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TERRORIST LISTINGS AND THE RULE OF LAW:  
THE ROLE OF THE EU COURTS

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## **Abstract**

Although the terrorist attacks on New York and Washington, D.C., on 11 September 2001, were not the first acts of terrorism on a major scale, they triggered a host of counter-terrorism measures, without due regard for the principle of the rule of law. While rule of law concerns have subsequently received more attention, the UN is still continuing its practice of terrorist listings, without any right of judicial review. The response of national and regional courts has been varying. The European Court of Justice, through its *Kadi* case law, has assumed a leading role in the exercise of judicial control of terrorist listings made by the UN. In addition, the EU judicial system provides for remedies with respect to listings made unilaterally by the EU. The main thrust of the paper is on the role of the European Court of Justice in safeguarding respect for fundamental rights and the rule of law with regard to both UN-based and autonomous EU terrorist listings.

## **Keywords**

Terrorist listings, the rule of law, judicial review, EU courts





## 1. Introduction: Counter-Terrorism, International Law and Judicial Control

As is well-known, the terrorist attacks on New York and Washington D.C., on 11 September 2001, triggered a host of preventive and repressive measures to counter terrorism. But it is also a notorious, although less emphasized, fact that ‘9/11’ was far from being the first terrorist act on a major scale. That the international community was well aware of the problem of terrorism is demonstrated by the considerable number of international conventions aimed at combating terrorism that were concluded already well before 2001.<sup>1</sup> Few subjects have in fact prompted such a jungle of international legal rules, ranging from sector and often quite specific conventions<sup>2</sup> to universal and regional conventions of a more horizontal nature obliging states to take measures to prevent and/or prohibit acts of terrorism.<sup>3</sup> These instruments have, of course, been accompanied by national, including European Union (hereinafter EU), legislative and other measures.<sup>4</sup>

These instruments are aimed at combating terrorism rather than addressing the problem of how to reconcile security imperatives and respect for the rule of law and human rights, including the principle of judicial control and access to courts. While the emotional aftermath of ‘9/11’ led to a very strong emphasis on the security side of the equation, the situation has gradually changed since then and concern for the rule of law and human rights is by now reflected in some international instruments or programmes relating to counter-terrorism, including the United Nations (hereinafter UN) Global Counter-Terrorism Strategy adopted by the UN General Assembly.<sup>5</sup> The Strategy also expresses support for the Human Rights Council, the Office of the UN High Commissioner for Human Rights and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.<sup>6</sup> The UN Security Council has acknowledged that counter-terrorism activities should be undertaken in accordance with international law, ‘in particular international human rights law, refugee law, and humanitarian law’.<sup>7</sup>

These affirmations have not prevented the Security Council, including its sanctions committees, from continuing to list individuals, groups, undertakings and entities as associated with terrorist

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<sup>1</sup> See, eg M Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts* (Leiden, Martinus Nijhoff Publishers, 2009) 3-47, 471-474 (list of treaties); A Rosas, ‘Counter-Terrorism and the Rule of Law: Issues of Judicial Control’ in A-M Salinas, KLH Samuel and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford, Oxford University Press, 2011, forthcoming).

<sup>2</sup> For example, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167.

<sup>3</sup> For example, International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

<sup>4</sup> Suffice it to mention here the Council of Europe Convention on the Prevention of Terrorism (opened for signature 16 May 2005, entered into force 1 June 2007), CETS No 189; EU Council Framework Decision 2002/474/JHA of 13 June 2002 on combating terrorism, [2002] OJ L 164/3, amended by Framework Decision 2008/919/JHA of 28 November 2008, [2008] OJ L 330/21; EU Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, [2008] OJ L 210/1.

<sup>5</sup> UN General Assembly Resolution 60/288 (20 September 2006), UN doc A/RES/60/288.

<sup>6</sup> The first Special Rapporteur (Mr Martin Scheinin) was originally appointed by the UN Commission on Human Rights, UNCHR Resolution 80 (2005), UN doc E/CN.4/RES/2005/37. In his most recent report of August 2010, the Special Rapporteur gives an account of developments within the UN to ensure that human rights are respected in the counter-terrorism activities of the organisation itself, UNGA ‘Report of the Special Rapporteur’ (6 August 2010), UN doc A/65/258.

<sup>7</sup> UN Security Council Resolution 1624 (14 September 2005), UN doc S/RES/1624 (2009). See also M Scheinin, ‘Monitoring Human Rights Obligations and the Fight against Terrorism: Whose Obligations? And Monitored How?’ in G Alfredsson *et al* (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jacob Th. Möller*, 2nd rev edn (Leiden, Martinus Nijhoff Publishers, 2009) 412-413; Report of the Special Rapporteur (6 August 2010), n 6 above, paras 33-58.

activities, imposing on them sanctions such as the freezing of their funds, without providing for any judicial control of these listings nor of delisting requests made by the persons concerned. This practice has drawn criticism from a number of circles, including bodies appointed by the UN, such as the UN Special Rapporteur mentioned above, and concerns expressed by an Analytical Support and Sanctions Monitoring Team supporting the Al Qaeda and Taliban Sanctions Committee of the Security Council.<sup>8</sup>

The lack of any system of judicial controls of terrorist listings at the UN level is all the more striking as there is an abundance of international legal rules and standards, mostly sponsored by the UN themselves, which contain restraints on counter-terrorism activities, including norms relating to judicial control and access to justice. The main areas of international law involved are human rights law, including asylum and refugee law, and international humanitarian law applicable in armed conflicts (hereinafter humanitarian law). True, international human rights and humanitarian law instruments lack an international system of judicial control. While some treaty bodies, such as the Human Rights Committee of the International Covenant on Civil and Political Rights 1966 (hereinafter ICCPR),<sup>9</sup> may monitor compliance and in some cases even consider individual complaints, their decisions are not legally binding in the strict sense and, in any case, these bodies do not assist the UN bodies imposing sanctions against alleged terrorists.

However, the lack of a system of judicial control at the UN level cannot serve to justify the lack of any system of such control.<sup>10</sup> While it cannot be denied that the international human rights regime is far from being at its strongest in situations of conflict and disturbances falling short of the threshold of application of humanitarian law (that is, the existence of an 'armed conflict'), especially if there has been a declaration of a public emergency which 'threatens the life of the nation',<sup>11</sup> human rights law is, in principle, applicable to such situations as well as to situations of armed conflict.<sup>12</sup> Moreover, a public emergency short of an armed conflict is rarely declared in a manner which would enable derogations from the applicable human rights instruments. And if a public emergency has been properly declared, there is in any case a regime of so-called non-derogable rights which cannot be derogated from under any circumstances as well as a general requirement that the derogations are strictly required by the exigencies of the situation.

As to the question of judicial control, in particular, relevant human rights provisions include Article 10 of the Universal Declaration of Human Rights (hereinafter UDHR),<sup>13</sup> Article 14 ICCPR, Article 6

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<sup>8</sup> See, eg the 'Second Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities' (15 February 2005) UN doc S/2005/83 paras 53-60; Ninth Report (13 May 2009) UN doc S/2009/245 paras 19-25; Tenth Report (2 October 2009) UN doc S/2009/502 paras 34-54. See more generally, eg H Corell, 'Reflections on the Security Council and Its Mandate to Maintain International Peace and Security' in O Engdahl and P Wrangé (eds), *Law at War: The Law as it Was and the Law as it Should Be: Liber Amicorum Ove Bring* (Leiden, Martinus Nijhoff Publishers, 2008) 68-72; G Sullivan and B Hayes, *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights* (Berlin, European Center for Constitutional and Fundamental Rights, 2011) 11-16.

<sup>9</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>10</sup> See Rosas, n 1 above.

<sup>11</sup> ICCPR art 4(1). See, eg, M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev edn (Kehl am Rhein, NP Engel Verlag, 2005) 83-110. See also A Rosas, 'Human Rights at Risk in Situations of Internal Violence and Public Emergency: Towards Common Minimum Standards' in A Eide and J Helgesen (eds), *The Future of Human Rights Protection in a Changing World: Essays in Honour of Torkel Opsahl* (Oslo, Norwegian University Press, 1991) 165.

<sup>12</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, 136 para 106.

<sup>13</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UN General Assembly Resolution 217 A(III) (UDHR). See also L Lehtimaja and M Pellonpää, 'Article 10' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague, Martinus Nijhoff Publishers, 1999) 223.

of the European Convention on Human Rights (hereinafter ECHR),<sup>14</sup> Articles 8 and 25 of the American Convention on Human Rights,<sup>15</sup> Article 7 of the African Charter,<sup>16</sup> and Articles 13 and 16 of the Arab Charter.<sup>17</sup> Whereas the derogation clauses of the ECHR (Article 15) and the ICCPR (Article 4) do not mention the rights of access to court and to a fair trial among the non-derogable rights, Article 27(2) of the American Convention prohibits suspension, in times of public emergency, of ‘the judicial guarantees essential for the protection of [the non-derogable] rights’, and Article 4(2) of the Arab Charter lists Article 13 (right to a fair trial) among the non-derogable rights. The two latter instruments, which are more recent than the ECHR and the ICCPR, reflect a more general trend.<sup>18</sup> In this context it should also be recalled that humanitarian law conventions, which contain basic guarantees relating to judicial protection, do not allow for derogations.

The rather limited lists of non-derogable rights especially in the ECHR (Article 15), and to some extent also the ICCPR (Article 4), has led to many initiatives and pronouncements *de lege lata* or *de lege ferenda* to fill in the gaps.<sup>19</sup> Concerning the ICCPR, the Human Rights Committee has adopted so-called General Comments on both Articles 4 and 14. The Committee has held that even if Article 14 is not listed in Article 4 as a non-derogable right, it is inherent in the protection of rights explicitly recognized as non-derogable that they be secured by procedural guarantees, ‘including, often, judicial guarantees’, and that ‘the principles of legality and the rule of law require that fundamental rights of fair trial must be respected during a state of emergency’.<sup>20</sup>

In one of his reports, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism discusses the application of fair trial rights in emergencies and, more generally, problems encountered in the context of the fight against terrorism, such as access to court, the independence and impartiality of courts, and various aspects of a fair hearing. A number of recommendations drawing upon elements of best practices are presented, based on the principle that ‘all’ aspects of counter-terrorism law and practice must be in compliance with international human rights law, including the right of access to court and to a fair trial.<sup>21</sup>

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<sup>14</sup> Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), ETS No 5.

<sup>15</sup> American Convention on Human Rights: Pact of San José, Costa Rica (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 143.

<sup>16</sup> African Charter on Human and Peoples’ Rights (adopted 26 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

<sup>17</sup> Arab Charter of Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 *International Human Rights Report* (2005) 893.

<sup>18</sup> See also Table 2 on non-derogable rights in human rights instruments, including soft law instruments, in Rosas, ‘Emergency Regimes: A Comparison’ in D Gomien (ed), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Oslo, Scandinavian University Press, 1993).

<sup>19</sup> Rosas, n 18 above. See also the Turku Declaration of Minimum Humanitarian Standards, adopted by an international expert meeting in Turku, Finland, on 2 December 1990, reprinted as UN doc E/CN.4/Sub.2/199/55, and A Eide, T Meron and A Rosas, ‘Combating Lawlessness in Grey Zone Conflicts Through Minimum Humanitarian Standards’, 89 *American Journal of International Law* (1995) 215.

<sup>20</sup> CCPR, ‘General Comment No 29: Article 4: Derogations during a state of emergency’, CCPR/C/21/Rev1/Add11 (2001) paras 15-16. See also CCPR, ‘General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial’, CCPR/C/GC/32 (2007) para 6.

<sup>21</sup> See UN General Assembly, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’ (6 August 2008), UN doc A/63/223 para 16. See also UN Human Rights Council, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’ (4 February 2009), UN doc A/HRC/10/3 paras 58-63; ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’ (17 May 2010), UN doc A/HRC/14/46 paras 16-17, 27-33, which address the question of legal remedies and control in the activities of intelligence agencies.

As to international case law, suffice it to note here that treaty bodies or courts such as the Human Rights Committee and the European Court of Human Rights have had occasion to deal with some aspects of the right of access to court and to a fair trial in the context of terrorism and counter-terrorism, including in times of public emergency.<sup>22</sup> This legal control is, at best, fragmentary, as only a limited number of cases will reach these international adjudicatory bodies, and does not, at any rate, concern directly sanctions decisions adopted by the UN Security Council. While judicial control is not a panacea which will resolve all problems, it is clear, on the other hand, that it constitutes one important ingredient in a system based on respect for human rights and the rule of law. The jurisdiction of *national* courts becomes crucial in an international system where legal controls are at best rudimentary at the universal level.<sup>23</sup>

As will be explained below, the *EU Courts*<sup>24</sup> in this regard fulfil a role akin to national courts, given that the imposition of sanctions normally takes place at the EU rather than the Member States' level. The EU offers an important illustration of the legal problems involved, as the European Court of Justice (hereinafter ECJ), notably by its now well-known judgment in *Kadi*,<sup>25</sup> has assumed a leading role in the exercise of judicial control of counter-terrorism measures.

## 2. Judicial Control of EU Sanctions

The development of EU external relations has been matched by a gradual movement from sanctions and countermeasures undertaken by individual Member States towards a veritable EU sanctions regime.<sup>26</sup> Sanctions are often based on binding resolutions adopted by the UN Security Council but the EU may also take autonomous (unilateral) measures which do not constitute an implementation of UN sanctions.

After the Treaty of Maastricht (1992), sanctions, often termed 'restrictive measures', instigated at EU level began to be based on a combination of a Common Foreign and Security Policy (hereinafter CFSP) decision adopted on the basis of Title V or the so-called Second Pillar of the Treaty on European Union (hereinafter TEU) and a Community First Pillar legislative act, usually a regulation, normally adopted on the basis of Article 301, and as the case may be, Article 60, of the Treaty Establishing the European Community (hereinafter TEC).

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<sup>22</sup> Concerning the UN Human Rights Committee see, eg *Polay Campos v Peru* (Communication No 577/1994 CCPR/C/61/D/577/1994) HRC 1997, which concerned, *inter alia*, a trial by a special tribunal of anonymous or 'faceless' judges; and *Sayadi and Vinck v Belgium* (Communication No 1472/2006, CCPR/C/794/1472/2006) HRC 2008, in which the Committee declared admissible a complaint relating to the national implementation of an EU legislative act based on a UN Security Council resolution placing the complainants on a list of persons subject to counter-terrorism measures). Concerning the European Court of Human Rights see, eg *A v United Kingdom* (Application No 3455/05) (2009) 49 EHRR 29, which mainly concerned derogations under a declared public emergency from art 5 ECHR, but also raised issues under art 6. This judgment refers to national UK case law, *inter alia*, *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] 1 AC 440.

<sup>23</sup> See, eg the Report of the Special Rapporteur of 6 August 2010, n 6 above, para 58.

<sup>24</sup> The expression 'EU Courts' here refers to the Courts of the Union itself rather than the national courts of the EU Member States, in other words the European Court of Justice (ECJ) and the General Court of the EU (formerly the Court of First Instance of the European Communities). At Union level there is also a Civil Service Tribunal, established in 2004, but its relevance in the context of judicial control of counter-terrorism measures is marginal, at most.

<sup>25</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

<sup>26</sup> E Paasivirta and A Rosas, 'Sanctions, Countermeasures and Related Actions in the External Relations of the EU: In Search for Legal Frameworks' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (The Hague, Kluwer Law International, 2002). See also D Bethlehem, 'The European Union' in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Leiden, Martinus Nijhoff Publishers, 2004).

In the Treaty on the Functioning of the European Union (hereinafter TFEU), as it emerged from the Treaty of Lisbon (2007, entered into force on 1 December 2009), the main legal basis for taking restrictive measures is Article 215 TFEU. In addition, the TFEU contains a legal basis for taking counter-terrorism measures in the context of the area on freedom, security and justice (Article 75). Under Article 215, restrictive measures are based, first, of a unanimous decision under the CFSP and, then, a Council regulation, adopted by qualified majority. The Council regulation often confers powers on the Council or the European Commission to adopt further implementing measures, including powers to amend annexes, issue authorisations derogating from the sanctions regime, and so on.<sup>27</sup>

During the last ten or so years, restrictive measures have been taken against not only third states, but also persons or groups of persons not associated directly with a third state, in particular persons suspected of terrorism (notably Al Qaeda and the Taliban). Some of these measures have concerned movements which are primarily based within the EU rather than third states, such as Basque organisations and splinter groups active in Northern Ireland. The latter type of measures are likely to be of an autonomous (unilateral) character, whereas restrictive measures taken against other organisations and individuals are most often based on UN Security Council decisions.

Article 301 TEC provided for actions to interrupt or to reduce, in part or completely, ‘economic relations with one or more third countries’, while Article 60(1) concerned measures ‘on the movement of capital and on payments’. Article 215 TFEU combines the two procedures. Moreover, since according to a strict interpretation of Articles 60 and 301 TEC, sanctions against designated individuals such as suspected terrorists were not covered by these articles unless they could be considered to target a third state (and hence they were often adopted by inserting Article 308 TEC as an additional legal basis<sup>28</sup>), Article 215(2) TFEU provides for an explicit legal basis for adopting restrictive measures also against ‘natural or legal persons and groups or non-State entities’.

EU sanctions may implicate notably trade embargoes affecting goods and services, financial sanctions and investment bans, including the freezing of funds, and sanctions regarding means of transport. It will be recalled that Union regulations are directly applicable as the law of the land of all EU Member States, that they often possess direct effect (in other words, that they may be invoked by individuals), and that they may contain obligations for private parties, without there being any need for national implementing measures.<sup>29</sup> Questions left open in the Union regulation may, however, enable or even require some accompanying national measures.<sup>30</sup> The powers of the EU to undertake UN based or unilateral sanctions do not necessarily exclude all Member State competence if the Union abstains from taking the necessary measures, although the existence of exclusive Union competence in

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<sup>27</sup> Bethlehem, n 26 above, 125.

<sup>28</sup> According to art 308 TEC, the Council, acting unanimously on a proposal from the Commission, could take appropriate measures if such action were ‘necessary to attain . . . one of the objectives of the Community’ and other provisions of the TEC did not provide the necessary powers. A triple legal basis (arts 60, 301 and 308 TEC) was accepted, first by the then Court of First Instance in Cases T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533, paras 80-171; T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 paras 64-135; and then on appeal by the ECJ in Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 25 above, although the reasoning of the ECJ partly differs from that of the Court of First Instance. See also Case T-362/04 *Minin v Commission* [2007] ECR II-2003 paras 65-74; Case T-181/08 *Pye Phyoo Tay Za*, judgment of 19 May 2010 nyr. The provision corresponding to art 308 TEC in the TFEU is art 352.

<sup>29</sup> On direct applicability and direct effect of EU law, see A Rosas and L Armati, *EU Constitutional Law: An Introduction* (Oxford, Hart Publishing, 2010) at 63-72.

<sup>30</sup> Regarding the scope left for additional national implementing measures see, for example, Case C-124/95 *Centro-Com* [1997] ECR I-81, where Community law was held to preclude certain national measures intended to secure effective implementation of a UN Security Council resolution. See also Bethlehem, n 26 above, 132, 142-143, 150-154; P Kaukoranta, ‘The National Implementation of EC Economic Sanctions: The Case of Finland’ in M Koskenniemi (ed), *International Law Aspects of the European Union* (The Hague, Martinus Nijhoff Publishers, 1998) 99-109.

areas such as the common commercial policy, including foreign direct investment, and movement of capital, significantly curtails the scope for such a national competence.<sup>31</sup>

Before the entry into force of the Treaty of Lisbon, CFSP decisions – unlike EU legislative acts, whether grounded in CFSP decisions or not - were *not* as such subject to judicial review by the EU Courts except that the latter considered themselves competent to verify that CFSP decisions did not encroach upon the powers conferred by the TEC on the Community First Pillar.<sup>32</sup> Article 275 TFEU, while retaining the main principle that the Courts shall not have jurisdiction with respect to CFSP measures, provides explicitly for two exceptions: they shall have jurisdiction to monitor compliance with Article 40 TEU, which concerns the delimitation between CFSP and non-CFSP measures; and, what is new, to rule on actions on annulment concerning CFSP decisions ‘providing for restrictive measures against natural or legal persons’. The practical significance of the latter broadening of the jurisdiction of the EU courts is limited by the fact that there will probably not be too many cases where sanctions against natural or legal persons are based exclusively on CFSP decisions (if such restrictive measures concern economic or financial relations, they can be based on Article 215 TFEU, a non-CFSP provision).

Legislative acts such as regulations are always subject to judicial review, also where they are preceded by a CFSP decision. *Actions for annulment* under Article 263 TFEU can be brought by an EU institution and a Member State as well as by private parties; in the latter case, however, on the condition that the private party is ‘directly and individually concerned’, or if the action concerns a regulatory act, is ‘directly concerned’. If the action concerns a Commission regulation implementing a Council regulation, or concerns a Council regulation and is brought by a private party, the case is heard, at first instance, by the General Court, and as the case may be, on appeal by the ECJ. In addition, whether or not a natural or legal person has resorted to an action for annulment, *actions for damages* may be brought before the General Court invoking the non-contractual liability of the Union (Articles 268 and 340 TFEU).

In addition, the validity and interpretation of a regulation may be brought before the ECJ in the form of a request for a *preliminary ruling*, presented under Article 267 TFEU by a national court of one of the 27 EU Member States. An interpretation adopted by the ECJ is binding on the national judge and, in principle, also on national courts in general. A national court cannot declare an EU legal act invalid; this is the prerogative of the ECJ.<sup>33</sup> *Infringement actions* brought by the Commission against Member States under Articles 258 and 259 TFEU are less likely in sanctions, including terrorist listing, contexts.<sup>34</sup>

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<sup>31</sup> Case C-124/95 *Centro-Com*, n 30 above. See also P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, Oxford University Press, 2004) 447-453. In *Sayadi and Vinck v Belgium*, n22 above, the respondentState argued before the UN Human Rights Committee that with respect to the implementation of economic measures determined by the UN, there had been a transfer of competence from the Member States to the Union (para 4.1).

<sup>32</sup> See arts 46 and 47 TEU, as they existed before the Treaty of Lisbon. The ECJ had occasion to review not only Third Pillar decisions (concerning police and judicial cooperation in criminal matters) allegedly encroaching upon Community powers (see, for example, Case C-170/96 *Commission v Council* [1998] ECR I-2763), but also a Second Pillar measure held to produce a similar effect, Case C-91/05 *Commission v Council* [2008] ECR I-3651. The Court of First Instance also asserted a similar jurisdiction with respect to CFSP decisions, Case T-299/04 *Selmani*, order of 18 November 2005, not reported, para 56; Case T-228/02 *Organisation des Modjahedines du peuple d’Iran* (hereinafter *OMPI*) [2006] ECR II-4665 para 56.

<sup>33</sup> Case 314/86 *Foto-Frost* [1987] ECR 4225; Joined Cases C-453/03, C-11/04 and C-194/05 *ABNA* [2005] ECR I-10423. See also Rosas and Armati, n 29 above, at 58, 229.

<sup>34</sup> But see Cases 532/08 *Commission v Ireland* [2009] ECR I-90; C-546/08 *Commission v Sweden* [2009] ECR I-105; C-502/08 *Commission v Spain* [2009] ECR I-161; C-549/08 *Commission v Ireland* [2009] ECR I-162; C-6/09 *Commission v Belgium* [2009] ECR I-165; C-170/09 *Commission v France*, judgment of 17 April 2010 nyr, in which several Member States were condemned for failure to transpose within the prescribed period Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purposes of

Before the Treaty of Lisbon, Title VI TEU concerning police and judicial cooperation in criminal matters (the so-called Third Pillar of the Union) provided for a more limited judicial review. Within this framework the Council could adopt common positions, framework decisions, and decisions each of which could include measures relating to suspected terrorists.<sup>35</sup> The ECJ had jurisdiction to give preliminary rulings only if the Member State concerned had made a declaration to that effect. The Court could rule on the legality of framework decisions and decisions only if actions were brought by a Member State or the Commission. Title VI TEU did not provide for a right of individuals to bring actions for annulment against Council decisions taken in this framework.

The Treaty of Lisbon has brought about a radical change in this regard. The Third Pillar has disappeared, and measures relating to police and judicial cooperation in criminal matters can now be taken under Title V, Part III, TFEU concerning the area of freedom, security and justice (which also include powers relating to border checks, asylum and immigration, and judicial cooperation in civil matters). This area will be subject to full judicial control, although there is a transitional period of a maximum of five years during which former Third Pillar decisions will be transformed into legal acts, adopted in the context of the area of freedom, security and justice.<sup>36</sup>

In the context of this area, Article 75 TFEU provides that where necessary to achieve the objectives set out in Article 67 (which includes ensuring a high level of security through measures to prevent and combat crime), ‘as regards preventing and combating terrorism and related activities’, regulations in accordance with the ordinary legislative procedure may be adopted ‘to 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’. More concrete measures to implement this framework may be adopted by the Council, on a proposal from the Commission. This new article enables the EU Council to adopt, by qualified majority, restrictive measures against persons and groups of persons based in the EU.<sup>37</sup> At the time of writing, a case is pending before the ECJ which addresses the question of the scope of Article 75 as compared to Article 215 TFEU.<sup>38</sup>

It should be underlined that the EU sanctions regime is operating within a constitutional order which implies, *inter alia*, legislative acts which are not only directly applicable in all EU Member States but also, in case of conflict, prevail over their national laws.<sup>39</sup> This constitutional setup affects profoundly the nature of judicial control within the EU: whereas the scrutiny exercised by human rights courts and treaty bodies such as the European Court of Human Rights is limited to an external control, aimed at determining whether a given measure or conduct is or is not in conformity with the human rights instrument concerned (for example, the ECHR), the jurisdiction of EU courts relates to the interpretation and validity of EU legal acts in general, with powers to annul or declare invalid such acts. There can thus be no doubt that the EU system corresponds generally to sanctions regimes

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money laundering and terrorist financing [2005] OJ L 309/15. Moreover, the Commission might argue that Member States’ national measures are in violation of either EU sanctions legislation or EU exclusive competence in a certain area.

<sup>35</sup> See, eg Case C-354/04 P *Gestoras Pro Amnistía and Others v Council* [2007] ECR I-1579, which concerned Common Positions which were adopted on the basis of both art 15 TEU (which was part of the CFSP) and art 35 TEU (which belonged to the Third Pillar). The latter legal basis was necessary to cover persons and organisations based in the EU (notably organisations active in Northern Ireland and the Spanish Basque country).

<sup>36</sup> See Protocol No 36 on transitional provisions annexed to the TEU and the TFEU, [2010] OJ C 83/322.

<sup>37</sup> J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010) 186 observes generally that the Lisbon Intergovernmental Conference decided that ‘the legal basis enabling the Council to adopt by [qualified majority vote] measures on the freezing of assets to fight terrorism and related activities’ was to be inserted into the general provisions of the area on freedom, security and justice.

<sup>38</sup> Case C-130/10 *Parliament v Council*, pending. See also P Van Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency’ 47 *Common Market Law Review* (2010) 1009.

<sup>39</sup> On the principles of primacy, direct applicability and direct effect of EU law see, eg, Rosas and Armati, n 29 above, ch 5.

operating in States, irrespective of how the Union is characterised in general constitutional terms (regional integration organisation, confederation, federation, ‘post-modern state’, and so on).<sup>40</sup>

### 3. Case Law of the EU Courts

#### 3.1 General Overview of Judicial Remedies

Terrorist listings by the EU, whether based on UN Security Council decisions or not, have already generated an extensive case law.<sup>41</sup> As was noted above, the main remedies available to persons who have been listed by the EU as suspected terrorists and who accordingly are subject to restrictive measures consist of actions for annulment, actions for damages and national proceedings which may lead to a request for a preliminary ruling from the ECJ. The following matrix provides an overview of these categories of judicial remedies, taking also into account the distinction between UN-based sanctions and autonomous (unilateral) acts.

	UN SANCTIONS	EU UNILATERAL
<b>ACTIONS FOR ANNULMENT</b> (ARTICLE 263 TFEU) (EX ARTICLE 230 TEC)	1	2
<b>ACTIONS FOR DAMAGES</b> (ARTICLE 340 TFEU) (EX ARTICLE 288 TEC)	3	4
<b>PRELIMINARY RULINGS</b> (ARTICLE 267 TFEU) (EX ARTICLE 234 TEC)	5	6

As was noted above,<sup>42</sup> with respect to events that precede the entry into force of the Treaty of Lisbon, a distinction has also to be made between restrictive measures aiming at interrupting or reducing ‘economic relations with one or more third countries’ (Article 301 TEC, see also Article 60 TEC) and restrictive measures directed at individuals or groups of individuals without a sufficient link to a third country. In the latter case, the measures have also been based on Article 308 TEC. As was also noted above, Article 215 TFEU now covers both categories of restrictive measures.

The following discussion will be structured in accordance with the categories contained in the matrix. The main emphasis will be on categories 1 and 2. Categories 3 and 4 will be commented upon only in passing; actions for damages have not played a major role in the context of restrictive measures taken against suspected terrorists. It will be recalled that actions for annulment and actions

<sup>40</sup> On the constitutional aspects of the EU legal order see, eg R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, Oxford University Press, 2009); A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*. 2nd rev edn (Oxford, Hart Publishing, 2010); Rosas and Armati, n 29 above.

<sup>41</sup> See, eg Sullivan and Hayes, n 8 above, 41-75; Rosas, n 1 above.

<sup>42</sup> See ch 2 above.



for damages, if brought by natural or legal persons, are examined at first instance by the EU General Court, and then, as the case may be, by the ECJ on appeal, while requests for preliminary rulings are always made directly to the ECJ.<sup>43</sup>

### **3.2. Actions for Annulment: UN Sanctions**

#### 3.2.1. The *Kadi* Case Law

A natural or legal person who alleges the illegality of restrictive measures may bring an action for annulment before the General Court if the EU legal act in question 'is addressed to that person or which is of direct and individual concern to them' or, in case of a regulatory act, which 'is of direct concern to them and does not entail implementing measures'. In actions for annulment, the General Court has jurisdiction 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers'.<sup>44</sup> An appeal against the decision of the General Court may be brought before the ECJ 'on points of law only'.<sup>45</sup>

Some of the restricted measures imposed by the EU against alleged terrorists in order to implement sanctions decided by the UN Security Council and one of its sanctions committee have been the subject of actions for annulment.<sup>46</sup> The EU Courts have thus not escaped the question of the specific status of UN law in the Union legal order when called upon to rule upon the *validity* of Union acts purporting to implement Security Council decisions.

This was the main issue considered in *Yusuf* and *Kadi*, judged by the then Court of First Instance in 2005. The applicants in these cases challenged the legality of Community regulations implying the freezing of their funds and other financial resources, on the grounds, *inter alia*, that the EU Council lacked competence and that the contested regulation infringed their fundamental rights, in particular the right of property and the right to a fair hearing.<sup>47</sup> Their actions were dismissed by the Court of First Instance. These two cases were followed by other similar cases in which this Court based its reasoning to a large extent on the one developed in much greater detail in *Yusuf* and *Kadi*.<sup>48</sup>

This reasoning can be summarised as follows.<sup>49</sup> The Court held, *inter alia*, that from the standpoint of international law, the obligations of UN Member States prevail over any other obligation of domestic or international treaty law, including the ECHR as well as Union law, notably the TEC (now the TFEU) and that the EU, although not a Member of the UN, must by virtue of Union law, be considered bound by the obligations under the UN Charter in the same way as its Member States. The

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<sup>43</sup> True, according to art 256(3) TFEU, questions referred for a preliminary ruling could, in specific areas laid down by the Statute, be transferred from the ECJ to the General Court. No such transfer has taken place, however, and the ECJ is not likely to propose any in the foreseeable future, as the backlog of cases is much greater in the General Court than in the ECJ. See Cour de justice de l'Union européenne, *Rapport annuel 2010* (Luxembourg, Office des publications de l'Union européenne, 2011) 87, 181, according to which there were, at the end of the year 2010, 799 cases pending before the ECJ and 1300 cases pending before the General Court.

<sup>44</sup> See art 263 TFEU.

<sup>45</sup> See art 256(1) TFEU and art 58 of the Statute of the Court of the European Union.

<sup>46</sup> See, eg P Eeckhout, 'Community Terrorism Listings, Fundamental Rights and UN Security Council Resolutions: In Search for the Right Fit' 3 *European Constitutional Law Review* (2007) 183.

<sup>47</sup> Cases T-306/01 *Yusuf* and T-316/01 *Kadi*, n 28 above.

<sup>48</sup> Cases T-253/02 *Ayadi v Council* [2006] ECR II-2139; T-49/04 *Hassan v Council and Commission* [2006] ECR II-52; T-362/04 *Minin*, n 28 above.

<sup>49</sup> What follows are excerpts and abbreviations of a summary of these two judgments as presented by the Court of First Instance in its judgment in Case T-253/02 *Ayadi*, n 48 above, para 116.

Court considered that in implementing the UN decisions in question, the Union institutions acted under circumscribed powers, with the result that they had no autonomous discretion. It followed that the resolutions of the UN Security Council at issue fell, in principle, outside the ambit of the Court's judicial review with the consequence that it had no authority to call into question, even indirectly, their lawfulness in the light of Union law.

None the less, the Court of First Instance held that it was empowered to control, indirectly, the lawfulness of the resolutions in question with regard to *jus cogens*, understood as a body of higher rules of public international law from which no derogation is possible. Subject to this exception, it was not for the Court to review indirectly whether the Security Council's resolutions were themselves compatible with fundamental rights as protected by the Union legal order, or to verify that there had been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it had taken or to check indirectly the appropriateness and proportionality of those measures.

The matter came before the ECJ on appeal. In his Opinion, Advocate General Poiares Maduro proposed to the ECJ to set aside the judgment of the General Court on the ground that the Court had erred in law in holding that, as a general rule, sanctions imposed by Community measures in the implementation of UN Security Council binding decisions are not subject to judicial review.

The ECJ, in its judgment of 3 September 2008, largely followed its Advocate General and accordingly set aside the judgment of the Court of First Instance.<sup>50</sup> The ECJ did not accept the view that Community regulations implementing UN Security Council sanctions fall outside the ambit of judicial review or that this review would be limited to *jus cogens* questions. The Court did agree however with the lower Court that the review of lawfulness does not apply to the Security Council decision as such, but to the Union act intended to give effect to the decision. Nevertheless, stressing the basic nature of fundamental rights, which are part of the 'constitutional principles of the EC Treaty', and the jurisdiction of the Court, which in a Union based on the rule of law forms 'part of the very foundations of the Community',<sup>51</sup> the ECJ concluded the following:

It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.<sup>52</sup>

It should be added that the scope and intensity of the 'full review', 'in principle', of the lawfulness of Union acts asserted here seems to be inspired by the approach taken by the General Court in *Organisation des Modjahedines du peuple d'Iran* (hereinafter *OMPI*), a case *not* involving the implementation of UN Security Council decisions.<sup>53</sup> As will be explained later, the General Court in this and subsequent cases relating to non-UN based sanctions established a set of principles specifying the intensity of judicial review which is called for with a view to striking a fair balance between the need to combat international terrorism and the protection of fundamental rights.

Before confirming its right and obligation to carry out a full review with respect to UN based sanctions as well, the ECJ also considered the UN sanctions system and the re-examination procedure before the UN Sanctions Committee, including some amendments made to the system in 2006. The

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<sup>50</sup> Joined Cases C-402/005 P and C-415/05 P *Kadi*, n 25 above.

<sup>51</sup> Joined Cases C-402/005 P and C-415/05 P *Kadi*, n 25 above, paras 281-282, 285.

<sup>52</sup> Joined Cases C-402/005 P and C-415/05 P *Kadi*, note 25 above, para 326.

<sup>53</sup> According to the General Court, the ECJ in *Kadi* drew on the reasoning in Case T-228/02 *OMPI*, n 32 above, and thus 'approved and endorsed the standard and intensity of the review' as carried out by the General Court in the latter case. This interpretation of *Kadi* is presented in Case T-85/09 *Kadi v Commission*, judgment of 30 September 2010 nyr.

Court noted that the procedure before the Committee remained ‘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’.<sup>54</sup> The conclusion was that the re-examination procedure ‘does not offer the guarantees of judicial protection’. That task thus fell upon the ECJ, as the review by the Court of the validity of any Community measure in the light of fundamental rights ‘must be considered to be an expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement’.

As to substance, the ECJ did refer to the specific circumstances characterizing the fight against terrorism and to ‘overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States’. That does not mean, however, that restrictive measures escape judicial review and hence it is the task of the Community judicature ‘to apply. . . techniques which accommodate, on the one hand, legitimate security concerns. . . and, on the other hand, the need to accord the individual a sufficient measure of procedural justice’.<sup>55</sup> The ECJ found in conclusion that the sanction measures taken constituted a breach of the rights of defence of the persons concerned and of the principle of effective judicial protection, as well as unjustified restrictions of their right to property.

### 3.2.2. The Aftermath of *Kadi*

The General Court revised its approach accordingly and has in judgments following *Kadi* exercised judicial review of sanctions decisions even when grounded in UN Security Council resolutions.<sup>56</sup> Similarly, the ECJ has rendered judgments based on its rulings in *Kadi*.<sup>57</sup> In a recent judgment, however, the General Court, while yielding to the approach of the *Kadi* judgment of the ECJ, also echoed the concerns expressed notably by certain EU Member States in their observations to the *Kadi* Case as well as some parts of legal doctrine as to the consequences of the *Kadi* decision for the ability of the EU and its Member States to honour the obligations following from binding UN Security Council resolutions.<sup>58</sup>

The *Kadi* judgment has provoked a lively debate in legal doctrine. There are voices criticizing the ECJ for having put into question the relevance of public international law for the EU legal order and notably the binding and overriding nature of UN Security Council decisions taken under Chapter VII of the Charter,<sup>59</sup> in view also of its Article 103.<sup>60</sup> Others believe that the Court did the right thing, in

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<sup>54</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 25 above, para 323. See also paras 320-322, 324-325.

<sup>55</sup> Joined Cases C-402/005 P and C-415/05 P *Kadi*, n 25 above, paras 342-344. See also para 363.

<sup>56</sup> Case T-318/01 *Othman v Council and Commission* [2009] ECR II-1627; Joined Cases T-135/06 to T-138/06 *Mohammed Al-Faqih and Others v Council*, judgment of 29 September 2010 nyr.

<sup>57</sup> Joined Cases C-399/06 P and C-403/06 P *Hassan v Council and Commission* (C-399/06), *Ayadi v Council* (C-403/06) [2009] ECR I-11393 (on appeal against the judgment in Case T-49/04 *Hassan*, note 48 above).

<sup>58</sup> Case T-85/09 *Kadi v Commission*, n 53 above.

<sup>59</sup> See, eg, G de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ 51 *Harvard International Law Journal* (2010) 1; G de Búrca, ‘The European Court and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values’ (reply to Pasquale De Sena and Maria Chiara Vitucci) 20 *European Journal of International Law* (2009) 853; I Cantor, ‘The European Court and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values’ (reply to Pasquale De Sena and Maria Chiara Vitucci) 20 *European Journal of International Law* (2009) 870; M Forteau, ‘La CJCE et la Cour européenne des droits de l’homme face à la question de l’articulation du droit européen et du droit des Nations unies: Quelques remarques iconoclastes’ No 529 *Revue du Marché commun et de l’Union européenne* (2009) 397; J-P Jacqué, ‘Primauté du droit international versus protection des droits fondamentaux’ 45 *Revue trimestrielle de droit européen* (2009) 161.

<sup>60</sup> According to art 103 UN Charter, in the event of a conflict between the obligations of UN membership and the obligations of Members under any other international agreement, ‘their obligations under the present Charter shall

view of the fact that at the UN level there is no systematic judicial or even quasi-judicial review of UN Security Council decisions. According to this second view, it is difficult to accept that sanctions decisions having considerable economic and human consequences and taken by a political body (such as the Security Council together with its sanctions committees) could set aside the body of human and fundamental rights relating to access to justice, property rights, and so on. In the absence of legal controls at the UN level, national and regional courts and authorities should assume their responsibility for upholding the rule of law.<sup>61</sup>

*Kadi* has not remained a single desperate voice in the desert. Around one month after the judgment, the UN Human Rights Committee declared as admissible an individual complaint concerning the compatibility with the ICCPR of national measures taken by Belgium in implementation of a Security Council resolution (and accompanying EU acts) which placed the complainants on a list of persons subject to counter-terrorism restrictive measures.<sup>62</sup> In *Abdelrazik* (2009), the Canadian Federal Court found that the refusal to allow a Canadian citizen listed by one of the UN Sanctions Committee as an Al Qaeda associate to return to Canada violated his rights under the Canadian Charter of Rights and Freedoms.<sup>63</sup>

It is true that other national courts have taken a somewhat different approach.<sup>64</sup> In *Al-Jedda*, the House of Lords ruled that UN Security Council resolutions prevail, in principle, over the ECHR, although that principle had to be reconciled with the fundamental rights that the United Kingdom has undertaken to secure to those within its jurisdiction.<sup>65</sup> But in *Ahmed and Others*, the United Kingdom Supreme Court seemed to take a more restrictive view of the possibilities of implementing Security Council decisions in the domestic legal order, declaring *ultra vires* executive orders violating fundamental rights if they were based only on ‘general words’ in an Act of Parliament (although the

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prevail’. According to the International Court of Justice, the obligations under the Charter include obligations with respect to binding Security Council resolutions, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America and Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures: Order) (14 April 1992) [1992] ICJ Reports 114 para 42, 3 para 39.

<sup>61</sup> Authors tilting towards this view include D Simon and A Rigaux, ‘Le jugement des pourvois dans les affaires Kadi et Al Barakaat: smart sanctions pour le Tribunal de première instance?’ 11 *Europe* (2008) 9; S Griller, ‘International Law, Human Rights and the European Community’s Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*’ 4 *European Constitutional Law Review* (2008) 528; N Graf Vitzthum, ‘Les compétences législatives et juridictionnelles de la Communauté européenne dans la lutte contre le terrorisme: L’affaire “Kadi”’ (2008) 11 *Zeitschrift für europarechtliche Studien* (2008) 375; T Tridimas and J Gutierrez-Fons, ‘EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress’ 32 *Fordham International Law Journal* (2008-2009) 660; KS Ziegler, ‘Strengthening the Rule of Law, But Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights’ 9 *Human Rights Law Review* (2009) 288; MScheinin, ‘Is the ECJ Ruling in *Kadi* Incompatible with International Law?’ 28 *Yearbook of European Law* (2010) 637; Sullivan and Hayes, n 8 above, 57-61.

<sup>62</sup> *Sayadi and Vinch v Belgium*, n 22 above, and Scheinin, n 61 above, 638-645.

<sup>63</sup> Judgment of the Federal Court of 4 June 2009 in *Abdelrazik v Canada* 2009 FC 580 <<http://decisions.fct-cf.gc.ca/en/2009/2009fc580/2009fc580.html>> accessed 8 October 2010.

<sup>64</sup> See the Ninth Report of the Analytical Support and Sanctions Monitoring Team appointed to support the work of the UN Security Council Al-Qaida and Taliban Sanctions Committee (13 May 2009), n 8 above, paras 19-25, where reference is made, *inter alia*, to a decision of the Swiss Federal Tribunal Case 1A.45/2007 (14 November 2007), <<http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdictionrecht-urteile/2000.htm>>.

<sup>65</sup> Judgment of the House of Lords of 12 December 2007 in *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58. The House of Lords (per Lord Bingham, para 39) held that the United Kingdom, when exercising the power to detain authorised by UN Security Council resolutions ‘must ensure that the detainee’s rights under article 5 [of the ECHR] are not infringed to any greater extent than is inherent in such detention’. See also M Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’ 20 *Duke Journal of Comparative International Law* (2009) 69, who discusses *Kadi* in the light of, *inter alia*, *Al-Jedda*.

outcome would have been different had an Act of Parliament provided a sufficiently specific basis).<sup>66</sup> While not endorsing *Kadi* or *Abdelrazik*, the Supreme Court cited these judgments in the context of its discussions on the relevance of fundamental rights and the flaws in the UN sanctions system.<sup>67</sup> It described the status of persons designated for restrictive measures as ‘effectively prisoners of the state’.<sup>68</sup>

The European Court of Human Rights, for its part, has declined jurisdiction to review the compatibility of certain restrictive measures taken in the implementation of resolutions adopted by the UN Security Council under Charter VII of the Charter.<sup>69</sup> As the ECJ pointed out in *Kadi*,<sup>70</sup> however, those cases concerned the question of attribution of responsibility between the UN and States parties to the ECHR, not the judicial review of action taken by States parties as such (although it is true that the Court made a statement which may be interpreted as a more general deferral to UN Security Council sanctions decisions<sup>71</sup>). The decision of the Human Rights Committee, by contrast, concerned the compatibility of action taken by a State party to the ICCPR. The case of *Al-Jedda* is at the time of writing still pending before the European Court of Human Rights.<sup>72</sup>

In any case, *Kadi* seems to have served as an encouragement for the UN to improve listing and delisting procedures.<sup>73</sup> Already in 2008 the Security Council introduced some novelties which were not considered in the *Kadi* judgment, such as a mandatory review of all entries on the list by June 2010.<sup>74</sup> Furthermore, in the following year, the Council established the Office of the Ombudsperson, which can receive requests from individuals and entities seeking to be removed from the Consolidated List.<sup>75</sup> That these modifications of the UN sanctions regime are still a far cry from judicial control has been underlined by the EU General Court in its most recent *Kadi* judgment:

In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee’s list requires consensus within the committee. Moreover, any evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee’s list and there is no mechanism to ensure that sufficient information be made available to the person

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<sup>66</sup> Judgment of the Supreme Court of 27 January 2010 in *Her Majesty’s Treasury v Mohammed Jabar Ahmed and others, Her Majesty’s Treasury v Mohammed al-Ghabra, R (Hani El Sayed Sabaei Youssef) v Her Majesty’s Treasury* [2010] UKSC 2 (*Ahmed and others*). The quotations are from the leading judgment of Lord Hope (with the agreement of Lord Walker and Lady Hale) para 74. See also paras 106 (per Lord Phillips), 175 (per Lord Rodger), 250 (per Lord Mance).

<sup>67</sup> *Ahmed and others*, n66 above, paras 66-69 (per Lord Hope), 100-106 (per Lord Phillips), 242-247 (per Lord Mance).

<sup>68</sup> *Ahmed and others*, n 66, para 60 (per Lord Hope).

<sup>69</sup> See, eg Milanovic, n 65 above.

<sup>70</sup> Joined Cases C-402/005 P and C-415/05 P *Kadi*, n 25 above, paras 310-314.

<sup>71</sup> Judgment of 2 May 2007 in *Behrami v France; Saaramati v France, Germany and Norway* (2007) EHRR. SE10 para 149.

<sup>72</sup> A Grand Chamber hearing in *Al-Skeini and Others and Al Jedda v United Kingdom* (application nos 55721/07 and 27021/08) was held on 9 June 2010, Press Release 468 (9 June 2010) <<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?sessionId=60329887&skin=hudoc-pr>>.

<sup>73</sup> See notably the reports of the Analytical Support and Sanctions Implementation Monitoring Team assisting the Al-Qaida and Taliban Sanctions Committee of the Security Council, n 8 above. The Ninth Report (13 May 2009) states that the *Kadi* judgment of the ECJ ‘is arguably the most significant legal development to affect the regime since its inception’ (para 19).

<sup>74</sup> UNSC Resolution 1822 (30 June 2008) UN Doc S/RES/1822 (2008). See also Scheinin, n 61 above, 648-649.

<sup>75</sup> UNSC Resolution 1904 (2009) (17 December 2009) UN Doc S/RES/1904 (2009).

concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee's list).<sup>76</sup>

The General Court, despite its above-mentioned reservations regarding the outcome of *Kadi*, as decided by the ECJ, accordingly annulled the contested decision.

The *Kadi* case law as well as the *OMPI* case law to be further considered in section 3.3. below (autonomous EU sanctions) have also generated some modifications to the internal EU sanctions regime.<sup>77</sup> With respect to the implementation of UN sanctions, the most important reform is spelled out in a regulation amending an earlier regulation on restricted measures directed against persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.<sup>78</sup> According to the new regulation, the Commission, while being empowered to include a person or entity listed by the UN on the EU list, must without delay communicate the UN statement of reasons to the person or entity concerned, providing him, her or it an opportunity to express his, her or its views on the matter. Where observations are submitted, the Commission must review its decision in the light of those observations. If a further request from the person or entity concerned is made, based on substantial new evidence, to remove the person or entity from the list, a further review shall be carried out by the Commission. The Commission is assisted by a committee consisting of representatives of the Member States and chaired by the Commission.<sup>79</sup>

### 3.3. Autonomous (Unilateral) EU Sanctions

The ECJ and the General Court have also been confronted with a number of actions for annulment in which the sanctions imposed by the EU against alleged terrorists were not based on UN sanctions or where, in any case, the persons concerned were not identified in the relevant UN Security Council resolutions.<sup>80</sup> In the actions brought by such persons, the General Court first distinguished these cases from the circumstances of *Kadi*, observing that since the identification of the persons concerned, and the adoption of the ensuing measure of freezing funds, 'involve the exercise of the Community's own powers, entailing a discretionary appreciation by the Community,' the Union institutions are in principle bound to observe the right to a fair hearing, the obligation to state reasons, and so on.<sup>81</sup>

In some of these cases, the General Court has concluded, *inter alia*, that the contested Union decisions did not contain a sufficient statement of reasons and were adopted in a procedure during which the applicant's right to a fair hearing (or his right of defence) was not respected. That implied that the Court was not in a position to review the lawfulness of the EU Council decisions, which were

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<sup>76</sup> Case T-85/09 *Kadi v Commission*, n 53, para 128. See also the judgment of the United Kingdom Supreme Court in *Ahmed and Others*, n 66, paras 78 (per Lord Hope), and 252 (per Lord Mance).

<sup>77</sup> Sullivan and Hayes, n 8 above, 18-20, 110-111.

<sup>78</sup> Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, [2009] OJ L 346/42.

<sup>79</sup> See arts 7, 7a and 7b of Regulation 1286/2009. The committee functions in accordance with the so-called comitology procedure, at the time of the adoption of the Regulation laid down in Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L 184/23. This Decision has subsequently been replaced by Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, [2011] OJ L 55/13.

<sup>80</sup> Case T-228/02 *OMPI*, n 32 above.; Case T-47/03 *Sison v Council* [2007] ECR II-73; Case T-327/03 *Al-Aqsa v Council* [2007] ECR II-79; Case T-253/04 *Kongra-Gel v Council* [2008] ECR II-46; Case T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3019 (which is a follow-up to Case T-228/02); Case T-284/08 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3487; Case T-348/07 *Stichting Al-Aqsa v Council*, judgment of 9 September 2010 nyr (which is a follow-up to Case T-327/03).

<sup>81</sup> The quotation is from the judgment in Case T-228/02 *OMPI*, n 32 above, para 107.

consequently annulled. But if, after such a judgment, the EU Council has made an effort to give the person concerned a fair hearing and to state the reasons for his or her continued inclusion on a list of targeted persons, the Court may be persuaded to accept the measures.<sup>82</sup>

The General Court has made a distinction between the ‘general rules’ contained in an EU sanctions regulation and the more concrete decision to enter a specific natural or legal person in the list of persons subject to the restrictive measures concerned. With respect to the first aspect, the General Court has held that the competent Union institutions have ‘broad discretion’ as to what matters to take into consideration for the purpose of adopting economic and financial sanctions. There is in this respect a more limited review, which is restricted to ‘checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power’.<sup>83</sup>

As to the individual decision, the standard of review is higher.<sup>84</sup> The review extends to the assessment of the facts and circumstances relied on as justifying the decision, and to the evidence and information on which that assessment is based. The Court must also ensure that the rights of defence are observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding the rights of defence are well founded.<sup>85</sup> Since the restrictions imposed by the Union institutions on the rights of defence of the parties concerned can only be offset by an independent and impartial judicial review, the Union judicature must be able to review the lawfulness and merits of Union measures to freeze funds without it being possible to raise objections that the evidence and information used by the competent Union institution is secret or confidential.<sup>86</sup>

#### **4. Actions for Damages**

As noted above, natural and legal persons may, as a general rule, bring actions for damages asserting a non-contractual liability of the EU. However, in *Segi* and *Gestoras Pro Amnistía*, the General Court rejected the applicants’ claim for damages, holding that actions for damages were not possible under the then Title V TEU (CFSP or the Second Pillar), or under Articles 34 and 35 TEU (Title VI or the Third Pillar).<sup>87</sup> This conclusion was upheld on appeal to the ECJ.<sup>88</sup> In these cases, the ECJ accepted that the appellants did not have a right to claim damages from the EU for a combined CFSP and Third Pillar common position adopted by the Council<sup>89</sup> listing the appellants as having been involved in terrorist acts.

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<sup>82</sup> This happened in Case T-256/07 *People's Mojahedin Organization of Iran*, n 80 above, in which the then Court of First Instance dismissed a part of the claimant's action.

<sup>83</sup> Case T-390/08 *Bank Melli Iran v Council* [2009] ECR II-3967 para 36. See also Case T-228/02 *OMPI*, n 32 above, para 159.

<sup>84</sup> Case T-390/08 *Bank Melli Iran*, n 83 above, para 37. See also Case T-228/02 *OMPI*, n 32 above, para 154.

<sup>85</sup> Case T-390/08 *Bank Melli Iran*, n 83 above, para 37.

<sup>86</sup> See Case T-85/09 *Kadi v Commission*, n 53 above, paras 141-144. The General Court in this context also referred to its earlier judgments in Case T-228/02 *OMPI*, n 32 above, paras 154-159; Case T-256/07 *People's Mojahedin Organization of Iran*, n 80 above, paras 137-138; Case T-284/08 *People's Mojahedin Organization of Iran*, n 80 above, paras 55, 73-78; Case T-341/07 *Sison* [2009] ECR II-3625 paras 97-98.

<sup>87</sup> Case T-333/02 *Gestoras Pro Amnistía*, order of 7 June 2004, not reported; Case T-338/02 *Segi*, order of 7 June 2004, not reported (these orders of the Court of First Instance are not available in English).

<sup>88</sup> Case C-354/04 P *Gestoras Pro Amnistía*, n 35 above; Case C-355/04 P *Segi v Council*, [2007] ECR I-1657.

<sup>89</sup> Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001, L 344/ 93) and subsequent Common Positions.

Nevertheless, the Court went on to analyse the legal nature of ‘common positions’, as compared to ‘framework decisions’ and ‘decisions’, adopted under the Third Pillar (as it existed prior to the Treaty of Lisbon). A special reason for this analysis was the fact that common positions, by virtue of Article 35 TEU, were immune from the preliminary rulings procedure and thus the jurisdiction of the Court. The Court held that a common position which ‘intended to produce legal effects in relation to third parties’ would *not* be a true common position but would, by virtue of the principle of effective judicial protection, constitute a legal act subject to the preliminary ruling procedure, as well as to judicial review if an action for annulment were to be brought by a Member State or the Commission.<sup>90</sup> The ECJ, in other words, judged that common positions, which according to the then Article 34 TEU were to define ‘the approach of the Union to a particular matter’ (a wording that suggests the political rather than legal nature of a common position), could not produce legal effects in relation to individuals. For such sanctions measures, either framework decisions or decisions, which were subject to the preliminary rulings procedure, had to be used instead.

The judgments of the ECJ in *Gestoras Pro Amnistía* and *Segi* once again attest to the importance that the Court attaches to the principle of effective judicial protection.<sup>91</sup> While this principle did not have the same force in the context of the Third Pillar as in Community law proper, the limitations of the Court’s jurisdiction contained in Article 35 TEU, as it existed prior to the Treaty of Lisbon, had to be interpreted strictly, so as to leave, as far as possible, some scope for judicial review. It would seem that Article 275 TFEU, which, as was noted above, excludes, in principle, the jurisdiction of the EU Court with respect to the CFSP but adds that there is such jurisdiction with respect to CFSP decisions providing for restrictive measures against natural or legal persons, has been inspired by the Court’s case law. It should also be recalled in this context that the Treaty of Lisbon has done away with the Third Pillar and that the limitations on judicial control contained in the former Title VI TEU will be phased out, during a transitional period of five years maximum.

## 5. Preliminary Rulings

In preliminary rulings procedures under Article 267 TFEU, the distinction between UN-based (category 5 in the matrix above<sup>92</sup>) and non-UN-based sanctions (category 6) has not played a major role in the EU Courts’ case law. This is because most cases have concerned the *interpretation* rather than the *validity* of Union acts providing for restrictive measures. The following discussion will address both the question of interpretation and that of validity and will not be strictly structured in accordance with the distinction between UN- and non-UN-based measures.

To start with questions of *interpretation*, the ECJ (it will be recalled that preliminary rulings are always given by the ECJ, not the General Court) have found in some instances that a UN Security Council decision was not directly relevant for the question of how EU law should be applied and interpreted, despite the fact that the EU measures concerned constituted at least in some way an implementation of a UN decision, and the courts could accordingly limit their analysis to the internal EU principle or rule involved.<sup>93</sup> In other cases the UN Security Council resolution has been considered relevant for the interpretation of the EU rule at issue. Some of these cases have concerned sanctions instigated against third countries rather than individuals or groups of individuals suspected of terrorist activities.

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<sup>90</sup> Case C-354/04 P *Gestoras Pro Amnistía*, n 35 above, paras 49-57.

<sup>91</sup> See Rosas and Armati, n 29 above, at 228-229, 231-232. See also Case C-279/09 *DEB*, judgment of 22 December 2010 nyr.

<sup>92</sup> See section 3.1 above.

<sup>93</sup> See, for example, Case C-299/94 *Anglo Irish Beef Processors International* [1996] ECR I-1925, paras 37-39 (a preliminary ruling request from the Irish High Court).



The first such case, *Bosphorus*, concerned the impoundment, in Ireland, of an aircraft leased for four years by a Yugoslav airline to a Turkish airline using the aircraft for flights between Turkey and EU Member States and Switzerland.<sup>94</sup> In answer to a request by the Supreme Court of Ireland for a preliminary ruling, the ECJ held that a provision of a Council regulation of 1993<sup>95</sup> providing, *inter alia*, for the impoundment of aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the Federal Republic of Yugoslavia covered the case of an aircraft owned by a Yugoslav airline but leased by it to a non-Yugoslav airline. The Court based its analysis not only on a textual, systemic (contextual) and teleological (the aims of the measure) interpretation of the EU Regulation as such, but also on ‘the text and the aim’ of relevant UN Security Council resolutions.

The case of *Ebony* is similar.<sup>96</sup> Here the same UN Security Council resolution was used to back up an interpretation of the same EU regulation to the effect that the latter also covered the impoundment, in Italy, of a vessel flying the flag of a non-EU country and found, in international waters, under circumstances which gave good reason to believe that she was on course for the territorial waters of the Federal Republic of Yugoslavia (Serbia and Montenegro). In *Aulinger*, the ECJ also made a reference to a UN Security Council resolution relating to the Federal Republic of Yugoslavia (Serbia and Montenegro) and noted not only that ‘account must be taken’ of the wording and the purpose of the resolution in order to interpret the Council regulation<sup>97</sup> but also that the regulation in question ‘cannot therefore be interpreted in a manner that is contrary to’ the UN decision.<sup>98</sup>

Other preliminary rulings have specifically concerned persons or organizations associated with terrorist activities.<sup>99</sup> In the case of *Möllendorf*, the ECJ backed up its interpretation of an EU regulation imposing sanctions against Usama bin Laden, the Al Qaeda network and the Taliban by reference to the wording and the purpose of a UN Security Council resolution which the Regulation was designed to implement, noting that for the purposes of interpreting a sanctions regulation, ‘account must also be taken’ of the wording and purpose of the relevant UN decision.<sup>100</sup> Similar observations were made by the ECJ in the recent cases of *M and Others*, which concerned the question whether a sanctions regulation covered the provision by the State of social security or social assistance benefits to the spouse of a person listed as an alleged terrorist.<sup>101</sup>

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<sup>94</sup> Case C-84/95 *Bosphorus* [1996] ECR I-3953. See also I Canor, ‘Can Two Walk Together, Except They Be Agreed? The Relationship between International Law and European Law: The Incorporation of United Nations Sanctions against Yugoslavia into European Community Law through the Perspective of the European Court of Justice’ 35 *Common Market Law Review* (1998) 137; Eeckhout, n31, 426-428.

<sup>95</sup> Art 8 of Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), [1993] OJ L 102/14.

<sup>96</sup> Case C-177/95 *Ebony Maritime SA* [1997] ECR I-1111.

<sup>97</sup> Case C-371/03 *Aulinger* [2006] ECR I-2207 para 30. Council Regulation (EEC) No 1432/92 of 1 June 1992, [1992] OJ L 151/4; UNSC Resolution 757 (1992) UN Doc S/RES/757.

<sup>98</sup> Case C-371/03 *Aulinger*, n 97 above, para 30.

<sup>99</sup> See, for example, J-C Bonichot, ‘La Cour de justice des Communautés européennes et la lutte contre le terrorisme: Entre le marteau et l’enclume?’ in *Mélanges en l’honneur de Yves Jégouzo* (Paris, Dalloz 2009).

<sup>100</sup> Case C-117/06 *Möllendorf* [2007] ECR I-8361 para 54, which concerned the question whether immovable property sold to a person listed as a terrorist could be registered as transferred even if the contract for sale and the agreement on transfer had been concluded, and the sale price paid, before the date on which the buyer was included in the list. The ECJ held that the final registration was prohibited by a prohibition in art 2(3) of Council Regulation (EC) No 881/2002 of 27 May 2002, [2002] OJ L 139/9 to make available economic resources to a person included in the list.

<sup>101</sup> Case C-340/08 *M and Others*, judgment of 29 April 2010 nyr.,. The Court observed that ‘account must also be taken’ of the wording and purpose of a UN Security Council resolution which the Union regulation was designed to implement (para 45). The conclusion of the case was that the benefits in question were not covered by the Union regulation (Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, [2002] OJ L 139/9. See also Case C-550/09 *E and F*, judgment of 29 June 2010 nyr., para 72.

In the above-mentioned judgments relating to the interpretation of EU legal acts, the ECJ did not discuss the specific status of UN Security Council binding sanctions decisions in the Union legal order. As it was a question of interpretation, references to UN decisions which the EU legal acts were designed to implement did not pose the same problem as the situation encountered in the *Kadi* case law, which concerned validity review. If the Union legislator states that the act in question is intended to implement a given UN decision, binding under the UN Charter, it is fairly uncontroversial to take the UN decision ‘into account’ in the interpretation of the Union legal act, considering the relevance of the UN Charter for the Union legal order (which, as the ECJ confirmed in *Kadi*, however, does not imply that the EU is directly bound by the Charter).<sup>102</sup>

Preliminary ruling cases, of course, do not always concern EU legal acts which are based on UN Security Council decisions. Moreover, such cases may concern EU legal acts which not in itself constitute restrictive measures directed against alleged terrorists but the application and interpretation of acts of a more general nature to such persons. A case in point is a recent judgment in *B and D*, where ECJ held that while terrorist acts, which are characterized by their violence towards civilian populations, should be regarded as ‘serious non-political crimes’ as well as ‘acts contrary to the purposes and principles of the [UN]’, within the meaning of a provision enabling exclusion from refugee status under an EU directive,<sup>103</sup> the mere fact that a person is a member of a terrorist organisation cannot automatically mean that that person must be excluded from refugee status.<sup>104</sup> The brand of terrorism, in other words, cannot imply that the safeguards of the directive, including an obligation to assess each individual case on its merits, be discarded.

According to Article 267 TFEU, as clarified by case law,<sup>105</sup> national judges are not empowered to declare invalid Union legal acts but are, in case of serious doubts about the validity of such acts, obliged to request a preliminary ruling from the ECJ. In *E and F*, the national Court requested a ruling on not only the interpretation of an EU sanctions regulation but also the legality of the entry of an alleged terrorist organisation on a list of targeted persons.<sup>106</sup> The ECJ held that in respect of the period during which the organisation had been included on the list without any statement of reasons, that inclusion was illegal. It followed that it could form no part of the basis for a criminal conviction of persons who had been accused of being members of the organisation in question and of raising funds for its benefit.

## 6. Conclusions

At least in a quantitative sense, the EU Courts seem to have become the leading jurisdiction to review the legality of restrictive measures directed against alleged terrorists and to rule on the interpretation of legal acts providing for such restrictive measures. The fact that this can be done with respect to legal acts adopted *unilaterally* by the Union has been fairly uncontroversial. The main problems concerning such autonomous measures have concerned the CFSP (the Second Pillar) as well as the

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<sup>102</sup> On the relevance of the UN Charter for the EU legal order in general see A Rosas, ‘The Status in EU Law of International Agreements Concluded by EU Member States’, *Fordham International Law Journal* (2011, forthcoming). On the relevance of UN Security Council decisions for the interpretation of EU legal acts see, in addition to the case law mentioned in n 94-101 above, the Opinion of Advocate General Jacobs in *Bosphorus*, n 94 above, para 35, where it was considered that it was not in that case necessary to decide the question whether Security Council resolutions bind the EC, and Eeckhout, n 31 above, at 436-440.

<sup>103</sup> Art 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12.

<sup>104</sup> Joined Cases C-57/09 and C-101/09 *B and D*, judgment of 9 November 2010 nyr.

<sup>105</sup> See n 33 above.

<sup>106</sup> Case C-550/09, n 101 above.

Third Pillar (judicial cooperation in criminal matters) as it existed before the Treaty of Lisbon. This Treaty has abolished the Third Pillar, although a transitional period of a maximum of five years from the entry into force of the Treaty, on 1 December 2009, will imply that some of the EU decisions based on the Third Pillar, with its limitations on the jurisdiction of the EU Courts, will remain in place for a while.<sup>107</sup> As to CFSP decisions, Article 275 TFEU has opened the way for judicial review of decisions providing for ‘restrictive measures against natural or legal persons’.

To the extent that there could still be gaps in the system of judicial protection, including problems arising from the transitional period preceding the complete disappearance of the Third Pillar, they should be filled in by judicial control at national level (the courts of EU Member States). The limitations of judicial control in the Third Pillar led the ECJ, in *Gestoras Pro Aministía* and *Segi*,<sup>108</sup> to underline the importance of judicial control at the national level. This emphasis on national remedies is now reflected in Article 19(1) TEU, as amended by the Treaty of Lisbon, which provides that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. In addition, Article 47 of the EU Charter of Fundamental Rights,<sup>109</sup> which since the entry into force of the Treaty of Lisbon has the same legal value as the TEU and the TFEU, provides that ‘[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article’.

The EU Courts have confirmed that there is, in principle, ‘full review’ of the legality of restrictive measures. This does not imply, however, that the Courts are unwilling to grant the political institutions a margin of discretion, given the security concerns involved, as long as a fair balance is struck between the requirements of the rule of law and security considerations. If some guarantees are not respected with respect to the terrorist listing of individuals, notably the obligation to provide a reasoning and the right of the individual concerned to be heard, the balance struck is not fair. The margin of appreciation of the Union political institutions is greater with respect to the more general assessment of whether restrictive measures should be taken at all and what specific sanctions they should entail.

While these developments are by now fairly uncontroversial and firmly grounded in EU primary law, the question of the judicial review of sanctions imposed to implement *binding UN Security Council decisions* continues to stir debate. In *Kadi* and *Yusuf*, the General Court took a restrictive view of the scope of judicial review under Union law, and a generous view of the status of UN sanctions and UN law in the Union legal order.<sup>110</sup> The ECJ took a different approach, underlying the need for full judicial review of the Union acts concerned, in the broader context of a Union based on the rule of law and a constitutional and autonomous legal order. Some other judicial or quasi-judicial bodies have come close to this approach, while others have been more in line with the approach taken by the General Court.

The approach of the ECJ is arguably based on the consideration that the brand of terrorism (which has existed for hundred of years, but which on the other hand still lacks a precise universal definition<sup>111</sup> and thus easily lends itself to extensive applications) cannot justify any opt-out from the

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<sup>107</sup> See n 35-36 above.

<sup>108</sup> Cases C-354/04 P, n35, and C-355/04, n 88 above.

<sup>109</sup> Charter of Fundamental Rights of the European Union [2010] OJ C 83/389. On the status of the Charter in EU law see, for example, Rosas and Armati, n 29 above, ch 10.

<sup>110</sup> Cases T-306/01 *Yusuf* and T-316/01 *Kadi*, n 28 above.

<sup>111</sup> But see the Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging of the Special Tribunal for Lebanon (Appeals Chamber) of 16 February 2011, Case No STL-11-01/I, [http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216\\_STL-11-01\\_176bis\\_F0010\\_AC\\_interlocutory\\_Decision\\_Filed-EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_176bis_F0010_AC_interlocutory_Decision_Filed-EN.pdf), where it is argued that a definition of terrorism, consisting of

EU system of fundamental rights, including the principle of effective judicial protection. A judicial confirmation of such a derogatory regime would be to take a considerable step back in human history and to accept a ‘black hole’ in the rule of law. As Advocate General Poiares Maduro observed in *Kadi*, the mere existence of a possibility that the sanctions taken are disproportionate or even misdirected ‘is anathema in a society that respects the rule of law’.<sup>112</sup> The ECJ, to quote its Advocate General, could not ‘turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect’.<sup>113</sup>

There was fundamentally a choice between two options. The first would have been to review the legality of the Security Council and Sanctions Committee decisions themselves, in the light of the UN Charter and international human rights law sponsored by the UN. The ECJ did not choose this path, as the ECJ is not an international court entrusted with the task of assessing the legality of, or interpreting in an authoritative way, public international law norms.<sup>114</sup> Of course, the Court may in concrete cases be called upon to apply and interpret a rule of public international law which forms part of the Union legal order (such as an agreement to which the Union has adhered).<sup>115</sup> However, if it enters into the question of validity, the Court will limit itself to the validity of a Union legal act. Moreover, in interpreting rules of public international law, the Court often shows deference to adjudicatory bodies whose primary task it is to settle disputes and render opinions on the international rules in question (the International Court of Justice, the Appellate Body of the World Trade Organization, the European Court of Human Rights, and so on).<sup>116</sup>

To this should be added that the EU is not a Member of the UN and that the precise status of the Charter in Union law is open to discussion. This is *not* to say that the UN Charter would be irrelevant from the point of view of the Union legal order.<sup>117</sup> In *Kadi*, the ECJ referred to the need to observe the undertakings given in the context of the UN when the Union gives effect, by means of the adoption of legal acts taken on the basis of the then TEC, to resolutions adopted by the Security Council under Chapter VII of the Charter.<sup>118</sup> In a post-Lisbon Treaty context, it can be added that the TEU, as amended, provides that the objectives and principles of Union external relations include respect for international law, including ‘the principles of the United Nations Charter’ (Articles 3(5) and 21(1) TEU).

In *Kadi*, the ECJ instead focused on the internal legislative act implementing the Security Council resolutions. The status of Security Council decisions in national law, including Union law even if the UN Charter and Security Council decisions were binding on the Union, depends on the national legal system concerned.<sup>119</sup> It is submitted that many national courts of EU Member States would have come to a similar result as the ECJ did in *Kadi*, if called upon to review national measures to implement the

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three main elements, has gradually emerged. See also MP Scharf, ‘Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation’, 15 *ASIL Insights* (Issue 6, March 4, 2011)

<sup>112</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 25 above, Opinion of 16 January 2008, para 53.

<sup>113</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 25 above, para 44.

<sup>114</sup> See, in particular, Graf Vitzthum, n 61 above, at 428-429.

<sup>115</sup> See, eg A Rosas, ‘The European Court of Justice and Public International Law’ in J Wouters, A Nollkaemper and E de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (The Hague, TMC Asser Press, 2008) 71.

<sup>116</sup> A Rosas, ‘With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts’ 5 *The Global Community Yearbook of International Law and Jurisprudence* (2005) 203.

<sup>117</sup> See Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 25 above, paras 291-297, and more generally Rosas, n 102 above.

<sup>118</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 25 above, para 293.

<sup>119</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 25 above, para 298. See also, for example, B Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 1995) 626 (commentary by J Frowein to art 41 of the Charter).

counter-terrorism sanctions at issue in that case.<sup>120</sup> Be that as it may, the ECJ held that even supposing that the relevant provision of primary law concerning the binding effect of international agreements (now Article 216(2) TFEU) were to be applicable to the UN Charter, the latter, while it might prevail over acts of secondary Union law (such as regulations), could not prevail over primary law such as the TEU and the TFEU.<sup>121</sup> Moreover, the *Kadi* judgment renders explicit what was at least implicit in some earlier judgments: there are some basic rule of law and fundamental rights principles of Union law that ‘form part of the very foundations’ of the Union legal order and to which even norms of written primary law may have to yield.<sup>122</sup>

It should be underlined, on the other hand, that the ‘very foundations’ of the Union legal order, that is the basic obligation to respect the rule of law and fundamental rights, are not, as far as substance is concerned, something unique to the EU. There is no need to recall here in detail the well known and strong links which exist between EU fundamental rights and international human rights norms. EU fundamental rights, including the new Charter of Fundamental Rights,<sup>123</sup> draw heavily upon international instruments, notably the ECHR, but also upon instruments such as the UDHR, the ICCPR and the International Covenant on Economic, Social and Cultural Rights 1966.<sup>124</sup>

Thus, if the EU insists on respect for rule of law principles in the implementation of UN sanctions, it is upholding principles which are – or at least should be – inherent in the UN legal order as well. As post-*Kadi* developments demonstrate, judicial review does not necessarily entail a bar to sanctions against individuals. Moreover, one may ask whether the thesis that the current UN sanctions regime is compatible with the Charter and international human rights law could really stand up to any serious legal scrutiny. That there are problems with this regime has been acknowledged by bodies inside the UN system, including even the Security Council, which has instigated some measures, albeit half-hearted, to introduce controls at the UN level.<sup>125</sup>

Would the EU Courts continue to insist on full judicial review if there was judicial control at the UN level? The ECJ did respond to the argument that some controls at the UN level had already been introduced notably in 2006. The Court, as was noted earlier, observed that there can be no immunity from jurisdiction within the internal EU order as ‘clearly’ the UN procedure ‘does not offer the guarantees of judicial protection’.<sup>126</sup> The Advocate General noted that if a genuine and effective mechanism of judicial control by an independent tribunal had existed at the UN, ‘then this might have

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<sup>120</sup> Graf Vitzthum, n 61 above, 427 observes that the ECJ followed an approach similar to that which probably would have been adopted by certain national constitutional courts, including the German Constitutional Court. Even in the United Kingdom, which still adheres to the principle of the sovereignty of Parliament, the recent *Ahmed* judgment rendered by the Supreme Court, n 66 above, suggests a trend towards greater scrutiny of internal measures to implement Security Council sanctions by virtue of rule of law and fundamental rights principles.

<sup>121</sup> Joined Cases C-402/05 P and C-415/05 P, n 25 above, paras 308-309.

<sup>122</sup> Joined Cases C-402/05 P and C-415/05 P, n 25 above, paras 303-304. See also Rosas and Armati, n 29 above, at 151-152.

<sup>123</sup> See n 109 above.

<sup>124</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3). See, for example, A Rosas, ‘The European Union and International Human Rights Instruments’ in V Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, TMC Asser Press, 2001); A Rosas, ‘The European Union and Fundamental Rights/Human Rights’ in C Krause and M Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku/Åbo, Åbo Akademi University Institute for Human Rights, 2009); A Rosas, ‘The European Union: In Search of Legitimacy’ in V Jaichand and M Suksi (eds), *60 Years of the Universal Declaration of Human Rights in Europe* (Antwerp, Intersentia, 2009) 415.

<sup>125</sup> On 17 December 2009, Ambassador Susan E. Rice, US Permanent Representative to the United Nations, in the context of her remarks on Security Council Resolution 1904 (2009) of 17 December 2009 establishing the Office of the Ombudsperson (see n 75 above), referred to ‘concerns that have been expressed by some European courts’, USUN Press Release of December 17, 2009.

<sup>126</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi*, n 25 above, para 322.

released the [Union] from the obligation to provide for judicial control of implementing measures'.<sup>127</sup> If this is so, the ECJ approach would not be very far from the approach taken in the *Solange I* and *Solange II* judgments (1974 and 1986) of the German Constitutional Court with respect to the right for the latter Court to control respect for fundamental rights in Union law, seen against the German Constitution.<sup>128</sup> Such an approach would also come fairly close to that adopted in the *Bosphorus* case law of the European Court of Human Rights with respect to its right to control respect for the ECHR by the EU Member States when implementing EU law.<sup>129</sup> That method allows for a lesser degree of judicial control if an 'equivalent' system of protection has been developed at the EU level. Only the future can tell whether such scenarios are of any relevance for the relationship between EU law and UN law.

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<sup>127</sup> Para 54 of the Opinion, n 112 above.

<sup>128</sup> BVerfG (1974) 37, 271; BVerfG (1986) 73, 339. See also Graf Vitzthum, n 61, at 426-9.

<sup>129</sup> Case of *Bosphorus v Ireland* (2005) VI EHRR (Application No 45036/98).

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