

# Chapter Twelve

## The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection

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### I. Introduction

Since 1999, action by the European Union (the EU) as well as by the European Community (the Community or the EC) has been necessary to implement United Nations Security Council resolutions adopted under Chapter VII of the UN Charter, which impose economic measures against 'blacklisted' persons and corporate entities, in the framework of the so-called 'war on terror'.<sup>1</sup> A list of

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<sup>1</sup> On UN Security Council sanctions in general, and for a discussion, from the perspective of human rights protection, of the sanctions regimes currently in place, see V Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (The Netherlands: Kluwer Law International, 2001); A Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 851; M E O'Connell, 'Debating the Law of Sanctions' (2002) 13 *European Journal of International Law* 63; B Fassbender, 'Targeted Sanctions and Due Process' (2006) Humboldt-Universität zu Berlin and United Nations Office of Legal Affairs, Office of the Legal Counsel <[www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf)>; I Cameron, 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions' (2006) Council of Europe <[http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/public\\_international\\_law/Texts\\_&\\_Documents/2006/I.%20Cameron%20Report%2006.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_&_Documents/2006/I.%20Cameron%20Report%2006.pdf)>; A Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 *European Journal of International Law* 881; A Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States' (2006) 4 *Journal of International Criminal Justice* 1044. For a discussion of the work of the different sanctions committees, see the report by T Biersteker and S Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (2006) The Watson Institute for International Studies, <[http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf)>; J Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007). Scholarly contributions analysing the EU (and EC) implementation of Security Council sanctions include: S Bohr, 'Sanctions by the UN Security Council and the EC' (1993) 4 *European Journal of International Law* 256; I Canor, 'Can Two Walk Together, except they Be Agreed? The Relationship between International Law and European Law: The Incorporation of UN Sanctions against Yugoslavia into European Community Law through the Perspective of the ECJ' (1998) 35 *Common Market Law Review*

persons and entities having ties with the Taliban, Osama bin Laden, Al Qa'ida, or their associates, is managed and updated by a Security Council committee set up, inter alia, to monitor states' efforts to implement the sanctions imposed with Resolution 1267 (1999), and known as the '1267 Committee' or the 'Taliban Sanctions Committee'.<sup>2</sup> A separate committee, called the 'Counter-Terrorism Committee' (CTC) was set up by the Security Council in order to supervise states' compliance with Resolution 1373 (2001),<sup>3</sup> most notably with the measures providing for the freezing of assets and other economic and financial resources of those who commit acts of terrorism, or attempt to commit them, or who take part in them. The 1267 Committee's list of terrorist individuals and entities is 'based on information provided by states and regional organisations'.<sup>4</sup> The CTC, unlike the 1267 Committee, does not draw up or impose any such lists.

The implementation of UN counter-terrorism sanctions by the EU is in many aspects a good test of the efficacy of the UN strategy to combat terrorism, through the imposition of specific obligations on states and of sanctions on non-state actors.<sup>5</sup> According to several commentators, one of the most controversial aspects

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137; N Vennemann, 'Country Report on the European Union' in C Walter et al (ed), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, London, New York: Springer, 2004) 217; A Reinisch, 'The Action of the European Union to Combat International Terrorism' in A Bianchi (ed), *Enforcing International Law Norms against Terrorism* (Oxford: Hart Publishing, 2004) 119-62; R Pavoni, 'UN Sanctions in EU and National Law: The Centro-Com Case' (1999) 48 *International and Comparative Law Quarterly* 582. Pavoni correctly notes that 'a very interesting and unprecedented (but now established) practice has emerged in the EC/EU context with respect to the implementation of UN embargoes of the 1990s and a particular institutional machinery ... has been set up for that purpose' (at 583).

<sup>2</sup> In para 6 of Resolution 1267 (1999), the Security Council established a committee composed of all the Council's members. The committee is responsible most notably for ensuring that states implement the measures imposed by para 4 of the said resolution, and for designating the funds or other financial resources referred to in this paragraph. Initially established to monitor states' sanctions on Taliban-controlled territory, the 1267 Committee has progressively seen its scope of activity extended to all measures against individuals and entities associated with the Taliban, Osama bin Laden and Al Qa'ida. See E Rosand, 'The Security Council's Efforts to Monitor the Implementation of Al-Qaida/Taliban Sanctions', (2004) 98 *American Journal of International Law* 745.

<sup>3</sup> On the work of the CTC see, inter alia, E Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97 *American Journal of International Law* 333; E J Flynn, 'The Security Council's Counter-Terrorism Committee and Human Rights' (2007) 7 *Human Rights Law Review* 371.

<sup>4</sup> S/RES/1333 (2000) [16b].

<sup>5</sup> On the EU implementation of counter-terrorism sanctions, see generally I Cameron, 'European Union Anti-Terrorist Blacklisting' (2003) 3 *Human Rights Law Review* 225, who examines various aspects of the implementation and the legal effects of EU sanctions (most notably through the case study of Sweden) and of the legal remedies available to the blacklisted individuals, especially before the ECtHR. He correctly highlights that 'while the ECtHR is a better body than the CFI or ECJ to check the compatibility of EU measures with human rights, it is easy to forget that the ECHR standards are designed to be subsidiary, or supplementary to the national constitutional standards, which form the first, and most important, line of defence of the Rechtsstaat' (255). See also the contributions of C Warbrick, 'The European Response to Terrorism in an Age of Human Rights' (2004) 15 *European Journal of International Law* 989; B Bowring and D Korff, 'Terrorist Designation with Regard to European and International Law: The Case of the PMOI', (Paper presented at the International Conference of Jurists in Paris, 10 November 2004) 30 (2005) *Statewatch*

<<http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf>>; I Tappeiner, 'The Fight against

of the sanctions regimes is the risk that such measures, under the pretext of the 'war on terror', may encourage and legitimise violations of some fundamental human rights at the UN level,<sup>6</sup> at the regional level (eg the EU), as well as at the domestic level. Most notably, the procedure through which individuals and entities associated with the Taliban, Osama bin Laden and Al Qa'ida are labelled as 'terrorists' and put into a list has been the object of extensive criticism.

In this chapter I focus on the case law of the European Court of Justice (ECJ) originating from lawsuits filed by individuals and entities targeted by the sanctions adopted by EU and EC institutions when implementing the UN sanctions.<sup>7</sup> Such complaints are always dealt with initially by the Court of First Instance (CFI) and its judgments may be appealed to the ECJ. The thrust of the plaintiffs' complaints is the alleged invalidity of certain Community acts under which they are listed. They argue that they are prevented from living normal lives and conducting their financial activities normally, as a consequence of being listed by the EU and having their assets and funds frozen, and because of damage to their personal and professional reputation. Violations of several human rights which are guaranteed under international law, Community law and constitutional traditions common to the EC member states,<sup>8</sup> are thus alleged, including the right to use property, the right to a fair hearing and the right to effective judicial review.

Judicial review of counter-terrorism sanctions listing individuals and entities is not available at the suit of individuals through the principal judicial organ of the UN, the International Court of Justice (ICJ). Nor has the Security Council manifested any intention to set up any subsidiary body empowered to examine

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Terrorism. The List and the Gaps' (2005) 1 *Utrecht Law Review* 97; N Lavranos, 'Judicial Review of UN Sanctions by the Court of First Instance' (2006) 11 *European Foreign Affairs Review* 471; R A Wessel, 'Regulation beyond the State: Accountability of International Organizations in a Multilevel Legal Order', (Paper presented at the Annual Ius Commune Conference, Edinburgh, 1-2 December 2005); W Vlcek, 'Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice' (2006) 11 *European Foreign Affairs Review* 491; C Lehnardt, 'European Court Rules on UN and EU Terrorist Suspect Blacklists' (2007) 11 *ASIL Insight* <<http://www.asil.org/insights/2007/01/insights070131.html>>. Monar's Chapter 11 in this volume, provides a general background on the EU response to international terrorism, including most notably the recent 'Terrorism Framework Decision' and the 'European Arrest Warrant Framework Decision'.

<sup>6</sup> The issues relating to the lack, or to a belated and partial incorporation, of a human rights framework in the procedural and substantive aspects of the CTC are analysed with respect to the treatment of asylum-seekers by P Mathew, 'Resolution 1373 — a Call to Preempt Asylum Seekers? (or, "Osama the Asylum Seeker")', in J McAdam (ed), *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008) 19.

<sup>7</sup> The relevant acts must be adopted by the European Council ('the Council') also on the basis of the EC treaty, because action of the Community is always necessary to implement certain aspects of 'common positions' adopted in the EU framework: it would then be appropriate to refer each time to 'EU/EC' sanctions and 'EU/EC' counter-terrorism action — see also below n 19. However, throughout the paper I will be referring mostly to 'EU sanctions' or 'EU action' for simplicity's sake.

<sup>8</sup> For more discussion on the sources of human rights protection in the EU system, see below, section III.

individuals' claims.<sup>9</sup> As for the remedies offered by international courts and bodies supervising the implementation of international human rights instruments, they are an option only once domestic remedies have been exhausted: this is, for instance, the case for the jurisdiction *ratione materiae* of the European Court of Human Rights (ECtHR), under Article 35 (1) of the *European Convention on Human Rights and Fundamental Freedoms* (ECHR).<sup>10</sup> However, it is not clear how this prerequisite may be satisfied where UN sanctions are implemented through acts adopted at the EU level rather than by states.<sup>11</sup> So, even though some commentators have argued that, as a matter of principle, national courts may legally afford judicial review of mandatory resolutions adopted by international organisations (and of international treaties),<sup>12</sup> this does not seem an option in the cases examined here. As the remainder of this paper will show, the ECJ is sometimes the first and the only avenue of relief available to concerned individuals and entities.<sup>13</sup> But is the ECJ willing and able to play its role in such cases?

The Court has previously been confronted, in the mid-1990s, with the issue of the legality of sanctions of a different kind, most notably comprehensive diplomatic, economic and trade sanctions (eg, general trade embargoes), imposed on either states or non-state actors, or both, involved in armed conflicts. For instance, in the *Bosphorus Case* the Court examined the question as to whether restrictions of property rights and of the right to exercise economic activities may be justified in the framework of the implementation at Community level of UN sanctions adopted against the former Federal Republic of Yugoslavia.<sup>14</sup>

<sup>9</sup> Interestingly, a reference to this possibility (in particular, to an 'independent international court') was made by the CFI in two judgments handed down on 21 September 2005: *Yusuf and Al Barakaat International Foundation v Council and Commission* (T-306/01) [2005] ECR II-3533 [340] (hereafter *Yusuf*) and *Yassin Abdullah Kadi v Council and Commission* (T-315/01) [2005] ECR II-3649 [285] (hereafter *Kadi*). Both cases are discussed below, section III, subparagraphs A and B.

<sup>10</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (entered into force 3 September 1953). According to art 35 (1) '[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

<sup>11</sup> On the right to effective access to the ECtHR, see Cameron, above n 5, 248-50.

<sup>12</sup> This point is developed, inter alia, by Benedetto Conforti in the report he submitted to the Institute of International Law (*Institut de droit international*), 'The Activities of National Judges and the International Relations of their State' (1993) 65 *Annuaire de l'Institut de droit international* I-65, 347-51, 389-91; see also B Conforti, 'Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado' (2006) 11 *Il Diritto dell'Unione Europea* 333, 344; E de Wet and A Nollkaemper, 'Review of Security Council Resolutions by National Courts' (2002) 45 *German Yearbook of International Law* 166, 184-202.

<sup>13</sup> Bowring and Korff, above n 5. For a discussion of the ECJ jurisdiction in such cases, see below, section III.

<sup>14</sup> This is still the leading case in this area (*Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications, Ireland and the Attorney General* (C-84/95) [1996] ECR I-3953). Bosphorus Airways was a Turkish charter airline which leased a Yugoslav State-owned plane, subsequently seized by the Irish authorities under the sanctions regime decided by the UN Security Council against the Federal Republic of Yugoslavia (FRY), and implemented through an EC Regulation

However, the case law of the ECJ offers no precedent exactly in the area of counter-terrorism sanctions of the kind examined here, that is, measures targeting designated non-state actors suspected of being involved in terrorist activities or associated with terrorist organisations.<sup>15</sup>

Recently confronted with claims against these measures, the CFI has held that it could not review them.<sup>16</sup> I will analyse from the perspective of the protection of human rights some of the most controversial issues emerging from representative cases before the CFI, in order to show the extent to which there has been an evolution in the Court's approach to the review of European counter-terrorism sanctions. As I will show, with respect to the EU sanctions implementing Security Council Resolution 1267 (1999) the Court maintains that review of the relevant Community acts would necessarily entail review of the UN Resolution itself, which would be clearly beyond its jurisdiction. However, the Court reserves to itself the power to review Security Council resolutions at

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(Council Regulation No 990/93 of 26 April 1993, concerning trade between the EC and the Federal Republic of Yugoslavia (Serbia and Montenegro), [1993] OJ L 102/14). Bosphorus Airways challenged the seizure before the Irish courts, arguing that the EC sanctions were not susceptible to being applied against an undertaking not incorporated (and not operating) in the FRY. The Irish Supreme Court eventually referred the case to the ECJ for a preliminary ruling (under art 234 of the EC Treaty), given that Ireland was implementing the EC sanctions adopted to implement, in turn, the UN-mandated economic sanctions. The ECJ stated that the aim to stop the armed conflict in the FRY had to be given precedence over the rights invoked by Bosphorus Airways; the latter, according to the Court, are not absolute rights and may thus be sacrificed for the objectives of general interest pursued by the Community, that is, ending the conflict. Thus, the seizure of the aircraft required by the EC regulation constituted no violation of the property right of Bosphorus. The applicant then decided to institute proceedings before the European Court of Human Rights: see below n 71 and accompanying text. The CFI subsequently upheld the *Bosphorus* judgment in *Dorsch Consult Ingenieurgesellschaft mbH v Council and Commission* ((C-184/95) [1998] ECR I-1443), where the applicant, a German-based engineering consulting company, asked the Court to order the Council and the Commission to compensate it for damage suffered as a result of Regulation (EC) No 2340/90, on the embargo on trade with Iraq and Kuwait. The application was dismissed by the CFI, because the contested EC regulation was adopted in order to implement Security Council Resolution 661 (1990), and therefore as part of the action towards the maintenance of international peace and security in the area. In the Court's opinion, negative consequences for some operators (essentially, limitations to the freedom to trade) were justified also because the economic risk in doing business in Iraq had not been exceeded. See the note on the *Dorsch Consult Case* by J Kokott and R Schlögl in *International Decisions* (1999) 93 *American Journal of International Law* 668.

<sup>15</sup> These measures are sometimes referred to as 'smart sanctions'. Such is the terminology adopted, for instance, by the CFI in the *Yusuf* and *Kadi* judgments of 21 September 2005. The Court said that such sanctions, being targeted and selective, 'reduce the suffering endured by the civilian population of the country concerned, while none the less imposing genuine sanctions on the targeted regime and those in charge of it' (*Yusuf* (T-306/01) [2005] ECR II-3533 [113], [122] and *Kadi* (T-315/01) [2005] ECR II-3649 [90]). The Court was clearly trying to show the distinction between these sanctions and other kinds of sanctions adopted by the Security Council under Chapter VII of the UN Charter, already mentioned in the text, and which are not examined any further in this paper. Fassbender (above n 1, 4), correctly points out that the regime instituted under SC Resolution 1267 (1999) differs from all the other UN sanctions regimes 'in that, after the Taliban were removed from power in Afghanistan, there is no particular link between the targeted individuals and entities and a specific country'.

<sup>16</sup> According to a note prepared by *Statewatch* in January 2007, the CFI judgment of December 2006 in the *OMPI Case* (see below n 139) 'represents the first successful legal challenge to the EU proscription regime: 13 previous challenges have been dismissed (seven cases have been appealed to the ECJ, another seven cases are pending)' (*Statewatch News Online, Successful Challenge to EU "Terrorist" list by PMOI* (2007) *Statewatch* <<http://www.statewatch.org/news/2007/jan/04ecj-pmoi.htm>>).

least where violations of human rights protected by *jus cogens* norms are alleged. This line of reasoning, which has failed to convince several commentators, will then be analysed.<sup>17</sup> In contrast, the Court has fully scrutinised and declared invalid an EC regulation implementing UN Security Council Resolution 1373 (2001) because of the different features of the sanctions regime established under that resolution.<sup>18</sup> My analysis will also illustrate how the potential concurrent jurisdiction of different judicial bodies may in some cases produce the result that only very limited judicial review of EU counter-terrorism sanctions is offered when human rights violations are alleged.

## II. Enforcing United Nations Counter-Terrorism Sanctions in the European Community/European Union System

In order to provide some background information for the analysis to follow, it is appropriate first to outline briefly the main features of the two sanctions regimes set up by the UN Security Council as part of its counter-terrorism strategy, and then the implementing measures ('common positions' and regulations) adopted within the EU framework.<sup>19</sup>

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<sup>17</sup> These points are further developed later in this chapter, see below section III, subparagraphs A and B.

<sup>18</sup> See the discussion below at section III, subpara D.

<sup>19</sup> Generally speaking, UN sanctions of an economic and financial nature must be implemented by the EC rather than by its member states because, under art 133 EC Treaty, the Community has an exclusive competence in the area of external trade. Action by the Community, under art 301 and art 60 EC Treaty, depends in these cases on previous action by the EU pursuant to the EU Treaty provisions in the field of the common foreign and security policy (CFSP, see below n 23), that is, by the agreement of a common position or a joint action. As to the acts adopted, they are usually regulations and 'common positions', respectively. Council regulations are normative acts adopted by the EC and identified by their general and direct applicability in the Community legal order, as well as by their binding character in their entirety. In other words, regulations produce direct effects, and thus confer rights and duties, in the domestic orders of all member states, even in the absence of measures for domestic implementation (see, for instance, J Steiner, L Woods and C Twigg-Flesner, *EU Law* (Oxford: Oxford University Press, 9<sup>th</sup> ed, 2006) 93-4; S Bronitt, F Burns and D Kinley, *Principles of European Community Law* (New South Wales, Australia: Law Book Company, 1995) 102; or the EU official website, <[http://europa.eu/scadplus/constitution/legislation\\_en.htm](http://europa.eu/scadplus/constitution/legislation_en.htm)>). On the other hand, EU 'common positions' are not acts of a Community nature and must be defined within the framework of two procedures of the EU law-making process, that is, the cooperation procedure and the co-decision procedure: see arts 251 and 252 of the EC Treaty, formerly arts 189b and 189c respectively, the full text of which, together with the rules of procedures of the European Parliament relating to common positions, can be read at <[http://www.europarl.europa.eu/commonpositions/default\\_en.htm](http://www.europarl.europa.eu/commonpositions/default_en.htm)> (for insights on the EU law making process, see *ex multis* Bronitt, Burns and Kinley, 86-91). In other words, common positions are adopted by the Council but not on the basis of the EC Treaty. For instance, common positions may be adopted by the Council, composed of representatives of the governments of member states, in the field of Justice and Home Affairs (JHA, or the third pillar of the EU, see below n 23) under Title VI, art 34 of the EU Treaty, as well as in the field of Common Foreign and Security Policy (CFSP, or second pillar of the EU, see Bronitt, Burns and Kinley, 86-91) under Title V, art 15 of the EU Treaty. The most relevant element, for our analysis, is the fact that common positions are not subject to review of their lawfulness before the CFI/ECJ.

Prior to 11 September 2001 (9/11), the EU institutions had put in place a common response to international terrorism<sup>20</sup> in order to implement Security Council resolutions 1267 (1999)<sup>21</sup> and 1333 (2000).<sup>22</sup> They were acting on the basis of both the *Treaty on the European Union* (in particular, the so-called second and third pillars of the EU, respectively the CFSP and the JHA)<sup>23</sup> and the European Community Treaty (the so-called first pillar).<sup>24</sup> The European Council adopted implementing acts as early as November 1999, and then regularly adopted updates in order to follow the 1267 Committee's updates.<sup>25</sup> The European measures include the freezing of funds and of other financial assets of Osama bin Laden and individuals and entities associated with him, as designated by the 1267 Committee. UN sanctions were further implemented by the European Council with *Regulation* (EC) No 467/2001, which prohibited the export of certain goods

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<sup>20</sup> A detailed review of all the acts adopted by the EU institutions to implement UN sanctions is provided by Tappeiner, above n 5, 102-10, as well as by Vennemann, above n 1, 219-29.

<sup>21</sup> Under Resolution 1267, adopted on 15 October 1999, the Security Council required that the Taliban hand over Osama bin Laden to the appropriate authorities. To this end, para 4(b) of this resolution required that all the states 'freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the [1267 Sanctions] Committee', established by para 6 of the same resolution. The Council further imposed on states an obligation to ensure that neither the said funds 'nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need'.

<sup>22</sup> In para 8 (c) of this resolution the Council asked all states to freeze without delay funds and other financial assets of Osama bin Laden, as well as individuals and entities associated with him, and to ensure that funds of financial resources be made available, directly or indirectly, for the benefit of Osama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Osama bin Laden or individuals and entities associated with him, including the Al Qa'ida organisation. Furthermore, the Security Council instructed the Sanctions Committee to maintain an updated list, based on information provided by the states and regional organisations, of the individuals and entities designated as associated with Osama bin Laden, including those in the Al Qa'ida organisation. In para 17, the Security Council called upon all states and all international and regional organisations, including the UN and its specialised agencies, to act strictly in accordance with the provisions of the resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement. The measures adopted were established for 12 months and it was for the Security Council to decide, at the end of that period, whether to extend them for a further period on the same conditions.

<sup>23</sup> CFSP is the acronym for 'Common Foreign and Security Policy', indicating pillar two of the EU, whereas 'Justice and Home Affairs' (JHA) constitutes the third pillar. They are regulated under arts 11-28 of the EU Treaty (Title V) and arts 29-42 (Title VI), respectively. It must be noted that the second and third pillars share the same institutions of the EC, but all decisions must be made unanimously, for instance, the common positions. See Steiner, Woods and Twigg-Flesner, above n 19, 9. The said pillars are entirely based on inter-governmental cooperation among the member states, and therefore acts of a Community nature may never be adopted in these fields (see the synopsis on 'The Union's founding principles' in the EU official website, <[http://europa.eu/scadplus/constitution/legislation\\_en.htm](http://europa.eu/scadplus/constitution/legislation_en.htm)>).

<sup>24</sup> The first pillar of the EU has absorbed the European Communities and their traditional fields of activity and competence.

<sup>25</sup> In order to impose the sanctions established under SC Resolution 1267, the Council adopted on 15 November 1999 Common Position 1999/727/CFSP, concerning restrictive measures against the Taliban. The measures were subsequently defined by the Council in Regulation (EC) No 337/2000 concerning a flight ban and the freezing of funds and other financial resources in respect of the Taliban of Afghanistan. In February 2001, the Council adopted Common Position 2001/154/CFSP, which implemented UN Security Council Resolution 1333 (2000).

and services to Afghanistan, strengthened the flight ban and extended the freezing of funds and other financial resources in respect of the Taliban of Afghanistan.<sup>26</sup>

On 27 May 2002, in order to implement Security Council Resolution 1390 (2002)<sup>27</sup> the European Council adopted *Common Position 2002/402/CFSP*, concerning restrictive measures against Osama bin Laden, members of the Al Qa'ida organisation, the Taliban and other individuals, groups, undertakings and entities associated with them.<sup>28</sup> On the same day, the European Council adopted *Regulation (EC) No 881/2002*, repealing its previous regulations on the subject.<sup>29</sup>

A separate path was followed by the Security Council with the adoption of Resolution 1373 (2001) immediately after the attacks of 9/11.<sup>30</sup> The new regime of sanctions thereby created was implemented by the European Council through two common positions adopted on 27 December 2001 (the most relevant being

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<sup>26</sup> *Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/200 [2001] OJ L 67/1*. It was not until 8 March 2001 that the 1267 Committee published the first consolidated list of the entities and the persons to be subjected to the freezing of funds, pursuant to Security Council resolutions 1267 (1999) and 1333 (2000). This list has since been amended and supplemented several times, so the Commission adopted various regulations pursuant to art 10 of Regulation No 467/2001 in order to amend Annex 1.

<sup>27</sup> Resolution 1390 (2002) laid down new measures to be directed against Osama bin Laden, members of the Al Qa'ida network and the Taliban and other associated individuals, groups, undertakings and entities.

<sup>28</sup> *Council Common Position 2002/402/CFSP of 29 May 2002 concerning restrictive measures against Osama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP [2002] OJ L 139/4*. Art 3 of the common position prescribed the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council resolutions 1267 (1999) and 1333 (2000). In accordance with para 3 of Resolution 1390 (2002), the measures adopted must be maintained and then reviewed by the Security Council 12 months after their adoption, at the end of which period the Council must either allow those measures to continue or decide to improve them.

<sup>29</sup> *Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9*.

<sup>30</sup> Resolution 1373 (2001) obliges states to freeze all assets and other economic and financial resources of those who commit acts of terrorism or attempt to commit them, or who take part in them or who facilitate the carrying out of these acts. Furthermore, states have to take steps that forbid assets and other economic and financial resources, as well as other financial and allied services, from being made available to these persons.

*Common Position* 2000/931),<sup>31</sup> as well as through *Regulation* (EC) No 2580/2001.<sup>32</sup> Under this regime, the procedure leading to a measure to freeze funds takes place first at the national level and then at the Community level. Whereas in the first phase a 'competent national authority', which in principle must be judicial, takes a decision to include a certain party in the list, in the second phase the European Council must decide on the actual inclusion, on the basis of precise information or material in the relevant file transmitted by the national authority.<sup>33</sup>

As soon as the two UN sanctions regimes entered into operation, it became manifest that the listing and de-listing procedures lacked transparency and failed to safeguard what may be called due process rights. Even though a de-listing procedure is set up under the sanctions regime, individuals and entities are not allowed to petition the committees for de-listing, nor are they granted a hearing.<sup>34</sup> Petitions for de-listing may be submitted only to governments, which may in turn bring the issue to the attention of the committee. However, any decision concerning de-listing would still be left to the discretion of the committee or of the Security Council.<sup>35</sup> The 1267 Committee therefore adopted, in November 2002, written guidelines for inclusion in and removal from the list.<sup>36</sup> Shortly thereafter, the Security Council adopted Resolution 1452 (2002), which provided for a number of derogations from, and exceptions to, the freezing of funds and economic resources imposed by its previous resolutions. Such derogations and exceptions were to be decided by member states on 'humanitarian grounds' and with the Sanctions Committee's consent.<sup>37</sup> Just as in the previous phases, the

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<sup>31</sup> *Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP)* [2001] OJ L 344/93. This common position includes an Annex with a list to be 'drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the person, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds' (art 1 (4)).

<sup>32</sup> *Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism* [2001] OJ L 344/70.

<sup>33</sup> See, most notably, arts 1 (4) ('the initial decision to freeze funds') and 1 (6) ('subsequent decisions to freeze funds') of *Common Position* 2001/931, as well as art 2 (3) of *Council Regulation* (EC) No 2580/2001.

<sup>34</sup> See, generally, Bierstecker and Eckert, above n 1, 34-7; as to the 1267 Committee, see also Fassbender, above n 1, 4.

<sup>35</sup> *Ibid.*

<sup>36</sup> Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of its Work (as amended on 29 November 2006)* (2002) United Nations <[www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf)>. The guidelines provide, inter alia, that submission of names should, to the extent possible, include a statement of the basis for the designation, generally focusing on the connection between the individual and Al Qa'ida, the Taliban, or Osama bin Laden, together with identifying information for use by the national authorities who must implement the sanctions.

<sup>37</sup> On this point, see G Burci, 'Interpreting the Humanitarian Exceptions through the Sanctions Committees' in Gowlland-Debbas (ed), above n 1, 143; E de Wet, 'Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime'

implementation of further Security Council resolutions involved the adoption by the European Council of a new *Common Position* (2003/140/CFSP) and of further amendments to *Regulation* (EC) No 881/2002, thus introducing a system of exceptions to the restrictive measures previously imposed.<sup>38</sup>

*Regulation* (EC) No 881/2002 and its consolidated list,<sup>39</sup> which are part of the 1267 sanctions regime against the Taliban, Osama bin Laden and Al Qa'ida, are the object of most of the lawsuits discussed in this paper. Other complaints were filed against *Regulation* (EC) No 2580/2001, and are therefore within the framework of the 1373 sanctions regime. As the remainder of this paper will show, the Court has dealt with the two different sanctions regimes in very different ways in terms of the judicial review which it is prepared to offer to individuals and entities targeted by the measures.

### III. Challenging the European Union Sanctions before the Court of First Instance/European Court of Justice

Since 2001, the legality of the counter-terrorism sanctions adopted under the different EU pillars has, on several occasions, been challenged before the CFI. The plaintiffs are individuals resident, or entities incorporated, in both EU and non-EU states, such as Sweden, the United Kingdom (UK) and Saudi Arabia, and whose names were included in Annex 1 of *Council Regulation* (EC) No 881/2002, or in *Regulation* (EC) No 2580/2001.<sup>40</sup> In all the cases considered, applicants have not only challenged the Community's competence to adopt the contested regulations, but they have also asked the Court to declare these acts invalid, alleging violations of fundamental human rights, as protected by Community law. This paper aims to cover some of the legal issues concerning the protection of the applicant's human rights.

As to the jurisdictional questions, for the purposes of my analysis I will only note that most of the relevant cases arise from 'annulment actions' brought by individuals (natural or legal persons) under Article 230 of the EC Treaty. An individual may only challenge a decision addressed to him/herself or a decision

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(2001) 14 *Leiden Journal of International Law* 277, 281-4; and more recently, Bierstecker and Eckert, above n 1, 31-3.

<sup>38</sup> *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* [2003] OJ L 81/1.

<sup>39</sup> By the end of 2006, the regulation and the attached list had been amended more than 60 times, both by the Council and by the Commission.

<sup>40</sup> See, respectively, above nn 38 and 32. When analysing EU counter-terrorism sanctions, some commentators have highlighted the distinction between European (or 'EU internal') terrorists and non-European (or 'EU external') terrorists, especially in light of Common Position 2001/931. According to this argument, whereas the Council Decisions of June 2002, implementing Regulation 2580/2001, only list 'EU external' terrorists, the list annexed to Common Position 2001/931 include both internal and external terrorists (see, for instance, Reinisch, above n 1, 130). However, this dichotomy is far from being clear-cut, as shown by Tappeiner, above n 5, 109-10.

‘which, although in the form of a regulation or a decision addressed to another person, is of *direct* and *individual* concern to the former’.<sup>41</sup> The other form of individual direct action before the ECJ against Community institutions is action seeking compensation for any damage that may have been caused by a Community act.<sup>42</sup> However, in a couple of cases the CFI rejected applications for compensation, lodged by organisations (*Segi and Others* and *Gestoras Pro-Aministía*, respectively) blacklisted by the European Council when implementing Security Council Resolution 1373 (2001).<sup>43</sup> The Court concluded that it could not afford judicial review to the applicants, because it lacks jurisdiction to examine complaints against acts adopted under Title VI of the EU Treaty (JHA or third pillar).<sup>44</sup>

As to the merits of individuals’ actions for annulment, the applicants usually claim that the EU decisions to freeze their funds, and all related subsequent decisions, are never communicated to them in advance. Also, the decisions never mention the specific information allegedly provided by a competent national authority in order to justify the inclusion of individuals and organisations in the disputed list, therefore the right to a fair hearing does not seem to be protected. Persons affected by decisions of public authorities must be given the right to put their case, in particular with respect to the correctness and the relevance of the facts and the circumstances alleged as well as to the evidence adduced. The principle of due process of law, which encompasses both the right to be heard and the right to effective judicial protection, presupposes the existence of courts and tribunals, which are impartial and independent of the executive power.<sup>45</sup>

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<sup>41</sup> Art 230 (4) EC Treaty [emphasis added].

<sup>42</sup> This is regulated under art 288 EC Treaty.

<sup>43</sup> The two organisations filed two distinct applications for damages as compensation for damage allegedly suffered as a result of their inclusion in the list attached to Common Position 2001/931 (referred to above, n 31) as well as to other acts applying specific measures to combat terrorism (*Action brought on 31 October 2002 by the Gestoras Pro Amnistía association, Juan Mari Olano Olano and Julen Zelarain Errasti against Council of the European Union* (T-333/02) [2003] OJ C 19/36; *Action brought on 13 November 2002 by the SEGI association, Araitz Zubimendi Izaga and Aritz Galarraga against Council of the European Union* (T-338/02) [2003] OJ C 7/24).

<sup>44</sup> Even though Common Position 2001/931 was adopted under the CFSP heading, the Court found in an Order of 7 June 2004 that the applicants were only affected by its art 4, which entails measures falling within the area of police and judicial cooperation in criminal matters (JHA) (*Segi and Others v Council of the European Union*, (T-338/02) [2004] II-1647 [33]). Since the Community legal system is based on the principle of conferred powers (see art 5 EU Treaty) and the ECJ powers are listed exhaustively under art 46 EU Treaty, the Court concluded that no judicial remedy for compensation is available in the context of Title VI of the EU Treaty (JHA) [34]. On the other hand, ‘[t]he Community courts have jurisdiction over the present action for damages in so far as the applicants allege failure to observe the powers of the Community’ [41]. See, in the same sense, the order delivered on the same date in the case *Gestoras Pro Amnistía and Others v Council of the European Union* (T-333/02) (unreported; a summary of the order is available in [2004] OJ C 228/40).

<sup>45</sup> Fassbender, above n 1, 6. Although these rights were first developed in the context of criminal justice, where the principle of fairness of the legal process is of particular relevance, they are nowadays seen as relevant each time fundamental human rights are at stake. On these aspects, it is appropriate to refer to the reasoning of the ECtHR in the seminal judgment delivered in the *Golder Case* (1975) 18 Eur

As is well known, the case law of the ECJ gradually built up a framework for human rights protection, in the absence of any general provision in the EC Treaty on the protection of fundamental rights.<sup>46</sup> Only with the Maastricht Treaty were the constitutional traditions and the international human rights obligations of member states formally integrated into the legal order of the EU itself.<sup>47</sup> According to Article 6 (1) of the EU Treaty, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Under Article 6 (2), the Union is bound to respect fundamental rights as guaranteed by the *European Convention on Human Rights* and as they derive from the constitutional traditions common to the member states, as general principles of Community law. General principles of Community law are 'unwritten principles used by the Court to supplement the Treaties and acts of the institutions' and to ensure that 'Community law reflects and is firmly rooted in the basic legal values of the Member States'.<sup>48</sup> It has correctly been noted that, although no human rights treaty is directly binding upon the EU and its institutions, the CFI and the ECJ normally rely on the ECHR when reconstructing general principles in the field.<sup>49</sup>

The principle of respect for fundamental human rights is the measure of legality of EU anti-terrorist sanctions relevant for the purposes of this chapter.<sup>50</sup> In

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Court HR (ser A) 4, 12-8. See also the recent analysis by Cameron, above n 1, 7-10, on aspects of due process in criminal matters, civil matters and with respect to blacklisting in general. He correctly highlights that 'UN blacklisting does not fit into this more traditional pattern of due process. It bears a superficial similarity to interim seizure of assets pending a trial, but it is in fact entirely different. ... at the UN level, the freezing measures are alternatives to criminal investigations, not adjuncts'.

<sup>46</sup> See, *ex multis*, F G Jacobs, 'European Community Law and the European Convention on Human Rights' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration (Essays in Honour of Henry G. Schermers)* (Dordrecht, Boston: M Nijhoff, 1994), 561; A Arnall, *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2<sup>nd</sup> ed 2006) 337-66. Notwithstanding the absence of provisions of a general scope on the protection of fundamental human rights, the EC Treaty of 1957 specifically prohibited discriminatory practices based on grounds of nationality or gender.

<sup>47</sup> A discussion of the hierarchy of sources in the EU system is clearly beyond the scope of this paper. May I just refer to the following passage by Giorgio Gaja, 'The Protection of Human Rights under the Maastricht Treaty', in D Curtin and T Heukels (eds), above n 46, 549, 551-52: 'the constant characterization by the [ECJ] of fundamental rights as "an integral part of the general principles of law" appears to locate the protection of human rights at a level which is higher than Community secondary legislation, but lower than the Treaty establishing the Communities' [footnotes omitted].

<sup>48</sup> Arnall, above n 46, 335.

<sup>49</sup> T Ahmed and I de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) *European Journal of International Law* 771, 774-5, 780.

<sup>50</sup> More recently, the constitutional traditions common to the member states and the standards of the ECHR as interpreted by the ECtHR and by the Community courts have been drawn on in the Charter of Fundamental Rights of the European Union (hereafter, the EU Charter, the full text of which is published in [2000] OJ C 364/1), an instrument signed by all member states but not yet ratified. I will note that, according to art II-112 of the EU Treaty, '[i]nsofar as this Charter contains rights which correspond to rights guaranteed by the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.' The relevant part for our analysis is Chapter VI (art 47-50), under the heading of 'Justice'. Most notably, art 47 codifies the right to an effective remedy and to a fair trial, whereas art 48 deals with the presumption of innocence and the right of defence.

particular, the right to a fair hearing and the right to access to courts as set out in Articles 6 and 13 of the ECHR are indisputably part of the general principles of Community law.<sup>51</sup>

However, the CFI has shown a certain reluctance to exercise judicial review. As early as December 2001, two actions under Article 230 EC were brought by different applicants (to whom I will refer as *Yusuf* and *Kadi*, respectively) against the European Council, asking the Court to annul *Regulation* (EC) No 881/2002, whose Annex 1 listed the applicants as targets of restrictive measures.<sup>52</sup> Most notably, *Yusuf* and *Kadi* alleged the infringement of their right to use property, of their right to a fair hearing and of their right to an effective judicial remedy.<sup>53</sup>

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<sup>51</sup> See, for instance, *Yusuf* (T-306/01) [2005] ECR II-3533 [192]. For further discussion see, inter alia, C Harlow, 'Access to Justice as a Human Right: The European Convention and the European Union' in P Alston (ed), *The EU and Human Rights* (Oxford, New York: Oxford University Press, 1999) 187. Art 6 of the ECHR reads, in the relevant parts:

1. 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b. to have adequate time and facilities in the preparation of his defence;
  - c. to defend himself in person or through the legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

Under art 13 of the ECHR: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

Summing up, the main aspects of the due process rights protected by the ECHR are (i) the right to procedural fairness, (ii) the presumption of innocence in criminal proceedings, (iii) specific rights for persons accused of criminal offences, including the right to be informed of the charge and the right to be tried within a reasonable time and (iv) the right to be free from retrospective criminal law (art 7 ECHR). These rights must be read in conjunction with other corollaries of the principle of fair trial, most notably: the right not to be deprived of liberty unless in accordance with a procedure described by law (art 5 (1) ECHR); the right of appeal in criminal matters (7<sup>th</sup> Protocol to the ECHR, art 2); the right to compensation for wrongful conviction (7<sup>th</sup> Protocol to the ECHR, art 3); the right not to be tried twice for the same offence (7<sup>th</sup> Protocol to the ECHR, art 4).

<sup>52</sup> *Action brought on 10 December 2001 by Abdirisak Aden and Others against the Council of the European Union and the Commission of the European Communities* and *Action brought on 18 December 2001 by Yassin Abdullah Kadi against the Council of the European Union and the Commission of the European Communities* [2002] OJ C 56/16. The applications were originally brought against both the Commission and the Council; however, the CFI ruled that, on account of the repeal of some acts adopted by the Commission, the action had to be regarded as being brought against the Council alone (*Yusuf* (T-306/01) [2005] ECR II-3533 [71]-[77]; *Kadi* (T-315/01) [2005] ECR II-3649 [52]-[8]).

<sup>53</sup> Infringements of the right to property are also the object of most of the lawsuits considered in this chapter. Both the domestic legislation of most European states and customary international law require that interferences with individual property be in principle grounded on judicial findings and not on

In two nearly identical judgments handed down on 21 September 2005, the CFI held that it lacked jurisdiction to review EC sanctions implementing Security Council Resolution 1267 (1999), because it had no jurisdiction to review the legality of the latter; it thus rejected all the pleas.<sup>54</sup>

Only the pleas concerning the breach of the applicants' fundamental rights will be dealt with in this chapter. In light of *Yusuf* and *Kadi* and subsequent cases, I will now assess the way in which the Court interpreted its power to review the legality of the contested EC regulation (A). I will then analyse the alleged breach of the applicants' right to a fair hearing and to an effective judicial remedy, when 1267 sanctions are implemented at the EU level (B). Interestingly, the Court has concluded, in a more recent case, that an essential guarantee for the protection of the applicants' rights is their right to diplomatic protection (C). Lastly, I will turn to a case relating to the protection of human rights with respect to the implementation of the 1373 sanctions regime (D).

## A. The Court's Jurisdiction, the Primacy of the United Nations Legal Order and the Role of *Jus Cogens* in the Protection of Human Rights

The *Kadi* and *Yusuf* cases presented the CFI with the opportunity to discuss several issues of EU law and international law, including: the legal basis for counter-terrorism measures in EU and EC law;<sup>55</sup> the obligations of the EU and of its member states resulting from the UN Charter and Security Council

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administrative procedures, such as the procedures of the 1267 Committee. Violations of the right to privacy and to the protection of personal information of the targeted individuals and organisations may also be considered when analysing the judicial review of EU counter-terrorism measures. See Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States', above n 1, 1064-9.

<sup>54</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 and *Kadi* (T-315/01) [2005] ECR II-3649. For comments on various aspects of the two judgments see, inter alia, Steve Peers, 'First EU Court Ruling on Terrorist Lists' (2005) *Statewatch* <<http://www.statewatch.org/news/2005/sep/10terrorlists.htm>>; C Tomuschat, 'Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission: Case Note' (2006) 43 *Common Market Law Review* 537; B Conforti, above n 12, 333; A Gianelli, 'Il rapporto tra diritto internazionale e diritto comunitario secondo il Tribunale di primo grado delle Comunità Europee' (2006) 89 *Rivista di diritto internazionale* 131; L Pech, 'Trying to Have it Both Ways: On the First Judgments of the Court of First Instance Concerning EC Acts Adopted in the Fight against International Terrorism' (2007) 1 *Irish Human Rights Law Review* 1 (available on the SSRN database: <<http://ssrn.com/abstract=915386>>).

<sup>55</sup> The first ground of annulment put forward by the applicants was the Council's incompetence to adopt the contested regulation. The position of the CFI on this point may be summarised as follows (*Yusuf* (T-306/01) [2005] ECR II-3533 [108]-[66]). Whereas arts 60 and 301 EC Treaty constitute in themselves a sufficient basis for the adoption of restrictive measures against the rulers of a third state (ie, the Taliban of Afghanistan), and thus the measures laid down by Regulation No 467/2001 come within the power of the Community; the legal basis for the parts of the same regulation that impose economic and financial sanctions on individuals not presenting a link with a third state may not be found in the said articles if taken in isolation, because the powers to adopt economic sanctions do not encompass the interruption of economic relations with third states. It is thus necessary to read these articles together with art 308 EC Treaty (on residual powers of the Community), in order to have an appropriate joint legal basis, notwithstanding the fact that the adoption of 'smart sanctions' against individuals or entities is not part of any power expressly attributed to the Community.

resolutions; the Court's power to review the lawfulness of UN sanctions; the scope of the applicants' right to a hearing and of the right to judicial review. With regard to the breach of the right to a hearing, the applicants' submission was that the European Council never examined the reasons for their listing, first by the states and then by the Sanctions Committee.<sup>56</sup> The plaintiffs alleged that '[t]he entire procedure leading to the addition of the applicants to the list in Annex 1 to the contested regulation is ... stamped with the seal of secrecy.'<sup>57</sup>

The challenges to the EU sanctions were rejected in light of the Court's interpretation of the relationship between the UN Charter and Community law. According to the CFI, although it is undisputed that the Community is based on the rule of law and that all acts of its institutions may be reviewed by the Court, member states' obligations under the UN Charter and Security Council's resolutions must nevertheless prevail over all other conventional obligations, including obligations under the EC Treaty and under the ECHR.<sup>58</sup> In other words, the principle of primacy of the UN legal order and of the Charter's obligations, as expressed by Article 103 of the Charter, sets the scene for the Court's analysis of its power to entertain the claims. The Court's line of reasoning implies, first, that the Community itself, although not a UN Member, is bound by obligations stemming from UN Security Council's resolutions, to the extent that the Community's member states are bound by such resolutions and must comply with them also in their dealings with the Community.<sup>59</sup> This means that the Community, in exercising its powers, is required to adopt all necessary provisions to allow its member states to fulfil their obligations, including the obligation to implement UN counter-terrorism sanctions.<sup>60</sup>

The second limb of the CFI's reasoning stems from the circumstance that the European Council, when adopting the contested EC regulation, was acting 'under circumscribed powers [and] had no autonomous discretion'.<sup>61</sup> Thus, the Court considers that:

[a]ny review of the internal lawfulness of the contested regulation, ... would ... imply that the Court is to consider, indirectly, the lawfulness of [Security

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<sup>56</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [191] (*Yusuf and Al Barakaat International Foundation*, during argument); *Kadi* (T-315/01) [2005] ECR II-3649 [141]-[5].

<sup>57</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [191]. It must be noted that EC regulations No 467/2001 and No 881/2002 do not make clear, unlike Common Position 2001/931 and Regulation 2580/2001, that 'competent authority' for blacklisting individuals and entities 'shall mean a *judicial* authority, or, where judicial authorities have no competence in the area covered by this paragraph, an *equivalent* competent authority in that area' [emphasis added].

<sup>58</sup> *Ibid* [231]-[34]; *Kadi* (T-315/01) [2005] ECR II-3649 [181]-[84].

<sup>59</sup> States' obligations discussed here stem from arts 25, 48 and 103 of the UN Charter.

<sup>60</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [254]; *Kadi* (T-315/01) [2005] ECR II-3649 [204]. Several scholars have commented upon this extension of the monist idea of hierarchy between the Community legal system and member states' legal systems to the relationship between UN law and Community law. See, for instance, Tomuschat, above n 54, 540; Lavranos, above n 5, 475.

<sup>61</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [265]; *Kadi* (T-315/01) [2005] ECR II-3649 [214].

Council] resolutions [given that] the origin of the illegality alleged by the applicant would have to be sought not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions.<sup>62</sup>

As a consequence, the Court saw no other option than to refrain from exercising any judicial review of the Community measures, as it lacks power to review judicially the underlying Security Council's resolutions,<sup>63</sup> and thus rejected the applicants' claims.<sup>64</sup>

The third limb of the CFI reasoning further complicates an already disputable argument, since the Court notes that the (indirect) exercise of judicial review of the Security Council's resolution would still be an option in all cases of alleged violations of fundamental rights guaranteed by peremptory norms of international law (*jus cogens*).<sup>65</sup>

One is left with the impression that some of the elements of the test outlined by the Court were not really necessary. Indeed, the Court had simply been asked to examine the compatibility of a regulation, implementing UN sanctions, with primary Community law, which includes the EC Treaty and fundamental rights as protected by the constitutional traditions common to member states and by the ECHR. Thus, it does not seem that the Court had any truly persuasive reason not to exercise judicial control of the observance of Community law by Community institutions, under Article 220 EC Treaty.<sup>66</sup> It is difficult to see what would have really prevented the Court from invalidating the contested regulation with respect to the applicants, had such regulation been found to violate procedural and substantive rights guaranteed under Community law, without adjudicating on the legality of Security Council Resolution 1267 (1999). As we will see, the Court has moved towards this approach in the more recent *OMPI Case*.<sup>67</sup>

A different outcome would have been welcome especially as the Court itself notes the lack of other avenues of judicial review open to the applicants.<sup>68</sup> One wonders where else targeted individuals and entities might seek legal protection. The Court's reasoning seems to be in conflict with the principle that 'access to justice is one of the constitutive elements of a Community based on the rule of law and is guaranteed in the legal order based on the EC Treaty'.<sup>69</sup>

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<sup>62</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [266]; *Kadi* (T-315/01) [2005] ECR II-3649 [215].

<sup>63</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [276]; *Kadi* (T-315/01) [2005] ECR II-3649 [224].

<sup>64</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [346]; *Kadi* (T-315/01) [2005] ECR II-3649 [291].

<sup>65</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [277]; *Kadi* (T-315/01) [2005] ECR II-3649 [226].

<sup>66</sup> See Lavranos, above n 5, 474-9.

<sup>67</sup> Analysed below, subparagraph D.

<sup>68</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [339]-[40] and *Kadi* (T-315/01) [2005] ECR II-3649 [284]-[5].

<sup>69</sup> See *Philip Morris International v Commission* (T-377/00) [2003] ECR II-1 [121].

It is true that invoking the primacy of UN law in order to exclude any judicial review of Community acts by the CFI seems in line with the *Bosphorus Case*, where the ECJ affirmed that the exercise of fundamental rights may be subject to restrictions justified by objectives of general interest pursued by the Community, for instance the effective implementation of UN sanctions.<sup>70</sup> However, the consolidation of this jurisprudence is a source of concern if one considers that the ECtHR, in its more recent cases, has concluded that in future cases it would exercise its jurisdiction *only* where the protection of fundamental rights within the EC is 'manifestly deficient'.<sup>71</sup> One commentator has labelled this reluctance of both the ECJ and the ECtHR to exercise jurisdiction in such cases as a 'common hands-off approach'.<sup>72</sup>

Another problematic aspect of the *ratio decidendi* in the cases at hand is that the threshold triggering the CFI's powers of (indirect) judicial review of UN resolutions is a violation of *jus cogens* rules.<sup>73</sup> However, not all fundamental rights are the subject of protection by peremptory rules of international law.<sup>74</sup> The jurisprudence of the ICJ does not offer clear guidance on this point.<sup>75</sup> The

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<sup>70</sup> Above n 14, [22]-[6].

<sup>71</sup> *Bosphorus v Ireland* [2005] 42 E.H.R.R. 1 [156]. After the ECJ delivered its judgment in this case (*Bosphorus*, above n 14), the applicants brought the case before the ECtHR and instituted proceedings against Ireland, alleging a violation of the right to property, as guaranteed under art 1 of Protocol I to the ECHR. See the case note by Steve Peers, 'Limited responsibility of European Union member States for actions within the scope of Community Law' (2006) 2 *European Constitutional Law Review* 443.

<sup>72</sup> Lavranos, above n 5, 475.

<sup>73</sup> E de Wet, 'Holding the UN Security Council Accountable for Human Rights Violations: A Role for Domestic and Regional Courts?', (Paper presented at the Workshop on *Connecting the Public with the International: Law's Potential*, The Australian National University, Canberra, 2-4 July, on file with author).

<sup>74</sup> See Pech, above n 5, [9], who argues that the notion of *jus cogens* 'does not seem warranted and is certainly rather perilous in practice'.

<sup>75</sup> With the exception of the recent judgment handed down on 3 February 2006 in the dispute opposing the DRC and Rwanda (*Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)*, [2006] [74], available at <<http://www.icj-cij.org/docket/files/126/10435.pdf>>), the ICJ has never expressly mentioned *jus cogens* in its case law. The exact scope of *jus cogens* norms at international law cannot be determined precisely, although there is a general consensus that the notion encompasses norms protecting fundamental interests of the international community, eg, the norms prohibiting aggression, slavery, genocide, apartheid, torture, the use or threat of force, as well as most norms of international humanitarian law, in particular those prohibiting war crimes and crimes against humanity (see A Cassese, *International Law* (Oxford: Oxford University Press, 2<sup>nd</sup> ed, 2005) 202-3). This being said, there is certainly an argument in favour of the CFI's choice of the *jus cogens* test, because in the legal doctrine there seems to be a broad agreement to the effect that *jus cogens* does indeed limit the authority of the Security Council, most notably when the protection of fundamental human rights is at stake: see, generally, the recent study of A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 *European Journal of International Law* 59. In the Bosnia case, Judge Lauterpacht rightly emphasised in his separate opinion that the UN Security Council is bound by peremptory norms of international law and that 'it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Order of 16 September 1993) [1993] ICJ Rep 440-1).

CFI simply defines *jus cogens* as 'a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible'.<sup>76</sup> One may, on the one hand, welcome the CFI's message to the Security Council, defining the limits within which the Court would unconditionally accept the exercise by the latter of its powers in the counter-terrorism field.<sup>77</sup> However, an element of uncertainty is thereby introduced, because the standard of *jus cogens* is not a well-established feature of the case law of the ECJ in the field of human rights protection.<sup>78</sup> It is not clear how applicants may be able to prove before the CFI whether *jus cogens* norms are at stake or not in a given case.<sup>79</sup>

## B. Assessing the Alleged Human Rights Violations: Inconsistencies in the *Jus Cogens* Test

It is now time to discuss in more depth the way in which the *jus cogens* test is applied by the Court, in order to assess (and dismiss) the applicants' claims against the EC regulations. It is where the ECJ deals with the rights allegedly violated by the EC regulation that the *jus cogens* test reveals its weaknesses. For instance, the Court finds that the right to property may be regarded as protected by *jus cogens* when arbitrary deprivations are involved.<sup>80</sup> The Court thereby broadens the scope of peremptory norms, which do not traditionally seem to cover the right to property.<sup>81</sup> The discussion of *jus cogens* appears even less convincing with reference to the right to a fair hearing and the right to an effective judicial remedy, to which I now turn.

### 1. Right to a Fair Hearing

The authority provided by the Court when analysing the right to a fair hearing is quite scant. The Court makes passing reference to the 'complete system of legal remedies and procedures designed to enable the Court of Justice to review

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<sup>76</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [277] and *Kadi* (T-315/01) [2005] ECR II-3649 [226].

<sup>77</sup> See Lavranos, above n 5, 485. Pech, above n 54, [17], quoting other commentators, argues that the two cases discussed here apply by analogy the line of reasoning of the German Federal Constitutional Court in 1974 in the *Solange I* judgment (*Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, reported in (1974) 2 *Common Market Law Review* 540). The German Constitutional Court reserved for itself the power of reviewing and setting aside EC secondary legislation, where this would be found to violate fundamental rights protected in the German legal system. In the same vein, so Pech's arguments runs, the CFI may be sending a message to the Security Council expressing its intention to offer judicial review each time that fundamental rights protected under EU and EC law are sacrificed by the Security Council to other interests. Gianelli, above n 54, 139, argues that the *Kadi* and *Yusuf* judgments may play a significant role, hopefully, in inducing the ICJ to deal with *jus cogens* in a bolder way.

<sup>78</sup> According to Peers, above n 54 '[t]his is believed to be the first time that an EU Court has even referred to the principle of 'jus cogens', never mind applied it to a specific case.'

<sup>79</sup> For instance, Lavranos, above n 5, 476, argues that such an element would be impossible to prove before the ECJ.

<sup>80</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [293].

<sup>81</sup> See for instance de Wet, above n 73.

the legality of acts of the institutions', based on its own case law and on the ECHR;<sup>82</sup> it also clarifies that observance of the right to a fair hearing is today a fundamental principle of Community law, as it emerges from the Court's case law.<sup>83</sup> However, despite lengthy discussion of other matters, the Court does not address the content of the right to a fair hearing as *jus cogens*,<sup>84</sup> because at each passage of its reasoning it emphasises the exception rather than the rule, thereby restricting the procedural right in the present cases.<sup>85</sup>

The Court's main point is that for cases of counter-terrorism sanctions the right to a hearing must be weighed against the consideration that an advance warning to targeted individuals and entities would help the latter to relocate their funds and thus nullify the 'surprise effect'.<sup>86</sup> In the Court's view, this limitation is admissible because 'it appears that no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of this case',<sup>87</sup> that is, counter-terrorism sanctions adopted by the Security Council under Chapter VII. The Court emphasises that there are still safeguards, offered in the first place by the periodical re-examination of the contested decision by the issuing authority,<sup>88</sup> and then by the (additional) possibility of petitioning the Sanctions Committee through the applicants' respective state of residence or citizenship.<sup>89</sup> Although this is a restriction of the right to be heard (because the applicants were not heard before the adoption of the Security

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<sup>82</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [260]-[1]; 'As the Court has repeatedly held ... "judicial control ... reflects a general principle of law which underlies the constitutional traditions common to the Member States ... and which is also laid down in Articles 6 and 13 of the [ECHR]".'

<sup>83</sup> *Ibid* [325].

<sup>84</sup> The lack of a clear position of the Court on this point has been interpreted in completely opposite ways by the doctrine. To give just two examples, whereas Tomuschat, above n 54, 549, says that 'the Court does not even make an attempt to show that [the right to a hearing] might have the nature of *jus cogens*'; Ahmed and de Jesús Butler, above n 49, 780, have no doubt that '[p]erhaps overgenerously, the Court of First Instance (CFI) recently appeared to consider all human rights [including the right to a hearing] to have attained the status of *jus cogens* in international law.'

<sup>85</sup> It is generally acknowledged that art 6 ECHR 'is concerned, not with substantive, but with procedural due process', which implies that the ECtHR 'may not substitute its own assessment of the facts for that of domestic courts. Its task is to "ascertain whether the proceedings in their entirety, including the way evidence was taken, were fair"' (Leonard Leigh, 'The Right to a Fair Trial and the European Convention on Human Rights' in D Weissbrodt and R Wolfrum (eds), *The Right to a Fair Trial* (Berlin, New York: Springer, 1997) 645, 646-7, quoting the ECtHR judgment in *Edwards v United Kingdom* (1992)).

<sup>86</sup> '[A prior hearing would] jeopardise the effectiveness of the sanctions and would [be] incompatible with the public interest objective pursued' (*Yusuf* (T-306/01) [2005] ECR II-3533 [308]).

<sup>87</sup> *Ibid* [307].

<sup>88</sup> The Court refers here to the circumstance that Resolution 1390 (2002) provides that measures such as the freezing of funds, imposed by the previous resolutions, must be reviewed by the Security Council 12 months after their adoption. The options following such review include the decision to allow those measures to continue, or to improve them (see para 3 of the resolution). The same system of review of the sanctions after 12 months is adopted under Resolution 1455 (2003), adopted one year later (see para 2 of the resolution).

<sup>89</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [309]-[11], 345; *Kadi* (T-315/01) [2005] ECR II-3649 [263]-[64], [290].

Council sanctions and of the EC regulations),<sup>90</sup> such *restriction*, in the Court's view, is not 'to be deemed improper in the light of the mandatory prescriptions of international law'.<sup>91</sup>

The decisive element leading the Court to dismiss the alleged violation of the right to a hearing is the circumstance that, according to the Court's settled case law, the exercise by the Community of a power of appraisal is the prerequisite for the obligation to respect the procedural rights guaranteed by the Community legal order, including the right to a hearing.<sup>92</sup> Since the European Council does not enjoy any powers of investigation and inquiry when transposing the Security Council's decision into an EC sanction, a hearing before the enactment of the contested regulations would be pointless:

[T]he Community institutions were required to transpose into the Community legal order resolutions of the Security Council and the decisions of the Sanctions Committee in no way authorised [the Community institutions], at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations, since both the substance of the measures in question and the mechanisms for re-examination ... fell wholly within the purview of the Security Council and its Sanctions Committee. As a result, the Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanctions Committee, no discretion with regard to those matters and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants. The principle of Community law relating to the right to be heard cannot apply in such circumstances, *where to hear the person concerned could not in any case lead the institutions to review its position*.<sup>93</sup>

## 2. The Right to an Effective Judicial Remedy

The Court then turns to a discussion of the claim concerning the appellants' right to an effective judicial remedy and applies the *jus cogens* test in an

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<sup>90</sup> In the Court's words, '[t]he fact remains that any opportunity for the applicants effectively to make known their views on the correctness and the relevance of the facts in consideration of which their funds have been frozen and on the evidence adduced against them appears to be definitely excluded. Those facts and that evidence, once classified as confidential or secret by the State which made the Sanctions Committee aware of them, are not, obviously, communicated to them, any more than they are to the Member States of the United Nations to which the Security Council's resolutions are addressed.' Ibid [319].

<sup>91</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [315] [emphasis added].

<sup>92</sup> Ibid [327].

<sup>93</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [328] [emphasis added]. The Court followed, on this point, the European Council's submission, based on the need to give effect to Chapter VII resolutions of the UN Security Council. In the European Council's view, doing otherwise would constitute an infringement of member states' international obligations. Furthermore, the lack of any autonomous discretion of the European Council would preclude any unlawful conduct on its part. See Ibid [205]-[17] (the European Council, during argument); *Kadi* (T-315/01) [2005] ECR II-3649 [160] and comments by Pech, above n 54, [15].

unconvincing way. The argument based on the need to respect the Security Council's prerogatives under Chapter VII of the Charter seems to be the decisive one here. The judges limit themselves to noting that, even though there is no other judicial remedy available to the applicants, 'any such lacuna in judicial protection is not in itself contrary to *jus cogens*',<sup>94</sup> because the limitation is justified by the nature and the objective of Security Council decisions.<sup>95</sup> In other words, the Court argues that the *jus cogens* norm on the right to an effective judicial remedy does contain in itself a limitation to the enjoyment of such a right, that is, the exercise by the Security Council of Chapter VII powers.<sup>96</sup> It seems that the Court is not following coherently the *jus cogens* test as originally outlined.<sup>97</sup> In this case, the Court would probably do better to re-frame the test and conclude that it simply cannot offer any judicial review, under any circumstance whatsoever, of EC decisions implementing Chapter VII sanctions.

### 3. Critique

The Court's holdings on these points are hardly persuasive, particularly as it generally appears inaccurate in its discussion of several international law points. Two elements may be highlighted in this respect.

First, the two judgments would have benefited from a more thorough analysis of some fundamental aspects of the universal and regional systems of human rights protection.<sup>98</sup> For instance, the CFI argues that proof that the right to access to the courts is not absolute is provided on the one hand by the possibility to derogate from it under Article 4 (1) of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>99</sup> at a time of public emergency that threatens the life of the nation, and on the other hand by certain restrictions inherent in the right itself.<sup>100</sup> The Court's reasoning seems to be based on insufficient analysis of the

<sup>94</sup> *Yusuf* (T-306/01) [2005] ECR II-3533 [340]-[41].

<sup>95</sup> *Ibid* [270].

<sup>96</sup> 'In this instance, the Court considers that the limitation of the applicants' right to access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of the Charter), is inherent in that right as it is guaranteed by *jus cogens*.' (*Yusuf* (T-306/01) [2005] ECR II-3533 [343]).

<sup>97</sup> See above n 65.

<sup>98</sup> For instance, on the basis of art 6 of the ECHR there was no reason why the judges might not have analysed the right of audience and the right to judicial review as two sides of the same coin, instead of analysing them separately, as they did. See the text of art 6, above n 51.

<sup>99</sup> *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976).

<sup>100</sup> *Yusuf*, (T-306/01) [2005] ECR II-3533 [342]. Art 4 of the ICCPR reads, in the relevant parts:

'4. In time of emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin;

international rules on derogation from protected rights, or on limitations thereto. To begin with, the Court's assertion as to derogations from the right of access to the courts (including the right to a hearing) differs with the position expressed by the Human Rights Committee in General Comment No 29:

States parties may in no circumstances invoke article 4 of the [ICCPR] as justification for acting in violation of humanitarian law or *peremptory norms of international law*, for instance ... by deviating from *fundamental principles of fair trial*, including the presumption of innocence.<sup>101</sup>

Since *jus cogens* norms may still be subject to restrictions or exceptions in the sense of *limitations*, the issue here is whether there is a permissible limitation on the right of access to courts. The Court resorts to a 'balance of interests' argument, according to which the applicants' interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council.<sup>102</sup>

Some commentators have persuasively contended that 'the balance metaphor is inappropriate to describe the process of reconciling respect for civil liberties and human rights with the (alleged) imperatives of ... security.'<sup>103</sup> In particular,

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5. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.'

<sup>101</sup> Human Rights' Committee General Comment no. 29: States of Emergency (art 4), 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11 [11] [emphasis added]. Even though the ECJ invokes the maintenance of international peace and security as an 'essential public interest', this would not be enough to meet the requirements of a 'public emergency', as defined by the ECtHR when interpreting art 15 of the ECHR, as well as by the Human Rights Committee with reference to art 4 ICCPR. See, inter alia, R Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles: étude sur l'article 15 de la Convention européenne des droits de l'homme* (Brussels: Editions de l'Université libre de Bruxelles, 1987) 123-236 ; A Svensson-MacCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the "Travaux Préparatoires" and Case Law of the International Monitoring Organs* (The Hague, Boston: M. Nijhoff, 1998), *passim*; C Michaelsen, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275, 288-92; O Gross and F Ni Aoláin, *Law in Times of Crisis* (Cambridge, UK, New York: Cambridge University Press, 2006) 247-325. Most notably, while the case law of the ECtHR leaves a considerable amount of discretion to a state that is trying to derogate from the conventional regime, under the 'margin of appreciation' doctrine (on this point, and in particular on the progressive broadening of the notion in the case law of the ECtHR, see O Gross and F Ni Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention of Human Rights' (2001) 23 *Human Rights Quarterly* 625), it has been shown that 'an overwhelming majority of Council of Europe States have not regarded the actual terrorist threat to be of sufficient gravity to meet the "public emergency" criteria' of art 15 ECHR (Michaelsen, 293). According to art 15 of the ECHR, derogation is only permissible to the extent 'strictly required by the exigencies of the situation'. It would be difficult to argue that the measures adopted by the Security Council under Resolutions 1267 (1999) and 1390 (2002) satisfy such conditions, especially because of the lack of a system of independent supervision.

<sup>102</sup> *Yusuf*, (T-306/01) [2005] ECR II-3533 [344]; *Kadi*, (T-315/01) [2005] ECR II-3649 [289].

<sup>103</sup> See the debate as analysed by C Michaelsen, 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 *University of New South Wales Law Journal* 1, 19; for a similar conclusion from a criminal law perspective and with reference to the 'war on drugs', see S

Michaelsen has suggested replacing this metaphor with the proportionality test, which is more consistent with the spirit and the letter of international human rights instruments,<sup>104</sup> so that each time derogating measures must be assessed against particular emergencies.<sup>105</sup> The test of proportionality is, of course, more rigorous than the one of the balance of interests, because it is based on requirements such as suitability, necessity and appropriateness.<sup>106</sup>

The right of access to courts as enunciated by Article 6 ECHR is not absolute and may be subject to limitations, which must be legitimate and proportionate.<sup>107</sup> Whether the gravity of the threat posed by international terrorism is enough to justify limitations of access to courts as outlined by the CFI is a matter for debate. However, there is at least a serious concern that such limitations restrict access to courts 'in such a way or to such an extent that the very essence of the right is impaired'.<sup>108</sup> Indeed, affected individuals and entities are never put in a position to bring potential claims to court to prove their innocence; they may only petition their respective national states. A review mechanism resting essentially on a government's choice to trigger the de-listing procedure before the Sanctions Committee, and in which the affected individuals are not granted any standing,<sup>109</sup> cannot constitute an appropriate solution to enforce the victims' rights.<sup>110</sup> In particular, the de-listing procedure cannot generally satisfy the terms required by Article 6 (1) ECHR, which, in the words of the ECtHR, embodies the 'right to a court', meaning 'the right to have any claim relating to [one's] civil rights and obligations brought before a court or a tribunal'.<sup>111</sup>

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Bronitt, 'Constitutional Rhetoric versus Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76.

<sup>104</sup> Michaelsen, above n 103, 20.

<sup>105</sup> Michaelsen, above n 101, 291.

<sup>106</sup> Michaelsen, above n 103, 20.

<sup>107</sup> *Osman v the United Kingdom* (1998) VIII Eur Court HR 3169 [147]. Most notably, the ECtHR clarifies that limitations 'are permitted by implication since the right of access by its very nature calls for regulation by the State' (ibid). For a discussion on the doctrine of inherent limitations in the system of the ECHR, see P Van Dijk et al (ed), *Theory and Practice of the European Convention on Human Rights* (Deventer, London: Kluwer Law and Taxation, 4<sup>th</sup> ed, 2006) 343-50.

<sup>108</sup> Ibid.

<sup>109</sup> 'Admittedly, the procedure described above confers no right directly on the persons concerned themselves to be heard by the Sanctions Committee, the only authority competent to give a decision, on a State's petition, on the re-examination of their case. Those persons are thus dependent, essentially, on the diplomatic protection afforded by the States to their nationals' (*Yusuf*, (T-306/01) [2005] ECR II-3533 [314]).

<sup>110</sup> I do not think that this conclusion should be reconsidered in light of the Court's consideration that a wrongful refusal by the competent domestic authority to bring a case before the 1267 Committee may always constitute the basis for an individual action for judicial review before domestic judges; such action, in the Court's view, may also be directed against the contested EC regulation and the Security Council resolutions themselves. The point was presented by the UK at the hearing and was cursorily mentioned by the Court in both *Yusuf* (T-306/01) [2005] ECR II-3533 [317] and *Kadi* (T-315/01) [2005] ECR II-3649 [270]. It was subsequently developed in the *Ayadi* and *Hassan* cases (see below, nn 114-115 and accompanying text).

<sup>111</sup> *Waite and Kennedy v Germany* (1999) I Eur Court HR 393 [50].

Summing up, there does not seem to be a relationship of proportionality between the means employed and the (legitimate) aims pursued.

One might conclude that an effective and independent procedure to protect human rights within the framework of the Security Council counter-terrorism resolutions does not exist or is, at best, seriously ill-equipped to deal with individual grievances, if the only means available to individuals to challenge the sanctions is a mere inter-governmental mechanism before the Security Council itself, not offering any guarantees of independence and transparency.<sup>112</sup> The ECJ should never decline to afford judicial review when no other avenues are available to the plaintiffs. In the cases under examination, the Court should have invalidated the EC regulation at least with respect to the plaintiffs, purely because of the failure of the Community institutions to include in the regulation an appropriate mechanism for independent judicial review of complaints by affected individuals and entities.<sup>113</sup>

### C. A 'Right' to Diplomatic Protection under European Union Law and its Enforcement

In two subsequent cases on the implementation of the 1267 sanctions regime, decided on 12 July 2006, *Ayadi*<sup>114</sup> and *Hassan*,<sup>115</sup> the CFI substantially upheld the main line of argument and findings of the *Kadi* and *Yusuf* judgments, but then developed a few aspects further, perhaps in order to address, at least partially, the perplexity and scepticism with which the earlier judgments had generally been received by scholars.

*Ayadi*, a Tunisian national resident in Dublin and designated by the Sanctions Committee as a person associated with Osama bin Laden, asked the CFI to annul Article 2 of Regulation (EC) No 881/2002, with respect to his position.<sup>116</sup> The plea in law relevant for my analysis is the alleged infringement of the fundamental principle of respect for human rights, in particular *Ayadi's* right to access to his

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<sup>112</sup> See for instance de Wet, above n 73. I also agree with Conforti, above n 12, 343, on the point that the CFI's argument according to which the applicants were able to bring an action for annulment before the Court itself under art 230 EC Treaty (*Yusuf* (T-306/01) [2005] ECR II-3533 [333]-[7]) sounds almost like a mockery, given that the applicant's plea referred to the lack of judicial remedies within the UN sanctions regime.

<sup>113</sup> As suggested also by Lavranos, above n 5, 480-3.

<sup>114</sup> *Ayadi v Council* (T-253/02) [2006] ECR II-2139 (hereafter *Ayadi*).

<sup>115</sup> *Hassan v Council* (T-49/04) [2006] ECR II-52 (hereafter *Hassan*).

<sup>116</sup> Art 2 of Regulation No 881/2002 provides:

1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex 1 shall be frozen;
2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex 1;
3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex 1, so as to enable that person, group or entity to obtain funds, goods or services'.

property and the right to a judicial remedy under Article 6 ECHR.<sup>117</sup> Hassan, a Libyan national, was detained in the UK while awaiting the outcome of extradition proceedings brought at the request of the Italian authorities, on terrorism charges. Hassan maintained that Regulation 881/2002 infringes fundamental rights and general principles of Community law, most notably the right to property, the right to respect for private and family life, the right to be heard and the right to an effective judicial remedy. He lamented he had not been given any opportunity to put his case forward with respect to his listing in the contested regulation.<sup>118</sup> Most notably, he pointed out that he was not given any information with respect to the basis for his inclusion in the Sanctions Committee's list nor with respect to the state that requested such inclusion.<sup>119</sup> In this respect, he claimed that if prior hearing was not appropriate when dealing with counter-terrorism sanctions, he still ought 'to have been given the right to be heard subsequently, so that he might have his name removed from the list at issue'.<sup>120</sup> He furthermore submitted that the de-listing procedure 'does not provide for access to an independent or impartial tribunal to challenge on the merits the refusal of the State concerned to petition the Sanctions Committee for removal or the Committee's decision to reject such a petition'.<sup>121</sup>

The Court relies extensively on *Kadi* and *Yusuf*, because during the hearing, the applicants acknowledged 'the exhaustive answers to the arguments, in essence identical, put forward in those cases by the parties in their written pleadings'.<sup>122</sup> One of the arguments relied upon by the applicants concerned the Court's previous conclusion that the lacuna found to exist in the judicial protection of the persons targeted by sanctions was still to be seen as compatible with *jus cogens*.<sup>123</sup> The CFI develops its previous position in at least two directions.<sup>124</sup>

First, it upholds the point made in *Yusuf* and *Kadi* according to which the de-listing procedure does not confer upon individuals any right to be heard before the 1267 Committee, the whole mechanism being based on the traditional

<sup>117</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [92]-[102]. Most notably, *Ayadi* claimed that 'there is no effective mechanism for reviewing the individual measures freezing funds adopted by the Security Council, with the result that the danger is that his property will remain frozen for the rest of his life. On his head the applicant has argued that he had endeavoured in vain to persuade the Security Council to alter its stance in relation to him. So, he wrote twice to the Irish authorities, on 5 February 2004 and 19 May 2004, seeking their assistance in having him removed from the Sanctions Committee list. By letter of 10 October 2005 those authorities informed him that his file was still being considered, but did not give him to understand that they would take any steps to his advantage' [102].

<sup>118</sup> *Hassan* (T-49/04) [2006] ECR II-52 [74]-[6].

<sup>119</sup> *Ibid* [83].

<sup>120</sup> *Ibid* [81].

<sup>121</sup> *Ibid* [83].

<sup>122</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [117]; *Hassan* (T-49/04) [2006] ECR II-52 [93].

<sup>123</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [118]; *Hassan* (T-49/04) [2006] ECR II-52 [95].

<sup>124</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [134]; *Hassan* (T-49/04) [2006] ECR II-52 [104].

notion of diplomatic protection afforded by a state to its own nationals.<sup>125</sup> However, the Court describes the possibility of presenting a request of re-examination to one's own government as a 'right guaranteed not only by [the Guidelines of the Committee for the Conduct of its Work] but also by the Community legal order'.<sup>126</sup> This right corresponds to an obligation for each EU member state to protect fundamental human rights, spelled out by the Court in such a way that it is clear the Court is not following *Yusuf* and *Kadi*.<sup>127</sup>

[an obligation] in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law, given that the respect of those fundamental rights *does not appear capable of preventing the proper performance of their obligations* under the Charter of the United Nations.<sup>128</sup>

In other words, there can be no conflict between human rights and other obligations under the UN Charter. EU member states must ensure that affected persons and entities are able to present their cases before the respective domestic authorities. Also, they must 'act promptly to ensure that such ... cases are presented without delay and fairly and impartially to the Committee,<sup>129</sup> with a view to their re-examination, if that appears to be justified in light of the relevant information supplied'.<sup>130</sup> While the Court must be commended for this effort towards a more effective protection of human rights, the obligation that it derives from EU law, most notably from Article 6 of the Treaty, has no equivalent under current customary international law, given that there is no general obligation for states to exercise diplomatic protection.<sup>131</sup> Also, some commentators have

<sup>125</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [141]; *Hassan* (T-49/04) [2006] ECR II-52 [111]. In this sense, the Guidelines of the Committee for the Conduct of its Work, above n 36, offer to states guidance on how to address the 1267 Committee, in order to start a re-examination procedure.

<sup>126</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [145]; *Hassan* (T-49/04) [2006] ECR II-52 [115] [emphasis added].

<sup>127</sup> It is probably appropriate to reiterate here that in the previous cases the Court concluded that, under both customary international law and the EC Treaty, EC member states had an obligation to leave unapplied any Community law provision that would impede the proper performance of their obligations under the UN Charter and Security Council resolutions (*Yusuf* (T-306/01) [2005] ECR II-3533 [240] and *Kadi*, (T-315/01) [2005] ECR II-3649 [190]).

<sup>128</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [146]; *Hassan* (T-49/04) [2006] ECR II-52 [116] [emphasis added].

<sup>129</sup> The Court inferred from the different resolutions adopted by the Security Council an obligation for states to cooperate fully with the Sanctions Committee and to act in good faith during the re-examination procedure (*Ayadi* (T-253/02) [2006] ECR II-2139 [142]; *Hassan* (T-49/04) [2006] ECR II-52 [112]).

<sup>130</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [147], [149]; *Hassan* (T-49/04) [2006] ECR II-52 [117], [119]. This means that states must not refuse to initiate a re-examination procedure where requested in accordance with the Guidelines, even if the affected subjects are not able to provide all relevant information for the complaint (*Ayadi* (T-253/02) [2006] ECR II-2139 [148] *Hassan* (T-49/04) [2006] ECR II-52 [118]).

<sup>131</sup> Diplomatic protection is a topic currently under consideration by the International Law Commission. Some draft articles have been provisionally adopted. See for instance draft articles 1 ('Definition and Scope') and 2 ('Right to Exercise Diplomatic Protection') provisionally adopted by the ILC at its fifty-fourth session in 2002 (*Report of the International Law Commission, 55<sup>th</sup> sess*, UN GAOR, 58<sup>th</sup> sess, Supp. 10, UN Doc A/58/10 (2003) 81). For a more recent analysis of these issues, see S Touzé, *La Protection*

shown a fair degree of scepticism towards inferring such a right from the Guidelines or the Community legal order.<sup>132</sup> It remains to be seen whether the Court's innovative position will encourage further developments in the international practice, in cases involving counter-terrorism sanctions.<sup>133</sup>

A second aspect of the *Ayadi* and *Hassan* cases deserves attention here. The Court clarifies that the right individuals have to diplomatic protection before the Sanctions Committee is enforceable before the domestic courts of the state in question. The role of the domestic judges this time appears to be grounded on a clearer and firmer basis in Community law, first of all because we now know that there is an individual 'right' to diplomatic protection, but also because the interaction between the different levels (EC and domestic) of enforcement of the said right is explained. The Court draws on a jurisprudential Community principle that is now part of its settled case-law, and according to which '*in the absence of Community provisions, it is for the domestic legal system of each Member State to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from the direct effect of Community law*'.<sup>134</sup> This principle is applicable in the cases under review, each time a right to diplomatic protection, derived from EC law, is violated by the competent national authorities through their refusal to submit a de-listing request to the 1267 Committee. The Court also clarifies that the domestic procedural rules to be applied in such cases cannot be less favourable than those governing rights originating in domestic law, nor can they render the exercise of the right to diplomatic protection virtually impossible or excessively difficult.<sup>135</sup> However, in instances of conflict between the domestic rules and the *raison d'être* and objective of the contested EC act, the latter must prevail over the application of the former.<sup>136</sup>

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*des Droits des Nationaux à l'Étranger – Recherches sur la Protection Diplomatique*, PhD thesis, University of Paris II Panthéon-Assas (2006) 307-450.

<sup>132</sup> See Lavranos, above n 5, 483; de Wet, above n 73.

<sup>133</sup> J Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (2005) 24 *Australian Year Book of International Law* 75, analyses international judicial practice demonstrating the emergence of a duty of the state to provide diplomatic protection when certain conditions are met. In particular, he focuses on the recent decision of the South African Constitutional Court in *Kaunda and others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5 (4 August 2004), although the majority argument on the existence of some form of a state's (a government's) obligation to offer diplomatic protection to its nationals abroad was based on the 1996 South African Constitution (82-3).

<sup>134</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [151]; *Hassan* (T-49/04) [2006] ECR II-52 [121] [emphasis added]. The principle was spelled out by the ECJ in the *Leffler* judgment (*Götz Leffler v Berlin Chemie AG*, Case C-443/03, Grand Chamber, Decision of 8 November 2005, ECR 2005-1, 9611), and quoted in Dugard, above n 133.

<sup>135</sup> This results from an application of the Community law principles of equivalence and effectiveness (see *Ayadi*, (T-253/02) [2006] ECR II-2139 [152]; *Hassan* (T-49/04) [2006] ECR II-52 [122]).

<sup>136</sup> *Ibid.*

To sum up, the cases reviewed in this section contribute to giving the protection of fundamental human rights a higher rank in the hierarchy of international law obligations. However, the mechanism 'invented' by the CFI for the protection of fundamental human rights of blacklisted individuals and entities does not actually challenge in any meaningful way the supremacy of UN law over both Community and domestic law. Indeed, the Court makes it clear that the states' possible lack of cooperation with concerned individuals, even when it is made the object of a judicial finding by domestic judges, 'in no way means that the [UN's] procedure for removal from the list is in itself ineffective'.<sup>137</sup> One is thus left with the impression that responses coming from the 'lower' levels — the Community and the domestic levels — apart from inter-governmental action in the framework of the 1267 Committee, do not have any real impact on what seems to be a rather human rights-resistant<sup>138</sup> UN sanctions regime.

#### D. New Developments for European Community/European Union Sanctions Adopted Pursuant to Security Council Resolution 1373 (2001)

A partially new approach emerges from a judgment handed down by the Court on 12 December 2006, with respect to an action brought against an EC decision in the framework of *Community Regulation* No 2580/2001 and of *Common Position* 2001/931/CFSP,<sup>139</sup> both implementing Security Council Resolution 1373 (2001). In 2002, the France-based *Organisation des Modjahedines du peuple d'Iran* (hereafter OMPI), which appeared in the list annexed to the above-mentioned acts, filed a lawsuit with the CFI for the partial annulment of the above-mentioned common positions and of a Council decision implementing the above-mentioned regulations.<sup>140</sup> The OMPI claimed that the contested decision, by imposing sanctions on it without giving the possibility to express its views, infringed its right to a fair hearing, as guaranteed in particular by Article 6 (2) EU Treaty and Article 6 ECHR. The OMPI also claimed that it was not even aware of the identity of the national authority that took the decision to put it on the list for the purposes of the contested EU/EC acts, nor was it aware of the evidence and

<sup>137</sup> *Ayadi* (T-253/02) [2006] ECR II-2139 [154]; *Hassan* (T-49/04) [2006] ECR II-52 [124].

<sup>138</sup> I am quoting here from the title of Pene Mathew's presentation at the ANZSIL Annual Meeting 2005 ('Anti-terrorist = rights-resistant? The Work of the Counter-Terrorism Committee' Australian and New Zealand Society of International Law Thirteenth Annual Meeting, The Australian National University, Canberra, 16-18 June 2005, on file with the author).

<sup>139</sup> See above n 31.

<sup>140</sup> *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* (T-228/02) [2006] (unreported, available at <<http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-228/02&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>>), hereafter *OMPI*.

information on the basis of which such a decision was taken.<sup>141</sup> It thus alleged that its inclusion in the disputed list was decided ‘apparently solely only on the basis of documents produced by the Tehran regime’.<sup>142</sup> Inclusion in the list without a previous hearing and without the slightest indication of the factual and legal grounds providing legal justification also constituted, in the applicant’s view, an infringement of the obligation to state reasons provided for in Article 253 EC Treaty and of the right to effective judicial protection.<sup>143</sup>

The Court, while dismissing the action as in part inadmissible and in part unfounded in so far as it sought annulment of a Council Common Position,<sup>144</sup> on the other hand annulled a Council Decision, in so far as it concerned the applicant, on specific restrictive counter-terrorism measures.<sup>145</sup> The decision of the Court is ground-breaking, because it sets aside some of the obstacles, which in the previous cases, barred the appellants’ right to judicial review.

It is essential to note that this is the first decision on the merits of a complaint challenging a sanctions regime different from the one discussed in the previous cases, and indeed the Court clarifies that its conclusion is determined by the different features of the 1373 sanctions regime, which the contested EU acts were implementing.<sup>146</sup> Member states are required not only to identify suspected persons (meaning persons other than those already covered by Resolution 1267), but also to put in place their own procedure for the freezing of funds. It is therefore for the member states, and for the Community in some particular cases, to identify specifically the persons, groups and entities whose funds are to be frozen, in accordance with the rules in their own legal orders. Then the European Council, deliberating on the basis of ‘precise information or material which indicates that a decision has been taken by a competent [national] authority’,<sup>147</sup> unanimously decides to set up a list of persons to whom sanctions apply under the 1373 regime.<sup>148</sup> Thus, the CFI holds that, under this sanctions regime, the

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<sup>141</sup> Art 1 (4) of *Common Position* 2001/931 spells out the criteria to establish the list of persons, groups and entities involved in terrorist acts. These criteria were then listed under art 2 (3) of Regulation No 2580/2001.

<sup>142</sup> *OMPI* (T-228/02) [2006] [64], [167].

<sup>143</sup> *Ibid* [65]. I will not consider here the further pleas presented by the applicant and relating, respectively, to a manifest error of assessment and to the violation of the presumption of innocence (*ibid* [66]-[7]).

<sup>144</sup> *Ibid* [60]. The act contested is *Council Common Position 2005/936/CFSP of 21 December 2005, updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2005/847/CFSP* [2005] OJ L 340/80. As mentioned at above n 19, the Court cannot review EU common positions.

<sup>145</sup> *Council Decision of 21 December 2005 implementing Article 2 (3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/848/EC* [2005] OJ L 340/64.

<sup>146</sup> *OMPI* (T-228/02) [2006] [99]-[108].

<sup>147</sup> This is the language of art 2 (3) EC Reg 2580/2001 and art 1 (4) *Common Position* 2001/931.

<sup>148</sup> The initial decision is regulated by art 1 (4) of *Common Position* 2001/931, which spells out the criteria to establish the list of persons, groups and entities involved in terrorist acts. The subsequent decisions to freeze funds are regulated under art 1 (6) of the same common position, under which the

fundamental human rights and safeguards allegedly infringed are fully applicable to cases such as *OMPI*, because the relationship between the UN and the Community level does not limit the action of the latter to the exercise of circumscribed powers, but rather requires the exercise of its discretionary powers and appreciation in the establishment and the maintenance of the terrorists' list.<sup>149</sup> Even if this means that the Court will probably decide to uphold the previous cases when assessing future lawsuits filed against sanctions implementing the 1267 regime, rather than the 1373 regime, one may still argue that some elements in the *OMPI* judgment may lead the Court to reconsider its position even with respect to the latter regime, at least partially and on a case-by-case basis.

For instance, the Court does not use the *jus cogens* argument here and brings the discussion on the right to a fair hearing back to the terms of the case-law of the ECJ and of the ECtHR. The main point is now that even when the disclosure of confidential material in counter-terrorism sanctions may affect national security, individuals must still be heard before measures adversely affecting them are taken.<sup>150</sup> In all cases where the right to full disclosure of evidence to the concerned parties is subject to exceptions,<sup>151</sup> the Court concludes that the right to judicial review is the ultimate guarantee for affected individuals. These points deserve further explanation.

In the first place, the Court gives the right to a fair hearing at the Community level a very limited scope.<sup>152</sup> According to *Common Position* 2001/931, the decision to list individuals and entities at the national level is normally taken by a competent *judicial* authority,<sup>153</sup> which should ensure adequate protection of the right to a fair hearing at the domestic level.<sup>154</sup> The Court concludes that 'observance of the right to a fair hearing has a relatively limited purpose in respect of the Community procedure for freezing funds'.<sup>155</sup> Indeed, as a general

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names of persons and entities in the list are to be reviewed at regular intervals, and at least once every six months to ensure that there are grounds for keeping them in the list. The relevant rules are also laid down in art 2 (3) of Regulation No 2580/2001, according to which the Council is to establish, review and amend the list of persons, groups and entities to which that regulation applies, in accordance with the said Common Position. At the time of writing, the most recent updates are included in Common Position 2006/380, of 30 May 2006.

<sup>149</sup> *OMPI* (T-228/02) [2006] [102]-[3]. One may note the difference with the ratio decidendi in the *Yusuf* and *Kadi* cases, reproduced above, n 93 and accompanying text.

<sup>150</sup> *OMPI* (T-228/02) [2006] [114]-[37].

<sup>151</sup> In the Court's words, 'the general principle of observance of the right to a fair hearing requires, unless precluded by overriding considerations concerning the security of the Community or its member States, or the conduct of their international relations, that the evidence adduced against the party concerned ... should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds' (ibid [137] emphasis added).

<sup>152</sup> Ibid [118].

<sup>153</sup> See above n 33.

<sup>154</sup> *OMPI* (T-228/02) [2006] [120].

<sup>155</sup> Ibid [126].

rule the European Council must defer as far as possible to the assessment made by the competent domestic authority, and only when the evidence on which the national decision is based are not assessed by the said authority, a notification and a hearing at the Community level will be required.<sup>156</sup>

On the one hand, the Court highlights how different factors may tend to restrict the scope of the right to a fair hearing.<sup>157</sup> The Court resorts to one of the main arguments used in the *Yusuf* and *Kadi* cases: the need for a ‘surprise effect’ for counter-terrorism sanctions. Notification to the OMPI of the evidence adduced by the relevant domestic authority and the granting of a hearing prior to the decision to freeze funds ‘would thus be incompatible with the public interest objective pursued by the Community pursuant to Security Council Resolution 1373 (2001)’.<sup>158</sup> Drawing on the case law of the ECtHR, most notably on the *Chahal* and *Jasper* cases,<sup>159</sup> the CFI concludes that:

in circumstances such as those in this case, where what is at issue is a temporary protective measure restricting the availability of the property of certain persons, groups and entities in connection with combating terrorism, overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them, and, in consequence, the hearing of those parties with regard to such evidence, during the administrative procedure.<sup>160</sup>

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<sup>156</sup> Ibid [124]-[5]. Most notably, the Court is aware that, on the basis of the principle of ‘sincere cooperation’ between member states and the Community institutions, the European Council has an ‘obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority.’ (This is a general principle of Community law, postulating the reciprocal duty to cooperate in good faith; however, it is also binding in the area of pillar three, *JHA* (see Ibid [122]-[4])).

<sup>157</sup> Ibid [127].

<sup>158</sup> Ibid [128], [136]. Given the need for a surprise effect, the overriding considerations concerning the security of the Community and of its member states may never be invoked with respect to a *subsequent* decision to *maintain* a person or entity on the disputed list, as distinct from the initial decision to list such person or entity [131].

<sup>159</sup> *Chahal v United Kingdom* (1996) 23 ECR 1996-V 1831; *Jasper v United Kingdom* (2000), unreported [51]-[3]. Mr Chahal was a Sikh separatist leader, who had been detained in custody in the UK for deportation purposes since August 1990, when his application for asylum was refused and the UK Home Secretary decided that he was a threat to national security. Mr Chahal filed a lawsuit before the ECtHR, alleging that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment. Also, he complained that his detention pending deportation had been too long, and that he had no legal remedy for his convention claims because of the national security element in his case. The complaint was brought under arts 3, 5 and 13 of the ECHR. Mr Jasper was a British national who filed a lawsuit to obtain a decision as to whether the facts of the case disclosed a breach by the UK of its obligations under art 6 of the Convention. With respect to some criminal proceedings before the Crown Court and the Court of Appeal, taken together, the applicant submitted that any failure to disclose relevant evidence undermined the right to a fair trial, as protected under arts 6 (1) and 3(b) and (d) of the Convention. Most notably, he contended that *ex parte* hearings before the judge violated art 6, because no safeguard against judicial bias or error was afforded, nor was there any opportunity to put arguments on behalf of the accused.

<sup>160</sup> OMPI T-228/02 [2006] [133].

This being said, under the ECtHR case law restrictions on the rights of the defence, justified by public interest in non-disclosure, should nevertheless be strictly proportionate and counterbalanced by adequate procedural safeguards followed by the judicial authorities.<sup>161</sup> The CFI accordingly finds that there is a need to notify to the parties concerned the evidence adduced against them in so far as this is reasonably possible, 'either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds', to ensure that they are able to defend their rights effectively.<sup>162</sup> Each time a party is not given the opportunity to be heard before the adoption of one initial decision to freeze funds, then the obligation to state reasons is the necessary 'surrogate' to allow the affected subjects to challenge the lawfulness of that decision.<sup>163</sup>

It is against this background that the Court highlights the importance of the right to effective judicial protection, especially where 'it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights'.<sup>164</sup> Judicial review of the lawfulness of a decision to freeze funds may be provided by the Court upon an action for annulment (Article 230 EC Treaty) brought by affected individuals. The CFI finds in the case under review that the contested decision to include OMPI in the list does not contain a sufficient statement of reasons and thus it violates the applicant's right to a fair hearing. Since the Court

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<sup>161</sup> See the case of *Chahal*, above n 159 [131], [135], where the ECtHR found that in cases concerning national security and terrorism certain restrictions on the right to a fair hearing may be envisaged, especially concerning disclosure of evidence adduced or terms of access to the file, but then added: 'This does not mean, however, that the national authorities can be free from effective control by domestic courts whenever they choose to assert that national security and terrorism are involved'. In *Jasper v the UK*, above n 159 [52]-[3], the same principle implied the need to ensure that the decision-making procedure, as far as possible, 'complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused'. In particular, *Jasper* agreed with the UK Government and the European Human Rights Commission that the right to full disclosure was not absolute and could, in pursuit of a legitimate aim such as the protection of national security or of vulnerable witnesses or sources of information, be subject to limitations. However, in the Court's opinion, any such restriction on the rights of the defence should be strictly proportionate and counterbalanced by procedural safeguards adequate to compensate for the handicap imposed on the defence. The views of the ECtHR were subsequently codified by the Committee of Ministers of the Council of Europe in the *Guidelines on Human Rights and the Fight against Terrorism* (2002) Council of Europe <[http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/fight\\_against\\_terrorism/2\\_adopted\\_texts/Guidelines%20HR%202005%20E.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/2_adopted_texts/Guidelines%20HR%202005%20E.pdf)>. Art IX, under the heading of 'Legal proceedings', affirms that 'a person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law' (para 1). The restrictions to the right of defence mentioned under para 3 include the arrangements for access to and contacts with counsel, the arrangements for access to the case-file and the use of anonymous testimony. Para 4 clarifies that the said restrictions to the right of defence 'must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance'.

<sup>162</sup> *OMPI* T-228/02 [2006] [129].

<sup>163</sup> *Ibid* [141].

<sup>164</sup> *Ibid* [155].

is not in a position to review the lawfulness of the decision contested by the OMPI, it annuls the said act in so far as it concerns the applicant.<sup>165</sup>

The persuasiveness of the Court's argument rests on the departure from the *jus cogens* test and from the heavy reliance on the 'state of emergency' paradigm. The way in which the Court resorts in *OMPI* to the 'balance metaphor' — which is the test to check that the concerns about the confidentiality of intelligence information in counter-terrorism are weighed against the procedural justice standards that must at all times be accorded to individuals — seems more in line with the jurisprudence of the ECtHR concerning proportionality of limitations, as well as with the constitutional traditions common to the member states.<sup>166</sup>

In conclusion, the *OMPI* judgment must be welcomed not only for the findings as to the applicability *in abstracto* of the right to a fair hearing, but also for its reasoning as to the safeguards available to enforce this fundamental right.

#### IV. Concluding Remarks

This chapter has reviewed some of the cases brought before the CFI (ECJ) by individuals and entities seeking judicial review of EU counter-terrorism sanctions, implementing Security Council Resolution 1267 (1999) (and its successor instruments) and Security Council Resolution 1373 (2001). In the first judgments handed down in these cases, the CFI pays (probably) excessive deference to a monist vision of the relationship between the United Nations order and the EU law, postulating an undisputable supremacy of Security Council resolutions adopted under Chapter VII over the EU legal order. The Court thus declines to review the lawfulness not only of Security Council's counter-terrorism sanctions but also of the implementing acts adopted by the European Council under the EC Treaty. The CFI position is not in line with the current picture of the EU system, where as a result of a long work of judicial construction, the protection of fundamental human rights is well entrenched in the EU Treaty.

It is not clear at this stage whether the ECJ may be ready to uphold the more encouraging *OMPI* judgment in future cases arising from the 1267 Sanctions regime. The *OMPI Case* may not, then, constitute the charting of a new direction, nor would it provide an answer to the general question of the *designation* of individuals and entities as 'terrorists'.<sup>167</sup> The CFI's acceptance of a serious lacuna in the EU human rights framework is all the more worrying if one considers the

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<sup>165</sup> Ibid [160]-[74].

<sup>166</sup> The Court makes it clear that only restrictions to the right to a fair hearing, which are admissible under domestic law, may be admissible in the case before it. It satisfies itself that restrictions to the right to be heard in the course of an administrative procedure are permitted in many member states on grounds of public interest, public policy or the maintenance of international relations, or where the purpose of the decision to be taken is or could be jeopardised if the said right is observed (ibid [133]-[4]).

<sup>167</sup> The information note published by *Statewatch* on the *OMPI* judgment (see above n 16) correctly highlights that 'the ruling is limited to the decision to freeze the OMPI's assets, rather than the broader issuer of its designation as "terrorist"'.

lack of alternative avenues of redress open to individuals affected by counter-terrorism measures. Not only must one exclude any significant role for domestic judges when dealing with judicial review of EC measures (with the possible exception of preliminary ruling procedures, which would anyway bring the ball back to the ECJ's court),<sup>168</sup> but also the ECtHR, in the recent *Bosphorus* judgment,<sup>169</sup> appears inclined to exercise judicial review only when fundamental human rights are not otherwise protected in a manner that is equivalent to the protection afforded by the ECHR. However, this outcome is difficult to reconcile with the established case law of the ECtHR, according to which 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.<sup>170</sup>

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<sup>168</sup> 'To help safeguard the uniform application of Community law, Article 234 (ex 177) EC therefore lays down a procedure which enables national courts to refer to the Court of Justice questions of Community law that they have to decide before giving judgment' (Arnull, above n 46, 95).

<sup>169</sup> Above n 71.

<sup>170</sup> *Artico v Italy* (1980) 37 Eur Court HR (ser A) [33].