is that it conceded little ground to the source of the security concerns, namely the fact that the sanctions originated from the Security Council. It accepted that the Community must respect international law and, in that context, attach 'special importance' to SC resolutions,⁷² but this did not translate to granting any special status to Community measures adopted to comply with such resolutions when reviewing their compatibility with fundamental rights. Similarly, the ECJ accepted that it must balance 'legitimate security concerns',⁷³ and heed to 'overriding considerations to do with safety or the conduct of the international relations of the Community and its Member States',⁷⁴ but by doing so, it emphasized the nature of the interests at stake rather than the SC as their ultimate exponent. The judgment is euro-centric rather than internationalist.

In relation to the right to property, the Court recalled that it is not an absolute right and its exercise may be restricted subject to two conditions. Such restrictions must (a) pursue a public interest objective and (b) meet the standard of proportionality, i.e. they must not constitute a disproportionate and intolerable interference impairing the very substance of the right.⁷⁵ The ECJ found that, in principle, such justification existed. Drawing on the case-law of the ECtHR, it acknowledged that the Community legislature enjoys a '*great margin of appreciation*' in choosing the means to attain public interest objectives and ascertaining their adequacy.⁷⁶ Referring to its judgment in *Bosphorus*,⁷⁷ it stressed the importance of adopting effective measures to combat terrorism in order to maintain international peace and security and accepted that such an imperative objective may justify even substantial collateral effects on *bona fide* third parties. Accordingly, freezing of assets as a means of counter-terrorism could not be qualified as a disproportionate restriction on the right to property. The Court took into account that, under the UN sanctions scheme and the Community legislation giving effect to it, the freezing of funds to cover certain basic expenses could be lifted upon request of the affected parties. Furthermore, the SC resolutions provided for a mechanism of periodic re-examination of the sanctions imposed and a procedure whereby affected parties could raise their claims.

Nevertheless, the ECJ found that, as applied to Mr Kadi, the contested regulation breached the right to property because it violated due process standards which are an integral part of

⁷² ECJ judgment in *Kadi*, op.cit., n.1, para 294.

⁷³ Ibid, para 344.

⁷⁴ Ibid, para 342.

⁷⁵ Ibid, para 355.

⁷⁶ See European Court of Human Rights, judgment in *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. United Kingdom* of 30 August 2007, *Reports of Judgments and Decisions* 2007-0000, §§ 55 and 75.

⁷⁷ Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport and the Attorney General* [1996] ECR-3935.

that right.⁷⁸ In so far as it concerned Mr Kadi, the contested regulation was adopted without furnishing any guarantee enabling him to put his case to the competent authorities and therefore constituted an unjustified encroachment upon his right to property.

5. Process Rights and Community Sanctions

Process rights have been examined in more detail by the CFI in the context of anti-terrorist sanctions imposed by the Community and not directly by the UN. It is interesting to examine in this context the judgment of the CFI in *People's Mojahedin Organisation of Iran (OMPI) v Council (OMPI II case)*,⁷⁹ which was delivered after the ECJ's judgment in *Kadi*. Before examining the judgment of the CFI, it is necessary to explain briefly its background.

The legislative setting in *OMPI II* was different in that the contested sanctions list was not adopted at UN level but by the Community institutions acting in implementation of SC resolutions drafted in more general terms. In particular, CFSP Common Position 2001/931,⁸⁰ adopted to give effect to UNSC Resolution 1373(2001), mandated the European Community to order the freezing of funds and other economic resources of persons, groups and entities listed in the Annex. The key provision of the Common Position is Article 1(4), which states that the list in the Annex is to be drawn up on the basis of precise information which indicates that a decision has been taken by a competent authority in respect of the persons concerned, irrespective of whether it relates to the instigation of investigations or prosecution for a terrorist act, or an attempt to perpetrate, participate or facilitate such an act. The decision must be based on serious and credible evidence or clues, or condemnation for such deeds. 'Competent authority' is understood to mean a judicial authority or, where judicial authorities have no competence in the relevant area, an equivalent authority. According to Article 1(6), the names of persons and entities in the list in the Annex are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list.

Common Position 2001/931 was transposed into Community law by Council Regulation No 2580/2001.⁸¹ Article 2 of that Regulation provided for the freezing of assets of the persons, groups and entities included in a sanctions list which is to be determined by a Council Decision. It also mandated the Council, acting by unanimity, to establish, review and amend that list in accordance with the provisions laid down in Common Position 2001/931. Since the initial sanctions list which was introduced in December 2001,⁸² the Council has adopted various common positions and decisions updating the lists respectively provided by the Common Position 2001/931 and Regulation No 2580/2001.

In a number of cases, organizations or individuals who had been included in those lists brought proceedings before the CFI seeking their annulment. The basic findings made by the CFI may be summarized by reference to the judgment in *Organisation des*

⁷⁸ See, to that effect, the judgment of the European Court of Human Rights in *Jokela v. Finland* of 21 May 2002, *Reports of Judgments and Decisions* 2002-IV, § 45 and case-law cited, and § 55.

⁷⁹ Case T- 256/07 *People's Mojahedin Organisation of Iran v Council (OMPI II)*, judgment of 23 October 2008.

⁸⁰ OJ 2001 L 344/93.

⁸¹ OJ 2001 L 344/70.

⁸² Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001, OJ 2001 L 344/83.

Modjahedines du peuple d'Iran (OMPI) v Council (OMPI I case),⁸³ which was delivered before the ECJ's judgment in *Kadi*. The CFI held that the Community standards for the protection of fundamental rights applied in relation to the contested measures. It distinguished the case from *Kadi* on the ground that, in *Kadi*, the Community institutions had merely implemented resolutions of the Security Council and decisions of its Sanctions Committee which did not authorize the Community to provide for any mechanism for the examination of individual situations. In *OMPI I*, by contrast, although SC Resolution 1373 (2001) provided that all states must freeze terrorist assets, it did not specify individually the persons and entities who were to be the subject of the sanctions. Thus, the Community acts which specifically applied the sanctions did not come within the exercise of Community circumscribed powers and were not covered by the principle of primacy of UN law under Article 103 of the UN Charter.⁸⁴ They were therefore subject to review on the basis of fundamental rights standards as they apply in Community law.

The CFI then proceeded to examine the requirements of the right to a hearing, the duty to give reasons and the right to judicial protection and found that they were breached. The applicant had not been notified of the evidence against it before proceedings commenced. Neither the initial decision to freeze its assets nor the subsequent decisions maintaining the freezing mentioned the specific information or material in the file, as required by Article 1(4) of Common Position 2001/931 showing that a decision justifying its inclusion in the disputed list had been taken by a national competent authority. Similarly, the CFI found that the requirement to state reasons had been violated. It placed particular emphasis on the fact that the complete lack of statement of reasons prevented it from exercising its function of judicial review. A distinct feature of the case was that, at the hearing, the Council and the United Kingdom were not able to explain to the Court on the basis of which national decision the contested decision had been adopted. The CFI therefore was not in a position to review the lawfulness of the contested decision. Furthermore, it stressed that the possibility of communicating the reasons after the application to the Court has been filed cannot fulfil the requirements of the right to a hearing.⁸⁵ The statement of reasons must appear in the contested decision or be provided 'immediately thereafter',⁸⁶ and must be 'actual and specific'.⁸⁷

The detailed examination of *OMPI I* and the other judgments of the CFI is beyond the scope of this paper.⁸⁸ Suffice it to make the following observations.

In *OMPI I*, the CFI had the opportunity to examine the requirements imposed by the right to a hearing in a mixed procedure, i.e. one involving both national and Community authorities. It pointed out that, under Article 1(4) of Common Position 2001/931, the procedure leading to a decision to freeze assets is taken at two levels, one national and the other Community. In the first stage, a competent national authority must take a decision that the party

⁸³ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council*, [2006] ECR II-4665; See also Case T-253/04 *KONGRA-GEL*, judgment of 3 April 2008; Case T-229/02 *Osman Ocalan on behalf of PKK v Council*, judgment of 3 April 2008; Case T-327/03 *Stichting Al-Aqsa v Council*, judgment of 11 July 2007; Case T-47/03 *Sison v Council*, judgment of 11 July 2007.

⁸⁴ *OMPI I*, op.cit., paras 99-102.

⁸⁵ See *OMPI I*, op.cit., para 139; *KONGRA-GEL*, op.cit., paras 99-101.

⁸⁶ *KONGRA-GEL*, op.cit., para 102.

⁸⁷ *Al Asqa*, op.cit., para 61.

⁸⁸ For an analysis, see Tridimas & Gutierrez, op.cit. Note that in *KONGRA-GEL*, *PKK* and *Al-Aqsa* the CFI also annulled the contested sanctions but based its judgment solely on breach of the right to reasoning.

concerned is associated with terrorist acts. That decision must be based on serious and credible evidence or clues. In the second stage, the Council acting unanimously must decide to include the party concerned in the list on the basis of precise information which indicates that such a national decision has been taken.

The CFI held that the right to a fair hearing must be safeguarded primarily in the first stage, i.e. before the national authorities. It is at that stage that the party concerned must be placed in a position in which he can effectively present his views on the evidence, subject to possible restrictions on the right to a fair hearing which are justified in national law on grounds of public policy, public security or the maintenance of international relations.

By contrast, the right to a hearing has a relatively limited scope in the second phase of the procedure, which unravels at Community level. The party concerned must be afforded the opportunity to make his views known only on whether there is specific information in the file which shows that a decision meeting the definition laid down in Article 4(1) of Common Position 2001/931 was taken at national level. Observance of the right to a fair hearing does not in principle require that the party concerned be afforded again at that stage the opportunity to express his views on the appropriateness and well-foundedness of that decision, as those questions may only be raised at national level. Likewise, in principle, it is not for the Council to decide whether the proceedings opened against the party concerned and resulting in that decision, as provided for by the national law of the relevant Member State, was conducted correctly, or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the competent national courts under the oversight of the European Court of Human Rights.⁸⁹

The CFI based this limitation of its review function on the principle of sincere cooperation provided in Article 10 EC which underpins the whole EU legal order. It held that Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001 introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism. In that context, the principle of sincere cooperation entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are 'serious and credible evidence or clues' on which its decision is based and in respect of recognizing potential restrictions on access to the evidence on grounds of public policy, public security or the maintenance of international relations.

The CFI, however, provided for an exception from this deferential approach. It held that the above considerations are valid only in so far as the evidence or clues in question were in fact assessed by the competent national authority. If, in the course of the procedure before it, the Council bases its initial decision or a subsequent decision to freeze funds on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority, that information must be considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at Community level, not having already been so at national level.⁹⁰ This exception is based on the understanding that the Council is not bound by the EU Common Position, i.e. it does not have to include in the list all the persons included in the Common Position.⁹¹ It follows that,

⁸⁹ *OMPI I*, op. cit., para 121.

⁹⁰ *OMPI I*, op cit, para 126.

⁹¹ The CFI also held that, when the Community implemented the EU Common Position, it did not act under powers circumscribed by the will of the Union or that of its Member States. It derived this from the wording of

in deciding whether to include a particular person or entity in the list, it exercises discretion and may take account of information not placed before the national competent authority. In such a case therefore it must afford to the person concerned the right to express his views thus closing the remedial gap left by the lack of intervention of the national authority.

Despite the purposeful reiteration of the application of the right to a hearing as a matter of principle, the CFI recognized that it is subject to comprehensive limitations in the interests of the overriding requirement of public security. These limitations concern the timing of notification of the evidence, the type of evidence that may be notified, and the opportunity to present views on the evidence. In short, they permeate all its aspects.

Understandably, the CFI held that notifying the evidence and granting a hearing before the adoption of the decision to freeze funds would be liable to jeopardize the effectiveness of the sanctions and thus incompatible with the public interest objective of preventing terrorism: an initial measure freezing funds must, by its very nature, be able to benefit from a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented.⁹² However, the evidence must be notified to the party concerned, in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds.⁹³ The CFI also accepted that, although in principle the parties concerned must have the opportunity to request an immediate re-examination of the initial measure freezing their funds, such a hearing after the event is not automatically required in the context of an initial decision to freeze funds. The requirements of the rule of law are safeguarded by their right to seek judicial review before the CFI.⁹⁴

With regard to the evidence to be notified, the CFI recognized that overriding security concerns or considerations relating to the conduct of the international relations of the Community and its Member States may preclude the communication of certain evidence to the parties concerned and, therefore the hearing of those parties with regard to such evidence.⁹⁵ The CFI took the view that such restrictions are consistent with the constitutional traditions of the Member States and the case law of the ECtHR.⁹⁶

The CFI then proceeded to indicate the type of evidence whose communication may be restricted in the circumstances of the case. It held that the restrictions apply primarily to the 'serious and credible evidence or clues' on which the national decision to instigate an investigation or prosecution is based but they may conceivably also apply to the specific content or the particular grounds for that decision, or even the identity of the authority that

(Contd.) _____

Article 301 EC, according to which the Council is to decide on the matter 'by a qualified majority on a proposal from the Commission', and that of Article 60(1) EC, according to which the Council 'may take', following the same procedure, the urgent measures necessary for an act under the CFSP.

⁹² See *OMPII*, op.cit., para 128; This was endorsed by the ECJ in *Kadi*, see above n. 1.

⁹³ *OMPII*, op.cit., para 129.

⁹⁴ Op.cit., para 130. The above limitations do not apply to subsequent Council decisions maintaining the freezing of funds. Once assets have been frozen, it is no longer necessary to ensure a surprise effect to guarantee the effectiveness of the sanctions so that any subsequent decision maintaining the sanction must be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence. This obligation applies irrespective of whether the persons concerned expressly made a prior request to be heard: op.cit., paras 131-132.

⁹⁵ Op.cit., para 133.

⁹⁶ See e.g. *Chahal v United Kingdom*, judgment of 15 November 1996, Report 1996-V, ' ' 131, and *Jasper v United Kingdom*, judgment of 16 February 2000, No 27052/95, ' ' 51 to 53; see also Article IX.3 of the Guidelines adopted by the Committee of Ministers of the Council of Europe, referred to in paragraph 111 above.

took it. It is even possible that, in very specific circumstances, the identification of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardize public security, by providing the party concerned with sensitive information which it could misuse.⁹⁷

It follows from the above that, in view of public security concerns, the right to a hearing is reduced in practice to a right to be notified of the evidence concomitantly, or as soon as possible thereafter, of the adoption of the economic sanction. The right to be heard after that is not ‘automatically’ recognized. Given such severe limitations on the right to be heard, the requirement to state reasons becomes the central aspect of due process. The CFI accepted, however, that the requirement to give reasons is subject *mutatis mutandis* to the same limitations on overriding grounds as those applicable to the right to a hearing. Considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds. Thus, the Council may be precluded from, first, disclosing the serious and credible evidence or clues on which the national decision to instigate an investigation or prosecution is based; secondly, even from referring in detail to the specific content or the particular grounds of that decision, and thirdly, ‘in very specific circumstances’, from disclosing the identity of the Member State or third country in which a competent authority has taken the decision in question.⁹⁸

In relation to the right to judicial protection, the CFI pointed out that judicial review is all the more imperative being the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights.⁹⁹ The Community Courts must thus be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential. The CFI thus put at rest the view that the executive may withhold evidence from the court or that they may oust the jurisdiction of a judicial body by invoking a public security prerogative.¹⁰⁰ It left open however the question whether the confidential information may be provided only to the CFI or be made available also to the applicant’s lawyers.¹⁰¹

The CFI acknowledged limitations on its power of review. First, it accepted that the Council enjoys broad discretion in adopting economic sanctions in implementation of CFSP policies. Secondly, it conceded that the Community Courts may not substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council. Thirdly, it held that the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate,

⁹⁷ Op.cit., para 136.

⁹⁸ See *OMPI*, op.cit., paras 148 and 136.

⁹⁹ Op.cit., para 155.

¹⁰⁰ This view finds support in the case law of the ECtHR. See e.g. *Chahal v United Kingdom*, para 135; *Öcalan v Turkey*, judgment of 12 March 2003, No 46221/99, para 106.

¹⁰¹ See, in this context, *Chahal v United Kingdom*, paras 131 and 144; *Tinnelly & Sons and Others and McElduff and Others v United Kingdom*, paras 49, 51, 52 and 78; *Jasper v United Kingdom*, paras 51 to 53; and *Al-Nashif v Bulgaria*, judgment of 20 June 2002, No 50963/99, paras 95 to 97, and also Article IX.4 of the Guidelines adopted by the Committee of Ministers of the Council of Europe.

and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council's assessment of whether the imposition of penalties was appropriate in the circumstances and the factors that it took into account in this context.¹⁰²

6. The Level of Judicial Scrutiny and Post *Kadi* Case Law

After the judgment in *OMPI I*, the Council informed OMPI that it intended to maintain its inclusion in the sanctions list. It provided OMPI with a statement of reasons and also informed it that it could submit observations within a period of one month. In its statement of reasons, the Council pointed out that a decision had been taken with respect to OMPI by a competent authority within the meaning of Article 1(4) of Common Position. That decision was an order by which the Home Secretary of the United Kingdom had proscribed the applicant as an organization concerned in terrorism under the Terrorism Act 2000.

Subsequently, and in accordance with the statement of reasons notified to OMPI, the Council adopted Decision 2007/445¹⁰³ by which it adopted a new sanctions list and in which OMPI's name was maintained. OMPI sought the annulment of Decision 2007/445 but, after the commencement of the proceedings, the Council adopted a new decision (Decision 2007/868)¹⁰⁴ which repealed Decision 2007/445 and provided for a new sanctions list in which, again, the applicant's name appeared. After the adoption of Decision 2007/445 but before Decision 2007/868 there had been a material development: The Proscribed Organisations Appeal Commission (POAC) had allowed an appeal against the Home Secretary's decision refusing to lift the proscription of the applicant and ordered the Home Secretary to lay before the Parliament the draft of an Order removing the applicant from the list of organizations proscribed under the Terrorism Act 2000. Decision 2007/868 was notified to the applicant by letter in which the Council took the view that the reasons for continuing to include the applicant in the list, as previously communicated, still held good. With regard to the POAC's decision, the Council observed that the Home Secretary had sought to bring an appeal against it.

The CFI found that whilst the Council had observed the applicant's process rights in adopting Decision 2007/445, it had failed to do so in adopting Decision 2007/868.

In relation to Decision 2007/445, the CFI held that the annulment of the contested decision in *OMPI I* did not prohibit the Council from adopting a new decision maintaining the freezing of its assets on the basis of the same decision of the national competent authority on which the original Council decision which was annulled in *OMPI I* had been adopted. The CFI reiterated that, where a Community act is annulled on procedural grounds, the institution which authored the act may adopt a new measure which is identical in substance provided that it observes the formal and procedural rules whose breach gave rise to annulment and that the legitimate expectations of the persons concerned are duly protected. In the instance case, OMPI's legitimated expectations had been duly honoured because the

¹⁰² Para 159. and, to that effect, Eur. Court H.R., *Leander v Sweden*, judgment of 26 March 1987, Series A No 116, ' 59, and *Al-Nashif v Bulgaria*, paragraph 158 above n. 101 ' ' 123 and 124).

¹⁰³ OJ 2007 L 169/58.

¹⁰⁴ OJ 2007 L 340/100.

Council had informed it of its intention to maintain its name in the list.¹⁰⁵

The CFI found that process requirements had been satisfied and that the Council had committed no manifest error of assessment. It had sent to the applicant a statement clearly and unambiguously explaining the reasons which, in its opinion, justified the applicant's continued inclusion in the list. In its statement, the Council had not merely relied on the Home Secretary's Order but also provided specific examples of acts of terrorism. Furthermore, it had acted on the basis of the Home Secretary's Order which was a decision of a national competent authority within the meaning of Article 1(4) of Common Position 2001/931. Under the duty of sincere cooperation, the Council was not required to question the assessment of the incriminating material by the national competent authority. Indeed, as the CFI noted, the Council was required to leave, as much as possible to the assessment of that authority, in particular regarding the existence of the 'serious and credible evidence or clues' on which the latter's decision was based. Whilst the Home Secretary was not a judicial authority, the fact that its decision was open to judicial review and that such an action was either not brought or did not lead to a decision in the applicant's favour, placed the Council in the same position. With regard to the weighing up of the incriminating and exculpatory evidence, the CFI took the view that the Council had acted reasonably. Where the decision of the national authority is the subject of challenge before the domestic courts, the Council should refuse in principle to express an opinion on the validity of the arguments on substance raised before the outcome of the proceedings is known. Otherwise, its assessment, as a political institution, would run the risk of conflicting with the assessment made by the domestic court.

By contrast, the CFI found that Decision 2007/868 was vitiated by illegality. The key point in the CFI's reasoning is that, where the Council decides to continue to include a person in the sanctions list, it is under an obligation to verify that a competent national authority must have taken a decision meeting the definition of Article 1(4) of Common Position 2001/931. Such verification is an 'imperative' requirement.¹⁰⁶ Prior to the adoption of Decision 2007/868, the POAC had held that the decision of the Secretary of State refusing to declassify the applicant as a terrorist organization was irrational. According to the POAC's assessment, the evidence proved that OMPI had ceased all terrorist activities since 2001 and disarmed in 2003. The CFI attached particular importance to the POAC's decision and also to the fact that the POAC had refused the Home Secretary permission to appeal to the Court of Appeal.

The CFI however did not annul Decision 2007/868 on substantive grounds. It held that, in view of the POAC's decision, the statement of reasons supporting Decision 2007/868 was insufficient. The Council's reasoning was in fact identical to the statement of reasons supporting the earlier Decision 2007/445. It did not therefore explain the actual and specific reasons why the Council took the view that, despite the decision of the POAC, OMPI should continue to be included in the sanctions list.

In *OMPI II*, the CFI clarified a number of points pertaining to the scope and content of process rights.

It reiterated that the Council must provide 'actual and specific' reasons justifying the

¹⁰⁵ *OMPI II*, op.cit., paras 75-76.

¹⁰⁶ *OMPI II*, op.cit., paras 131, 173.

inclusion of a person in the list.¹⁰⁷ Thus, the statement of reasons must refer not only to the legal conditions of application of Regulation No 2580/2001, namely, the existence of a national decision taken by a competent authority, but also the reasons why the Council considers, in the exercise of its discretion, that the person concerned must be made the subject of a measure freezing funds.¹⁰⁸ The obligation to provide reasons applies both to an initial decision to freeze funds and subsequent decisions maintaining a person's name in the list. However, when the grounds of a subsequent decision to freeze funds are in essence the same as those already relied on when a previous decision was adopted, a mere statement to that effect may suffice, particularly when the person concerned is a group or entity.¹⁰⁹

The right to a hearing does not necessarily entitle a person to a formal hearing where the legislation governing the matter in issue does not so provide. It suffices that the persons concerned have been put into a position where they can make their views effectively known to the authorities.¹¹⁰

There is no right to continuous conversation. The right to a hearing and the duty to state reasons do not necessarily require the decision maker to answer specifically all the points raised by the person concerned.¹¹¹

Finally, the CFI rejected the argument that only present and current terrorist activity justifies inclusion in the list and that a person may not be included therein solely on the basis of past conduct. The opposite view would undermine the objectives of the Community sanctions regime and SC Resolution 1373 (2001) on which it was based. The imposition of sanctions, being intended essentially to prevent the perpetration of terrorist acts or their repetition, is based more on the appraisal of a present or future threat than on the evaluation of past conduct.¹¹²

One of the most interesting aspects of *OMPI II* is the pronouncements of the CFI as regards the scope and the standard of judicial scrutiny in reviewing sanctions decisions. The starting point of the CFI is that the Council has broad discretion as to what to take into consideration for the purpose of adopting economic sanctions. This discretion concerns, in particular, the assessment of suitability of sanctions. The prime consideration in deciding whether to freeze someone's assets must be the Council's perception or evaluation of the danger that, if sanctions were not adopted, the funds in questions might be used to fund or prepare acts of terrorism. Subject to this criterion, the Council enjoys discretion in assessing the reasons why economic sanctions must be imposed on a specific person.

Although the Council enjoys broad discretion, this does not mean that the role of the judiciary is subdued. In determining the scope of the judicial inquiry, the CFI held that the Community judicature has in effect a threefold role. First, it must examine whether the requirements of the applicable law are fulfilled; Secondly, it must assess the evidence. In

¹⁰⁷ *OMPI II*, para 81.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, para 82; and see *Al-Aqsa*, *op.cit.*, para 54.

¹¹⁰ *OMPI II*, para 93; see, to that effect and by analogy, Joined Cases T-134/03 and T-135/03 *Common Market Fertilisers v Commission* [2005] ECR II-3923, para 108.

¹¹¹ *OMPI II*, *op.cit.*, paras 95 and 101; This finding reiterates previous case law: see e.g. Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paras 117-118 and Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19, para 22; Joined Cases T-346/02 and T-347/02 *Cableuropa and Others v Commission* [2003] ECR II-4251, para 232.

¹¹² *OMPI II*, paras 109-110.

particular, it must establish whether the evidence relied on by the Council is factually accurate, reliable and consistent; whether it contains all the relevant information to be taken into account in order to assess the situation; and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, the Court must not substitute its own assessment of what is appropriate for that of the Council.¹¹³ Thirdly, it must review the observance of certain procedural guarantees which are of fundamental importance when the decision-maker enjoys wide discretion. In particular, it must review observance of the obligation of the competent institution to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision.¹¹⁴

Despite the rhetoric used in the judgment, the standard of review favoured by the CFI appears to be only cautiously deferential and more intrusive than the manifest error test when used in reviewing legislative choices or broad economic, social or security policy. The reason for this is that the sanctions measures are individual rather than legislative in nature.

7. Conclusion

The judgment of the ECJ in *Kadi* is of major constitutional importance. On the one hand, it empowers the Community to play a role in foreign relation and security policy. On the other hand, it places fundamental rights at the apex of the Community edifice. In fact, competence and fundamental rights protection are closely intertwined and the first predetermines the second: either the Community has competence to impose sanctions on individuals, in which case Community human rights standards apply, or the matter is to be left entirely to the Member States to deal with. In that respect, the judgment of the CFI leaves something to be desired. By opting for competence without protection, it reinforced a model of supra-national government which begs legitimacy.

The approach of the ECJ may be contrasted with that of the CFI in many respects. First, whilst the ECJ displays the confidence of a constitutional court and makes general pronouncements of principle, the CFI opts for a minimalist approach and avoids engagement with wider issues of human rights protection. Secondly, whilst the ECJ asserts the 'constitutional hegemony'¹¹⁵ of the EC and endorses a model of the Community as a self-contained legal order showing mistrust for outside sources of authority, the CFI prominently looks for allies in international and national law. In the CFI's reasoning, the primacy of the UN Charter makes the limits on its jurisdiction inevitable whilst the assistance of national legal systems is crucial to bridge the remedial gap left by Community law.

The issue of competence remains problematic. The judgment aptly illustrates that, given the integration potential of the EC Treaty, the division of powers between the Community and the Member States remains inherently unstable. As in many previous occasions, the ECJ errs on the side of Community competence on the basis of an instrumental rationale which,

¹¹³ *OMPI II*, para 138.

¹¹⁴ *OMPI II*, para (see *Spain v Lenzing*, paragraph 138 above, paragraph 58 and case-law cited). Such review (para 141): corresponds, in essence, to the review of a manifest error of assessment (*OMPI*, paragraph 1 above, paragraph 159).

¹¹⁵ *Op.cit.*

in terms of formal reasoning, remains somewhat unconvincing.

On the issue of fundamental rights protection, the ECJ's commitment is to be applauded. Inevitably, the Community judiciary will be drawn into finding a balance between, on the one hand, the overriding interests of public security and, on the other hand, the rights of the individual. In this respect, the judgment marks the beginning rather than the end of the inquiry. No doubt, the ECJ and the CFI will have the opportunity to pronounce and elaborate further on the limits of process rights and the appropriate level of judicial scrutiny. This is an extremely delicate task given the interests at stake. The judgments of the CFI in relation to Community sanctions suggest that, whilst it will not enter into questions of substance, it is prepared to make full use of process rights. The Community courts endorse different visions as to the relationship between international law and Community law but appear to stand much closer together in their understanding of what Community standards of fundamental rights require. The judgments serve to remind us that the other branches of government cannot take the judiciary for granted. As Lord Hailsham wisely observed, *'Unlike the keepers of the seraglio, they (the judges) do not have their political or social opinions carefully removed'*.¹¹⁶

¹¹⁶ See Lord Hailsham, *A True Conservative Lord Chancellor* (1979), quoted by R. Stevens, *A loss of innocence? Judicial independence and the separation of powers*, (1999) 19 *Oxford Journal of Legal Studies*, 365 at 380.

The Potentially Competing Jurisdiction of the European Court of Human Rights and the European Court of Justice

Annalisa Ciampi*

The imposition by the United Nations Security Council of targeted sanctions – a strategy originally devised to strengthen the effectiveness of the Security Council's action while minimizing the negative consequences naturally flowing from traditional sanctions regimes for the general population – has raised a number of serious issues which cut across the political, institutional and legal (even moral) arenas.

Concerns for the protection of human rights were iconically stated in the *2005 World Summit Outcome Document*,¹ in which UN Member States' Heads of State and Government called upon the Security Council 'to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions'. Thenceforth, improvements have been made to procedures related to targeted sanctions regimes. Even now, however, there is no legal mechanism for reviewing the accuracy of the information behind a sanctions committee listing or the necessity for and proportionality of sanctions adopted, nor does the individual affected have a right of access to a review body within the UN system.

This situation recently motivated the European Court of Justice (ECJ) to state in *Kadi* that Community measures of implementation of UN targeted sanctions are subject to the principle of full judicial review for the purposes of protecting fundamental human rights.²

Real and effective protection of both substantive and procedural rights of listed individuals and entities requires the establishment of an independent body at the international level to consider delisting proposals through judicial review of listing decisions. In this respect, the ECJ's *Kadi* judgment is likely to provide further impetus to current efforts aimed at improving the Security Council sanctions mechanism (if not the abandonment *tout court* of the listing procedure in its current form),³ as a result of the direct interactions between the UN and the EU legal orders.⁴

* Professor of EU and International Law, University of Verona and University of Florence.

¹ A/RES/60/1, 24 ottobre 2005.

² Accordingly, the Court annulled the regulation implementing the Security Council's asset-freezing resolutions on the grounds that they violated the rights to a fair procedure and to property protection. ECJ (Grand Chamber), Judgment of 3 September 2008, *Ahmed Ali Yusuf e Al Barakaat International Foundation v. Council of the European Union* (Cases C-402/05P and C-415/05P). For an extensive commentary on the judgment and on other related ECJ's rulings on anti-terrorist sanctions, see P.T. Tridimas and J.A. Gutierrez-Fons, *EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?*, *Fordham International Law Journal* (forthcoming. Available at SSRN: <http://ssrn.com/abstract=1271302>).

³ For this scenario, see Scheinin in this volume.

⁴ I developed the argument based upon the interaction among different players acting at the various levels (the UN, the EU, the European Convention of Human Rights legal space and the national legal orders) in *Sanzioni del Consiglio di sicurezza e diritti umani*, Milano, 2007. For a critical appraisal of *Kadi*'s implications for the relationship between the EU and the international legal order, see De Búrca, *The European Court of Justice and the International Legal Order after Kadi*, *Jean Monnet Working Paper 01/09*, available at

The outcome of the proceedings in *Kadi* is also liable to create a sort of competition between the ECJ and the European Court of Human Rights (ECtHR) in upholding fundamental human rights guarantees throughout Europe. Against the background of the relevant principles of the ECtHR case law (recalled below in Section 1), this paper explores the question of whether and to what extent the *Kadi* ruling could inspire the ECtHR in adjudicating cases of alleged human rights violations arising out of the implementation of UN sanctions. To this end, different scenarios of individual applications before the ECtHR call for distinct lines of analysis (Sections 2-4). The concluding remarks stress the need for judicial protection of human rights at the regional level while awaiting reforms of the listing/delisting procedures which only the political process can ultimately introduce (Section 5).

1. The Relevant ECtHR Case Law

In *Bosphorus*,⁵ the ECtHR held that a state party's measure implementing European Community regulations, which in turn implement Security Council resolutions, falls under Article 1 of the European Convention of Human Rights (hereinafter, also 'the European Convention') and therefore falls within the jurisdiction *ratione materiae* and *ratione personae* of the Court. However, the existence within the EC of a system for the protection of human rights 'equivalent', in principle, to that provided in the European Convention gives rise to the presumption that measures implementing international obligations arising under EC law comply with the Convention's requirements. This presumption is only rebuttable in a case of 'manifest deficiency' of protection (a particularly high standard, unlikely to be met in any concrete case in the absence of exceptional circumstances which seem very difficult even to foresee).

In the joined cases *Behrami and Saramati*,⁶ concerning proceedings instituted respectively against France and against France and Norway (the latter a state not party to the EU), the Court took the view that the impugned actions and omissions, which had taken place in the context of an operation authorized by the Security Council under Chapter VII of the UN Charter, were attributable to the UN and not to the respondent states. Therefore, they fell outside the jurisdiction *ratione personae* of the Court. The Court expressly distinguished the circumstances of the cases with which it was concerned from those in the *Bosphorus* case. In particular, in *Bosphorus* it had declared itself competent in relation to the seizure of the

(Contd.) _____

<http://www.jeanmonnetprogram.org/papers/09/090101.pdf>.

⁵ ECtHR (Grand Chamber), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005. Among the many commentaries, see CONFORTI, *Le principe de l'équivalence et le contrôle sur les actes communautaires dans la jurisprudence de la Cour européenne des droits de l'homme*, in BREITENMOSER et al. (eds.), *Human rights, Democracy and the Rule of Law. Liber amicorum Luzius Wildhaber*, Zürich, Baden-Baden, 2007, p. 173 ff.; COSTELLO, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, *Human Rights Law Review*, 2006, p. 87 ff.; GAJA, *The Review by the European Court of Human Rights of Member States' Acts Implementing European Union Law: 'Solange' Yet Again?*, in DUPUY et al. (eds.), *Common Values in International Law. Essay in Honour of Christian Tomuschat*, Berlin, 2006, p. 517 ff.; HOFFMEISTER, *ECtHR review of national measures enforcing EC regulation implementing UN Security Council decision*, *AJIL*, 2006, p. 442 ff.

⁶ ECtHR (Grand Chamber), *Behrami & Behrami v. France and Saramati v. Norway and France*, Joined Applications No. 71412/01 and 78166/01, Judgment of 2 May 2007. For comments, see P. Bodeau-Livinec, G.P. Buzzini, S. Villalpando, *ECtHR judgment on applicability of European Convention on Human Rights to acts undertaken pursuant to UN Chapter VII operation in Kosovo*, *AJIL*, 2008, p. 323 ff.; K.M. Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, *EJIL*, 2008, p. 509 ff.

applicant's leased aircraft carried out by the respondent state authorities, on the state's territory, and pursuant to a decision by one of its ministers, despite the fact that the source of the impugned seizure was an EC Council Regulation implementing a UN Security Council resolution.

In the present cases, the impugned acts and omissions of KFOR and UNMIL cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and the Court's competence *ratione personae* (para. 151 of the judgment).

For these reasons, the Court declared the applications inadmissible.

Different legal reasoning and judicial solutions, however, do not result in a substantively different outcome for the individual applicants. In *Bosphorus*, as in *Behrami* and *Saramati*, the ECtHR refrained from scrutinizing the national conduct at the origin of the alleged human rights violation in light of the requirements of the European Convention. The individual is deprived of his/her right to judicial protection under the European Convention of Human Rights precisely in those situations in which such protection, by its very subsidiary nature, should become available to him/her. In both instances, this happens in the presence of the 'coverage' – so to speak – of a UN Security Council resolution ('via', in the first case only, a regulation of the EC).

After the ECJ's *Kadi* ruling,⁷ will the ECtHR be prompted to revise its case law? Tackling this question makes it necessary to identify possible scenarios.

2. The First Scenario

As a first scenario, one could imagine an application of an individual affected by UN targeted sanctions implemented through Community measures, brought against a state party to the European Convention, and member of the EU.

It is hardly questionable that the *Bosphorus* rationale with respect to the impounding of an aircraft as part of a general flight embargo against the Former Yugoslavia would apply *a fortiori* to measures implementing UN targeted sanctions. This is because, in relation to the latter, any state discretion even as to the determination of the individuals and entities to be

⁷ I leave aside the question of the follow-up to the ECJ's *Kadi* ruling given by the EC political institutions. See Commission Regulation (EC) No. 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban. The Regulation was adopted by the Commission in the exercise of the power delegated to it by the Council under the annulled regulation (see Article 7, paragraph 1, of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan). An alternative way of proceedings would have been for the EU Council to proceed with the enactment of a new regulation, in accordance with the co-decision procedure. This choice does not appear to be questionable *per se*. However, serious issues arise in practice as to whether the Commission regulation constitutes a real and effective remedy to the infringements found by the ECJ. These could give grounds for a new action for annulment before the Court of First Instance, whose judgment would in turn be subject to appeal before the ECJ. The following remarks proceed on the assumption that, as a result of the ECJ's ruling in *Kadi*, the EC legal order affords individuals affected by UN targeted sanctions effective protection of human rights not only in principle, but also in practice.

affected is – by definition – eliminated.

As for the ECtHR finding that the EC protects human rights in a manner at least equivalent, that is, comparable, to that for which the European Convention provides, suffice it to note here that at the time *Bosphorus* was decided (30 June 2005), it was still unclear whether the Luxembourg courts would be prepared to annul Community measures adopted in the implementation of UN sanctions for the purposes of upholding fundamental human rights.⁸ Previous ECJ judgments had actually shown an inclination towards upholding the validity of Community measures on the grounds that they contributed to the fulfilment of the overall Security Council objective of peace maintenance, despite their obvious interference with fundamental human rights guarantees.⁹

Notwithstanding the Court's express reservation that any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection – and although it remains questionable from other, not less significant, perspectives¹⁰ – the ECJ's ruling in *Kadi* can count as nothing but a basis on which to confirm rather than review the Court's finding of equivalence in the EC.

In this scenario, therefore, it seems quite unlikely, to say the least, that the Court would depart from its previous case law and truly engage in effective judicial review of state parties' actions taken in the implementation of EC regulations which in turn apply UN Security Council resolutions.

3. The Second Scenario

Another scenario that is easy to foresee would be proceedings in a *Bosphorus*-like situation brought against a state such as Norway or Switzerland or any other state party to the European Convention that is not a member of the EU. Currently, a case against Switzerland is already pending before the ECtHR upon the application of Youssef Nada, whose name has been included in the Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaeda, Osama bin Laden, the Taliban and other individuals, groups, undertakings and entities associated with them,¹¹ since 2001. Nada's claim to be removed from the Swiss decree implementing the UN sanctions on the grounds that they were adopted in breach of his basic human rights was ultimately dismissed by the Swiss Supreme Court on 14 November 2007.¹² Following previous rulings of the Court of First

⁸ The judgment of the Court of First Instance on *Kadi*'s action for annulment – which was later to be overturned by the ECJ – was given after the ECtHR's *Bosphorus* judgment (see Court of First Instance of the European Communities, Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of 21 September 2005, ECR, 2005, p. II-3649 ff.).

⁹ See ECJ, Case C-84/95, *Bosphorus v Minister for Transport, Energy and Communications and others*, Judgment of 30 July 1996, ECR, 1996, I, p. 3978 ff., which in response to a reference for a preliminary ruling, considered restrictions on the exercise of the right of property and freedom to pursue an economic activity to be justified in the general interest.

¹⁰ For a full appreciation of the issues raised by the Court's determination that the EC legal order truly offered a level of protection equivalent – that is 'comparable', in the words of the Court – to that of the European Convention, see A. Ciampi, *L'Union européenne et le respect des droits de l'homme dans la mise en oeuvre des sanctions devant la Cour européenne des droits de l'homme*, RGDI, 2006, p. 86 ff.

¹¹ The Consolidated List with real-time updates, can be consulted at <http://www.un.org/sc/committees/1267/consolist.shtml>.

¹² Swiss Supreme Court, Judgment of 14 November 2007, available in German at: http://jcb.blogs.com/jcb_blog/files/tf_youssef_nada.pdf.

Instance of the European Communities (CFI), the Swiss Federal Court ruled that the Swiss sanctions were not ‘autonomous’ but the result of the ‘binding effect’ of the decisions of the UN Security Council taken under Chapter VII of the UN Charter, the global uniform application of which would be jeopardized if the courts of individual member states could amend or reverse sanctions against individuals or entities because of possible violations of fundamental rights under the European Convention on Human Rights or the UN Covenant on Civil and Political Rights. Moreover, in parallel with the outcome of *Kadi*’s proceedings before the CFI, the Court stated that the binding effect of the UN Security Council decisions could only be limited by a norm of ‘*jus cogens*’, and found that the procedural guarantees raised by the plaintiff as ineffective in the case of the UN sanctions (right to a fair trial and right to an effective remedy) were not considered ‘core provisions of international human rights conventions’. Nada now claims before the ECtHR that this situation amounts to a breach of his rights under the European Convention, for which the Swiss state ought to be held responsible.

In this case, there is no place for the doctrine of ‘equivalent protection’. Conditions are not obviously ripe for a finding that the UN system protects human rights in any manner comparable to the European Convention, as outlined above.¹³

The invocation of the rule on (lack of) attribution as construed by the ECtHR in *Behrami* and *Saramati* should also be ruled out in light of the Court’s express exclusion from its scope of application acts of implementation of Security Council resolutions carried out by a state party on its own territory.

Hence, in such a scenario, there is room for a ‘spillover’ effect of the ECJ’s *Kadi* judgment on the ECtHR case law,¹⁴ which presents us with the following paradox.

In finding that human rights must be judicially protected even within the scope of implementation of UN Security Council sanctions, the ECJ would ‘set the example’ for the ECtHR. The ECtHR, for its part, would show that it has learned its lesson. However – and here lies the paradox – the lesson learned from the ECJ would benefit individuals and entities affected by targeted sanctions in non-EU member states, and not within the EU.

Before tackling the question of whether this is a desirable development for ECtHR case law, a third – albeit unlikely – scenario has to be taken into account.

4. The Third (Least Likely) Scenario

An individual application could be brought against one or more state parties to the European Convention where they are also members of the Security Council, in relation to their contribution to the *adoption*, not the implementation, of UN targeted sanctions. In principle, responsibility should be envisaged for both permanent and rotating members of the Security

¹³ See the introductory paragraph. The question of whether under the current system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, was tackled and answered in the negative by the ECJ in *Kadi* (see paras. 320-325 of the judgment).

¹⁴ An objection could be raised in relation to the admissibility requirement of prior exhaustion of local remedies, if – as in the *Nada* case – the refusal of the national courts to review the impugned measure was exclusively or essentially premised upon the *Kadi* judgment of the CFI. In order to prove successful, however, one would have to show that as a consequence of the overruling of the CFI’s judgment by the ECJ, the national legal system opens up the possibility of an extraordinary remedy (such as a petition for re-hearing) that the applicant should have exhausted.

Council (provided that the latter sat in the Council at the time of the applicant's listing and/or at any time thereafter). This would equally affect EU as well as non-EU member states.

Such a scenario is the least likely to materialize, in view of the difficulties for prospective applicants of demonstrating that they hold 'victim' status within the meaning of Article 34 of the Convention, as a direct result of the inclusion of their name in a UN sanctions list, independently from the adoption of concrete measures in the implementation thereof. Article 34 of the Convention requires an individual applicant to claim that he or she has actually been affected by the alleged violation (whereas, prior to implementation this may be considered to remain speculative as regards the would-be applicant¹⁵). Moreover, the exercise of the right of individual petition cannot be used to prevent a potential violation of the Convention. It is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the Convention owing to the risk of a future violation.¹⁶

However, if an applicant did succeed in demonstrating that he or she is a victim in such a situation, it is far from certain that his/her application would be declared admissible.

In *Behrami and Saramati*, the ECtHR stated that 'the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions ... to the scrutiny of the Court.' In the Court's view, to do so would 'be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself'. The Court's statement referred to Resolution 1244 establishing UNMIK and KFOR: 'coercive measures [adopted] in reaction to an identified conflict considered to threaten peace', but could easily be extended to non-forcible measures adopted by the Security Council under Charter VII of the Charter which also 'are fundamental to the mission of the UN to secure international peace and security' and 'rely for their effectiveness on support from member States'. Moreover, as the Court made clear: 'This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution'.¹⁷

There are further grounds, therefore, for doubting that acts attributable to the states parties to the European Convention, taken within the Security Council in relation to the imposition of targeted sanctions, would ever be subject to scrutiny on the merits by the ECtHR.

5. Concluding Remarks

¹⁵ It is arguable, however, that an individual's reputation is affected by the mere listing of the person's name, which therefore impinges upon his or her right to respect for privacy protected under Article 8 of the European Convention.

¹⁶ For an illustrative case of these difficulties and the references to the Court's case law, see ECtHR, *SEGI and Others and Gestoras Pro-Amnistia and Others v. 15 EU Member States*, Applications Nos. 6422/02 and 9916/02, Decision of 23 May 2002, declaring inadmissible the applications of two associations and their spokespersons complaining that two Common Positions adopted by the Council of the EU in connection with the fight against terrorism infringed rights and freedoms secured to them by the Convention (Articles 3, 6 §§ 1 and 2, 8, 10, 11 and 13, and Article 1 of Protocol No. 1).

¹⁷ '[S]uch acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Charter VII mandate and, consequently, by the UN of its imperative peace and security aim' (This and all quotations in the text are taken from para. 149 of the *Behrami and Saramati* judgment).

In principle, the ECJ's judgment is liable to create a sort of competition between the ECJ and the ECtHR in the protection of fundamental human rights. This competition will hardly result, in practice, in the ECtHR regaining the lead in the judicial enforcement of the rights of individuals and entities targeted by UN sanctions.

On the one hand, EU Member States' acts implementing Community measures, which in turn apply UN sanctions, will remain shielded from the Court's scrutiny under the doctrine of equivalent protection. Far from offering a justification for a reversal of the finding that the EC provides for a system of human rights protection 'comparable' to that of the European Convention – an event considered to be unlikely anyway¹⁸ – the ECJ's ruling in *Kadi* gives reason to confirm the existence of equivalent protection in the EU legal order (see Section 2). On the other hand, in light of the considerations above (Section 4), state members of the EU participating in the listing process as permanent or non-permanent members of the Security Council are unlikely – to say the least – to be considered as falling within the ECtHR's jurisdiction on the grounds of this participation alone. No relief flows from the fact that proceedings brought against non-EU member states in analogous circumstances would be equally affected.

On the basis of its own case law, the ECtHR appears to be left with some room for manoeuvre only in relation to claims against non-EU member states' measures of implementation of UN sanctions and only until listing and delisting procedures within the UN system allow one to make a finding of equivalent protection at the international level (Section 3).

This is not only a paradoxical result of the interaction between the two courts but also a regrettable one. That the judicial protection of individuals targeted by UN sanctions implemented in the EU remains in the hands of the CFI and the ECJ, to the exclusion of the ECtHR, reverses the principle of the subsidiary nature of the protective mechanism of the Convention. It also sends the wrong signal from the perspective of EU accession to the European Convention on Human Rights,¹⁹ which should strengthen the convergence between the rulings of the two European courts.

The very assertive position of the ECJ in affording protection to human rights allegedly violated by sanction measures decided at the UN level should instead suggest that the time has come to improve the judicial protection offered by the ECtHR in matters concerning both the adoption and the implementation of UN Security Council resolutions under Chapter VII of the Charter, not only outside the EU – as the premises of the *Nada* case, referred to above, seem to suggest – but also *within* the legal order of the EU Member States.

Ultimately, it can only be hoped that the competition between the ECJ and the ECtHR will at least contribute to pushing forward the introduction of needed changes at the international level.

¹⁸ See *supra* note 10, at p. 98.

¹⁹ The accession of the EU to the Convention has been delayed by the changes of fortune everyone knows about. The Lisbon Treaty would make it possible once more, even though the necessary technical adjustment may take some time. As accession seems inevitable at some future point, should the Lisbon Treaty never enter into force, that could occur on the basis a new (comprehensive or more modest) treaty.

Le Conseil de sécurité, les sanctions ciblées et le respect des droits de l'homme

Luigi Condorelli*

1.- De brèves réflexions sur la question suivante : le Conseil de sécurité des Nations Unies (CS, dorénavant) est-il lié au respect des droits de l'homme (dorénavant DH), notamment lorsqu'il exerce les fonctions qui lui sont attribuées par le Chapitre VII de la Charte, et plus particulièrement lorsqu'il adopte des sanctions ciblées frappant des individus, par exemple dans le cadre de la lutte au terrorisme ?

J'entends articuler mon propos en divisant la question indiquée en trois sous-questions. La première est : les obligations en matière de DH concernent-elles le CS ? En cas de réponse positive, se pose alors la seconde sous-question : le mécanisme des sanctions ciblées est-il en lui-même satisfaisant, quant au respect des DH ? Si la réponse négative s'imposait, voilà alors la troisième sous-question : que faire ? Y a-t-il des moyens pour réagir, des mécanismes susceptibles d'être mis en œuvre pour revenir au respect des DH, ou bien faut-il se résigner face à leur violation ?

2.- Que je sache, aucun ne prétend – tout au moins explicitement – que le CS n'a pas à se soucier des DH et que son action pour le maintien et le rétablissement de la paix et de la sécurité internationale pourrait être conduite légitimement au mépris des principes pertinents du droit international. Mille considérations militent en faveur de l'idée suivant laquelle les DH s'imposent non seulement aux Etats, mais aussi aux diverses organisations internationales, y compris l'ONU (et, bien entendu, ses divers organes), malgré le fait qu'aucune organisation n'est pas partie contractante des traités internationaux en la matière. Je me borne à rappeler quelques-unes seulement de ces raisons.

La Charte, cela est ultraconnu, accorde une place de choix aux droits de l'homme et aux libertés fondamentales en tant que composante essentielle du nouvel ordre international dont elle esquisse l'architecture, et engage l'organisation à poursuivre le but de les promouvoir et en encourager le respect (Préambule, 2^{ème} Considérant, et article 1/3). Ne serait-il parfaitement contradictoire de soutenir que le CS serait admis à oublier les DH lors de son action, et qu'il pourrait même, au moyen de résolutions obligatoires, obliger les Etats membres à les enfreindre, alors que l'une des missions fondamentales de l'organisation est justement d'en encourager le respect ?

De toute façon personne ne saurait douter désormais que les principes fondamentaux des DH sont à concevoir comme intégrés aux principes de la Charte conformément auxquels le CS est astreint d'agir, ainsi que le prescrit l'article 24/2. Outre le droit conventionnel des DH (qui en tant que tel ne lie pas les Nations Unies), il y a indiscutablement un droit international général en la matière, se composant de principes à qualifier d'« intransgressibles », pour utiliser la terminologie mise à la mode par la Cour internationale de justice. Les obligations découlant de ces principes ne font d'ailleurs pas partie de celles pouvant – par le jeu combiné des articles 103 et 25 de la Charte – être mises en suspens par des décisions du CS. Ni le CS ne peut donc demander aux Etats de ne pas les respecter, ni il ne peut s'exempter lui-même de leur respect. Sans compter que les Etats, en devenant parties aux instruments pertinents, se sont justement engagés à considérer les

* Professor of International Law, University of Florence

dispositions de ceux-ci comme « intransgressibles », c'est-à-dire comme devant être observés dans toutes les circonstances prévues par elles : autrement dit, leur engagement les astreint à regarder comme également intransgressibles les clauses (dérogatoires et échappatoires) identifiant les cas et conditions dans lesquels certains DH sont exceptionnellement susceptibles d'être suspendus ou limités.

A ces remarques générales s'ajoutent de surcroît des éléments spécifiques concernant la lutte au terrorisme : des éléments grâce auxquels il est permis de parler d'une véritable adhésion unilatérale de l'organisation à l'ensemble des principes et règles pertinents des DH. Il suffit – sans aucun souci d'être complet – de citer par exemple les prises de position par lesquelles l'Assemblée générale reconnaît «...que la coopération internationale et toute mesure prise par les États Membres pour prévenir et combattre le terrorisme doivent être pleinement conformes au droit international, notamment à la Charte des Nations Unies et aux conventions et protocoles internationaux pertinents, en particulier au droit des droits de l'homme, au droit des réfugiés et au droit international humanitaire » (AG, rés. 62/272 du 15 septembre 2008) ; voire souligne que « que les États doivent veiller à ce que toutes les mesures prises pour lutter contre le terrorisme soient conformes aux obligations qu'ils assument en vertu du droit international, en particulier du droit international des droits de l'homme, du droit international des réfugiés et du droit international humanitaire » (AG, rés. 60/288 du 20 septembre 2006 sur la Stratégie antiterroriste mondiale de l'Organisation des Nations Unies). Fort significatif est aussi (voire même plus) ce que le CS proclame en toutes lettres, à savoir « ...qu'il faut combattre par tous les moyens, dans le respect de la Charte des Nations Unies et du droit international et notamment du droit international des droits de l'homme, du droit des réfugiés et du droit international humanitaire, les menaces que les actes de terrorisme font peser sur la paix et la sécurité internationales, et soulignant à cet égard le rôle important que l'Organisation des Nations Unies joue dans la conduite et la coordination de cette lutte » (CS, rés. 1822/2008 du 30 juin 2008). Il y a, en somme, pleine reconnaissance de la part de l'Organisation que la lutte au terrorisme doit être menée tant par les États que par les Nations Unies en observant les DH, dont le CS ne peut donc de toute évidence s'affranchir, tout comme il ne peut en affranchir les destinataires de ses résolutions.

3.- Le besoin d'articuler des raisonnements déductifs et inductifs du genre de ceux que je viens d'exposer, afin d'asseoir sur des arguments incontestables la conclusion d'après laquelle les DH lient les organisations internationales (et l'ONU notamment), ne s'imposerait pas si un tel lien était explicitement établi de manière claire, nette et incontestable. Il est regrettable que ce ne soit pas le cas. Mais il est vrai que cette situation s'explique, pour ainsi dire, historiquement. En effet, le constat qu'aucun des grands accords internationaux relatifs aux DH n'est ouvert aux organisations internationales est indicatif du degré de persistance de la conviction surannée d'après laquelle les organisations internationales ne constituent que des instruments de coopération entre gouvernements et, par conséquent, ne sont en principe pas concernées par les questions relatives aux violations des droits fondamentaux des individus, ces questions se posant – l'on avait tendance à croire – pour les États seulement. Mais le développement de la coopération internationale a engendré progressivement d'importantes nouveautés à ce sujet et a conséquemment ébranlé les certitudes d'antan.

D'abord, chacun sait que depuis longtemps déjà ont vu le jour quelques rares organisations (telles les Communautés européennes) conçues dès le départ comme appelées à gérer directement des situations et intérêts d'individus. Il s'est avéré alors indispensable de les outiller de mécanismes permettant de contrôler que la « gestion d'individus » se fasse de manière appropriée, dans le respect de la règle de droit ; et il est facile d'observer combien ces mécanismes se sont progressivement enrichis justement dans la direction de la

protection des DH. C'est là un phénomène bien connu, dont il n'y a pas besoin de dire davantage maintenant.

Les organisations internationales de type classique (telle l'ONU), en revanche, sont et restent empreintes d'une logique essentiellement intergouvernementale, qui les façonne de telle sorte que leur action s'adresse essentiellement aux Etats, et non pas aux particuliers : au vu de cela, la question du respect des DH a pu apparaître alors en principe peu pertinente. Toutefois, même pour ces organisations les DH entrent en jeu, quoique sans doute de manière quelque peu marginale la plupart du temps : ceci arrive toutes les fois qu'elles se trouvent justement impliquées dans ce que j'ai appelé la « gestion d'individus ». Deux exemples sont à rappeler ici.

Le premier exemple concerne le contentieux de la fonction publique internationale, qui représente un observatoire hautement significatif à ce sujet. Il suffit de rappeler que des tribunaux administratifs internationaux (mis en règle par rapport aux principes du *due process*) sont en place désormais auprès de l'ensemble des organisations internationales et qu'aucun de ceux-ci n'oublie de prendre en charge les DH dans le règlement des différends qui lui sont soumis. Dans ce sillage, il n'est pas inutile de se référer à la réforme en cours du Tribunal administratif des Nations Unies : l'étude des travaux préparatoires en dit long sur l'influence décisive des principes des DH.

Le deuxième exemple se rapporte à la justice pénale internationale, et plus précisément aux tribunaux pénaux *ad hoc* pour l'ex-Yougoslavie et le Rwanda, institués par le CS en 1993 et 1994 : il est aisé de remarquer qu'au moment même où l'ONU a décidé de s'engager directement dans la répression des crimes internationaux, elle n'a pas manqué pour autant d'accorder aux DH l'attention nécessaire, en assortissant la procédure de ces tribunaux de toutes les garanties pertinentes.

Ce sont là des données de la pratique internationale qui confirment on ne peut plus clairement le bien-fondé de la réponse donnée à la première sous-question. Soit l'organisation internationale se meut dans la dimension de la pure coopération intergouvernementale, et alors les DH ne sont en principe pas de mise, tout au moins directement. Soit l'organisation est en mesure d'agir de façon à empiéter immédiatement dans la sphère des droits et intérêts des particuliers, et alors son action doit se soumettre au plein respect des DH. Que les individus en question soient des fonctionnaires internationaux, des personnes soupçonnées d'être les auteurs de crimes gravissimes à soumettre à la répression pénale ou des terroristes présumés (voire des supporters présumés du terrorisme) qu'il faut détourner de leurs sombres desseins, on ne voit absolument pas pourquoi les choses changeraient, quant à la nécessité pour l'ONU de respecter les DH.

4.- Il est temps alors d'en venir à la deuxième sous-question : le mécanisme des sanctions ciblées est-il en lui-même satisfaisant, quant au respect des DH ?

Il y a sur ce thème un nombre désormais impressionnant de prises de position critiques (doctrinales, jurisprudentielles, politico-diplomatiques...) mettant en évidence pourquoi les sanctions ciblées du CS, notamment en matière de lutte antiterroriste, telles qu'elles sont actuellement agencées, apparaissent en contradiction flagrante avec les principes les plus élémentaires et fondamentaux des DH. Un document de haute tenue (autre que venant d'une source digne de toute considération), qui met fort bien en évidence, à mon sens, ces contradictions au moyen d'arguments très convaincants, mérite d'être rappelé : je m'étonne beaucoup, d'ailleurs, de constater qu'il est par contre largement ignoré. Il s'agit de la Résolution 1597 du 23 janvier 2008 de l'Assemblée parlementaire du Conseil de l'Europe sur les « Listes noires du CS des NU et de l'UE », rédigée suite (et conformément) au rapport de la Commission des questions juridiques et des DH (Doc.11454, rapporteur : Dick Marty).

L'Assemblée ne ménage pas ses mots quand elle « ... constate que les règles de

fond et de procédure actuellement appliquées par le CSNU et par le Conseil de l'UE, malgré quelques améliorations récentes, ne remplissent absolument pas les critères minimaux... et bafouent les principes fondamentaux qui sont à la base des droits de l'homme et de la primauté du droit » (point 6). Un peu plus loin, après avoir observé qu'entre autres aucun mécanisme de réexamen indépendant ni de réparation pour les violations subies n'est prévu, l'Assemblée n'hésite pas à affirmer que « une telle procédure est dès lors totalement arbitraire et sans crédibilité aucune » (point 6.1). Enfin, l'Assemblée utilise une expression bien crue quand elle qualifie « ... ces pratiques comme indignes d'organisations internationales telles que les Nations Unies et l'Union européenne » (point 7).

Il est important de signaler que l'Assemblée parlementaire est parvenue à ces conclusions après avoir mis soigneusement en évidence les principes fondamentaux des DH en matière de procédure et de fond que les sanctions ciblées – telles qu'elles sont actuellement organisées – « bafouent ». Il s'agit, d'une part, des principes de procédure relatifs au droit pour chacun d'être promptement avisé et informé des accusations portées contre lui et de la décision prise à son égard ; du droit d'être entendu et de pouvoir assurer sa défense ; du droit de saisir rapidement une instance indépendante et impartiale dotée du pouvoir d'annuler la décision restreignant ses droits, si elle est infondée ; du droit d'être indemnisé le cas échéant, en cas de violation constatée des DH. Il s'agit, d'autre part, des principes de fond relatifs à la définition claire des motifs ayant conduit à l'imposition des sanctions et des preuves à l'appui, ainsi qu'à la durée dans le temps de l'inclusion dans les listes noires, alors que de surcroît des enquêtes pénales n'ont pas eu lieu ou n'ont donné aucun résultat permettant de confirmer le bien fondé des accusations portées.

Il est également important d'actualiser à l'allusion aux « améliorations récentes » relatives aux procédures d'inclusion et de retrait de noms de personnes dans les listes noires du CS (et de l'UE), dont il est question dans la résolution de l'Assemblée parlementaire. Il est vrai, en effet, que depuis son adoption de nouvelles améliorations sont intervenues, grâce à la Résolution 1822/2008 du 30 juin 2008 du CS (déjà citée auparavant) : il s'est agi cependant – on n'oubliera pas de le souligner – de simples retouches marginales qui, si elles ont sans doute ajusté quelque peu les procédures en question, en termes d'« équité et transparence » (par. 28 de la Résolution 1822/2008), ne les ont certainement pas rendues moins arbitraires et plus crédibles dans l'ensemble.

Un point différent, mais à relier avec ce qu'on vient de constater, permet de parfaire le tableau. On sait que l'inclusion de noms dans les listes noires de terroristes présumés ou de supporters de ceux-ci a été prise en considération dans le cadre de procédures criminelles internes, afin de décider quel poids il convient de lui accorder aux fins de l'établissement de la responsabilité pénale de personnes figurant dans ces listes et accusées de crimes en rapport avec le terrorisme. Or, il m'est arrivé de participer récemment à un colloque dans lequel un magistrat italien ayant une grande expérience dans ce domaine a résumé en quelques mots très efficaces la *communis opinio* des juges nationaux à un tel propos : en soi, la présence du nom d'une personne dans une liste de ce genre n'est ni une preuve, ni même un indice : on peut lui accorder au maximum le rôle d'un simple 'spunto investigativo'. En somme, une sorte de « puce à l'oreille » des autorités d'investigation. N'est-il pas extraordinaire alors qu'une simple « puce à l'oreille » puisse se voir reconnaître *ipso facto* par les droits internes des Etats membres des Nations Unies des effets préjudiciables aussi lourds pour les individus concernés comme le sont ceux de restreindre gravement leur liberté de mouvement ou leur droit de propriété ?

4.- Je passe maintenant à la troisième sous-question : y a-t-il des moyens pour réagir, des mécanismes susceptibles d'être mis en œuvre pour revenir au respect des DH, ou bien faut-il se résigner face à leur violation ?

Certes, la voie maîtresse à laquelle on est amené à songer aussitôt est celle de la

réforme du système onusien, quant aux sanctions frappant des individus : une réforme y introduisant *ex novo* tout ce qui fait pour l'heure gravement défaut afin que le respect des DH soit assuré au niveau même des N.U. Ce sera intéressant d'écouter le prochain intervenant, le Professeur Scheinin, qui nous informera sur l'état des débats à ce sujet. Toutefois, en attendant que ceux-ci débouchent à l'avenir (qui sait quand !) sur des résultats tant soit peu satisfaisants, peut-on envisager dès à présent l'utilisation de voies adéquates qui seraient ouvertes aux intéressés, étant donné qu'aucune ne l'est d'après le droit de l'organisation mondiale ?

Un point est à mettre au clair tout de suite. Même si, comme on le soutiendra d'ici peu, il est possible d'identifier diverses voies de droit permettant d'enrayer les compressions graves de droits individuels (que ce soit le droit de propriété ou la liberté de mouvement) qui seraient imposées par le CS en violation des DH, il n'en reste pas moins qu'en biffant lesdites compressions on ne bifferait de toute façon pas les effets que l'inclusion de noms de personnes dans les listes noires produit inévitablement quant à la réputation des particuliers concernés, du fait même de la publicité qui est donnée *urbi et orbi* à leur qualification en tant que terroristes ou supporters de terroristes. Voilà un type de préjudice pour lequel, s'il est injustifié, le droit d'obtenir une réparation appropriée devrait être garanti : il reste alors à se demander comment l'intéressé devrait pouvoir s'y prendre.

Toute réflexion quant aux moyens de droit utilisables face à des sanctions ciblées du CS, en vue d'assurer le respect des DH, doit se baser sur la constatation que, si c'est bien le CS qui édicte les listes noires (soit directement, soit par le biais de l'un de ses organes subsidiaires) et qui établit quels effets l'inclusion des noms de certaines personnes doit produire à l'encontre de celles-ci, c'est indiscutablement aux Etats membres qu'en incombe la mise en œuvre, en vertu de l'obligation générale que fait peser sur eux l'article 25 de la Charte : à savoir, l'obligation « ...d'accepter et d'appliquer les décisions du CS... ». Par conséquent, faute de moyens utilisables par les intéressés pour obtenir le respect de leurs DH au niveau onusien, un tel respect ne peut qu'être recherché (et assuré si possible) au niveau des Etats, par le biais de leurs droits internes. Dans le cadre européen, bien entendu, la référence faite aux droits internes englobe à cette fin le droit de l'Union européenne, étant donné que la mise en œuvre des sanctions ciblées relève – pour ainsi dire – d'une sorte de division du travail entre l'appareil de l'Union et celui de ses Etats membres : ce n'est pas le cas d'entrer ici dans des détails à ce sujet, qui ne relèvent pas aux fins des remarques à présenter.

Venons alors aux voies à emprunter en commentant, pour commencer, celle qu'on pourrait appeler la « voie Kadi » : je fais allusion par là à l'arrêt bien connu de la CJCE du 3 septembre 2008 dont nous avons abondamment discuté pendant notre colloque. Disons-le aussitôt : à mon sens, il faut saluer le choix de la Cour, laquelle a considéré la sauvegarde des DH comme s'imposant en Europe de manière absolue, y compris dans le cadre de la lutte au terrorisme international au moyen de l'action onusienne. En effet, la CJCE a souligné avec force que les mesures adoptées dans ce but, par le CS en l'espèce, ne peuvent être mises en œuvre en Europe qu'en respectant les droits fondamentaux. Bien entendu, le juge communautaire s'est ainsi référé aux DH tels qu'ils sont garantis par l'ordre juridique de l'UE, donc en tant qu'intégrés aux principes généraux du droit communautaire (par. 330) : en somme, les DH qui découlent des traditions constitutionnelles communes aux Etats membres et qui ont été consacrés par la Convention européenne des droits de l'homme (par. 335). Il s'agit indéniablement d'une prise de position de haute volée, impliquant l'idée très juste d'après laquelle quiconque (UE et/ou Etats) est appelé à mettre en œuvre les décisions du CS doit faire cela en respectant les DH.

Il ne faut cependant pas prêter à la CJCE une conception qu'elle s'est bien gardée d'accueillir : la Cour n'a pas du tout décidé que la liste noire arrêtée par le CS, dont il était question dans l'affaire Kadi, ne serait pas exécutée en Europe du fait qu'elle contredit les

DH. En effet, la Cour s'est bornée à annuler le règlement communautaire mis en cause (qui reproduisait la décision du CS obligeant à appliquer à certains particuliers une « sanction ciblée » de gel de fonds) parce qu'il viole les DH, mais elle l'a fait sans nullement s'en prendre à la mesure édictée par le CS, qui n'a pas fait l'objet de la moindre critique. Pour la CJCE la mesure en question reste incontestablement obligatoire pour les Etats (et pour la Communauté) et doit être exécutée fidèlement par eux, mais par des modalités respectueuses des DH. Autrement dit, d'après la Cour le règlement annulé est à remplacer par un nouveau règlement communautaire mettant en œuvre la décision du CS de manière que les DH ne soient pas violés : le Conseil des Communautés est d'ailleurs formellement invité à le formuler rapidement. En somme, la violation des DH à laquelle la CJCE a porté remède est attribuable d'après elle à la Communauté européenne, et non pas à l'O.N.U. Il va de soi qu'en agissant de la sorte le juge européen a réussi à esquiver totalement, pour l'heure, la question qui se poserait au cas où l'acte onusien devait être qualifié comme contredisant *per se* les DH, c'est-à-dire comme un acte ne laissant aucun espace pour leur respect aux autorités appelées à l'exécuter. Or, qu'arriverait-il si tel était le cas ? La Cour se garde bien de se prononcer là-dessus, alors qu'il nous incombe, à nous, de nous prononcer.

Pour ce faire, rappelons d'abord un point déjà mis en évidence : d'une part, l'obligation de respecter les DH incombe tant aux Etats qu'aux Organisations internationales (y compris l'O.N.U.) et, d'autre part, un Etat ne saurait justifier sa conduite non conforme aux DH en s'abritant derrière la nécessité de s'acquitter de ses obligations en tant que membre d'une OI (y compris, encore une fois, l'O.N.U.). Mais alors, dans quelle mesure et par quelles voies pourrait-on faire valoir le caractère illégal de l'acte d'une OI engendrant la violation des DH, que ce soit de façon médiate ou immédiate, lorsque l'organisation en question, à l'instar de l'O.N.U., n'est pas dotée de mécanismes accessibles aux particuliers permettant de contrôler la légalité de ses actes et de les annuler le cas échéant ? Un tel contrôle ne peut-il pas être effectué à l'extérieur de l'organisation, à savoir par le juge national (ou, le cas échéant, par le juge communautaire) ? N'est pas celle-ci la voie à emprunter ?

Pour moi, il s'impose de donner à ces questions une réponse positive. Je suis convaincu, en effet, que personne n'a jamais expliqué de manière satisfaisante pourquoi, du fait qu'aucun contrôle de la légalité des décisions du CS n'est organisé au sein du système des N.U., on devrait faire découler la conséquence qu'un tel contrôle ne pourrait pas être effectué de manière incidente par les juges nationaux (ou par le juge communautaire) au moment où ceux-ci sont appelés à prendre en compte de telles décisions aux fins du règlement d'un différend qui leur est soumis. Même si l'on raisonne en termes de primauté du droit international et des principes de la Charte sur les droits internes et sur le droit communautaire, et en termes de primauté des obligations découlant de la Charte sur celles prescrites par n'importe quel autre traité international, on ne voit pas pour quelle raison la force prépondérante des décisions du CS devrait se déployer sans entraves même en cas de violation des principes de la Charte, alors que le Conseil est astreint à agir « conformément aux buts et principes des Nations Unies » (art. 24, par.2). Bien au contraire, je suis tenté de dire que la reconnaissance de ladite primauté devrait justement amener à des conclusions d'un tout autre genre ! Il est à mon sens loisible de soutenir que, du moment que le contrôle de la légalité des décisions du CS n'est pas un domaine réservé à la compétence exclusive d'un organe déterminé, il faut alors en inférer que tout juge appelé à faire application d'une de ces décisions (y compris le juge national) doit s'assurer à titre incident que celle-ci a été valablement émise, tant pour ce qui est des conditions de forme que de fond : c'est-à-dire qu'elle ne contredit pas les principes de la Charte, dont ceux relatifs aux DH doivent être conçus comme faisant partie. Si le juge en question devait juger que la décision du CS viole les DH, il ne pourrait certes pas procéder à son annulation, mais il devrait se borner à refuser de l'appliquer *in casu* du fait de son illégalité. Il pourrait en naître alors un différend entre

les N.U. et l'Etat (ou l'entité) dont le juge est l'organe, la responsabilité internationale de cet Etat (ou de cette entité) se trouvant alors à être engagée le cas échéant, avec toutes les conséquences risquant d'en découler d'après les principes pertinents du droit international. L'inconvénient est sérieux, mais son élimination passe par la mise en place d'un mécanisme centralisé de contrôle du respect des DH qui soit accessible et fiable, et non pas par un abandon des DH à l'arbitraire du CS.

Il y a encore une troisième voie à explorer : il convient de se demander, en effet, s'il n'est vraiment pas concevable que l'intéressé puisse attaquer directement en justice l'auteur de la violation des DH (à savoir l'ONU) à fin d'obtenir éventuellement le retrait de l'acte ayant causé ladite violation, ou au moins le dédommagement du préjudice subi.

Voilà une question à laquelle on donne couramment d'emblée une réponse nettement négative. A première vue, le principe d'après quoi l'organisation jouit d'une immunité absolue de juridiction devant les juges internes constitue un obstacle insurmontable : une telle possibilité serait donc à exclure, d'après l'article 105 de la Charte et l'article II, Section 2, de la Convention sur les privilèges et immunités des Nations Unies de 1946. Il est cependant à remarquer qu'il existe un nombre croissant d'indices, se dégageant de la pratique jurisprudentielle, qui mettent toujours plus en évidence la relation devant être établie entre l'immunité des OI et le respect des DH par celles-ci, en ce sens que l'OI ne saurait justifier son droit à se voir reconnaître l'immunité devant les cours nationales qu'à condition d'accorder au niveau international une protection et des garanties, sans doute pas strictement identiques, mais tout au moins fondamentalement équivalentes à celles qui pourraient être obtenues au niveau national. Equivalentes, bien entendu, en ce sens que le respect des principes internationaux relatifs aux DH doit être en tout cas assuré. Il sied d'ailleurs de remarquer que la Convention de 1946 à peine citée offre un argument de choix en faveur de cette conception. En effet, son article VIII, Section 29, prescrit une véritable obligation à la charge de l'ONU, en lui enjoignant de prévoir des modes de règlement « appropriés » pour des différends que l'immunité juridictionnelle de l'organisation soustrait à la compétence des juges nationaux. On peut alors légitimement soutenir que, dans la mesure où l'organisation ne s'est pas acquittée de cette obligation dans le domaine qui nous intéresse, en ne prévoyant aucun mode de règlement des différends tant soit peu « approprié » (c'est-à-dire prenant notamment en compte la sauvegarde des DH), l'organisation ne peut être admise à se prévaloir de l'immunité.

Il convient de souligner qu'à mon sens les développements auxquels apparaît promis le principe de la protection équivalente des DH vont bien au-delà du domaine dans lequel ce principe a commencé à être affirmé, qui est celui du contentieux de la fonction publique internationale (et des thèmes similaires) : ainsi, par exemple, concernant les différends soulevés par des fonctionnaires internationaux se plaignant de traitements non-conformes aux DH prétendument infligés par leur employeur, l'on sait qu'un courant jurisprudentiel qui s'épaissit de jour en jour subordonne l'octroi à l'OI de l'immunité de juridiction devant les cours nationales à la vérification que les individus en question jouissent effectivement, auprès de l'OI concernée, de ce qu'il est devenu courant d'appeler le « droit au juge », c'est-à-dire de la possibilité d'accéder à une instance indépendante et impartiale dotée du pouvoir de contrôler le respect des DH. En effet, le principe de la protection équivalente a assurément vocation à jouer tôt ou tard – me semble-t-il – face à toutes les sortes de violations des DH qui seraient imputables à des OI, y compris celles engendrées par des sanctions ciblées édictées par le CS. Autrement dit, ce n'est pas tout de résoudre la question de savoir si le fait internationalement illicite constitutif d'une infraction aux DH doit être attribué ou non à telle ou telle OI ou à tel ou tel Etat : une fois ce problème réglé, il reste à voir quels sont les voies et les mécanismes par le biais desquels la responsabilité de l'OI – si la charge en incombe à celle-ci – peut être mise en cause. C'est bien à ce stade que le principe de la protection équivalente interviendra, afin d'empêcher

l'invocation de l'immunité *ratione personae* de l'OI responsable devant le juge interne au cas où celle-ci n'offrirait pas en son for intérieur des garanties comparables à celle que pourrait offrir l'appareil judiciaire national. En somme, aux thèses faisant valoir l'impossibilité de mettre en cause la responsabilité des N.U. en cas de violations des DH attribuables à l'organisation, faute de juges internationaux compétents, d'une part, et au vu de l'incompétence des juges nationaux engendrée par l'immunité juridictionnelle de l'organisation, d'autre part, il convient d'opposer un raisonnement d'un tout autre ordre, quoique sans doute prospectif pour l'heure : s'il n'y a pas de juge international habilité à vérifier le respect des DH (ou, pour mieux dire, si l'OI n'offre pas de garanties équivalentes), alors l'immunité de l'OI ne devrait pas pouvoir être invoquée avec succès devant les juges nationaux.

5.- Deux mots de conclusion. Toute étude portant sur le dossier des listes noires et des sanctions ciblées du CS, dès qu'elle se penche sur certaines des modalités qui caractérisent pour l'heure ces dernières, débouche inévitablement sur le constat d'une tendance bien connue – certes non exclusive, mais forte au demeurant – qui continue d'empreindre encore de nos jours la stratégie de la lutte contre le terrorisme international : c'est que les DH se trouvent rangés trop souvent au second plan, dès qu'ils sont perçus comme susceptibles de gêner l'efficacité des mesures antiterrorisme. Ce n'est certes pas ici le lieu approprié pour démontrer le bien-fondé de la conviction – que je partage entièrement – d'après laquelle en réalité le respect des DH est en mesure de renforcer une telle lutte, au lieu de l'affaiblir. Il vaut la peine en revanche de remarquer que le climat paraît en train de changer de façon bien perceptible : les modes du combat au terrorisme mené sans assez de soucis pour les DH – que ce soit au niveau des politiques nationales ou internationale – sont présentement assujettis à une critique toujours croissante qui semble en mesure de porter progressivement d'appréciables fruits. De ce point de vue, le changement de politique en cours aux Etats-Unis, notamment au sujet de Guantanamo, prête sans doute à des présages d'évolution allant dans le bon sens, qui concernent non seulement l'action nationale, mais celle internationale (et onusienne) aussi.

The *Kadi* Rulings: A Survey of the Literature

Sara Poli and Maria Tzanou*

Aim of the Survey and Methodology

This survey undertakes to critically summarize the comments that legal writers of international or European law have made in relation to two cases concerning the legality of Community acts imposing sanctions on individuals listed by the UN Sanction Committee. In particular, we will deal with the CFI's ruling of 21 September 2005¹ and on the appeal handed down by the ECJ on 3 September 2008² over which much ink has been spilt, given the range of legal issues at stake. Our survey is confined to the two '*Kadi* rulings' and does not take into consideration the challenges of sanctions based on lists of individuals drawn up at EC level, independently of the UN sanction system.³

Giving an account of the literature on these judicial decisions, which will feature prominently in all international and European law manuals, is scientifically risky and requires several *caveats*.

This survey is not exhaustive in that it reviews a sample of comments and moreover, bears certain limits. First of all, it is restricted '*ratione temporis*'. Many scholars will continue to write in the months to come, especially on the ECJ's decision and on the future ruling of *Kadi*'s second challenge,⁴ but we decided to cut Penelope's rope at the end of May 2009. Therefore, comments published after this cut-off date have been excluded. Secondly, for

* Sara Poli is Marie Curie Fellow, EUI, University of Rome 'Tor Vergata'; Maria Tzanou is PhD student, EUI. The former has written sections I, II (text until footnote 16; and from footnote 43 until the end), sections III and V. Maria Tzanou has written the remainder of the survey. The conclusions were written by both authors. The latter would like to thank Professors Martinez Hinojosa, Pavoni and Tomuschat. The usual disclaimer applies. This research was supported by a Marie Curie Intra European Fellowship within the 7th European Community Framework Programme.

¹ T- 315/01 *Kadi v. Council/Commission* [2005] ECR II-3649. The progeny of the CFI's ruling in *Kadi* are T-253/02 *Ayadi v. Council* [2006] ECR II-2139, T-49/04 *Hassan v. Council* [2006] ECR II-52.

² C-402/05 P and C-415/05 P, judgement of 3 September 2008 *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union*, nyr. For the sake of convenience we will refer only to case C-402/05 P. This survey concerns the CFI and ECJ's rulings, leaving aside the opinion of AG's Maduro whose position was almost entirely followed by the ICJ with the exception of the assessment of the legal basis of the contested regulations.

³ See for example T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v Council* [2006] ECR II-4665. For a comment see Della Canea, 'Return to the due process of law: the European Union and the fight against terrorism' (2007) 32 ELRev. 896. See also T-253/04 *Kongra-Gel* of 3 April 2008, nyr; T-229/02 *Osman Ocalan on behalf of PKK v Council* of 3 April 2008, nyr; T-327/03 *Stichting Al-Aqsa v Council*, of 11 July 2007, nyr; T-47/03 *Sison v Council* [2007] ECR II-73; T-256/07, *People's Mojahedin Organisation of Iran (OMPI) v Council* ('OMPI II' Case), of 23 October 2008, nyr. On these cases, and in particular on OMPI II, see Guild, 'The uses and abuses of counter-terrorism policies in Europe. The case of the terrorist lists' (2008) 46 Journal of Common Market Studies 173; Tridimas, 'Terrorism and the ECJ: empowerment and democracy in the EC legal order' (2009) 34 ELRev. 103, 117. See also T-284/08, *People's Mojahedin Organisation of Iran (OMPI) v Council (OMPI III Case)* of 4 December 2008, nyr.

⁴ Case T-85/09 *Kadi v. Commission*, [2009] OJ C90/37.

practical reasons⁵ we decided to review authors writing in English, French, Spanish, German and Italian and published in the main European journals of international and European law. We considered American journals only in a limited number of cases. Thirdly, comments not written in English required translation and a reformulation of ideas in an abridged form; hopefully, the inevitable manipulation of the texts does justice to the authors' thoughts. Fourthly, the survey is not merely a mechanical exercise: it implies subjective choices in picking up the points made by the authors. Many commentaries presented all-encompassing analyses, but we had to be selective and report the authors' main convictions. We extracted the most significant arguments or those that came across more clearly, at least in our opinion. A certain degree of simplification of sophisticated legal reasoning was also necessary. In sum, this is only 'one' of many possible surveys that could be written on reactions to the *Kadi* rulings. It is our hope that the collected information will prove valuable for the reader.

Our work is divided into five sections. The first sketches out the position that the CFI and the ECJ set for themselves in the global legal order and expounds the reasons as to why the two judicial decisions were appreciated by commentators. Section two reviews the comments published on the admissibility of the action and on the legal bases of the contested regulations. We decided to give an account of the authors' views on the legal foundations of the contested acts in a separate section because in this instance the ground for challenge is an issue that stands alone. The third and fourth sections examine the main reasons for criticism of the CFI's and the ECJ's rulings respectively. The final section of the survey draws some overall conclusions and attempts to identify commonalities, if any, in the widely differing reactions of commentators to these two landmark judgments.

1. The Attitude of the CFI and the ECJ towards International Law and the Positive Assessment of their Rulings

The *Kadi* rulings raise the issue of the relationship between international and EC law. In general, writers epitomize the CFI's ruling as internationalist and monist and the ECJ's judgment as sharply dualist. Other commentators avoid the monist/dualist descriptors, 'as neither seem apt to any longer capture the complex interactions among multiple legal systems'.⁶ In order to label the way the Court conceives the relations between the international and Community legal orders, they use Schutze's term of 'middle ground',⁷ referring to the fact that the EC legal system is placed between the international and national legal orders.

Efforts were made to situate the position of the Luxembourg courts in relation to that taken by the US domestic courts on the subject of the relationship between domestic and international law on the one hand, and that of the ECtHR *vis-à-vis* the UN Security Council resolutions on the other.

⁵ The selection of languages mirrors those the authors are able to read.

⁶ Halberstam, Stein, 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order' (2009) 46 CMLR 13, footnote 114, 43.

⁷ Schutze, 'On 'Middle Ground' The European Community and Public International Law' EUI Working Paper n. 2007/13, 2.

Comparing the ECJ's attitude toward international law to that of the judicial branch of the USA, one commentator argued that the Luxembourg judge's position in *Kadi* represents a 'texasization' of the European Union.⁸ According to this strand of the literature there is a similarity between the ECJ's stance and that of the US Supreme Court in the *Medellin v Texas*⁹ decision.¹⁰ In both cases the two groups of judges refuse to articulate the relationship between the international and the constitutional order and show that the two bodies of law are separate.¹¹ An opposite view is taken by Scheinin who emphasizes that the ECJ ruling in *Kadi* should be seen as an affirmation of a high degree of coherence between EU law and international law.¹²

One author carries out a comparative evaluation of the attitude of the CFI, the ECJ and the ECtHR towards the SC resolutions and comes to the conclusion that the Strasbourg Court demonstrated strong substantive deference towards the Security Council, that the CFI showed moderate jurisdictional deference, and that the ECJ (and its Advocate General) proved to display very little if any deference.¹³ The positions of the three courts *vis-à-vis* the UN Charter is articulated as follows. The vision of the CFI's legal space is vertical, hierarchical and integrated in that the EU is below the UN. In this respect, the CFI's approach is similar to that of the ECtHR;¹⁴ one of the differences is that the former feels self-empowered to exercise judicial review whereas the latter does not.¹⁵ The ECJ's image of the relationship between the EU and the UN contrasts with the previous one; it is horizontal, heterarchical and segregated 'with the EU existing alongside other constitutional systems as an independent and separate municipal legal order'.¹⁶

At this juncture, it is appropriate to portray the reasons as to why the literature supported the CFI or the ECJ's judgments.

⁸ Thomas Franck in the Panel discussion at NYU, 17 September 2008, <http://globaladminlaw.blogspot.com/2008/10/nyu-kadi-panel-discussion-in-full.html>.

⁹ *Medellin v. Texas*, 552 US (2008). In this case the US Supreme Court refused to enforce the judgment of the ICJ without prior congressional action.

¹⁰ De Burca, 'The European Court of Justice and the International Legal Order after *Kadi*' Jean Monnet Working paper n. 1/2009 4-5.

¹¹ *Ibid.* Other commentators evoke another American judgment, the *Reid* decision (*Reid v. Covert*, 354 U.S. 1, 1957) but for the opposed purpose of welcoming the Court's establishment of the 'constitutional hegemony of EU law,' as the US Supreme Court did with respect to the domestic law. Indeed, in the mentioned decision, it is excluded that an international agreement can confer powers on the Congress or on any branch of the Government, which is free from restraints of the Constitution. Tridimas, Gutierrez-Fons, 'EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?' (2008) 32 *Fordham International Law Journal* 660, 729.

¹² Scheinin in this working paper. This author finds that the ECJ's ruling in *Kadi* is not incompatible with the UN Charter or more generally with international law. For example, it is compatible from an international law point of view that the ECJ's conclusion that the mandatory nature of Chapter VII resolutions leaves, despite the priority clause of Article 103 of the Charter, room for judicial review of national or EU level measures aimed at the implementation of those resolutions. The same insistence of the Court on securing compliance with human rights in the implementation of the 1267 sanctions regime 'is an affirmation of, and not a departure from, the imperative of the EU having to comply with international law.'

¹³ De Burca, above n. 10, at 38. On the ECtHR, the CFI and the ECJ's approach to international law see De Sena, Vitucci, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values' (2009) 20 *EJIL* 193.

¹⁴ *Ibid.*, at 202.

¹⁵ De Burca, above n. 10, at 40.

¹⁶ *Ibid.*, at 43.

Commentators who have expressed support for the CFI's ruling are relatively limited in number and in any case do not appreciate all aspects of the Court's position.¹⁷

First of all, the CFI's judgment was well received by a number of authors because it recognized the binding character of, and granted primacy to, UN law over EC law. It is worth recalling the reasoning of the Court: first, it asserted that the UN Charter binds the Community by virtue of the EC Treaty,¹⁸ by applying the so-called 'functional succession' theory, employed by the ECJ in *International Fruit Company*;¹⁹ secondly, it used Article 103 of the UN Charter to proclaim the primacy of the UN Charter even over primary Community law. This kind of analysis found support with a number of commentators,²⁰ who endorse the idea that an international organization – such as the EC – cannot question 'the hierarchical position of the UN Charter in the international legal order.'²¹ Insofar as the CFI's reasoning with regard to the binding nature of the UN Charter on the Community legal order is concerned, the authors backing up the CFI, find the analogy drawn by the Court with the *International Fruit Company* convincing,²² and point out that the approach taken by the CFI follows what has until recently been the general trend according to which European law knows no strong dualistic relationship with international law obligations.²³

Commentators emphasize that the positive implications of the CFI's finding that UN law enjoys primacy over EC law are the following: the Court acknowledges the role that the

¹⁷ Tomuschat, 'Case note to T-306/01 Ahmed Ali Jusuf' [2006] CMLR 537, 551; Gestri, 'Legal remedies against Security Council targeted sanctions: de lege lata and de lege ferenda options for enhancing the protection of the individual' (2007) 17 Italian Yearbook of International Law 25, 37; Hinojosa Martínez, 'Bad Law for Good Reasons: The Contradictions of the Kadi Judgment' (2008) 5 IOLR 1, 3; Brown, 'Kadi v. Council of the European Union and Commission of the European Communities; executive power and judicial supervision at European level' [2006] 6 European human rights law review 456; Aust, Naske, 'Rechtsschutz gegen den UN-Sicherheitsrat durch europäische Gerichte? Die Rechtsprechung des EuG zur Umsetzung 'gezielter Sanktionen' aus dem Blickwinkel des Völkerrechts' [2006] 61 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, 587; Steinbarth, 'Individualrechtsschutz gegen Maßnahmen der EG zur Bekämpfung des internationalen Terrorismus' [2006] Zeitschrift für Europarechtliche Studien – ZeuS 269, 285; Von Arnould, 'UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz' (2006) 44 Archiv des Völkerrechts 201, 210; Möllers, 'Das EuG konstitutionalisiert die Vereinten Nationen– Anmerkung zu den Urteilen des EuG vom 21. 09. 2005, Rs. T-315/01 und T-306/01' (2006) Europarecht 426.

¹⁸ For a criticism of the fact that the CFI did not make any reference to general international law to explain 'la vinculation de la Union para el derecho de la NNUU' see Roldán Barbero, 'La justicia comunitaria y el control de legalidad de las resoluciones del Consejo de Seguridad de Naciones Unidas. Comentario a las sentencias Yusuf/Al Barakaat y Kadi, de 21 de septiembre de 2005, del Tribunal de Primera Instancia de las Comunidades Europeas' (2005) Revista electrónica de estudios internacionales 875.

¹⁹ Joined Cases 21/72 to 24/72 *International Fruit Company and Others* ('*International Fruit*') [1972] ECR 1219.

²⁰ Tomuschat, above n. 17, at 543, Hinojosa Martínez, above n. 17, at 3, von Arnould, above n. 17, at 207, Stangos, Gryllos, 'Le droit communautaire à l' épreuve des réalités du droit international: leçons tirées de la jurisprudence communautaire récente relevant de la lutte contre le terrorisme international' (2006) Cahier de Droit européen 429, 472.

²¹ Hinojosa Martínez, above n. 17, at 2.

²² Tomuschat, above n. 17, at 543, Hinojosa Martínez, above n. 17, at 3, von Arnould, above n. 17, at 206-207, Stangos, Gryllos, above n. 20, at 472, Aust, Naske, above n. 17, at 587. The latter authors point out, though, that the difference between *Kadi* and *International Fruit Company* is that the present decision deals with the primacy of international law over EC primary law, whereas until now the decisions of the Court had to do with the relationship between international law and secondary Community law. Hinojosa Martínez takes a step further and holds that 'besides this reasoning grounded on Community law, the constitutional role of the UN Charter in international law provides further arguments to explain its compulsory character for the EC' (above n. 17, at 2).

²³ Möllers, above n. 17, at 5. Hinojosa Martínez, above n. 17, at 6. Tomuschat, above n. 17, at 545.

Security Council plays in the maintenance of international peace and security and avoids a destabilization of the UN system by a frontal attack undertaken by a Court of a regional organization.²⁴ Such an attitude reveals that the Community judge does not see the EC legal order in isolation from the international legal system and, in particular, the UN.²⁵ The CFI's ruling makes possible the interconnection between international and European law; this is welcomed in that it fosters 'international cooperation within a homogeneous world order system'.²⁶ Moreover, the Community forms a sub-regional sub-system of the UN Charter, which is hierarchically inferior to the fundamental principles and rules enshrined in the Charter.²⁷

Secondly, the CFI attracted positive comments from a number of scholars since it decided to indirectly review the SC resolutions on the basis of *jus cogens*. As many commentators²⁸ have pointed out, 'if indeed the international legal order constitutes an integrated whole, the necessary inference is that the UNSC does not operate in a vacuum'. The general rules that the international community has embraced as the foundation of its existence must then also apply to this body since '[t]he Security Council does not lead an existence outside and above the law'.²⁹

Let us now come to the CFI's application of *jus cogens*. The review of the SC resolutions on the basis of this standard is praiseworthy since the Court takes into consideration an international (*vis-à-vis* European) standard³⁰ and contributes to international discourse and to the formation of *jus cogens*.³¹

²⁴ Von Arnould, above n. 17, at 213.

²⁵ Aust, Naske, above n. 17, at 606.

²⁶ Tomuschat, above n. 17, at 551.

²⁷ Tomuschat notes that this conclusion of the CFI does not show any weakness; elsewhere, he further observes that the Community can live quite well under a regime which unambiguously accepts the primacy of those parts of the UN legal order that are binding on the Member States of the world organization (above n. 17, at 542-543).

²⁸ Almqvist, 'A human right critique of European judicial review: counter-terrorism sanctions' [2008] 57 ICLQ 303, 321; Brown, above n. 17, at 468; Steinbarth, above n. 17, at 281, von Arnould, above n. 17, at 215, Hinojosa Martínez, above n. 17, at 11, Gestri, above n. 17, at 37, Tridimas, Gutierrez-Fons, above n. 11, at 691, Eeckhout, 'Community terrorism listings, fundamental rights and the UN Security council resolutions. In search of the right fit' (2007) 3 European Constitutional Law Review 183, 195. An author notes that: '...two major achievements of these decisions are to be welcomed. First, there is the acknowledgement that the powers of the SC are not completely unfettered from legal restraint, but that they must conform to international *ius cogens*. Second, and perhaps more importantly, the court seems to have implicitly acknowledged the competence of domestic courts to control the international validity of SC resolutions which breach *ius cogens* rules.' Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' [2006] 3 IOLR 189, 203.

²⁹ Tomuschat, in this working paper. Brown considers the CFI's decision as progressive to the extent that the Court acknowledges human rights constraints on the collective decisions of a group of sovereign States (above n. 17, at 466).

³⁰ Von Arnould, above n. 17, at 210. Möllers argues that the 'gentlest' way to deal with international law is the approach and the standard of review taken by the CFI. The EC fundamental rights have been 'international law-friendly' relativised in this case (above n. 17, at 428).

³¹ Brown, above n. 17, at 468. According to the latter, insofar as the CFI's ruling encouraged the domestic courts of the EU to conduct a review of the UNSC resolutions on the basis of *jus cogens* norms, the Court gives the domestic court a stick with which to beat the SC resolutions (Ibid. at 466). However, he points out that 'it is highly unlikely that even a national constitutional court would take it upon itself to overrule the Security Council resolution on the basis of (inter)national law standards... in practice, the chances of any tribunal invalidating a determination of the Security Council are vanishingly small' (Ibid. at 468).

According to one commentator, the CFI's judgment strikes a balance between respect for the UN system and protection of human rights *vis-à-vis* the UNSC. It has neither given in to the temptation of taking over full control as long as there is no sufficient human rights-based review of SC resolutions (i.e. *Solange I*), nor has it fully declined to review such acts. Instead, it has opted for a sectoral exception as far ('soweit') as *jus cogens* is concerned.³² By doing so, it limits the dangers of eroding the UN system by encouraging desertion on grounds of national dissent.

A very specific point made mostly by German authors³³ concerns the recognition by the CFI of *jus cogens* as a 'constitutional instrument of the international public order'.³⁴ This is applauded because it contributes to the 'constitutionalisation of international law'.³⁵ In this respect, the Court with its ruling became an agent of the constitutionalization of the international legal order,³⁶ although a danger of 'fragmentation' of international law is also highlighted by commentators, due to the fact that the CFI assumed an autonomous competence for the review of *jus cogens*.³⁷

Furthermore, the CFI's judgment has gained support among certain scholars because it puts pressure on the UNSC to improve its sanctions system³⁸ by introducing substantial changes that can guarantee due process rights to the persons concerned, and could be considered as the first step towards a comprehensive submission of the Security Council to the rule of law.

Further strengths of the CFI's position are the following: it avoids an outcome of the total denial of a judicial review;³⁹ it does not hinder the effective implementation of peaceful measures adopted to combat terrorism⁴⁰ and it saves the 'Member State from having to choose between the UNSC resolutions and Community law. Therefore, it contributes to the

³² Von Arnould, above n. 17, at 209-210.

³³ However, see Bore Iveno, 'Le contrôle juridictionnel des résolutions du Conseil de Sécurité: vers un constitutionalisme international' (2006) *Revue générale de droit international public* 827, 836-837.

³⁴ Steinbarth notes that: 'Auch wenn den Klägern in der Sache damit nicht geholfen ist, verdient der Ansatz des EuG Zustimmung, die Verordnung und damit inzident auch den Gemeinsamen Standpunkt sowie die Resolutionen des Sicherheitsrates am Maßstab der zum *jus cogens* gehörenden übergeordneten Regeln des Völkerrechts als internationalem *ordre public* zu kontrollieren' (above n. 17, at 281).

³⁵ Aust, Naske, above n. 17, at 600, Möllers, above n. 17, at 430 ; Bore Eveno, above n. 33, at 830. Nettesheim explains that 'constitutionalisation of international law' means that the Member States have an interest in generating norms and controlling institutions on the level of the UN in a way that reflect their own standards and perceptions of legitimacy. See Nettesheim, 'UN sanctions against individuals – a challenge to the architecture of European union governance' [2007] 44 *CMLRev* 567, 591. For a criticism of the CFI's international constitutionalist posture, see D'Aspremont, Dopagne, 'Kadi: the ECJ's reminder of the elementary divide between legal orders' [2008] 5 *IOLR* 371, 375.

³⁶ Möllers, above n. 17, at 426.

³⁷ Aust, Naske, above n. 17, at 597.

³⁸ Santos Vara, 'El control judicial de la ejecución de las sanciones antiterroristas del consejo de seguridad en la unión europea' (2008) *Revista electrónica de estudios internacionales*; Aust, Naske, above n. 17, at 623, von Arnould, above n. 17, at 216, Tomuschat, above n. 17, at 551, 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, 802, Wessels, 'Editorial: The UN, the EU and Jus Cogens' [2006] 5 *IOLR* 1, 6.

³⁹ Steinbarth, above n. 17, 280. This author argues that the CFI applies a higher standard of judicial review for the observance of the individual position of the applicants than that employed by the ECJ in *Bosphorus* and *Ebony Maritime* (Ibid., at 281).

⁴⁰ Brown, above n. 17, at 468.

coherence and efficiency of the international legal system.⁴¹

Finally, it is worth making a further comment on the positive side of the CFI's *Kadi* ruling. The Court's approach, confining the review of the SC resolutions to *jus cogens*, was followed by the Swiss Federal Supreme court in the *Nada* case.⁴²

Shifting attention now to the ECJ's appeal, generally speaking it can be noted that positive assessments were more conspicuous than those in relation to the CFI's ruling.⁴³ At times, commentators were ostensibly⁴⁴ in favour of the ECJ's approach. Arguments in support of the higher Court's position may be sketched out as follows.

The ECJ is applauded since it does not allow the SC resolutions to trump EC primary law.⁴⁵ This implies that the EC Treaty, and in particular human rights, are ranked above any other source of law, including the UN Charter, in the hierarchy of norms. Some authors, dwelling upon the ramifications of the ECJ's ruling within the EC legal order, remark that the Court distinguishes between ordinary primary norms and fundamental primary norms (fundamental human rights) and gives priority to the latter.⁴⁶ It is also observed, although in a more neutral tone *vis-à-vis* the judgment, that the ECJ strengthens the idea that the EC legal order is domestic-like⁴⁷ in that the position of individuals stands above international

⁴¹ Ibid, at 463. Along these lines, see also Steinbarth, above n. 17, at 280.

⁴² *Nada v. State Secretariat for Economic Affairs*, Bundesgericht [BGer] [Federal Court], Nov. 14, 2007, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 450-67 (Switz.). For a comment see Reich, 'Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999)', (2008) 33 Yale Journal of International Law. Available at SSRN: <http://ssrn.com/abstract=1268163>.

⁴³ D'Argent, 'L'arrêt Kadi: le droit communautaire comme droit interne', (2008) Journal de droit européen, 265, 266; Vitzhum, 'Les compétences législatives et juridictionnelles de la Communauté européenne dans la lutte contre le terrorisme-l'affaire Kadi' (2008) Zeus 375, 426; Beulay, 'Les arrêts Kadi et Al Barakaat International Foundation-Réaffirmation par la Cour de Justice de l'autonomie de l'ordre juridique communautaire vis-à-vis du droit international' 524 (2009) Revue du Marché Commun et de l'Union Européenne 32; Griller, 'International law, human rights and the European Community's autonomous legal order: notes on the European Court of Justice decision in Kadi' [2008] 4 European Constitutional Law Review, 528, 553; Ohler, 'Gemeinschaftsrechtlicher Rechtsschutz gegen personengerichtete Sanktionen des UN-Sicherheitsrats' [2008] Europäische Zeitschrift für Wirtschaftsrecht 630; De Sena, Vitucci, above n. 13, 193; Kotzur, 'Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft/Zur Entscheidung des EuG in der Rs. Yusuf u.a. gegen Rat, EuGRZ 2005, S. 592 ff.' [2006] 33 Europäische Grundrechte-Zeitschrift 623; D'aspremont, Dopagne, above n. 35, at 371; Santos Vara, 'El control judicial de las sanciones contra Al-Qaeda y los talibanes en la Unión europea: Un desafío a los poderes del consejo de seguridad?' (2009) 13 Revista de derecho comunitario europeo 91, 116; Sauer, 'Rechtsschutz gegen völkerrechtsdeterminiertes Gemeinschaftsrecht?', [2008] 61 Neue juristische Wochenschrift 3687, Scheinin in this working paper. However, the ECJ's ruling was also openly disapproved by authoritative scholars. See section n. 4.

⁴⁴ Kunoy, Dawes, 'Plate tectonics in Luxembourg: the ménage à trios between EC law, international law and the European convention on human rights following the un sanctions cases' (2009) 46 CMLR 73, 76; Tridimas, Gutierrez-Fons, above n. 11, at 729; Harpaz, 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the Kadi Dispute' (2009) 14 European Foreign Affairs Review 65, 88, Cardwell, French, White, 'European Court of Justice, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Joined Cases C-402/05 P And C-415/05 P) Judgment of 3 September 2008' (2008) 58 ICLQ 229, 234; Curtin, Eckes, 'The *Kadi* case: mapping the boundaries between the executive and the judiciary in Europe' [2008] 5 IOLR, 365; Lavranos in this working paper.

⁴⁵ Vitzhum, above n. 43, at 426; Sauer, above n. 43, at 3686; Tzanou, 'Case-note on Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities' (2009) 10 German Law Journal 121, 144.

⁴⁶ Gianelli, 'L'autonomia del sistema giuridico comunitario rispetto al diritto delle Nazioni Unite' (2008) 91 Rivista di Diritto internazionale, 1078, 1082.

⁴⁷ Tomuschat, above n. 17, notes that the CFI had also regarded the EC legal order as a domestic regime (at

obligations.⁴⁸

The decision of the Court is regarded as salutary especially in light of the deficiencies in terms of human rights standards of the current UN sanction system.⁴⁹ The *Kadi* ruling of 2008 puts pressure on the Security Council to improve this system from the point of view of human rights protection without affecting its effectiveness.⁵⁰ The Court's position is considered an expression of the judicial self-assertion of the EU in the international community.⁵¹ Its choice not to engage in an open *international* dialogue in favour of the *internal constitutional* dialogue with its citizens is considered amongst the positive aspects of the ruling.⁵²

A further welcomed aspect of the Court's judgment concerns the exercise of full judicial review over acts implementing SC resolutions.⁵³ On this issue it is worth pausing on the opinion of an author who seems to advocate that the ECJ could have been even more audacious. He claims that there are no special problems in holding that the Community judge is entitled to review the legality of an international agreement or an international act which is binding for the Community.⁵⁴ However, the writer does not conclude on whether this kind of judicial review could extend to the binding decisions of the UNSC.⁵⁵ He argues that he is unable to do so given that the ECJ's ruling does not define the legal effects of SC

(Contd.) _____

541).

⁴⁸ Gianelli, above n. 46, at 1084, De Burca, above n. 10, at 36.

⁴⁹ Schmalenbach, 'Bedingt kooperationsbereit: Der Kontrollanspruch des EuGH bei gezielten Sanktionen der Vereinten Nationen' [2009] 64 Juristenzeitung 35, 41-42; D'aspremont, Dopagne, above n. 35, 371, at 377-378; Schrijver, Van den Erik, 'Eroding the primacy of the UN system of collective security: the judgment of the European Court of Justice in the case of Kadi and Al Barakaat' [2008] 5 IOLR 229, 337. Along these lines, Sauer, above n. 43, affirms that the constitutional principles of the Community legal order cannot de iure 'stand back' in the field of terrorist-lists when there have not been any serious attempts at the international level to remove the deficits in the judicial protection (at 3687). In contrast to this view, another author considers that the Court exceeded its powers in defining the limits to the SC's powers in the light of human rights standards. Santos Vara, above n. 43, at 101.

⁵⁰ Ohler, above n. 43, at 630; Sauer, above n. 43, at 3587, Gianelli, above n. 46, at 1084. It may be possible that the ECJ will cease to fully review Community acts giving effect to SC resolutions when sufficient guarantees of protection of fundamental rights are assured at UN level. Vitzhum, above n. 43, at 429. On the latter issue and also on authors with opposing views on the impact of the ECJ's ruling on the UN sanction system see section n. 4.

⁵¹ Ohler, above n. 43, at 630; in a similar vein see Harpaz, above n. 44, at 82. However the latter author also emphasizes that the ECJ erects high walls between and the UN legal order thus taking a judicial disintegrative approach which is difficult to reconcile with the EU's attempts to enhance its external 'actorness' (at 84-85). He further emphasises that 'the ECJ treats the UN order with suspicion while treating the ECHR legal order with openness. This judicial course of action can be explained by the normative commonality of the EU and the ECHR and the lack of such commonality between the EU's advanced human rights protection and the embryonic protection granted to HR within the global, UN legal order' (at 87).

⁵² Kunoy, Dawes, above n. 44, at 102 (emphasis added). *Contra* see De Burca, above n.10, at 43.

⁵³ Kunoy, Dawes, above n. 44, at 98-99. For criticism of the CFI's notion of 'structural limits' see Harpaz, above n. 44, at 92. The same authors praise the Court for rejecting 'the notion that there are 'political questions' over which the Court do not have jurisdiction' (at 101).

⁵⁴ Palchetti, 'Può il giudice comunitario sindacare la validità internazionale di una risoluzione del Consiglio di Sicurezza?' (2008) 91 Rivista di diritto internazionale 1085, 1087. *Contra* see Vitzhum, above n. 43, arguing that an *international* tribunal is the appropriate forum to interpret the UN Charter (at 428-429).

⁵⁵ On this point, an author criticises both the CFI and the ECJ for not explaining why they did not enjoy the power to review the legality of the SC decisions. De Wet, 'The role of European Courts in reviewing conflicting obligations under international law' [2008] IOLR 359, 363.

resolutions in the Community legal order.⁵⁶

From a substantive point of view, the Court is praised for its distrust of the invasion of due process⁵⁷ but also for striking the right balance between these rights and security concerns⁵⁸ and for advancing its own core values (human rights protection and judicial review).⁵⁹ One author defines with enthusiasm the ECJ's judgment as robust, inward-looking,⁶⁰ human rights-oriented and constitution-based.⁶¹ This line of argument is stretched so far as to argue that the ECJ 'exports' and indeed imposes on non-EC member states (and international organizations) European fundamental rights standards⁶² that enhance the protection of these values at global level. This phenomenon is termed 'European value imperialism'.⁶³

A further strength of the ECJ judgment is that it ensures that all economic sanctions imposed on individuals by the EC are subject to the same level of review by the Community courts, regardless of whether the EC has exercised discretion or not in implementing the SC resolutions.⁶⁴ The ECJ is also supported for reversing the CFI's ruling,⁶⁵ thus allaying the fears of a revitalization of a '*Solange I* rebellion' of constitutional courts⁶⁶ that eventually could have led to a lack of uniformity in human rights protection within the EC legal order.

⁵⁶ Another author takes the view that the ECJ's Kadi judgment considers the SC resolutions 'untouchable,' in contrast to the acts by which the EU/EC implements the resolutions. Wessels, 'The Kadi case towards a more substantive hierarchy in international law?' [2008] 5 IOLR 323, 326.

⁵⁷ Tridimas, Gutierrez-Fons, above n. 11, at 698.

⁵⁸ Ibid, at 729. In the same vein Ohler, above n. 43, argues that the ECJ found the appropriate solution in order to bring a balance between the observation of international obligations, of international security interests and the essential protection of human rights (at 633). Others defines the Court's conclusions as the fruit of a value-oriented approach, which is based more on the balance between a collective need to cooperate with the UN in the fight against terrorism and the need to protect human rights from the perspective of European law than on the formal status of the contested regulation as part of EC law. De Sena, Vitucci, above n. 13, at 227.

⁵⁹ Harpaz, above n. 44, at 88.

⁶⁰ Others would term the tone of the ECJ's reasoning 'parochial' and of 'Fortress Europe'-type. See De Burca, above n. 10, at 4.

⁶¹ Harpaz, above n. 44, at 88. See along these lines, Curtin, Eckes, above n. 44, at 368-369.

⁶² Lavranos in this working paper. De Sena, Vitucci, above n. 13, argue that the solution adopted by the ECJ in holding that human rights are breached is in line, if not even more advanced, than the case-law of the ECtHR (at 225).

⁶³ Ibidem. For a criticism of this kind of approach see Tomuschat in this working paper and De Burca above n. 10.

⁶⁴ Kunoy, Dawes, above n. 44, at 101; Gianelli, above n. 46, at 1081. In Kadi the CFI had distinguished between regulations implementing UNSC resolutions that do not list the names of suspected terrorists and those giving effect to SC resolutions that clearly identify the targeted individuals. In the former case, the EC exercises discretion in the implementation and therefore is entitled to draw up in-house lists of suspected terrorists. In the latter, no margin of discretion is left to the Community legislator which has to borne itself to give effect to the freezing orders against the identified subjects. The CFI had accepted to exercise full judicial review in the light of European human rights with respect to the former regulations but a limited one with respect to the latter. The ECJ's ruling in Kadi superdes the CFI's distinction by accepting full jurisdiction to review regulations impugned by Kadi thus affording the same standard of human rights protection to those who are listed as suspected terrorists, regardless of the UN or EU origin of the list. *Contra*, see Beulay, above n. 43, at 52.

⁶⁵ Kunoy, Dawes, above n. 44, at 102.

⁶⁶ Vitzhum, above n. 43, at 427. Gianelli, 'Il rapporto tra diritto internazionale e diritto comunitario secondo il Tribunale di primo grado delle Comunità europee' (2006) 89 Rivista di diritto internazionale, 131, 137; Kunoy, Dawes, above n. 44, at 102; Sauer, above n. 43, at 3687; Kämmerer, 'Die Urteile 'Kadi' und 'Yusuf' des EuG und ihre Folgen' (2008) Europarecht 65, 78.

Authors have also speculated on the impact that the ECJ's position on *Kadi* might have on the protection of human rights as afforded by the ECtHR.⁶⁷ It is suggested that this ruling makes up for the 'hand-off' approach of the Strasbourg Court which, in the *Behrami and Saramati* decision,⁶⁸ showed 'excessive and misguided deference towards the UNSC, the NATO, and the Member States'.⁶⁹ Others take the opposite view and suggest that the ruling is in line or is synergic with respect to the law of the ECHR. On the one hand, this is due to the fact that the ECJ satisfies the demand of human rights protection as defined by the ECtHR in *Bosphorus*⁷⁰ and on the other, the indirect review of the SC resolutions promoted by the ECJ 'may assist the EU Member States in meeting their ECHR obligations'.⁷¹

Finally, a further interesting comment regarding a positive evaluation of the ECJ ruling may be noted. One author contrasts the high level of human rights protection stemming from the ECJ's ruling with the way in which the EU legislator implemented the ECJ's ruling.⁷²

2. The Admissibility of the Annulment Action and the Legal Bases of the Contested Regulation

Virtually nobody has examined the admissibility of the annulment action before the CFI. This is due to the fact that the applicants' legal standing to challenge the regulation was fairly uncontroversial.⁷³ The reasoning of the two Courts on the legal bases of the impugned measure has also been relatively under-scrutinized by commentators⁷⁴ but it is submitted

⁶⁷ An author emphasises that the ECJ human-right oriented approach prevents the interference of the ECtHR. Salerno, 'Quale Comunità di diritto per il Sig. Kadi' (2009) 92 *Rivista di Diritto Internazionale* 110, 114). The author presumably refers to the possibility of the ECtHR intervening if the 'Bosphorus test' is not satisfied by the EU.

⁶⁸ It has been noted that the ECHR is not likely to get inspiration from the ECJ's ruling in *Kadi* to take a more favourable approach to the right of individuals, should it be called upon to examine the compatibility with the ECHR of acts attributable to the UN. De Sena, Vitucci, above n. 13, at 226-227.

⁶⁹ Lavranos in this working paper. A similar but more nuanced position is expressed by Harpaz, above n. 44, at 80.

⁷⁰ Vitzhum, above n. 43, at 427.

⁷¹ Harpaz, above n. 44, at 79. Ciampi in this working paper enquires as to whether the ECtHR would be prompted to revise its case law after the ECJ's *Kadi* ruling. She envisages two possible challenges before the Court. The first is brought by an individual affected by UN targeted sanctions, implemented through Community measures, against an EU member State. In this case, it seems quite unlikely that the Court would depart from its previous case law (*Bosphorus*, as in *Behrami and Saramati*) and truly engage in effective judicial review of State parties' actions under these conditions. In the second scenario legal action is taken against non-EU members (such as Norway and Switzerland). In these circumstances, there is room for a 'spillover' effect of the ECJ's *Kadi* judgment on the ECHR case law. The outcome of the two challenges evinces a paradox: the ECHR would draw inspiration from the ECJ's approach with beneficial effects on individuals and entities affected by the sanctions in non-EU member States but not within the EU.

⁷² He claims that reg. 1190/2008 ([2008] OJ L322/25), which is a revision of impugned regulation in *Kadi* is below the human rights standard as defined by the ECJ in its ruling of 3 September 2008, thus rendering the latter nugatory. This may cause an increase in the number of challenges of listing decisions at domestic level and may also lead to the 'nuclear option' of an action to the ECHR against all Member States. Salerno, above n. 67, at 116.

⁷³ Tomuschat, above n. 17, at 539. However, two writers remarked that the CFI did not specify whether the key factor to pass the admissibility test was that the regulation represented a bundle of individual decisions. Simon, Mariatte, 'Le Tribunal de première instance des Communautés: professeur de droit international?' (2005) *Europe* 6, 6.

⁷⁴ Three authors focused exclusively on the issue of the legal basis of the contested regulations: Bartoloni,

that it bears important implications for the Community legal order; therefore it deserves a fully-fledged analysis. It is worth recalling that the CFI, Advocate General Maduro and the ECJ all agree that the EC had competence to adopt 'smart sanctions,' but the bases justifying their conclusions were different.

Two theoretical questions may be raised as far as the legal foundations of the acts challenged in the Kadi rulings are concerned: a) whether the EC was competent to adopt smart sanctions and b) whether the CFI and/or the ECJ's reasoning, leading to the conclusion that the legal bases of the contested measure were appropriate, is sufficiently sound and robust.

Authors dealing with the thorny issue of competence are divided: three scholars question the EC's competence to adopt sanctions against individuals in the current Treaty framework⁷⁵ but did not examine the possible implications of the Court's finding that the Community was incompetent.⁷⁶ Other commentators seem to take the opposite view.⁷⁷ On the issue of the Treaty articles enabling the Community to take action, a group of authors hold that Articles 301 and 60 were sufficient legal bases, in tune with Advocate General Maduro;⁷⁸ by contrast, another author considers that those provisions could not be autonomously used to adopt the contested regulation.⁷⁹ Nobody disagrees with the Court's exclusion of Article 308 as the sole legal basis.⁸⁰

(Contd.) _____

'L'ambito di applicazione ratione personae degli articoli 301-60 TCE nelle recenti sentenze Yusuf e Kadi' (2006) *Diritto dell'Unione europea* 317, Hörmann, 'Die Befugnis der EG zur Umsetzung von Resolutionen des UN-Sicherheitsrates zur Bekämpfung des internationalen Terrorismus' (2007) *Europarecht* 120, Cremona in this working paper.

⁷⁵ Cremona, in this working paper; Hörmann, above n. 74, posits that the fact that the freezing is directed against persons as the subjects of rights speaks against the competence of the EC to implement sanctions against terrorism suspects: this is because for those quasi-police law measures the Community does not have yet any competence (at 131-132). In Eckes' views the CFI's failed to draw the only possible conclusion that the Community was not competent to adopt the concerned sanctions. Eckes, 'Judicial Review of European Anti-Terrorism Measures: The Yusuf and Kadi Judgments of the Court of First Instance' (2008) 14 *European Law Journal* 74, 81.

⁷⁶ However, such an analysis could have been superfluous in the light of the fact that the Lisbon Treaty provides for explicit legal bases for restrictive measures against legal and natural persons. On this issue see Cremona in this working paper.

⁷⁷ See Halberstam, Stein above n. 6 who consider a common sense conclusion that the coordination of smart sanctions at the EC level vindicates the EC's effective assistance of CFSP policies on economic measures, that such coordination relates to the EC's market functions, and that the Treaty was likely intended to sanctions targeted at individuals who are unconnected to any particular State (at 39). See also Tridimas, Gutierrez-Fons, above n. 11, at 674. However, for these authors the EC competence to adopt smart sanctions is highly problematic (at 671).

⁷⁸ Ibid, at 674, D'Argent, above n. 43, at 266 and, although more ambiguously Gattini. The latter considers that the ECJ rejected the argument that art. 60 and 301 of the TEC could not justify sanctions against individuals on a rather literal interpretation of the latter Article, without entering into an analysis of the *purpose* (emphasis added) of that provision which could have led the Court to construe the norm as encompassing also the kind of sanctions under review. Gattini, 'Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008, nyr.' (2009) 46 *CMLRev* 213, 223.

⁷⁹ The most extensive analysis on this point is made by Vitzhum, above n. 43, who holds that both a textual and historic interpretation of art. 301 and 60 as well as a teleological approach exclude that they enable the Community to adopt individual sanctions (at 384-390).

⁸⁰ A specific criticism on art. 308 is made by Bartoloni above n. 74. She agrees with the CFI's position that art. 308 could not be used as an autonomous legal basis but she does not see how the Court could come to the conclusion that the same provision could be used jointly with others as the legal foundation of the contested

Taking a closer look at the reasoning of both branches of the judiciary, upholding the triple legal bases, most authors find it highly problematic and controversial, although it is acknowledged that there was a strong motivation for the Courts to recognize the EC's competence.⁸¹

Turning more specifically to the CFI, this Court is criticized by no less than 12 authors⁸² but there are also exceptions: Tomuschat,⁸³ Steinbarth,⁸⁴ Karayigit,⁸⁵ and Von Arnould⁸⁶ regard the arguments put forward by the CFI as convincing. The way it accepts the cumulative legal bases⁸⁷ of Articles 301, 60 and 308, termed by one author as the 'magic mixture',⁸⁸ is not convincing for various reasons. Weaknesses are identified not so much in the absence of an explicit legal basis legitimizing individual sanctions⁸⁹ but in the 'bridge function' of Articles 301 and 60 of the TEC with respect to the objectives of the TEU. This is a way of unduly extending the scope of Community competences,⁹⁰ or of disregarding the difference between Community and Union competences,⁹¹ in breach of the principle of conferred

(Contd.) _____

regulations (at 326). On the same line of reasoning, see Tridimas, Gutierrez-Fons, above n. 11, at 676.

⁸¹ Cremona, in this working paper, Möllers, above n. 17, at 427.

⁸² Ohler, above n. 43, at 631, Möllers, above n. 17, at 427, Kämmerer, above n. 66, at 71-72, Hörmann, above n. 74, at 126, Stangos, Gryllos, above n. 20, at 458-463, Vitzhum, above n. 43, at 394, Eckes, above n. 75, at 77-81, Bartoloni, above n. 74, at 317, Sciso, 'Fundamental Rights and Article 103 of the UN Charter Before the Court of First Instance of the European Communities' [2005] 15 Italian Yearbook of Int. Law 137, at 140-141, Harpaz, above n. 44, at 74-75, Lebeck, 'UN security Council anti-terrorism measures implemented via EC EU Law-Constitutional dilemmas of multilevel governance' [2007] 14 Irish Journal of European Law 3, 25.

⁸³ He holds that art. 301 constitutes a bridge between the two Treaty regimes which, according to art. 3 TEU, should in any event constitute a coherent whole. Tomuschat, above n. 17, at 540.

⁸⁴ Although for this author it is essential from the point of view of legal certainty and the clarity of law, a modification of the Treaty. Steinbarth, above n. 17, at 275.

⁸⁵ He argues that adding art. 60 and 301 to the EC Treaty signifies that it has been accepted that the competence to adopt economic and financial sanctions are for the attainment of EU objectives under the framework of the CFSP (at 393). The CFI's teleological interpretation of art. 60, 301 and 308 does not clash with opinion 2/94 since it does not widen the scope of the Community competences. Karayigit, 'The Yusuf and Kadi judgments: the scope of the EC competences in respect of restrictive measures' [2006] 33 Legal Issues of European Integration 379, 394.

⁸⁶ Von Arnould, above n. 17, at 215.

⁸⁷ Kämmerer, above n. 66, at 70; Bartoloni, above n. 74, at 329-332.

⁸⁸ Eckes, above n. 75, at 79. According to an author, the use of art. 308 in conjunction with art. 60 and 301, could be justified if a Community action was necessary to pursue a CFSP objective which cannot be achieved through art. 301 and 60 (at 320-321), although art. 5 first paragraph of the TEC make it difficult to use the Community competence for CFSP purposes. Bartoloni, above n. 74, at 332.

⁸⁹ Two authors underline that art. 301 and 60 of the TEC, lacking any reference to sanctions against individuals, 'are tailored to the requirements of international law and politics at the time of their introduction in the EC Treaty. The fact that both provisions only refer to restrictive measures against states and not to restrictive measures against individuals is not a deliberate attempt of the drafters of the EC Treaty to restrict the Community's external competence. It is simply a consequence of the fact that at the time of drafting the possibility that individuals could be the direct addressee of international sanctions was not considered.' Bultemann, 'Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities' (2006) 19 Leiden Journal of International Law 753, 763; Vitzhum, above n. 43, at 386. On the contrary, another author questions whether smart sanctions meet the standards of necessity and urgency of art. 301/60 of the TCE. Beulay, above n. 43, at 46-47.

⁹⁰ Eckes, above n. 75, at 79-80; Lebeck, above n. 82, at 25; Brown, above n. 17, at 460.

⁹¹ Vitzhum, above n. 43, at 394. Halberstam, Stein, above n. 6, criticise the CFI since the new CFSP pillar cannot constitute the wholesale importation of the CFSP's substantive objectives as freestanding Community objectives

powers.⁹² Coming to the conditions of application for Article 308, the link with the objectives of the EC Treaty,⁹³ but also the nexus of the regulation with the functioning of the internal market,⁹⁴ are strongly contested. In other words, the CFI provides a rather broad interpretation of Article 308 of the EC Treaty,⁹⁵ departing from the ‘healthy tenets of opinion 1/94 and 2/94’.⁹⁶

Six commentaries made comparative analyses of the CFI and the ECJ’s rulings on the legal bases;⁹⁷ three authors sided with the ECJ⁹⁸ while several others did not consider the corresponding judgment entirely satisfactory. In particular, four authors are not persuaded by the way the ECJ makes sanctions against individuals an EC objective;⁹⁹ the attempt to identify a link to the operation of the Common Market, as far as Article 308 is concerned, is also unconvincing.¹⁰⁰ Gattini is also critical of this aspect of the ruling.¹⁰¹

Two consequences stem from the upholding of the triple legal basis: the first seems to be a very large appraisal of Community competences in the concerned area.¹⁰² The second is that, whereas the use of Article 301/60 alone would have implied exclusive competence to adopt smart sanctions, the decision that Article 308 was a necessary part of the legal basis carries with it the implication that Community powers in this respect are shared.¹⁰³ This

(Contd.) _____

(at 40).

⁹² Harpaz, above n. 44, at 74; Bartoloni, above n. 74, at 332.

⁹³ Bartoloni, above n. 74, at 327-328; Stangos, Gryllos, above n. 20, at 462; Santos Vara, above n. 43, at 96.

⁹⁴ The CFI interpreted as if the expression ‘in the functioning of the internal market’ was not included in art. 308. Stangos Gryllos, above n. 20, at 460. *Contra*, for an opinion holding that ‘in the functioning of the internal market’ does not create a problem for the application of art. 308 see, Vitzhum, above n. 43, at 392.

⁹⁵ Sciso, above n. 82, at 140.

⁹⁶ Brown, above n. 17, at 461.

⁹⁷ Tridimas, Gutierrez-Fons, Gattini, Vitzhum, Halberstam, Stein, Cremona, Ohler, Harpaz.

⁹⁸ For Harpaz, above n. 44, the ECJ reiterated the importance of the doctrine of conferred powers and restored the constitutional divides within the EU architecture, bringing us back to (constitutional) basics (at 74). Vitzhum, above n. 43, at 395, Ohler, above n. 43, at 630.

⁹⁹ Cremona in this working paper; Tridimas, Gutierrez-Fons, above n. 11, at 657-676; Beulay, above n. 43, at 46. By contrast, Halberstam, Stein, above n. 6, find the ECJ’s convincing in arguing its interpretation of art. 301’s ‘Implicit underlying objective’ that makes it possible to adopt sanctions through the efficient use of a Community instrument. However, they criticise the way the Court glosses over the narrower, country-specific meaning that the Court itself attributed to art. 301 and Court’s holding that art. 308 fills this gap (at 40).

¹⁰⁰ Tridimas, Gutierrez-Fons, above n. 11, at 676-678, Cremona in this working paper.

¹⁰¹ Gattini, above n. 78, argues that: ‘Even if the ‘efficient use’ argument is in itself irreproachable, being an expression of the fundamental principle of *effet utile* and having a long lineage in the Court’s jurisprudence, its use at that stage of arguments leaves a vague impression of contrivance (at 223). The expedient character of the reliance on Article 308 is made even more obvious from the somewhat cavalier way in which the Court dealt with one of the indispensable preconditions for applying Article 308, namely the demonstration that the lack of Community action would lead to distortion of competition between Member States and possible infringements of EC freedoms. In this regard the Court confined itself to the rather anodyne observation that ‘if economic and financial measures such as those imposed by the contested regulation...were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market’ (at 223-224). *Contra* on this last question, Ohler, above n. 43, at 631.

¹⁰² *Contra*, as far as the CFI’s reasoning is concerned, see Karayigit, above n. 85, at 394.

¹⁰³ Cremona in this working paper and Tridimas, Gutierrez-Fons, above n. 11, at 704; Vandepoorter, ‘L’application communautaire de décisions du Conseil de sécurité’ (2006) 52 *Annuaire français de droit international* 102, 116. By contrast, an author seems to assume that the EC competence’s is exclusive. Hinojosa Martínez, above n. 17, at 9. In support of this view, it could be argued that Community competence to adopt smart sanction has become exclusive as a result of the internal legislation that sets up harmonised list of

means that the subject who is entitled to implement the SC resolutions imposing sanctions on individuals may be the Member States at national level¹⁰⁴ or the Community.¹⁰⁵

3. Reasons for Criticism of the CFI's Ruling

Despite the few positive comments, overall the CFI's ruling received extensive criticism. Scholars found themselves in disagreement with many parts of the Court's pronouncement.

First of all, the judgment has been considered disappointing since the Court has chosen to defend fundamental rights as protected by *jus cogens* rather than applying the higher standard of protection guaranteed within the EC legal order.¹⁰⁶ In addition, the Court has been blamed for the 'sharp distinction'¹⁰⁷ it made between *Kadi* and the *OMPI*-like line of cases,¹⁰⁸ effectively creating a double standard in the rights of suspected terrorists. In the latter, the Court did not hesitate to apply the human rights standards of protection, as enshrined in the Community legal order, and consequently to annul the contested decision for breach of these principles.¹⁰⁹

The Court's reasoning on the relationship between the UN and the Community legal order has also been criticized by numerous authors.¹¹⁰ The most problematic aspect concerns the CFI's argument that the EC has to abide by the UN Charter. Many commentators have pointed out that the analogy drawn with *International Fruit Company* is not convincing.¹¹¹

(Contd.) _____

individuals to be sanctioned. This point was raised by Eeckhout (private conversation).

¹⁰⁴ Tridimas, Gutierrez-Fons, above n. 11, at 704.

¹⁰⁵ Tridimas argues in favour of action at [EC] level rather than at domestic level on the ground that it is more efficient, politically expedient, and stands a higher chance to be effective. Tridimas, above n. 3, at 108.

¹⁰⁶ Eeckhout, above n. 28, at 198, Hörmann, above n. 74, at 323, Ohler, 'Die Verhängung von 'smart sanctions' durch den UN-Sicherheitsrat - eine Herausforderung für das Gemeinschaftsrecht' (2006) *Europarecht* 848, 864, Vandepoorter, above n. 103, at 121, Gianelli, above n. 66, at 136, Vlcek, 'Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice' [2006] 11 *European Foreign Affairs Review* 491, 507. An author observes that the path followed by the CFI created on the one hand a serious gap in the fundamental rights protection, and on the other, a wide asymmetry, by establishing a decentralized control of a universal international organisation by the court of a regional organisation for the protection of rights outside the organisation. Haltern, 'Gemeinschaftsgrundrechte und Antiterrormaßnahmen der UNO' (2007) 62 *Juristenzeitung* 537, 541.

¹⁰⁷ Griller, above n. 43, at 534.

¹⁰⁸ See above n. 3.

¹⁰⁹ See above n. 2.

¹¹⁰ Hörmann, above n. 74, at 327, Kotzur, above n. 43, at 677, Blázquez Navarro, Espósito Massicci, 'Los límites al control judicial de la medidas de aplicación de la política exterior en los asuntos Ahmed Ali Yusuf/Al Barakaat International Foundation y Yassin Abdullah Kadi' (2006) *Revista española de derecho europeo* 123,147, Vitzhum, above n. 43, at 411, Gianelli, above n. 66, at 136. Schmal, 'Effektiver Rechtsschutz gegen «targeted sanctions» des UN-Sicherheitsrats?' (2006) *EuR* 566, 574.

¹¹¹ Nettesheim, above n. 35, at 585; Kotzur, above n. 43, at 677; Tzanou, above n. 45, at 143; Harings, 'Die EG als Rechtsgemeinschaft?' [2005] *Europäische Zeitschrift für Wirtschaftsrecht* 705; D'asprenmont, Dopagne, above n. 35, at 376, footnote 19. According to Ohler, above n. 106, an analogy with the functional succession of the GATT cannot be made since indeed, while in the field of the CCP according to Art. 133 EC, the Community enjoys exclusive competence, the CFSP belongs to the intergovernmental 2nd pillar. The EC Treaty does not provide for a competence of the Community in the field of the UN (at 863). Vandepoorter, above n. 103, argues that the analogy with *International Fruit Company* takes for granted that the EC is the only body competent to implement the sanctions imposed by the SC but this is not certain (at 119). An author takes a different view and

This is because if the ‘functional succession’ argument of the Community could be applied in the context of GATT, it is highly debatable¹¹² whether it could be extended to the UN; indeed, the Community has not assumed Member States’ powers in the areas governed by the UN Charter in the same way as it did with respect to GATT.

A number of writers have also focused their attention on the weaknesses of the Court’s interpretation of Article 307 EC.¹¹³ According to one author,

contrary to the assumption of the CFI, Article 307 EC does not support its claim of the duty of the EU to take on the obligations of the Member States. Such an interpretation obscures the character of this norm as a ‘division of powers’ norm, separating the powers of the EU and of the Member States.¹¹⁴

Another commentator points out that

whereas the Member States may invoke their obligation under the UN Charter in order to justify conduct inconsistent with the EC Treaty, it is highly doubtful that the EC can invoke obligations of the Member States in order to override limits on its actions established by the EC Treaty. A different conclusion would be tantamount to saying that, under Art. 307 of the EC Treaty, the existence of international obligations of the Member States allows the EC to act beyond the limits of its competence. This is a result which cannot be easily drawn from Art. 307 of the EC Treaty.¹¹⁵

Finally, it is highlighted that ‘Article 307 EC may not take precedence over fundamental rights, the protection of which the ECJ ensures in fulfilling its function under Article 220 of the Treaty’.¹¹⁶

Another bulk of critical comments concentrated on the recognition by the CFI of the

(Contd.) _____

criticizes the CFI since it should have based the EU’s obligation to respect UN law on customary international law. Roldán Barbero, above n. 18, 875. On the basis of this comment, another author criticises the ECJ. He holds that given that the judicature was eager to show its respect for international law, and in particular for the UN Charter, it could have recognized that the UN legal system is binding on the EU on the basis of customary international law whose principles are embodied in the UN Charter. Santos Vara, above n. 43, at 102.

¹¹² Schutze, ‘EC law and international agreements of the Member States-an ambivalent relationship?’ [2006-2007] 9 Cambridge Yearbook of European Legal Studies 387, 405.

¹¹³ Sauer, above n. 43, observes that articles 297 and 307 EC have nothing to do with the primacy of Security Council Resolutions in the EC legal order (at 3685). See also Vitzhum, above n. 43, at 421-426, Karayigit, above n. 85, at 397.

¹¹⁴ Nettesheim, above n. 35, at 584.

¹¹⁵ Cannizzaro, above n. 28, at 116.

¹¹⁶ Tridimas, Gutierrez-Fons, above n. 11, at 683. See also Cannizzaro, above n. 28, who argues that even if one assumed that Art. 307 gave priority to pre-existent international obligations of the Member States over obligations deriving from the EC treaty, this would lead to the conclusion that these commitments enjoy priority over the EC’s ‘bill of rights’ within the legal order of the EC. Such a perspective would be patently inconsistent with the constitutional nature of the EC Treaty, ‘one of the milestones of the European integration and a major jurisprudential achievement of the judicial institutions of the EC’ (at 203).

primacy of the UN Charter even over primary EC law,¹¹⁷ including fundamental rights as protected within the Community legal order. This approach by the CFI and its interpretation of Article 103 of the UN Charter were criticized both from the point of view of international law and Community law. As to the former, Eeckhout¹¹⁸ disagrees with the CFI's interpretation of Article 103 of the UN Charter because it implies that it governs clashes between the EC Treaty and the UN Charter. However, the conflict in the present case is internal to the Community legal system. It is in reality a conflict between the Community law imperative to respect fundamental rights on the one hand, and the imperative to respect UN law on the other. Thus, he concludes that what is portrayed by the Court as a rule governing conflicts between international law and Community law is in fact an internal precedence rule. As to the latter, it is questionable whether the primacy of UN law applies to the EC Treaty, since this agreement was emancipated from the classical international law and established an autonomous legal order with its constitutional character.¹¹⁹ Thus, the Court's pronouncement is criticized because it ends up qualifying EC primary law as an 'international agreement' within the meaning of Article 103 of the UN Charter. That is however unacceptable, because the Grounding Treaties – and in particular the EC Treaty – have a supranational character and have long been raised above the pure international law dimension and formed a '*sui generis*' constitutional legal order.¹²⁰ As one commentator puts it, the Court referred to the status of SC resolutions in terms of traditional EC law concepts by suggesting that they take 'primacy' over any other law obligation as a matter of international law. The concept of primacy, however, is an exceptionally strong constitutional term of European law and cannot simply be transferred to the UN system which is fundamentally different from the EU legal order. Even if the EU was created as an international organization, ECJ case law has contributed to its moving well beyond this status.¹²¹

The restrictive notion of the 'standard of review' applied to the EC regulations implementing the SC resolutions is a further aspect of the Court's judgment that attracted a lot of attention. In this respect, commentators have raised a number of questions concerning the Court's reasoning.¹²² First of all, it has been remarked that 'the Court of First Instance was not asked to rule on the legality of the actions of the SC',¹²³ but of the EC regulations implementing the relevant SC resolutions.¹²⁴ Against this background, the CFI erred in its

¹¹⁷ Eckes, above n. 75, contends that the CFI read Article 103 of the UN Charter in a very extensive way: it first held that UN law takes primacy not only over international law, but also over national law; secondly, it indirectly accepted the decisions of the Sanctions Committee to fall under the scope of Article 103 of the UN Charter (at 84). See also Lebeck, above n. 82, at 27.

¹¹⁸ Eeckhout, above n. 28, at 192.

¹¹⁹ Ohler, above n. 106, at 864.

¹²⁰ Kotzur, above n. 43, at 677. See also Harpaz, above n. 44, at 71, Karayigit, above n. 85, at 395.

¹²¹ Eckes, above n. 75, at 84.

¹²² See Lavranos, 'Judicial Review of UN Sanctions by the Court of First Instance' (2006) 11 European Foreign Affairs Review 471, 474: 'Does UN law, in particular Article 103 UN Charter, really prevent the CFI from exercising its basic task of determining whether the law is observed as Article 220 EC requires it do? Was the CFI really asked to review the UN resolution or rather was it asked to review only the EC regulation implementing the UN sanctions? Can the CFI really decline to provide for judicial review despite the fact that it came to the conclusion that there are no other judicial review possibilities available? ... On this background, the main question arises what does this common hands-off approach by the CFI and ECtHR regarding the review of UN sanctions mean for the procedural rights of affected individuals, in particular, the right to effective judicial review?' See also Vandepoorter, above n. 103, at 132.

¹²³ Eckes, above n. 75, at 88.

¹²⁴ Eeckhout, above n. 28, affirms: 'The applicants' actions for annulment were solely directed at those

judgment, since it actually had ‘the competence to review the compatibility of any secondary EC measure with primary EC law, that is, the EC Treaty, including fundamental rights as protected by the EC¹²⁵ or contained in the ECHR’.¹²⁶ According to one writer, an EC act implementing a SC resolution can be reviewed by the courts, because as a Community measure, it is subject to full judicial review under Article 230 TEC.¹²⁷ This task cannot be taken away by the Community judicature. One commentator did not hesitate to characterize the EC system after the CFI’s decision as a ‘complete system of *unavailable* legal remedies and procedures’ as opposed to the frequently used mantra of the ECJ.¹²⁸ The result of the Court’s decision to restrict the scope of judicial review was that the applicants’ fundamental rights were not effectively protected, while at the same time the Court was criticized for assuming judicial review on the basis of *jus cogens*.¹²⁹ However, the self-empowerment of the CFI to review the contested measures on the basis of *jus cogens* is also problematic from the point of view of international law.¹³⁰

The restrictive notion of the standard of review adopted by the CFI had a further consequence which has also been severely criticized by many authors. As Lavranos notes, ‘the most problematic aspect of the CFI judgments in *Kadi/Yusuf* is the failure or unwillingness to apply the hierarchy of norms that is normally applicable in the Community legal order’.¹³¹ In fact, as one commentator observes, the Court turned what has hitherto been known as the EC hierarchy of norms ‘upside down’: the highest norms after the Court’s judgment include *jus cogens*, followed by international agreements and decisions of international organizations, secondary EC law (i.e. EC regulations implementing UN obligations) and only then comes primary EC law, including the ECHR, while the lowest norms are national law.¹³² Such a ‘drastic modification’ of the hierarchy of norms is

(Contd.) —————

Regulations. They did not seek review of the Resolutions as such, since this is obviously not within the Court of First Instance’s jurisdiction’ (at 199).

¹²⁵ Conforti, Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado (2006) *Diritto dell’Unione europea*, 333, 342; Santos Vara, above n. 38.

¹²⁶ Lavranos, above n. 122, at 477. See also Vandepoorter, above n. 103, at 121, Conforti, above n. 125, at 342, Garde, ‘Is it really for the European Community to implement anti-terrorism UN Security Council Resolutions?’ (2006) 65 *Cambridge Law Journal*, 284.

¹²⁷ Along these lines, Santos Vara, above n. 38, at 8.

¹²⁸ Lavranos, above n. 122, 489. See also Eckes, above n. 75, who notes that the CFI’s claim it had carried out a complete review of the lawfulness of the contested regulation must sound like ‘mockery’ in the ears of the applicants whose rights were reduced from the full human rights guarantees under European law to the essential minimum of peremptory rules (at 91). See also Kunoy, Dawes, above n. 44, at 92. Another writer notes that the CFI does not invoke any title that can justify its jurisdiction to review the measures with regard to *jus cogens*. In other words, it declares itself competent. This argumentation is very disputable because it confuses the hierarchy of norms with the review of their legality. Bore Iveno, above n. 33, at 834.

¹²⁹ As Eeckhout, above n. 28, puts it: ‘That is precisely why I consider that the Court had the worst of both worlds’ (at 196). See also Kotzur, above n. 43, at 675, Haltern, above n. 106, at 541, De Burca, above n. 10, at 22, Jacqu  , ‘Le Tribunal de Premi  re instance face aux r  solutions du Conseil de S  curit   des Nations Unies. Merci monsieur le Professeur,’ *L’Europe des libert  s*, 2005, n   19, Karayigit, above n. 85, at 397.

¹³⁰ Cardwell, French, White, above n. 44, at 234. Eeckhout above n. 28, considers that if the CFI had concluded that the UN Resolutions at issue were unlawful under international law, this could have triggered a severe legal and even political crisis at international level (at 196). See also Eckes, above n. 75, at 88, Nettesheim, above n. 35, at 592, M  llers, above n. 17, at 428, Griller, above n. 43, at 540-541, Simon, *Lutte antiterroriste et protection diplomatique*, *Annuaire fran  aise de droit international*, 2005, (734), p.743, Jacqu  , above n. 129, Van den Herik, above n. 38, at 801 ; Wessel, above n. 38, at 8.

¹³¹ Lavranos, above n. 122, at 477.

¹³² Harpaz, above n. 44, at 77.

considered to be scarcely compatible with the general system of Community law.¹³³

Another weakness of the Court's position on the 'structural limits' of its jurisdiction is that it is not consistent with the Court of Justice's judgment in *Bosphorus*.¹³⁴ In the latter case, the ECJ did not hesitate to review an EC regulation implementing a SC resolution on the basis of fundamental rights as protected within the Community legal order.

Finally, certain commentators have pointed out that the limited review of the CFI could encourage the ECtHR¹³⁵ or national constitutional courts¹³⁶ to step in and exercise their jurisdiction in view of the limited human rights protection afforded at EC level.¹³⁷

A further issue attracting a wealth of criticism is the CFI's analysis of *jus cogens*. From the point of view of international law, there are two fundamental questions raised with respect to peremptory norms of international law: first, is an international body such as the UNSC bound by them, and second, what exactly is *jus cogens*? While the CFI's positive answer to the first question was generally welcomed by authors,¹³⁸ its analysis of the notion of *jus cogens* has raised virtually everybody's eyebrows.¹³⁹ In this respect, most commentators find the Court's conception of this notion rather expansive,¹⁴⁰ while one author considers it restrictive.¹⁴¹

If we take a closer look at each of the rights the CFI examined on the basis of *jus cogens*, a number of problematic aspects can be found in the Court's reasoning. Insofar as the right to property is concerned, the CFI is criticized because 'at no point does it seriously consider whether the right to property may be classified as a universal human right and, additionally, as a right to be classified as *jus cogens*'.¹⁴² According to one commentator, 'one may venture to say that the Court carries out its review exactly as if the Security Council and the EC Council as its agent had been found to be bound unreservedly by the right to property, without any restriction as to the inalienable core of that right'.¹⁴³ However, criticisms to the contrary, namely that the CFI has lowered the standard of review of the right to property to the examination of an 'arbitrary deprivation' of the applicant's property are not lacking.¹⁴⁴

¹³³ Lavranos, above n. 122, at 478.

¹³⁴ Eeckhout, above n. 28, at 201.

¹³⁵ Eckes, above n. 75, at 90, Nettesheim, above n. 35, at 600.

¹³⁶ Lavranos, above n. 122, at 487, Eeckhout, above n. 28, at 202.

¹³⁷ Sauer, above n. 43, at 3687.

¹³⁸ See above. It is worth noting that Vandepoorter, above n. 103, at 134 criticizes the justifications leading to the conclusion that the UNSC is subject to *jus cogens*.

¹³⁹ See in particular, Defeis, 'Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community' (2007) 30 *Fordham International Law Journal* 1449, 1458; Bultemann, above n. 89, at 768, Simon, Mariatte, above n. 73, at 9-10.

¹⁴⁰ Tomuschat, above n. 17, at 551, Tridimas, Gutierrez-Fons, above n. 11, at 693, Kämmerer, above n. 66, at 81-82, Möllers, above n. 17, at 430, Simon, above n. 130, at 744, Gianelli, above n. 66, at 138, Almqvist, above n. 28, at 321, Gestri, above n. 17, at 39, Jacqué, above n. 129, Defeis, above n. 139, at 1459, Ahmed, de Jesus Butler, 'The European Union and Human Rights: an International Law Perspective' (2006) 17 *EJIL* 771, 780-781.

¹⁴¹ Cannizzaro, above n. 28, states: 'However, the court adopted a very restrictive notion of *ius cogens*...' at 203. Blázquez Navarro, Espósito Massicci, above n. 110, argue that by assuming the *jus cogens* as a parameter of the judicial review, the CFI sets a very high limit to effectively protect the rights of the individuals (at 144).

¹⁴² Tomuschat, above n. 17, at 547. See also Kämmerer, above n. 66, at 82, Defeis, above n. 139, at 1459.

¹⁴³ Tomuschat, above n. 17, at 548. See also Halberstam, Stein, above n. 6, at 54.

¹⁴⁴ See for instance, Ohler, above n. 106, who argues that the CFI limits the standard of review to an

As far as the right to be heard is concerned, on the one hand the Court is criticized for the broad scope of this right.¹⁴⁵ On the other, some writers have stressed the fact that the protection that the CFI accorded to the rights of defence of the applicants was not satisfactory.¹⁴⁶

Finally, concerning the right to effective legal remedies, once again criticisms of the CFI's reasoning are not lacking. One author observes that 'it is somewhat disturbing that no visible effort is made to demonstrate that such right to judicial review ... pertains to the class of *jus cogens* norms'.¹⁴⁷ Another points out the circularity of the CFI's reasoning in arguing that the applicants' right for effective judicial review was not breached, because they had the possibility to address themselves to the Court under Article 230.¹⁴⁸ Finally, one commentator criticized the CFI for excluding this right from the scope of contemporary peremptory norms of international law, given that 'the right of individuals to have recourse to an impartial and independent tribunal against measures affecting their individual legal position, is expressly laid down in the major human rights conventions on the universal and on the regional plane'.¹⁴⁹

4. Reasons for Criticism of the ECJ's Ruling

While the ECJ's ruling was defended by a substantial group of writers,¹⁵⁰ it has also been severely criticized. Four fundamental objections are raised against the judgment of 3 September 2008.

The first is that the ECJ treats the UN Charter as any other international Treaty,¹⁵¹ whereas it is clearly not so since this agreement embodies the fundamental principles of today's international legal order and boasts almost universal membership.¹⁵² By questioning the hierarchical position of the UN Charter in the international legal order,¹⁵³ the ECJ creates a tension with the UN and highlights a sense of divergence of opinion between EU and public international lawyers, especially as far as the normative point of reference is concerned.¹⁵⁴ The Charter is considered such a unique international agreement that authoritative doctrine doubts the possibility of using Article 307 TEC to regulate the relations between obligations

(Contd.) _____

examination of the 'arbitrariness' of the measure and the individual remains thus without any protection to his right to property (at 859).

¹⁴⁵ One commentator notes 'the reader wonders what tiny difference might still be seen to exist between an assessment in the light of an international *jus cogens* rule and the assessment operated by the Court which (indirectly) subjects the Security Council to the standards evolved in the jurisprudence of the Court of Justice. Tomuschat, above n. 17, at 549. See also Halberstam, Stein, above n. 6, at 58, Kämmerer, above n. 66, at 82.

¹⁴⁶ Von Arnould, above n. 17, at 212, Ohler, above n. 106, at 861, Conforti, above n. 125, at 342-342.

¹⁴⁷ Tomuschat, above n. 17, at 549. See also Kämmerer, above n. 66, p. 72, Gestri, above n. 17, at 39.

¹⁴⁸ Von Arnould, above n. 17, at 212.

¹⁴⁹ Cannizzaro, above n. 28, at 203.

¹⁵⁰ See section n. 1.

¹⁵¹ De Burca, above n. 10, at 34; Schrijver, Van den Erik, above n. 49, at 336.

¹⁵² Tomuschat and Gaja in this working paper.

¹⁵³ Hinojosa Martínez, above n. 17, at 2.

¹⁵⁴ Cardwell, French, White, above n. 44, at 240.

under the UN Charter and those under EC law.¹⁵⁵ The same author argues that exemptions from obligations under the EC Treaty that are allowed in order to comply with obligations under the Charter could be wider than those that are admissible with regard to obligations under other treaties.¹⁵⁶

In second place, the ECJ is reproached for applying European¹⁵⁷ fundamental rights but not norms that reflect universal values. It is argued that its legal position would have been stronger if it had justified the lack of implementation of the UN sanctions on the basis of universal norms that also bind the Security Council itself,¹⁵⁸ or if it had looked at international instruments promoting respect for human rights and which are binding upon the states.¹⁵⁹ The ECJ failed to take any notice of the standard of international protection of those same rights and by doing so, it ultimately missed a great opportunity for advancing the EU's policy on human rights as a whole.¹⁶⁰ The Luxembourg Court distances itself from international law in contrast with its traditional attitude of openness to it¹⁶¹ and takes an inward-looking approach that eschews engagement in the kind of international dialogue that has generally been presented as one of the EU's strengths as a global actor.¹⁶² Its reasoning is criticized for having a chauvinist and parochial tone.¹⁶³ A strong pluralist approach underpins the judgment of the Court and this is at odds with the conventional self-presentation of the EU as an organization which maintains particular fidelity to international law and institutions.¹⁶⁴

The third reason for criticism is that the ECJ puts the Community legislator in a 'cul-de sac', as the steps necessary to comply with its standards seem beyond the European institutions' competences. Any procedural reform of the system of sanctions at Community level would

¹⁵⁵ Gaja in this working paper.

¹⁵⁶ Ibid.

¹⁵⁷ One author defines this approach 'Eurocentric.' Moyni, 'Aperçu de la jurisprudence communautaire développée dans le cadre de la lutte contre le financement du terrorisme international' (2009) *Revue du droit de l'Union européenne* 33.

¹⁵⁸ Hinojosa Martínez, above n. 17, at 6. Along the same line De Burca, above n.10, argues that it would have been preferable if the ECJ had 'invoked international law norms rather than only internal European standards in refusing to implement the SC Resolution without further due process guarantees' (at 55). See also Cardwell, French, White, above n. 44, at 239. One author argues that the Court should have reviewed the regulation imposing sanctions on Kadi on the basis of international customary law. See Pavoni in this working paper.

¹⁵⁹ Cardwell, French, White, above n. 44, at 237.

¹⁶⁰ Gattini, above n. 78, at 214. This author argues that the ECJ could have considered the status of international customary and Treaty law with regard to the human rights invoked and especially to the right to be heard (at 231). Further alternative outcomes are described by this commentator. First of all, the ECJ could have upheld the contested regulation because of the constraints of art. 307 and allowed the ECtHR as the proper court to pronounce on this issue. However, this option presents backlashes, risks and inconvenience (at 233-234). The second alternative outcome, which the Court has discarded, is inspired by the so-called *Solange*-approach also described by Griller, above n. 43 (at 544). In order not to undermine international co-operation, the Court could have refrained from scrutinizing the decisions of the UN sanction committees (and more generally those of the UNSC) so long as this organism provide those who are listed with acceptable opportunity to be heard through the administrative review mechanism (Gattini, above n. 78, at 234; Griller, above n. 43, at 544-545).

¹⁶¹ De Burca, above n.10, at 34.

¹⁶² Ibid, at 57.

¹⁶³ Ibid, at 4. See also Tomuschat, Francioni and along these lines Pavoni in this working paper.

¹⁶⁴ Ibid, at 57. On the contrary, Cardwell, French, White, above n. 44, downplay 'the rupture' highlighted by De Burca and argue that in the Kadi ruling 'the Court has applied its settled jurisprudence in a way that is consistent with its practise' (at 233).

not be suited to guarantee the European parameters of fundamental rights for the people on the list.¹⁶⁵

The fourth set of critical comments concerns the (negative) external impact associated with the ECJ's ruling. The self-assertion attitude of the Luxembourg court undermines the UNSC's authority and bears the risks of fragmentation of UN resolutions along the borders of national and supranational jurisdictions.¹⁶⁶ In turn, this could provoke a dangerous 'know-on' or 'spillover' effect on other courts that might want to affirm their local understanding of human rights.¹⁶⁷ Eventually, this could undermine the system of collective security.¹⁶⁸

Finally, many commentators have underscored ambiguities in the texture of the ECJ's ruling or blame it for avoiding to tackle many of the issues raised by the CFI.¹⁶⁹ As to the former, it is observed that it is not clear what kind of principles, under Article 6 TEU, form the foundation of the Union and need unreserved protection.¹⁷⁰ As to the latter, the ECJ does not deal at all with Article 103 of the UN Charter (and in fact disregards it¹⁷¹). The silence on whether the EC is bound by the Charter¹⁷² and on the legal effects of the SC resolutions¹⁷³ as well as on the extent to which human rights standards might bind the Security Council is also conspicuous.¹⁷⁴ In addition, it is difficult to understand from the ECJ's ruling whether certain resolutions of this body might enjoy immunity if they provide sufficient guarantees.¹⁷⁵ Finally, given the lack of discussion on the scope of Article 307, the ECJ does not provide guidance on the way in which Member States could eliminate the incompatibilities of their obligations.¹⁷⁶ In particular, one author emphasizes that the Court

¹⁶⁵ Hinojosa Martínez, above n. 17, at 8. See also Gattini, above n. 78, who points out that the Court does not help improving the review mechanism of the Consolidated lists (at 237). For critical remarks on the way the EC legislator implemented the ECJ's ruling see Salerno above n. above n. 67, at 114-115.

¹⁶⁶ Reich, above n. 42, at 510.

¹⁶⁷ De Burca, above n.10, at 58; Hinojosa Martínez, above n. 17, at 6; Tomuschat in this working paper.

¹⁶⁸ Schrijver, Van den Erik, above n. 49, at 335.

¹⁶⁹ Halberstam, Stein, above n. 6, at 48.

¹⁷⁰ Tomuschat (in this working paper) claims that it is not clear whether all rights protected by European law under art. 6 TEU must be defended against the interference of the UN or only the core substance of those principles. Should the former interpretation be the correct one, the ECJ would be more radical than the Solange I jurisprudence of the German Constitutional Court.

¹⁷¹ Tomuschat in this working paper.

¹⁷² D'Argent, above n. 43, at 266; Palchetti, above n. 54, at 1079. For example, as noted by Tomuschat (in this working paper), the Court does not mention the maxim *pacta tertiis nec prosunt nec nocent* as it is enshrined in both Vienna Conventions on the Law of Treaties (Article 34) to exclude that the Charter has no bearing on the European legal order.

¹⁷³ See Palchetti, above n. 54, at 1088; Cannizzaro, 'Sugli effetti delle risoluzioni del Consiglio di Sicurezza nell'ordinamento comunitario: la sentenza della Corte di Giustizia nel caso Kadi' (2008) 91 Rivista di Diritto Internazionale 1075, 1078.

¹⁷⁴ Griller, above n. 43, at 541-542.

¹⁷⁵ De Burca, above n. 10, at 36; Santos Vara, above n. 43, at 103. *Contra* see Griller, above n. 43, arguing that the ECJ left 'the door open to reduce scrutiny as soon as an effective mechanism of judicial control at UN level would be established' (at 549).

¹⁷⁶ Gattini, above n. 78, at 235. Along these lines Reich, above n. 42, claims the following: 'Not only domestic and above national lawmakers but above national and national courts alike, therefore, face a choice between Scylla and Charyddis: they either stress the supremacy of resolutions made under Chapter VII of the U.N. Charter in international law as the Swiss Federal Supreme Court did in the Nada-Decision and consequently

does not touch upon the issue of the opposing obligations under UN and EC law to which Member States find themselves subject because of the *Kadi* decision. The ECJ de facto constrains the Member States' freedom to comply with the SC resolutions within their domestic legal orders.¹⁷⁷ The Court's position as to the course of action that they should take is unclear. What is certain, in the opinion of the reviewed author, is that the denunciation of the earlier agreement (the UN Charter), is not a viable option.¹⁷⁸

5. Conclusions

In this survey we have reviewed approximately 70 comments on the CFI and/or the ECJ's *Kadi* rulings. What kind of overall conclusions may be drawn from this screening exercise?

We commenced our research hoping that we would discover certain commonalities in the academic literature commenting on the two judgments. The initial hypothesis was that we would at least be able to identify at least common patterns in the assessment of the position of the two Courts, depending on the legal perspective adopted by commentators. For example, we would have expected that international lawyers would by and large support the CFI's position and that, in general, EU lawyers would support the ECJ's approach.

The outcome of our work shows that it is not possible to find a consensus amongst experts in EU law in their preferences towards the ECJ's approach in relation to that of the CFI. Authoritative writers such as De Búrca, an eminent Professor of European law, criticized the ECJ's approach. Commentators concurred on the fact that the latter distanced itself from international law, although they were divided between those who assessed this phenomenon positively and those who considered it dangerous. As for international lawyers, many were critical of the CFI's ruling, but on the whole, they were harsher with the higher court.

At the beginning of our work we reflected on the extent to which the national legal culture and tradition could have affected the position of commentators. In other words, we wondered whether it was possible to identify a homogeneous 'national reaction' to the two rulings. We find it hard to conclude that there was any such reaction. With some caution, we could say that German authors distinguished themselves in their support for the CFI's ruling as soon as it was delivered. However, later on, when the ECJ's ruling came out, there were writers of the same nationality who applauded the higher court's stance.

Finally, in the array of different reactions to the *Kadi* rulings, the following minimum common elements may be identified.

First of all, most authors considered that the analysis of the legal basis in both rulings was affected by many weaknesses. The ECJ's reasoning attracted as much criticism as the CFI's. The clarity of the Lisbon Treaty in this area¹⁷⁹ can be seen as a positive development.

(Contd.) _____

allow for only very limited judicial review or they emphasize the relevant internal (domestic or above national) legal framework based on fundamental rights as the ECJ did in the *Kadi*- Case and risk to put aside the obligations under the U.N. Charter. *Tertium non datur*: under the present legal conditions these two approaches seem to be incompatible with each other at least to a large extent.'

¹⁷⁷ Gattini, above n. 78, at 226.

¹⁷⁸ Ibid.

¹⁷⁹ See art. 215, par. 2 of the TFEU provides an explicit legal base for restrictive measures relating to asset of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

Secondly, the view that the UN sanction system of listing and especially delisting is not line with minimum due process rights¹⁸⁰ is widely shared, even amongst those who were critical of the ECJ's ruling.¹⁸¹ The modifications to the sanction system introduced in 2006 signal limited progress.¹⁸² The same conclusion may be extended to the 2008 amendments.¹⁸³ A major weakness in the UN sanction system is identified in the lack of a substantive review of intelligence information by an independent and impartial organ.¹⁸⁴ As emphasized by the UN Special Rapporteur on the promotion and protection of human rights, Martin Scheinin, as long as there is no proper or adequate international review available for the inclusion of individuals in the terrorist list, national review procedures – even for international lists – are necessary.¹⁸⁵

Lastly, most writers embrace the position that the system should be subject to further changes,¹⁸⁶ although some of them are perceived as unrealistic.¹⁸⁷

¹⁸⁰ Sciso, above n. 82, at 147; Ciampi, 'Individual remedies against Security Council targeted sanctions' (2007) 17 Italian Yearbook of International Law 55, 56. The latter points out that on 23 January 2008 the Parliamentary Assembly of the Council of Europe has also claimed that the procedural and substantive standards applied by the UNSC do not comply with minimum standards. Ibidem. On the Resolution of the Assembly see Condorelli in this working paper.

¹⁸¹ Tomuschat in this working paper.

¹⁸² On the 2006 reform of the UN sanction committee and on the limited progress, see Francioni in this working paper; Arcari, 'Sviluppi in tema di tutela dei diritti di invidi iscritti nelle liste Comitati delle sanzioni del Consiglio di Sicurezza' (2007) 90 Rivista di diritto internazionale, 657, Ciampi, above n. 180, at 58-60; Salerno, above n. 67, at 112. However, see also the positive evaluations of the 2006 changes provided by Scheinin in this working paper. He argues that overall the problems in the 1267 sanctions regime listed by the ECJ in *Kadi* were not fixed by resolution 1822, this can be seen as a first affirmation by the Security Council itself that there is room for, if not even an obligation for, national or EU level judicial review over the implementation of the sanctions imposed by the 1267 Sanctions Committee. Hence, according to him this resolution should be seen as a tool for constructing coherence between institutional United Nations law, international human rights law and, for the EU region, also EU law.

¹⁸³ On the 2008 reform of the UN sanction committee, see Francioni in this working paper. De Sena, Vitucci, above n. 13, at 214.

¹⁸⁴ Van den Herik, above n. 38, at 798. Reich, above n. 42. Schmal, above n. 110, at 569. Others propose to set up a review procedure of the SC's action, inspired by the example of the World Bank Inspection Panels. Bothe, 'Security Council's targeted sanctions against presumed terrorists' (2008) 6 Journal of International Criminal Justice 541, 554. Von Arnould, above n. 17, argues in favour of an International Court of Human Rights and adds that so long and so far this is still a utopian solution, the CFI's judgments in *Kadi* and *Yusuf* points into the right direction (at 216).

¹⁸⁵ See Report of 16 August 2006 (A/61/267).

¹⁸⁶ *Contra* see Lysen, 'Targeted UN Sanctions: application of legal sources and procedural matters', [2003] 72 Nordic Journal of International Law 291, 296, 301, quoted by Bultmann, above n. 89, at 765. The UN Special Rapporteur on the promotion and protection of human rights, in his statement to the Third Committee of the General Assembly of 22 October 2008 summarised the options available to the Security Council after the ECJ's ruling in *Kadi and Al Barakaat* as follows. A first option would be to provide to the Council of the European Union, and to the governments concerned, sufficient information on the grounds for listing individuals or entities, so that the person or entity may be informed of those reasons and will be able to contest the implementation of the listing before national courts and the EU court. Another possible option, but certainly the least preferable one, would be to leave the situation at the UN level as it is. Naturally, according to the Special Rapporteur a further solution would be to introduce a mechanism of independent review at the United Nations level, as a last phase in the Security Council's decision-making about the listing. Finally, a fourth option would be the abolition of the 1267 Committee and its terrorist listing. In that case, Resolution 1373 would serve as the legal basis for the imposition of national terrorist listing procedures, also in respect of Taliban and Al Qaeda terrorists, and in conformity with due process. For further details see Scheinin's contribution in this working paper.

¹⁸⁷ This is for example the abolition of the 1267 sanction committee and terrorist listings altogether (Gattini,

(Contd.) _____

above n. 78, at 1237). A second option, equally problematic, consists in asking the sanction committee to provide to the EU institutions, the governments and the individuals more information on the ground for listing. Ibidem. A further possibility is that an administrative tribunal is established to review the decisions of one of the sanction committees. However, the chances of setting up such an organism are slim. Tomuschat in this working paper; Fassbender, 'Targeted Sanctions and Due Process' [2006] 3 IOLR 437.

Bibliography

1. Ahmed, de Jesus Butler, 'The European Union and Human Rights: an International Law Perspective' (2006) 17 *EJIL* 771.
2. Almqvist, 'A human right critique of European judicial review: counter-terrorism sanctions' [2008] 57 *ICLQ* 303.
3. Aust, Naske, 'Rechtsschutz gegen den UN-Sicherheitsrat durch europäische Gerichte? Die Rechtsprechung des EuG zur Umsetzung "gezielter Sanktionen" aus dem Blickwinkel des Völkerrechts' [2006] 61 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 587
4. Bartoloni, 'L'ambito di applicazione ratione personae degli articoli 301-60 TCE nelle recenti sentenze Yusuf e Kadi' (2006) *Diritto dell'Unione europea* 317.
5. Beulay, 'Les arrêts Kadi et Al Barakaat International Foundation-Réaffirmation par la Cour de Justice de l'autonomie de l'ordre juridique communautaire vis-à-vis du droit international' 524 (2009) *Revue du Marché Commun et de l'Union Européenne* 32.
6. Bothe, 'Security Council's targeted sanctions against presumed terrorists' (2008) 6 *Journal of International Criminal Justice* 541.
7. Cardwell, French, White, 'European Court of Justice, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Joined Cases C-402/05 P And C-415/05 P) Judgment of 3 September 2008' [2008] 58 *ICLQ* 229.
8. Curtin, Eckes, 'The *Kadi* case: mapping the boundaries between the executive and the judiciary in Europe' [2008] 5 *IOLR* 365.
9. De Búrca, 'The European Court of Justice and the International Legal Order after Kadi' *Jean Monnet Working Paper* n. 1/2009.
10. Bore Iveno, 'Le contrôle juridictionnel des résolutions du Conseil de Sécurité: vers un constitutionalisme international' (2006) *Revue générale de droit international public* 827.
11. Blázquez Navarro, Espósito Massicci, 'Los límites al control judicial de la medidas de aplicación de la política exterior en los asuntos Ahmed Ali Yusuf/Al Barakaat International Foundation y Yassin Abdullah Kadi' (2006) *Revista española de derecho europeo* 123.
12. Brown, 'Kadi v. Council of the European Union and Commission of the European Communities; executive power and judicial supervision at European level' [2006] 6 *European Human Rights Law Review* 456.

13. Bultemann, 'Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities', (2006) 19 *Leiden Journal of International Law* 753.
14. Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' [2006] 3 *IOLR* 189.
15. Cannizzaro, 'Sugli effetti delle risoluzioni del Consiglio di Sicurezza nell'ordinamento comunitario: la sentenza della Corte di Giustizia nel caso Kadi' (2008) 91 *Rivista di Diritto Internazionale* 1075.
16. Ciampi, 'Individual remedies against Security Council targeted sanctions' (2007) 17 *Italian Yearbook of International Law* 55.
17. Conforti, 'Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado' (2006) 89 *Diritto dell'Unione europea* 333.
18. D'Aspremont, Dopagne, 'Kadi: the ECJ's reminder of the elementary divide between legal orders' [2008] 5 *IOLR* 371.
19. Defeis, 'Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community' (2007) 30 *Fordham International Law Journal* 1449.
20. Della Canea, 'Global Security and procedural due process of law between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council,' (2008-2009) 15 *Colum. J. Eur. L.* 511.
21. De Sena, Vitucci, 'The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values' (2009) 20 *EJIL* 193.
22. Eckes, 'Judicial Review of European Anti-Terrorism Measures: The Yusuf and Kadi Judgments of the Court of First Instance' (2008) 14 *European Law Journal* 74.
23. Eeckhout, 'Community terrorism listings, fundamental rights and the UN Security council resolutions. In search of the right fit' (2007) 3 *European Constitutional Law Review* 183.
24. Fassbender, 'Targeted Sanctions and Due Process' [2006] 3 *IOLR* 437.
25. Garde, 'Is it really for the European Community to implement anti-terrorism UN Security Council Resolutions?' (2006) 65 *Cambridge Law Journal* 284.

26. Gattini, 'Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008, nyr.' (2009) 46 *CMLRev* 213.
27. Gestri, 'Legal remedies against Security Council targeted sanctions: de lege lata and de lege ferenda options for enhancing the protection of the individual' (2007) 17 *Italian Yearbook of International Law* 25.
28. Gianelli, 'Il rapporto tra diritto internazionale e diritto comunitario secondo il Tribunale di primo grado delle Comunità europee' (2006) 89 *Rivista di diritto internazionale* 131.
29. Gianelli, 'L'autonomia del sistema giuridico comunitario rispetto al diritto delle Nazioni Unite' (2008) 91 *Rivista di Diritto internazionale* 1078.
30. Griller, 'International law, human rights and the European Community's autonomous legal order: notes on the European Court of Justice decision in Kadi' (2008) 4 *European Constitutional Law Review* 528.
31. Halberstam, Stein, 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order' (2009) 46 *CMLR* 13.
32. Haltern, 'Gemeinschaftsgrundrechte und Antiterrormaßnahmen der UNO' [2007] 62 *Juristenzeitung* 537.
33. Harings, 'Die EG als Rechtsgemeinschaft?' [2005] *Europäische Zeitschrift für Wirtschaftsrecht* 705.
34. Harpaz, 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the Kadi Dispute' (2009) 14 *European Foreign Affairs Review* 65.
35. Hinojosa Martínez, 'Bad Law for Good Reasons: The Contradictions of the Kadi Judgment' (2008) 5 *IOLR* 1.
36. Hörmann, 'Die Befugnis der EG zur Umsetzung von Resolutionen des UN-Sicherheitsrates zur Bekämpfung des internationalen Terrorismus' (2007) *Europarecht* 120.
37. Jacqué, 'Le Tribunal de Première instance face aux résolutions du Conseil de Sécurité des Nations Unies. Merci monsieur le Professeur,' *L'Europe des libertés*, 2005, n° 19.
38. Kämmerer, 'Die Urteile "Kadi" und "Yusuf" des EuG und ihre Folgen' (2008) *Europarecht* 65.

39. Karayigit, 'The Yusuf and Kadi judgments: the scope of the EC competences in respect of restrictive measures' [2006] 33 *Legal Issues of European Integration* 379, 394.
40. Kotzur, 'Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft/Zur Entscheidung des EuG in der Rs. Yusuf u.a. gegen Rat, EuGRZ 2005, S. 592 ff. ' [2006] 33 *Europäische Grundrechte-Zeitschrift* 623.
41. Kunoy, Dawes, 'Plate tectonics in Luxembourg: the ménage à trios between EC law, international law and the European convention on human rights following the un sanctions cases' (2009) 46 *CMLR* 73.
42. Lavranos, 'Judicial Review of UN Sanctions by the Court of First Instance' (2006) 11 *European Foreign Affairs Review* 471.
43. Lebeck, 'UN security Council anti-terrorism measures implemented via EC EU Law-Constitutional dilemmas of multilevel governance' [2007] 14 *Irish Journal of European Law* 3.
44. Moïny, 'Aperçu de la jurisprudence communautaire développée dans le cadre de la lutte contre le financement du terrorisme international' (2009) *Revue du droit de l'Union européenne* 33.
45. Möllers, 'Das EuG konstitutionalisiert die Vereinten Nationen– Anmerkung zu den Urteilen des EuG vom 21. 09. 2005, Rs. T-315/01 und T-306/01' (2006) *Europarecht* 426.
46. Nettesheim, 'UN sanctions against individuals – a challenge to the architecture of European union governance' [2007] 44 *CMLRev* 567.
47. Ohler, 'Die Verhängung von "smart sanctions" durch den UN-Sicherheitsrat - eine Herausforderung für das Gemeinschaftsrecht' (2006) *Europarecht* 848.
48. Ohler, 'Gemeinschaftsrechtlicher Rechtsschutz gegen personengerichtete Sanktionen des UN-Sicherheitsrats' [2008] *Europäische Zeitschrift für Wirtschaftsrecht* 630.
49. Palchetti, 'Può il giudice comunitario sindacare la validità internazionale di una risoluzione del Consiglio di Sicurezza?' (2008) 91 *Rivista di diritto internazionale* 1085.
50. Roldán Barbero, 'La justicia comunitaria y el control de legalidad de las resoluciones del Consejo de Seguridad de Naciones Unidas. Comentario a las sentencias Yusuf/Al Barakaat y Kadi, de 21 de septiembre de 2005, del Tribunal de Primera Instancia de las Comunidades Europeas' (2005) *Revista electrónica de estudios internacionales* 875.

51. Santos Vara, 'El control judicial de las sanciones contra Al-Quaeda y los talibanes en la Unión europea: ¿Un desafío a los poderes del consejo de seguridad?' (2009) 13 *Revista de derecho comunitario europeo* 91.
52. Santos Vara, 'El control judicial de la ejecución de las sanciones antiterroristas del consejo de seguridad en la unión europea' (2008) *Revista electrónica de estudios internacionales*
53. Salerno, 'Quale Comunità di diritto per il Sig. Kadi' (2009) 92 *Rivista di Diritto Internazionale* 110.
54. Sauer, 'Rechtsschutz gegen völkerrechtsdeterminiertes Gemeinschaftsrecht?', [2008] 61 *Neue juristische Wochenschrift* 3685.
55. Schmalenbach, 'Bedingt kooperationsbereit: Der Kontrollanspruch des EuGH bei gezielten Sanktionen der Vereinten Nationen' [2009] 64 *Juristenzeitung* 35.
56. Sciso, 'Fundamental Rights and Article 103 of the UN Charter Before the Court of First Instance of the European Communities' [2005] 15 *Italian Yearbook of Internal Law* 137.
57. Schmal, 'Effektiver Rechtsschutz gegen «targeted sanctions» des UN-Sicherheitsrats?' (2006) *EuR* 566.
58. Schrijver, Van den Erik, 'Eroding the primacy of the UN system of collective security: the judgment of the European Court of Justice in the case of Kadi and Al Barakaat' [2008] 5 *IOLR* 229.
59. Simon, Mariatte, 'Le Tribunal de première instance des Communautés: professeur de droit international?' (2005) *Europe*, 6.
60. Stangos, Gryllos, 'Le droit communautaire à l' épreuve des réalités du droit international: leçons tirées de la jurisprudence communautaire récente relevant de la lutte contre le terrorisme international' (2006) *Cahier de Droit européen* 429.
61. Steinbarth, 'Individualrechtsschutz gegen Maßnahmen der EG zur Bekämpfung des internationalen Terrorismus' [2006] *Zeitschrift für Europarechtliche Studien – ZeuS* 269.
62. Reich, 'Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999)' (2008) 33 *Yale Journal of International Law*. Available at SSRN: <http://ssrn.com/abstract=1268163>.
63. Tomuschat, 'Case note to T-306/01 Ahmed Ali Jusuf' [2006] *CMLR* 537.

64. Tridimas, Gutierrez-Fons, 'EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?' (2008) 32 *Fordham International Law Journal* 660.
65. Tzanou, 'Case-note on Joined Cases C-402/05 P & C-415/05 P YassinAbdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities' (2009) 10 *German Law Journal* 121.
66. 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.
67. Vandepoorter, 'L'application communautaire de décisions du Conseil de sécurité' (2006) 52 *Annuaire français de droit international* 102.
68. Vitzhum, 'Les compétences législatives et juridictionnelles de la Communauté européenne dans la lutte contre le terrorisme-l'affaire Kadi' (2008) *Zeus* 375.
69. Vlcek, 'Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice' [2006] 11 *European Foreign Affairs Review* 491.
70. Von Arnould, 'UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz' (2006) 44 *Archiv des Völkerrechts* 201.
71. Wessel, 'Editorial: The UN, the EU and Jus Cogens' [2006] 3 *IOLR* 1.
72. Wessels, 'The Kadi case towards a more substantive hierarchy in international law?' 5 [2008] *IOLR* 323.