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# SUSPECTED TERRORISTS' RIGHTS BETWEEN THE FRAGMENTATION AND MERGER OF LEGAL ORDERS: REFLECTIONS IN THE MARGIN OF THE *KADI* ECJ APPEAL JUDGMENT

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In a time of non-conventional global threats evocatively characterized as “the age of terror,”<sup>1</sup> the United Nations (“U.N.”) and regional organizations are expected to address compelling security demands efficiently while at the same time preserving the fundamental human rights of alleged terrorists. How to achieve a fair compromise between such critical objectives is no new dilemma, as states have faced it individually in their endeavors against domestic terrorism. However, in the framework of international action, the impasse is compounded by the interplay between the multiple institutional actors and sources of law involved. In fact, the delegation by states of extensive mandatory powers to intergovernmental organizations has caused international law to pervade into municipal legal systems, and there is an increased use of international norms by domestic courts.<sup>2</sup> The law-making process within international organizations is no longer limited to the regulation of inter-state relations, but also results in the production of rights, obligations, and sanctions for private persons.<sup>3</sup> Perhaps in that sense international law can no longer be

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1. See, e.g., Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004).

2. See Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241 (2008); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82 (2004).

3. While international organizations are typically vested with mere recommendatory powers, in some cases they can adopt mandatory decisions to prescribe courses of action having a bearing on the life of private and legal persons in member States. The paradigmatic example is that of European Union legislative acts, especially within the framework of the Community pillar, but other such instances can be found in international practice: the international standards and procedures adopted by

accurately described as the “law of nations,” insofar as it is also becoming a law for individuals. The U.N. sanctions targeting private persons suspected of association with terrorist organizations of global reach illustrate the direct bearing of international activity on the life of national communities and individual subjects.

An unexpected clash between U.N. collective security action and human rights standards has grown from the de facto expansion of the Security Council’s post-9/11 prerogatives to an extent hardly foreseeable by the drafters of the U.N. Charter (“Charter”). Arguably, from a “policeman” of the international community of states, the Security Council (“Council”) is developing into a world law-enforcement super-structure, using its mandatory Chapter VII powers to take measures immediately impacting the situation of private individuals rather than states.<sup>4</sup> We are witnessing an unprecedented merger of traditionally distinct legal orders, domestic and international. Nonetheless, supporters of monism should not be deluded: as emphasized below, the disorderly expansion of international law, through the multiplication of decision-making fora outside a coherent hierarchic system, often determines a sharp divide. Within this intricate normative context, the role of the judiciary in delimiting admissible qualifications of human rights by national and international authoritative bodies is an increasingly arduous one.

Thus, the legal developments alluded to above raise the question of whether U.N. Security Council determinations (in particular the inclusion of a name on the “blacklists” of alleged terrorists) can be challenged in a court of law (a domestic court or a supra-national tribunal established by a treaty mechanism or by a regional international organization). The hesitant reaction of the judicature to this query is discernible in the case law of the European Community (“EC”) courts on European Union (“EU”) financial measures against suspected terrorists adopted in the furtherance of U.N. Security Council sanctions.

This Article briefly describes the human rights challenges entailed by the U.N. and EU individual financial sanctions, particularly from the

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the Council of the International Civil Aviation Organization (see Articles 37, 54 lett. (l), and 90 of the Convention on International Civil Aviation), the regulations adopted by the Health Assembly of the World Health Organization (see Articles 21 and 22 of WHO Constitution), etc. Moreover, as this article argues, in recent years analogous effects have been brought about by highly controversial U.N. Security Council decisions leading to the adoption of the targeted sanctions discussed below.

4. See Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT’L L. 275 (2008); Nico Krisch, *The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 879, 881, 887 (Christian Walter et al. eds., 2004).

viewpoint of access to justice. It then explores the early tendencies of the Court of First Instance ("CFI") in dealing with complaints from individuals included on EU-incorporated U.N. lists, as opposed to autonomous EU proscription lists. It discusses the two parallel sets of cases and the double standards in the protection of suspects' rights resulting from excessive deference to the Security Council. Against this background, the article subsequently analyzes the recent judgment of the European Court of Justice ("ECJ") on the *Kadi* appeal case of 3 September 2008.<sup>5</sup> The significant shift in jurisprudence signaled by the *Kadi* judgment is the starting point for new reflections on the fragmentation and merger of the legal phenomena in the post-modern world, and on the place of human rights and the rule of law principle in the value system of the international community.

#### I. PUNISHMENT WITHOUT A CRIME? U.N. FINANCIAL SANCTIONS AGAINST SUSPECTED TERRORISTS AND DUE PROCESS RIGHTS

The procedures at the core of the blacklisting mechanism have attracted significant criticism from academics, human rights activists, and governments.<sup>6</sup> At first glance, the imposition of capital-freezing measures by the Security Council is consistent with the widely saluted replacement

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5. Case C-402/05 P, *Kadi v. Council of the European Union*, 2008 E.C.R. I-6351.

6. See Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC J. INT'L L. 159 (2003); Anja Seibert-Fohr, *The Relevance of International Human Rights Standards for Prosecuting Terrorists*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 125, 126 (Christian Walter et al. eds., 2004); Raffaele Cadin, *Le 'liste nere' del Consiglio di sicurezza e il loro recepimento da parte dell'Unione europea: Quali rimedi per i sospetti terroristi?*, in *MIGRAZIONE E TERRORISMO: DUE FENOMENI IMPROPRIAMENTE ABBINATI* 115 (Maria Rita Saulle & Luigino Manca eds., 2006); Iain Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report prepared for the Council of Europe on 6 February 2006, (2006), available at <http://www.coe.int> (search "report Cameron" and click on the fifth result); Enzo Cannizzaro, *A Machiavellian Moment? The UN Security Council and the Rule of Law*, 3 INT'L ORG. L. REV. 189 (2006); Bill Bowring, Background Paper, *The Human Rights Implications of International Listing Mechanisms for 'Terrorist' Organizations*, in U.N. OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS [ODIHR] AND U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS [OHCHR] EXPERT WORKSHOP ON HUMAN RIGHTS AND INTERNATIONAL CO-OPERATION IN COUNTER-TERRORISM: FINAL REPORT 75-113 (Feb. 21, 2007); Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations*, 3 INT'L ORG. L. REV. 437 (2006); Thomas J. Biersteker & Sue E. Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (The Watson Inst. for Int'l Stud. Targeted Sanctions Project, Brown Univ., White Paper, Mar. 30, 2006). See also 2005 World Summit Outcome, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) ("We also call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.").

of general non-military coercive measures with “selective” sanctions, targeting only the political or military leadership of a regime rather than whole populations.<sup>7</sup> However, a more careful examination shows that this is hardly the case. Unlike the targeted sanctions adopted in response to the situation in Angola, Sierra Leone, Liberia, Iraq, D.R. Congo, Côte d’Ivoire, or Sudan,<sup>8</sup> the sanctions introduced by Resolution 1390 (2002) against Osama bin Laden, Al-Qaida members, the Taliban, “and other individuals or entities associated with them”<sup>9</sup> address a new type of global and virtually permanent threat, and their termination is not contingent upon the achievement of an immediate political goal.<sup>10</sup> More importantly, the focus of the collective security mechanism has shifted towards private

7. See August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT’L L. 851, 851–52, (2001).

8. After the pioneer Security Council Resolution (“Resolution”) 1127 of 1997 imposing travel sanctions on UNITA leaders, S.C. Res. 1127, ¶ 4, U.N. Doc. S/RES/1127 (Aug. 28, 1997), complemented by Resolutions 1173 and 1176 of 1998 deciding financial sanctions on UNITA members, S.C. Res. 1173, ¶ 11, U.N. Doc. S/RES/1173 (June 12, 1998); S.C. Res. 1176, U.N. Doc. S/RES/1176, targeted measures were adopted in reaction to the situation in Sierra Leone, S.C. Res. 1132, ¶¶ 5, 10, U.N. Doc. S/RES/1132 (Oct. 8, 1997); S.C. Res. 1171, ¶ 5, U.N. Doc. S/RES/1171 (June 5, 1998), Liberia, S.C. Res. 1306, U.N. Doc. S/RES/1306 (July 5, 2000); S.C. Res. 1343, ¶¶ 2, 7, 14 U.N. Doc. S/RES/1343 (Mar. 7, 2001); S.C. Res. 1521, ¶¶ 4, 18, 19, 21, 22, U.N. Doc. S/RES/1521 (Dec. 22, 2003); S.C. Res. 1532, ¶¶ 1, 4, 5, U.N. Doc. S/RES/1532 (Mar. 12, 2004), Iraq, S.C. Res. 1483, ¶¶ 19, 23, U.N. Doc. S/RES/1483 (May 22, 2003); S.C. Res. 1518, ¶¶ 1, 2, U.N. Doc. S/RES/1518 (Nov. 24, 2003), Democratic Republic of Congo, S.C. Res. 1493, ¶ 20 U.N. Doc. S/RES/1493 (July 28, 2003); S.C. Res. 1596, ¶¶ 13, 15, 18, U.N. Doc. S/RES/1596 (May 3, 2005); S.C. Res. 1649, ¶ 2, U.N. Doc. S/RES/1649 (Dec. 21, 2005), Côte d’Ivoire, S.C. Res. 1572, ¶¶ 9, 11, 14 U.N. Doc. S/RES/1572 (Nov. 15, 2004); S.C. Res. 1643, ¶ 3, U.N. Doc. S/RES/1643 (Dec. 15, 2005), Sudan, S.C. Res. 1591, ¶ 3, U.N. Doc. S/RES/1591 (Mar. 29, 2005); S.C. Res. 1672, ¶ 1, U.N. Doc. S/RES/1672 (Apr. 25, 2006).

9. This resolution extends the sphere of application of the sanctions initially decided under Resolution 1267 (1999) against Osama Bin Laden and the Taliban. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999). Under paragraph 2(a) of Resolution 1390, U.N. Member States were required to

[f]reeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons’ benefit, by their nationals or by any persons within their territory.

S.C. Res. 1390, ¶ 2(a), U.N. Doc. S/RES/1390 (Jan. 28, 2002). These obligations were reiterated by Resolutions 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), and 1822 (2008). See S.C. Res. 1452, U.N. Doc. S/RES/1452 (Dec. 20, 2002); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008).

10. See Cameron, *UN Targeted Sanctions*, *supra* note 6, at 164: “Resolution 1390 is ‘open-ended’ and so involves a qualitative difference in that there is no connection between the targeted groups/individuals and any territory or state.”

individuals, whose “association” with terrorism is difficult to ascertain,<sup>11</sup> and all the more so in the presence of secretive organizations.<sup>12</sup> Sanctions against persons belonging to the public sphere (regime leaders or armed rebels), in response to patent, uncontroversial conduct, and intended to constrain the targeted individuals to adopt a certain course of action, are very different from sanctions adopted against mere suspects of no public notoriety and based on unreliable intelligence material, speculating on any kind of “association” at the will of the executives. In using this scheme, the Security Council has started to perform global law-enforcement tasks, except no specific laws define the relevant crimes, and no court assesses guilt prior to the infliction of sanctions.

In fact, the Sanctions Committee (“Committee”) established by the Security Council to that end<sup>13</sup> receives proposals by Member States (“States”), mostly justified by confidential intelligence material,<sup>14</sup> and

11. The resolutions enabling the blacklisting mechanism, including the most recent, Resolution 1822 (2008), leave excessive room for arbitrary conduct by the executive branches, insofar as an individual or group can be found to be associated with Al-Qaida or the Taliban if, among other things, he or she “otherwise support[s] [their] acts or activities.” S.C. Res. 1822, ¶ 2(d), U.N. Doc. S/RES/1822 (June 30, 2008) (emphasis added). The assessment is not made by impartial tribunals. Some criteria for association are laid down by Resolution 1617 (2005):

[The Security Council] further decides that acts or activities indicating that an individual, group, undertaking, or entity is “associated with” Al-Qaida, Usama bin Laden or the Taliban include:—participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;—supplying, selling or transferring arms and related materiel to;—recruiting for; or—otherwise supporting acts or activities of; Al-Qaida, [O]sama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

S.C. Res. 1617, ¶ 2, U.N. Doc. S/RES/1617 (July 29, 2005). As this provision indicates, the criteria for “association” are extremely broad.

12. See Cameron, *UN Targeted Sanctions*, *supra* note 6, at 165–66, 168–70; Cadin, *supra* note 6.

13. The functions of the “Al-Qaida and Taliban Sanctions Committee” or “1267 Committee,” one of the various Sanctions Committees established by the Security Council *ratione materiae*, were decided by Resolution 1267 (1999) and subsequently modified by Resolutions 1390 (2002), 1526 (2004), and 1617 (2005). See S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005).

14.

As regards terrorist suspects, secret intelligence material can be assumed almost invariably to lie behind the listing . . . . On the occasions in which a sanctions committee member has asked a designating state for the basis of a particular blacklisting to be disclosed, and this basis is intelligence or diplomatic material, the reply has been given that the information comes from a reliable source, but that national security considerations rule out disclosing it. . . . Thus, the sanctions committees as such have rarely, or ever, evaluated the “evidence” that the named person is engaged in activities involving a threat to international peace and security.

IAIN CAMERON, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, DUE PROCESS AND UNITED NATIONS SECURITY COUNCIL COUNTER-TERRORISM SANCTIONS, REPORT PREPARED FOR THE COUNCIL OF EUROPE, FEB. 6, 2006, at 5 (2006), [http://www.coe.int/t/f/affaires\\_juridiques/coop%](http://www.coe.int/t/f/affaires_juridiques/coop%20)

draws a list of suspected persons and associations whose funds are to be frozen by States having jurisdiction thereover. Some evidentiary information is required for designating States to submit to the other States in the Committee,<sup>15</sup> but, according to the Guidelines of the Sanctions Committee on listing proposals by States (“Guidelines”), “[a] criminal charge or conviction is not necessary for inclusion on the Consolidated List as the sanctions are intended to be preventive in nature.”<sup>16</sup>

Furthermore, the working Guidelines do not envisage the prompt notification of the proscribed individuals by the Sanctions Committee as to the reasons for their inclusion on the list. It is true that the problem of secrecy has been addressed, to a certain extent, by Resolution 1735 (2006), which now requires the States directly concerned by the decision (the State where the individual is located and the State of nationality) to notify the listed subjects of the designation, of the reasons for designation (limited to publicly disclosable information), of the effects of the designation, and of the de-listing procedures.<sup>17</sup> The Guidelines of the Committee establish no obligation of notification for the Committee itself and only foresee a gentle reminder the Secretariat is to address to the States concerned (who are obliged to proceed to notification by virtue of Resolution 1735).<sup>18</sup> One aspect worth noticing is that it is up to the

E9ration\_juridique/droit\_international\_public/Textes\_&\_documents/2006/I.%20Cameron%20Report%2006.pdf.

Resolution 1617 began to address criticism for the lack of transparency of the blacklisting procedure, providing the release of some information. S.C. Res. 1617, ¶ 6, U.N. Doc. S/RES/1617 (July 29, 2005). Further reform was sought through Resolution 1735. S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

15. See Guidelines of the [Sanctions] Committee for the Conduct of Its Work (Adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, and 9 December 2008), at point 6 lett. (d) [hereinafter Guidelines], available at [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf).

16. *Id.* at point 6 lett. (c). See also paragraph 10 of the preamble to Resolution 1735 (2006), in which the measures decided by the Security Council are said to be preventative and independent from criminal rules under domestic legislations. However, see the perplexities of the Analytical Support and Monitoring Team in its Fourth Report, S/2006/154 of 10 March 2006, ¶ 49.

17. Resolution 1735 (2006) calls upon the State where the individual is located and the State of nationality

to take reasonable steps according to their domestic laws and practices to notify or inform the listed individual or entity of the designation and to include with this notification a copy of the publicly releasable portion of the statement of case, a description of the effects of designation . . . , the Committee’s procedures for considering delisting requests . . . .

S.C. Res. 1735, ¶ 11, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

18. In fact, the Secretariat notifies and “remind[s]” such State(s) to inform the individuals of the measure, of listing and de-listing procedures, attaching “a copy of the publicly releasable portion of the statement of case, a description of the effects of the designation . . . , the Committee’s procedures for considering delisting requests” and humanitarian exceptions provisions. See Guidelines, *supra* note 15, at point 6 letter (j).

designating State(s) to indicate what portion(s) of the statement of the case (in support of a proposed listing) the Committee may publicly release or release to Member States upon request.<sup>19</sup> In addition, the selective notification as to the statement of the case does not involve access of the individual to the file, and thus to the specific pieces of evidence.

A further, and more troubling, pitfall of blacklisting is that the Guidelines do not establish a procedure enabling the individuals concerned to challenge the allegations and evidence against them before an independent body. The proscribed individuals do not have a proper *right* to contest a listing decision and obtain the re-examination of their case. Re-examination with a view to cancellation from the list is actually only a mere *possibility*. Following a weak reform of the mechanism pursuant to Resolution 1730 (2006),<sup>20</sup> individuals can now file a petition with the focal point for de-listing within the U.N. Secretariat.<sup>21</sup> However, after the petition has been filed, re-examination depends on the discretionary intercession of a State in the Sanctions Committee willing to bring the issue on the body's agenda.<sup>22</sup> Thus, the direct petitioning system introduced by Resolution 1730 (2006) does not eliminate the critical aspects of the mechanism in terms of defense rights: (a) no review process is guaranteed—de-listing consultations cannot be started without the initiative of a State in the Committee, and such initiative is left at the

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19. *See id.* at point 6 lett. (d).

20. Resolution 1730 has very limited achievements: formal accession of individuals to the de-listing procedure (which remains inter-governmental in nature), and the possibility for States other than the State of nationality or residence to place the case on the Committee's agenda. S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006). In addition, it introduces a further element of concern: while the procedure *ex Res. 1730 (2006)* was thought of as an alternative to the intervention of the States of nationality, such States are allowed to establish the compulsory (and exclusive) petitioning to the focal point, with the result that governments may elude the scrutiny of domestic courts over abusive refusal to address the Sanctions Committee for de-listing. *See* Maurizio Arcari, *Sviluppi in tema di tutela dei diritti di individui iscritti nelle liste dei comitati delle sanzioni del Consiglio di sicurezza*, in 90 RIVISTA DI DIRITTO INTERNAZIONALE 657, 662–64 (2006).

21. This option was only recently opened to proscribed individuals by Resolution 1730, which established a focal point where de-listing requests from individuals can be filed. S.C. Res. 1730, *supra* note 20. Prior to that, the initiative of the State of nationality or residence was required in order for the Sanctions Committee to consider the cancellation of a name from the list. This procedure presented the typical flaws of the institution of diplomatic protection, insofar as the individual depended on the State's willingness to take the de-listing initiative, and States are generally moved by considerations of political opportunity. For a critical description of the mechanism in place before Resolution 1730 (2006), see Cameron, *UN Targeted Sanctions*, *supra* note 6, at 176–77.

22. The focal point for de-listing has the limited task of forwarding the requests for information and comments to the designating government(s) and government(s) of residence and citizenship, which, after consultations, may call for the request to be placed on the Committee's agenda; if none of these governments takes action, the focal point notifies the request to all States, and the initiative of one member is sufficient to place the issue on the Committee's agenda. *See* S.C. Res. 1730, *supra* note 21, at points 5–6 of the "De-listing procedure" annexed document.

discretion of States; (b) no independent third-party is authorized to control the accuracy of the Committee's determinations and adopt a de-listing decision: the same body, the Sanctions Committee—incidentally, a political body—, decides to include an individual on the list, and revises the decision; and (c) the individual is not entitled to participate in and argue his or her case during the proceedings.

This sanctions system opens the door to a scenario in which suspects find themselves deprived of any financial resources and ineligible for future payments for an indefinite duration, without having been charged with any offense whatsoever, or enabled to challenge the relevant decision. Against this background, the question almost suggests itself: is this punishment without a crime? In the light of its duration and far-reaching effects, funds-freezing resembles a criminal penalty,<sup>23</sup> and, in any legal order based on the rule of law,<sup>24</sup> such a punishment should only be inflicted after a tribunal has irrevocably determined guilt.

Now, the freezing of funds has been described by the Security Council's Sanctions Committee as a preventive administrative measure rather than a penalty.<sup>25</sup> However, as the case law of the European Court of Human Rights ("ECHR") indicates, the notion of "criminal" charge is determined not only by the legal classification of the offense, but also by the nature and severity of the possible penalty.<sup>26</sup> The effect of inclusion on the proscription list is long-term deprivation of any current or prospective financial assets,<sup>27</sup> and heavily impacts the moral and economic credibility

23. On the punitive character of the funds-freezing measures, see ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* 352–53 (2004).

24. Undoubtedly, upholding the rule of law is amongst the programmatic objectives of the United Nations, and arguably an obligation to adopt measures consistent with the rule of law binds the organs of the organization, at least by virtue of the good faith principle. *See id.* at 195–98; DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER (LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE)* 163–285 (2001).

25. *See* Letter dated 2 September 2005 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida, the Taliban, and associated individuals and entities ("1267 Committee"), addressed to the President of the Security Council, ¶¶ 37, 41, U.N. Doc. S/2005/572 (Sept. 9, 2005) ("The sanctions are intended as a deterrent as well as a set of preventative measures . . . . [T]he sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures such as freezing assets . . . ."). *See also* Guidelines, *supra* note 15, at point 6 lett. (c).

26. *See* Engel v. The Netherlands, 22 Eur. Ct. H.R. (ser. A) at 35 (1976); Putz v. Austria, 1996-I Eur. Ct. H.R. 312, 324 (1996); Pierre-Bloch v. France, 1997-VI Eur. Ct. H.R. 2206, 2224–2226 (1997).

27. Only limited "humanitarian" exceptions are permitted. *See* S.C. Res. 1452, ¶ 1(a), U.N. Doc. S/RES/1452 (Dec. 20, 2002) (outlining terms in which States may release a limited amount of funds to enable the targeted individual to satisfy some basic needs, such as aliments, lodging expenses, medical care, etc.).

of those listed,<sup>28</sup> and therefore could arguably be considered as the equivalent of a criminal sanction. Further, according to the same prominent jurisprudence, a person is considered to be “charged” when the authorities take measures implying an allegation that he or she has committed a criminal offense, and substantially affecting the situation of the suspect.<sup>29</sup> Such an implication is undoubtedly present in the inclusion of a name on the proscription list and in the adoption/maintenance of the freezing measure. Alternatively, if being placed on the list does not imply a criminal charge, a person has, in any event, a right of access to a judge in a dispute over any civil rights, such as many of the rights at stake for persons listed as alleged terrorists or supporters of terrorism: right to private life, reputation, or enjoyment of property.<sup>30</sup>

The U.N. terrorism blacklisting mechanism fails to secure the defense rights of suspects, and consequently all other rights are possibly infringed. Unsurprisingly, this situation has led to litigation before national and regional courts.

## II. LOST BETWEEN JURISDICTIONS: CFI PARALLEL CASE LAW ON U.N. AND EU BLACKLISTS AND THE DOUBLE STANDARDS IN THE PROTECTION OF SUSPECTS' RIGHTS

Judicial review of global counter-terrorism measures is an area in which the lack of coordination between jurisdictions particularly affects the prospective outcome of claims by alleged terrorists. This remark is

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28. The social stigma, as well as the economic consequences flowing from the lack of moral and financial credibility, should not be underestimated. See Cameron, *UN Targeted Sanctions*, *supra* note 6, at 171–72; C. Eckes, *How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of SEGI*, in 17 THE KING'S C. L.J. 144, 150–51 (2006). The social impact has been, however, oddly minimized by the ECHR. See *SEGI v. 15 States of the European Union*, ECHR decision of 23 May 2002, ¶ 6, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search HUDOC collection for “App. No. 9916/02,” then follow “SEGI and others” hyperlink).

29. See *Foti v. Italy*, 56 Eur. Ct. H.R. (ser. A) at 18 (1982). The publication of a warrant, search of premises or persons, and other activities with direct effect on the individual can be considered to indicate that he or she is alleged to have committed an offense.

30. An individual's right to court “in the determination of his civil rights and obligations or of any criminal charge” has also been widely discussed by the European Court of Strasbourg. In the landmark case *Ringeisen v. Austria*, the court clarified that the expression “civil rights and obligations” is to be given a broad interpretation as to cover all proceedings that determine private rights and obligations, whatever the character of applicable legislation and irrespective of the competent authority. See *Ringeisen v. Austria*, 13 Eur. Ct. H.R. (ser. A) at 39 (1971). Almost all rights set forth by domestic law (including those that are not conventionally guaranteed) are considered “civil rights,” such as the right to enjoy honor and a good reputation. See *Kurzac v. Poland*, ECHR judgment of 22 Feb. 2001, ¶ 20, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search HUDOC collection for “App. No. 31382/96,” then follow “Case of Kurzac” hyperlink).

persuasively supported by the case law of European Community courts regarding EC measures adopted to give effect to U.N. decisions. As is known, European Union Member States (“EU States”) put into operation the measures decided by the Sanctions Committee through EU and EC instruments, essentially common positions followed by implementing regulations or decisions.<sup>31</sup> EU institutions also adopt financial sanctions autonomously, within the general framework provided by U.N. Security Council Resolution 1373 (2001) of 28 September 2001, using a similar procedure to draw their own nominal lists based on information and requests by the EU States.<sup>32</sup> Individuals and associations on either of the two categories of lists in the EU States can seek relief before the EC courts. However, according to the judgments of the CFI on the matter, the claims result in very different outcomes depending on the origin of the list.

The *Yusuf, Kadi, Ayadi*, and *Hassan* decisions<sup>33</sup> evidenced that the CFI considered its jurisdiction to be precluded by the primacy of U.N. Charter obligations over any other international obligations, whether human rights treaty obligations or obligations deriving from EU membership.<sup>34</sup> Security

31. In order to give effect to Resolution 1390 (2002), the EU Council on May 27, 2002, acting under the powers conferred by Article 11 of the Treaty of the European Union in connection to external relations, adopted Common Position 2002/402/CFSP concerning restrictive measures against Osama bin Laden, members of the Al-Qaida organization and the Taliban, and other individuals, groups, undertakings, and entities associated with them. Starting with EC Regulation 881/2002 of May 27, 2002, the EC regulations based on the common positions automatically endorsed the lists without submitting their contents to control or revision. The EU Council has adopted several common positions and decisions updating both the EU lists and the lists established according to the decisions of the 1267 Committee. See Council Decision 2007/868/EC of 20 December 2007 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 Council Decision 2007/445/EC; Commission Regulation (EC) No. 760/2007 of 29 June 2007, updating Council Regulation (EC) No. 881/2002 and repealing Council Regulation (EC) No. 467/2000, 2007/871/CFSP; Council Common Position 2007/871/CFSP of 20 December 2007 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2007/448/CFSP; Council Decision 2007/445/EC of 28 June 2007, implementing Article 2(3) of Regulation No. 2580/2001 and repealing Decisions 2006/379/EC and 2006/1008/EC.

32. On the EU listing procedure, see Iain Cameron, *European Union Anti-Terrorist Blacklisting*, HUM. RTS. L. REV. 2, 225 (2003).

33. See Sandro Cerini, *Blacklisting e diritti fondamentali: Il regolamento del Consiglio n. 881 del 27.5.2002 non sopravvive al vaglio della Corte di giustizia*, 30 RIVISTA DELLA COOPERAZIONE GIURIDICA INTERNAZIONALE 288 (2008).

34. Case T-306/01, *Yusuf v. Council of the European Union*, 2005 E.C.R. II-3533.

From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.

*Id.* ¶ 231. See, e.g., Case T-315/01, *Kadi v. Council of the European Union*, 2005 E.C.R. II-3649, 3712 ¶ 181; Case T-253/02, *Ayadi v. Council of the European Union*, 2006 E.C.R. II-2139, 2186 ¶ 116;

Council resolutions under Chapter VII were considered to be U.N. Charter obligations within the meaning of Article 103, by virtue of Article 25.<sup>35</sup> Consequently, according to the CFI, “the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and . . . the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law.”<sup>36</sup> The argument is not particularly convincing if we consider that Article 103 merely regulates conflict of norms, and that nowhere in the Security Council resolutions or the Guidelines of the Sanctions Committee are States prevented from receiving complaints from the proscribed individuals after they enforce the funds-freezing decisions; there is, thus, no conflict between the relevant U.N. binding decisions and the exercise of the CFI’s prerogatives pursuant to the EC Treaty. The conflict may indeed arise subsequently, in the event the CFI quashes an EC-implementing regulation and establishes that funds must be unfrozen, but judicial review itself is arguably not barred by the supremacy of U.N. Charter obligations.

Irrespective of the permissibility of judicial review of the U.N. decision, the issue arises whether the CFI could exercise jurisdiction over EC implementation measures. In that respect, the CFI found that Community institutions, bound by the EC Treaty to further EU States’ international obligations, “acted under circumscribed powers, with the result that they had no autonomous discretion.”<sup>37</sup> Consequently, the argument goes, EC legislation adopted in order to give effect to the Security Council’s binding resolutions cannot be submitted to judicial review before the EC courts either. This contention is even more questionable, insofar as a court’s jurisdiction over EC acts, clearly based on the EC Treaty, does not depend on the objective pursued by their adoption: it is irrelevant for the purposes of the court’s jurisdiction if the adopting institutions intended to lay the basis for autonomous EC policy or to further international obligations.

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Case T-49/04, *Hassan v. Council of the European Union*, CFI judgment of 12 July 2006, ¶ 92, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search for “case number T-49/04,” then follow “T-49/04, Judgment, 2006-07-12” hyperlink).

35. See Case T-306/01, *Yusuf*, ¶ 234 (“Primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations.”). See also Case T-315/01, *Kadi*, ¶ 184; Case T-253/02, *Ayadi*, ¶ 116; Case T-49/04, *Hassan*, ¶ 92.

36. Case T-306/01, *Yusuf*, ¶ 276; Case T-315/01, *Kadi*, ¶ 225; Case T-253/02, *Ayadi*, ¶ 116; Case T-49/04, *Hassan*, ¶ 92.

37. Case T-306/01, *Yusuf*, ¶ 265; Case T-315/01, *Kadi*, ¶ 214; Case T-253/02, *Ayadi*, ¶ 116; Case T-49/04, *Hassan*, ¶ 92.

Apparently in an attempt to offset its deference to the Security Council, the CFI sought a compromise solution. The CFI deemed itself “empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations.”<sup>38</sup> From a practical point of view, this solution is of little consequence, since, as is known, the number of indisputable *jus cogens* norms in international law is minimal. From a legal point of view, it is, on the other hand, inaccurate: the CFI’s residual competence is misleadingly based on the scope of application of a normative source (*jus cogens*) rather than on rules of jurisdiction.<sup>39</sup> It is true that a causal relationship between *jus cogens* and judicial review, to the effect that *jus cogens* violations may result in immunity from review being lifted, has been established in connection to other fields, such as immunity of foreign states from jurisdiction.<sup>40</sup> However, in that case, the existence of *jus cogens* norms applicable to the case did not *create* jurisdiction, but removed the exemption from (pre-existing) jurisdiction. To put it differently, *jus cogens* does not create jurisdiction where it does not exist; at best, it removes an exemption from

38. Case T-306/01, *Yusuf*, ¶ 277; Case T-315/01, *Kadi*, ¶ 226; Case T-253/02, *Ayadi*, ¶ 116; Case T-49/04, *Hassan*, ¶ 92.

39. Indeed, it is one thing to assert that all subjects of international law are bound by imperative norms, and a very different one to derive therefrom that a court has jurisdiction over the acts of a legal subject as far as the control of conformity to *jus cogens* is concerned. There has been some doctrinal contestation of the basis of the CFI finding to the effect that it could review U.N. acts from a *jus cogens* point of view.

In the present international legal order, lacking a centralised and fully developed judiciary, it is up to the Security Council to decide on the form of legal protection to be included in the sanctions regime. . . . [T]he ICJ, the principal judicial organ of the UN, is the only judicial organ that potentially has the power to scrutinize Security Council resolutions. . . . It is, therefore, unclear on what basis the CFI considered itself competent to ‘check, indirectly, the lawfulness of the resolutions of the Security Council’.

Ramses Wessel, *Editorial: The UN, the EU, and Jus Cogens*, 3 INT’L ORG. L. REV. 1, 4-5 (2006).

40. See *Ferrini v. Federal Republic of Germany*, Cass., sez. un. civ., 11 Mar. 2004, n. 5044/04; see contra *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37 (2001); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79 (2001); *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. 157 (2001); *Jones v. Al-Arabiya* [2006] UKHL 26 (U.K.) (appeal taken from Eng.). The legal literature on the relationship between *jus cogens* and immunity is quite extensive. See Andrea Bianchi, *Ferrini v. Federal Republic of Germany*, 99 AM. J. INT’L L. 242 (2005); Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT’L L. 89 (2005); Lorna Mc Gregor, *State Immunity and Jus Cogens*, 55 INT’L & COMP. L.Q. 437 (2006); Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741 (2003); Carlo Focarelli, *Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision*, 54 INT’L & COMP. L.Q. 951 (2005); Emmanuel Voyiakis, *Access to Court v. State Immunity*, 52 INT’L & COMP. L.Q. 297 (2003); Ed Bates, *State Immunity for Torture*, 7 HUM. RTS. L. REV. 651 (2007).

the default jurisdiction. That said, even if a court lacks jurisdiction over the acts of a given body, the possibility of *incidental* jurisdiction remains open to discussion: it might be necessary for a court analyzing an act falling within its jurisdiction to first examine the lawfulness of an act outside its jurisdiction on which the first act is based. Some authors have indeed argued for such a possibility in the case of Security Council resolutions,<sup>41</sup> which would imply their diffuse control by the domestic courts of those countries implementing such resolutions in light of domestic and international law; however, this solution is not to be connected with the personal scope of *jus cogens*, but with the necessity of assessing the lawfulness of the original source of an act before deciding the lawfulness of the act itself. Nevertheless, despite this proclaimed self-restraint, the CFI ultimately took upon itself the task of balancing the competing interests involved when it contended:

In the circumstances of this case, 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 in accordance with the Charter of the United Nations.<sup>42</sup>

The above-mentioned judgments, while very few, did lay down a consistent pattern for the CFI to follow in cases regarding EC measures adopted to give effect to U.N. sanctions in other fields. In the 2007 *Minin* case,<sup>43</sup> the CFI discussed the claim introduced by an individual on the proscription list drawn by the Sanctions Committee for Liberia,<sup>44</sup> and used the same line of argument defined in *Yusuf* and the other terrorist lists cases. The CFI's contention was, again, that the preeminence of the U.N. legal order over that of the EC limits the control of legality by EC judicature, with the exception of *jus cogens* violations.<sup>45</sup>

The case law on U.N. proscription lists implemented by the EU has developed in sharp contrast with the case law on analogous financial sanctions autonomously adopted by the European Union institutions, in particular the *OMPI* judgment of 2006, and the *Sison* and *Sichting*

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41. See Cannizzaro, *supra* note 6.

42. Case T-306/01, *Yusuf*, ¶ 344.

43. Case T-362/04, *Minin v. Council of the European Union*, 2007 E.C.R. II-2003.

44. At stake were the EC implementation measures of the decisions made by the Sanctions Committee established by Resolution 1521 (2003) in connection with the situation in Liberia, particularly the funds freezing decisions pursuant to Resolution 1532 (2004).

45. Case T-362/04, *Minin*, ¶¶ 100–101.

judgments of 2007.<sup>46</sup> Absent the jurisdictional barrier, the CFI found that the obligation to observe the defense rights of suspects requires the institutions to notify the individuals of the reasons leading to the measure immediately after it was adopted, and to afford them a fair hearing if they so request.<sup>47</sup> Emphasis was placed on the consequences of the disproportionate reliance on confidentiality by the EU institutions, which presents two downsides.<sup>48</sup> First, the denial of access to the information in suspects' files impairs their right to express their viewpoint on the factual elements against them. Also, the courts are not placed in a position to perform their supervisory function,<sup>49</sup> which includes assessing evidence, especially when it is the only procedural guarantee of a fair balance between individual and collective interests.<sup>50</sup>

As the latest judgment of the CFI of October 2008 on the new *OMPI* application underscores, the broad discretion enjoyed by the EU Council in the sphere of economic and financial sanctions “does not mean that the Court is not to review the interpretation made by the Council of the relevant facts”,<sup>51</sup> quite to the contrary, “where a Community institution enjoys broad discretion, the review of observance of certain procedural guarantees is of fundamental importance.”<sup>52</sup> On the same occasion the CFI also stressed the importance of the accurate revision of the grounds for

46. See Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* (“*OMPF*”), 2006 E.C.R. II-4665; Case T-47/03, *Sison v. Council of the European Union*, 2007 E.C.R. II-73; Case T-327/03, *Stichting Al-Aqsa v. Council of the European Union*, 2007 E.C.R. II-79.

47. *OMPI*, ¶¶ 125–126, 137.

48. See *Stichting*, ¶ 61:

The state of uncertainty in which . . . the applicant has been left, regarding the actual and specific reasons for its inclusion in the list at issue, has been exacerbated by the reply given, even before this action was brought, to its request for access to all the documents made use of by the Council before adopting the decision originally challenged. [Access was denied] on the ground that the only document concerned . . . was classified as ‘CONFIDENTIAL EU’ and that its disclosure would undermine the protection of the public interest as regards public security and international relations.

49. See *id.* ¶ 58:

[T]he statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof.

See also *OMPI*, ¶ 98.

50. *OMPI*, ¶¶ 153–155.

51. *Id.* ¶ 138.

52. See Case T-256/07, *People's Mojahedin Org. of Iran v. Council of the European Union*, CFI judgment of 23 Oct. 2008, ¶¶ 137–139, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search for “case number T-256/07,” then follow “T-256/07, Judgment, 2008-10-23” hyperlink).

maintenance of proscription at regular intervals: the decision to maintain a name on the list must be adopted by the EU Council following the verification of the existence of a decision taken by a competent national authority on the basis of credible evidence.<sup>53</sup>

Clearly, U.N. and EU sanctions regimes are similar in terms of information collection, decision-making process, and impact upon the individuals concerned. What accounted for the radically different judicial outcome was the sole institutional origin of the proscription list: while the CFI upheld fair trial guarantees in EU blacklisting cases, no judicial remedy was acknowledged against sanctions resulting from mere incorporation of Security Council lists into EU law.

The creation of a barrier to judicial review for measures implementing Chapter VII resolutions found support in the stances of other judiciatures, whether national tribunals or the European Court of Human Rights.<sup>54</sup> They were based on various legal constructions converging into judicial self-restraint. One such construction relies on the paramountcy doctrine, affirming the prevalence of Security Council resolutions over human rights treaties by virtue of Article 103. Thus, in its 2006 *Al-Jedda* decision,<sup>55</sup> the London Court of Appeal found that action undertaken by a multinational force, authorized by a Chapter VII resolution to adopt all necessary measures to maintain security and stability in Iraq, falls within the scope of Charter “obligations” whose paramountcy is ensured by Article 103, and renders obligations arising from the ECHR inoperative.<sup>56</sup> In its 2007 judgment on the *Al-Jedda* appeal case,<sup>57</sup> the House of Lords (“HL”) confirmed that the detention was not contrary to the right to liberty under Article 5, paragraph 1 of the ECHR (and under the U.K. Human Rights Act of 1998), because the application of that provision was restricted by virtue of the operation of Articles 25 and 103 of the U.N. Charter.<sup>58</sup> According to the HL, the United Kingdom was bound to

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53. *Id.* ¶¶ 177–183. In the particular case, the EU Council had failed to re-evaluate its assessment in the light of the finding of the U.K. Proscribed Organisations Appeal Commission to the effect that the decision of the Home Secretary had been “unreasonable” and “perverse.” *Id.*

54. See *infra* the case law of U.K. courts, the Court of First Instance of the European Communities, and the European Court of Human Rights.

55. See *R (on the application of Al-Jedda) v. Sec’y of State for Defence (“Al-Jedda I”)*, [2006] EWCA (Civ) 327 (Eng.). At stake was the arrest and detention without trial of the plaintiff, on suspicion of terrorist affiliation, by British forces acting as part of a multinational force under the authority of Security Council Resolution 1546.

56. See *Al-Jedda I*, ¶¶ 77–81.

57. *R (on the application of Al-Jedda) v. Sec’y of State for Defence (“Al-Jedda II”)*, [2007] UKHL 58 (U.K.) (appeal taken from Eng.).

58. See *Al-Jedda II*, ¶¶ 30–36.

exercise its power of detention authorized by the Security Council wherever necessary for imperative reasons of security.<sup>59</sup>

Another ground for judicial self-restraint is the equivalent protection doctrine, underpinning the presumption of respect for human rights in a given legal order, such as the EU or the U.N. Thus, in the *Bosphorus* case,<sup>60</sup> the decision of the European Court of Human Rights to abstain from review was based on the alleged presumption of equivalence in human rights protection between the EC legal order and the European Convention, coupled with the fact that the respondent EC State had had no discretion in the transposition of the relevant EC act.<sup>61</sup> The ECHR also established that this presumption could only be rebutted by manifest violations.<sup>62</sup>

Third, de facto judicial immunity of measures carried out under a U.N. Chapter VII resolution is motivated by “exclusive U.N. imputability,” a thesis alleging that action required or authorized by the Security Council is attributable to the U.N. rather than to the States materially carrying out the operations.<sup>63</sup> The consequence of non-imputability is the paralysis of the

59. See *Al-Jedda II*. For a brief analysis of the House of Lords judgment, see Alexander Orakhelashvili, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, 102 AM. J. INT’L L. 337 (2008).

60. See *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* (“*Bosphorus*”), 2005-VI Eur. Ct. H.R. 113. The case regarded the seizure of an aircraft adopted by the respondent EC State in the furtherance of an EC compulsory act implementing a U.N. embargo decision. See Frank Hoffmeister, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland*, App. No. 45036/98, 100 AM. J. INT’L L. 442 (2006).

61. See *Bosphorus*, ¶¶ 152–155:

The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation . . . . On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. . . . In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.

See also *id.* ¶¶ 159–165 on the arguments for the presumption of Convention compliance of the European Union protection of fundamental rights.

62. See *Bosphorus*, ¶ 156:

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.

63. See *Behrami v. France and Saramati v. France* (“*Behrami and Saramati*”), ECHR judgment of 2 May 2007, ¶ 151, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search HUDOC

treaty-based systems of human rights protection, which do not bind international organizations, especially in terms of enforcement mechanisms.<sup>64</sup> In the *Behrami and Saramati* joint decision,<sup>65</sup> the European Court of Human Rights established that the actions of an international security force (such as unlawful detention), or the inactions of a civil administration (such as failure to de-mine), are attributable to the U.N. when such international presences operate on the basis of U.N.-delegated command pursuant to Chapter VII of the U.N. Charter.<sup>66</sup> The ECHR derived therefrom that it lacked competence *ratione personae* to entertain the claim.<sup>67</sup> Putting forward rather questionable argumentation, the ECHR considered that the delegation of U.N. Security Council powers to States acting collectively was sufficiently clear and limited to maintain the central role of the Security Council, despite the evident lack of “direct operational control.”<sup>68</sup> Also, the court failed to address the possibility of

Collection for “App. No. 71412/01,” then follow “Behrami and Behrami” hyperlink): “In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States . . . .”

64. As is known, international and regional conventions aimed at securing fundamental human rights include procedures available to individuals (most significantly complaints before judicial or quasi-judicial bodies) only as against violations allegedly committed by States parties (Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, Article 34 of the European Convention on Human Rights, Article 44 of the American Convention on Human Rights, Article 22 of the UN Convention against Torture, etc.). If an action by a State party infringing a protected right under such instruments is considered attributable to an organization of which that State is a member rather than to the State itself, individuals will be deprived of these conventional guarantees, for their complaints will be found inadmissible *ratione personae*.

65. The common decision in *Behrami and Saramati* attributed acts performed by EC States with the authorization of the Council (KFOR, UNMIK) to the U.N. as a distinct entity. See Pierre Bodeau-Livinec et al., *Behrami & Behrami v. France; Saramati v. France, Germany & Norway*, 102 (2) AM. J. INT’L L. 323 (2008); Paolo Palchetti, *Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell’uomo: i casi Behrami e Saramati*, 3 RIVISTA DI DIRITTO INTERNAZIONALE 681 (2007).

66. See *Behrami and Saramati*, ¶ 151: “UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.”

67. See *Behrami and Saramati*, ¶ 152.

68. The Court’s analysis of the attribution of KFOR actions focused on who exercised “ultimate authority and control,” *Behrami and Saramati*, ¶ 133, and it found that they laid with the U.N., considering sufficient the fact that the chain of command reached the Security Council through the regular reports of the Secretary General. This interpretation is hardly consistent with the “effective control” standard set forth by the International Law Commission for attribution of conduct either to the contributing States or the organization (Article 5 of the 2004 Draft articles on the responsibility of international organizations). While the Court insisted on the fact that the establishment of KFOR constituted an exercise of a Charter-based prerogative of the Security Council, the legal basis and the effective control over the operations are two distinct aspects. Since peacekeepers function as double organs (national and U.N.), at least the concurrent responsibility of contributing States should have been considered. As to the analysis of UNMIK actions, the Court found that, as a subsidiary organ, it

subsidiary or concurrent EC State responsibility. The *Behrami* doctrine has been consolidated in subsequent judgments that perpetuate the veil of impunity over State action covered by a Chapter VII resolution: *Kasumaj v. Greece* (5 July 2007),<sup>69</sup> *Gajic v. Germany* (28 August 2007),<sup>70</sup> *Berić v. Bosnia and Herzegovina* (16 October 2007).<sup>71</sup>

Against this mainstream dogma, the *Kadi* appeal judgment delivered by the European Court of Justice on 3 September 2008<sup>72</sup> challenges the myth of intangibility (or infallibility, for that matter) of measures aimed at implementing U.N. Chapter VII resolutions.

### III. THE *KADI* APPEAL JUDGMENT: ARTICLE 103 PARAMOUNTCY DOCTRINE VS. THE “EC CONSTITUTIONALITY” TEST

In its appeal judgment of 3 September 2008, the ECJ reversed the *Kadi* and *Yusuf* decisions of the Court of First Instance, finding that the CFI

erred in law . . . when it held . . . that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of jus cogens.<sup>73</sup>

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was “institutionally directly and fully answerable to the UNSC.” *Behrami and Saramati*, ¶ 142. While in the latter case the margin for interpretation appears wider, it may be argued that the focus on the formal qualification of the force should not entirely outweigh the reality on the field, and therefore the assessment of factual control.

69. *Kasumaj v. Greece*, ECHR decision of 5 July 2007, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search HUDOC Collection for “App. No. 6974/05,” then follow “*Kasumaj v. Greece*” hyperlink). The *Kasumaj* case regarded the occupation without compensation of the applicant’s agricultural land by the Greek KFOR contingent, and raised issues under Article 1 of Protocol 1, Article 6 para. 1 and Article 13. *Id.*

70. *Gajic v. Germany*, ECHR decision of 28 Aug. 2007, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search HUDOC Collection for “App. No. 31446/02,” then follow “*Gajic v. Germany*” hyperlink). The facts and alleged violations in *Gajic* were similar to those in *Kasumaj*, insofar as it concerned deprivation of property by the German contingent of KFOR. *Id.*

71. *Berić v. Bosnia and Herzegovina*, ECHR decision of 16 Oct. 2007, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search HUDOC Collection for “App. No. 36357/04,” then follow “*Beric and Others*” hyperlink). The case regarded the responsibility of Bosnia and Herzegovina, established by Resolution 1031 (1995), for acts of the High Representative who allegedly infringed the right to freedom of assembly, fair trial, and effective remedy. *Id.*

72. *See* Case C-402/05 P, *Kadi*.

73. *Id.* ¶ 327.

In establishing that U.N. mandatory decisions cannot have the effect of depriving the court of its competence to review EC legislation implementing them, the ruling overturns all prior jurisprudential orientations. Not only does the judgment dismantle the legal constructions upholding the immunity from review of measures giving effect to Security Council's Chapter VII resolutions, but it also contains the first judicial contestation of the validity of the remedy available at the U.N. level for wrongfully proscribed individuals.<sup>74</sup> The ECJ's interpretation of the applicability of EC constitutional principles in the presence of what may be termed "reinforced" international obligations offers a novel perspective on the relationship between legal orders.

*A. The EC Legal Order as a Self-Contained Regime and the "Constitutional Control" Value of Judicial Review*

The judgment unmistakably establishes the ECJ's competence to review any piece of EC legislation, irrespective of its original source (in particular, irrespective of whether it has been adopted in the furtherance of international obligations).<sup>75</sup> This finding is based upon a firmly asserted autonomy of the EC legal order—which comprises the norms regulating the allocation of powers amongst EC institutions—with respect to an international agreement.<sup>76</sup> The implications of EC autonomy, for EC courts, are that judicial control over the executive cannot be set aside by international commitments, and further, that when legislation is adopted in order to give effect to an international agreement, EC institutions are bound to secure the basic constitutional values of the EC legal order.<sup>77</sup>

The international legal order is, thus, construed as a multilayer system in which the EC legal order functions as a "self-contained regime," though the term is not explicitly employed. This analysis appears to be uncontroversial. The legal literature<sup>78</sup> and some international case law<sup>79</sup>

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74. See the observations regarding the Court's assessment of the U.N. re-examination procedure at *infra*, section D point 1.

75. See Case C-402/05 P, *Kadi*, ¶278: "[T]he lawfulness of any legislation adopted by the Community institutions, including an act intended to give effect to a resolution of the Security Council remains subject, by virtue of Community law, to full review by the Court, regardless of its origin."

76. *Id.* ¶ 282. The reference to the allocation of powers is clearly intended to pinpoint the relationship between EC judicature and EC executive organs, particularly the control of the former over the latter.

77. *Id.* ¶ 279.

78. See Anja Lindroos & Michael Mehling, *Dispelling the Chimera of 'Self-contained Regimes' International Law and the WTO*, 16 (5) EUR. J. INT'L L. 857 (2005); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT'L L. 483

have, indeed, acknowledged the existence of special regimes that abide by particular legal norms and are monitored by specific tribunals or quasi-judicial bodies. Such regimes have been especially identified in the areas of human rights, international criminal law, environmental law, and international trade law. Also, international organizations, such as the World Trade Organization or the EC itself, can be brought as examples of self-contained regimes insofar as they have their own law-making and compliance mechanisms, and both primary rules and rules of responsibility are established by the founding treaties rather than by international law. The proliferation of special regimes has also been recognized by the International Law Commission in its 2006 conclusions on the unity and fragmentation of international law,<sup>80</sup> and the concept was already implicit in the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.<sup>81</sup>

The *Kadi* judgment clarifies the peculiarity of the EC legal order as a special treaty-based regime, essentially describing it as grounded on impervious fundamental principles (rule of law, fundamental human rights),<sup>82</sup> and autonomous mechanisms designed to ensure that those principles are enforced (judicial review). Within this framework, the lack of exception to the ECJ jurisdiction is a natural corollary of the principle

(2006); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).

79. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

80. See International Law Commission, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006), [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1\\_9\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf).

81. See INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (2001), Art. 55 (Lex specialis): "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."

82. The general principles of EC law, binding EU institutions and member States when they implement EC legislation or act within the scope of EC law, are no novelty in the ECJ's jurisprudence. Though some of them (the duty of cooperation and non-discrimination on nationality grounds) arise directly from the EC Treaty, many principles (loyal cooperation, proportionality, legitimate expectations, fundamental rights, good administration) have developed by means of jurisprudence, and only recently found express recognition as constitutional principles of the EU legal order. See ANTHONY ARNULL ET AL., WYATT & DASHWOOD'S EUROPEAN UNION LAW 235-54 (2006). In this case the rule of law itself is indicated as a general principle and as a shield against obligations deriving from the interaction with other legal orders. The ECJ's approach cannot be said to be farfetched; not only can this principle be derived from the common constitutional traditions of member States, but the rule of law is implied in the formulation of the task assigned to the EC judiciary by Article 220 of the Treaty: "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed."

that the EC is governed by the rule of law.<sup>83</sup> The ECJ thus establishes a *necessary* relationship between rule of law and judicial review: judicial review is not an accessory procedural guarantee that can be set aside by strong presumptions of legality or security exigencies, but is an intrinsic element of the rule of law. As to the parameters for review, the lawfulness of EC acts, including legislation adopted to give effect to international commitments, is contingent upon the observance of human rights insofar as they are an integral part of EC general principles of law.<sup>84</sup>

*B. The Clash Between the International and EC Hierarchies of Sources and an Artifice for Reconciliation*

The view that the EC legal order operates within a fragmented international order logically circumscribes the scope of EC judicial review. In particular, the EC judicature cannot assess the legitimacy of any act emanating from a non-EC legal subject such as the U.N. Security Council. In fact, the ECJ warily specifies the extent of its competence, and stresses that its review does not regard the original U.N. resolutions, but exclusively considers the implementing EC legislation.<sup>85</sup>

Coherently with the strict distinction between the U.N. and EC orders, the ECJ does not advocate for any residual or indirect possibility of review of U.N. acts, even from a *jus cogens* perspective. It thus corrects the logical fallacy of the CFI referred to previously.<sup>86</sup> The position of the ECJ appears, in fact, more legally rigorous.<sup>87</sup> It does not purport to assess the validity of U.N. acts and neither does it challenge the primacy of the resolution at the international level. Nevertheless, it clarifies that the priority of sources is different in international law and EC law. In international law, U.N. Chapter VII resolutions supersede all other treaty

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83. See Case C-402/05 P, *Kadi*, ¶ 281: “[T]he Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity with the basic constitutional charter, the EC Treaty . . . .”

84. *Id.* ¶¶ 279, 283, 284.

85. *Id.* ¶¶ 286–287. However, further in the judgment, the court ultimately does assess the U.N. mechanism, establishing a direct relationship between the lack of an acceptable U.N. re-examination procedure and EC exercise of jurisdiction. See *supra* note 74.

86. See *supra* note 36, Section II.

87. Naturally, direct scrutiny of respect for human rights by U.N. bodies would not have been technically adequate for a tribunal entrusted with the supervision of conformity to obligations arising under a different conventional regime. However, the fact that the EC courts cannot quash a U.N. act does not mean the courts cannot analyze their legitimacy according to international law, rather than limit their task to assessing EC legitimacy in the wake of such acts. Also, one can hardly make the case that an EC act implementing an unlawful act under international law may nevertheless be lawful under EC law.

obligations, including the EC Treaty and human rights treaties such as the ECHR. Under EC law, even “reinforced” international obligations have to pass the test of “EC constitutionality”: they cannot be implemented if the implementation measure—an internal EC act—conflicts with the fundamental principles of the European Community.<sup>88</sup>

To be sure, there exists a prospect of collision between the obligation of EC institutions under international law to implement U.N. decisions even in case of contrast with other treaty obligations, and the subordination of any EC act to EC constitutional principles. In order to reconcile these two incompatibly hierarchized sets of norms in the instant case, the ECJ uses a legal artifice: the discretion of EC institutions in giving effect to U.N. decisions. The court thus acknowledges that the EC has an obligation to observe U.N. decisions,<sup>89</sup> but finds that “the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations.”<sup>90</sup> The discretion of States/EU institutions in transposing U.N. resolutions according to their domestic procedures entails for the court that the impossibility of challenging the international lawfulness of U.N. measures does not block the review of the internal lawfulness within the European Community of the EC implementing act. As a result, the ECJ, unlike the CFI, finds that judicial review of the internal lawfulness of the regulations is not barred by the primacy of Charter obligations.<sup>91</sup>

Naturally, once established that the ECJ’s jurisdiction is strictly limited to EC acts, it becomes crucial to determine if the impugned decision is attributable to EU States, EU institutions, or to the U.N. Security Council. In fact, the *Kadi* respondents had put forward the argument that the ECJ should refrain from reviewing EC acts insofar as they merely further U.N. decisions. The ECJ’s answer to this highly contentious issue is, once more,

88. See Case C-402/05 P, *Kadi*, ¶¶ 287–288:

[I]t is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*. However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

89. *Id.* ¶¶ 291–296.

90. *Id.* ¶ 298.

91. *Id.* ¶ 299.

against the mainstream. It refuses to emulate the ECHR inadmissibility decision in *Behrami and Saramati* based on the non-imputability to the responding States of U.N. mandated and authorized conduct.<sup>92</sup> Conversely, it invokes the *Bosphorus* precedent<sup>93</sup> to conclude that, in the case of blacklisting regulations, jurisdiction—*ratione personae*—does subsist.<sup>94</sup> According to the court, its jurisdiction is further supported by the existence of non-derogable EC legal principles, including rule of law, of which judicial review is an intrinsic part.

*C. Reinforced International Obligations and Non-Derogable EC Principles: A New Solange Doctrine*

The analysis of the judgment has already evinced that, since the European Community treaties have generated a self-contained regime, the paramountcy doctrine does not set aside the judicial mechanisms inherent in the EC legal order. One might, however, base the immunity of U.N.-mandated EC measures from review on the possibility to derogate from the EC Treaty in order to accommodate international obligations related to the maintenance of peace and security. In addressing this hypothesis, the ECJ develops a theory of non-derogable principles of EC law. The court states that derogations from the EC Treaty (e.g., from the common market) are indeed permitted in the furtherance of international obligations;<sup>95</sup> nonetheless, no derogation is authorized from “the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.”<sup>96</sup>

As emphasized above, the ECJ opposes the EC hierarchy of norms to the international hierarchy, and suggests that the Charter’s primacy in international law does not entail primacy at EC level. The court further specifies that the Charter supersedes any acts of secondary EC law by virtue of Article 300 (7) EC, but this does not extend to primary law, and particularly to the general principles which include fundamental rights. On the contrary, in accordance with Article 300 (6), international agreements need to pass a sort of EC constitutional test.<sup>97</sup> The court thus follows the

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92. See *supra* note 65, Section II.

93. *Id.*

94. Case C-402/05 P, *Kadi*, ¶¶ 312–314.

95. *Id.* ¶¶ 301–302.

96. *Id.* ¶ 304.

97. *Id.* ¶¶ 307–309.

conclusions of Advocate General Poiares Maduro on the *Kadi* appeal case presented on 16 January 2008. The Advocate General had rejected the respondents' contention that U.N. law should prevail over EC legal principles by the operation of Article 307 of the EC Treaty, which has the effect of safeguarding obligations arising from agreements concluded before 1 January 1958, such as the U.N. Charter and its Article 103. Instead, he argued that the EC Treaty has engendered an autonomous legal order placed in a dualistic relationship with international law. The main consequence deriving therefrom is the *conditional* acceptance of international obligations, even those of a strong character such as Article 103: the EC can legitimately comply with any such obligation *only insofar as* these obligations respect the constitutional values of the municipal legal order. From this perspective, Article 307 of the EC Treaty on which Poiares Maduro relied could be conceived as a safeguard clause of the newly created legal order. In fact, the Advocate General seems to suggest that the EC courts somehow fulfill the tasks of a domestic constitutional court by ensuring that compliance with international obligations is consistent with the fundamental principles on which that particular community is based. His reasoning is somewhat analogous to that advanced by the German Bundesverfassungsgericht in the well-known *Solange* judgments.<sup>98</sup> The analogy is supported by the reading of the ECJ judgment: the review performed by the court is described as the EC equivalent of the constitutional control over executive action performed

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98. As is known, in the *Solange I* judgment, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974 (F.R.G.), *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, [1974] 2 C.M.L.R. 540, 551, the German Federal Constitutional Court determined its competence not to apply EC acts in contrast with the fundamental rights enshrined in the German *Grundgesetz*. This decision was motivated by the absence of both a democratic legislative body in the EC and an EC "bill of rights." In the *Solange II* judgment, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986 (F.R.G.), *Re the Application of Wünsche Handelsgesellschaft*, 3 C.M.L.R. 225, the German Federal Constitutional Court considered whether it should suspend its rights-based control over EC acts so long as ("solange") EC legislation guaranteed the same fundamental rights as the German Constitution, and the Luxemburg Court offered sufficient judicial protection at the EC level. This stance was a partial reversal of the *Solange I* judgment, which gave Germany the authority to question all EC law against the framework of the national constitution. This solution attempted to reconcile the primacy of EC law and the maintenance of the competence of the constitutional judge as a guarantee of respect for fundamental human rights. In its 12 October 1993 judgment on the ratification of the Maastricht Treaty, the same court decided it would maintain its function of guaranteeing fundamental constitutional rights by not applying EC norms that contrasted with the constitution. Analogously, the *Kadi* opinion of Advocate General Poiares Maduro, and the subsequent ECJ judgment, contend that the international obligations must be enforced so long as they do not contrast with the fundamental (i.e., constitutional) EC principles, and that EC Courts are the final arbiter of the constitutionality of any measure aimed to ensure compliance with international obligations.

within domestic legal systems, and, as such, it cannot be impaired by international obligations.<sup>99</sup>

*D. The First Judicial Critique of the Terrorism Blacklists Scheme*

*1. An Indirect Appraisal of the U.N. Re-examination Procedure in the Context of Admissibility*

As emphasized above, the ECJ categorically states that it cannot assess the lawfulness of the U.N. decisions. However, it surprisingly does so, albeit in an indirect manner, when it discusses whether the U.N. de-listing procedure offers the judicial protection guarantees required by EU (and arguably international) human rights standards.<sup>100</sup>

The premises for this discussion are no less surprising. In the light of foregoing argumentation to the effect that review is not impaired by the supremacy of the Charter on the international plane, the court suggests that it may, however, *discretionally refrain from review* if it is satisfied that an effective re-examination procedure exists within the U.N. system. This possibility of derogation does not appear coherent with the principle, earlier expressed by the court, that the European Community cannot abdicate from the pursuance of the rule of law principle, including judicial review of any EC act. Admittedly, a U.N. mechanism observing the same guarantees could serve as a surrogate for the EC judicature, based on the equivalent protection doctrine. It still remains true that such a doctrine is not fully consistent with the ECJ's emphasis on the autonomy of the EC in terms of institutions and procedures.

As to the existence of equivalent guarantees at U.N. level, the court concludes in the negative. "[I]mmunity from jurisdiction within the internal legal order of the Community . . . constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection."<sup>101</sup> Even after the introduction of individual de-listing petitions, "the procedure before [the Sanctions] Committee is still in

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99. Case C-402/05 P, *Kadi*, ¶ 316:

[T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.

100. *Id.* ¶¶ 319–325.

101. *Id.* ¶¶ 321–322.

essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto”; moreover, the working Guidelines “do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information,” and “if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.”<sup>102</sup> Therefore, the reasoning follows, the court cannot abdicate from its role of ensuring the review of the lawfulness of the implementation measure.

While the ECJ’s overall assessment of the procedure from the viewpoint of defense rights seems correct, it must be said that its analysis does not take into account the updates in the Committee’s Guidelines introduced following Resolution 1735 (2006), as recalled above.<sup>103</sup> Only the *ex post facto* examination of the concrete application of these new provisions can show if the reform has actually led to increased transparency, but this procedural amendment should not have been disregarded altogether in the court’s analysis.<sup>104</sup>

The conclusion that the ECJ must not derogate from exerting its review function is, in any event, tightly connected with the lack of an authentic remedy at U.N. level. One cannot help but wonder: does the ECJ then suggest that a further reform of the U.N. mechanism might provide a basis for immunity from review in the future?

## 2. *Substantive Findings: Denial of Judicial Protection, and Procedural Violation of Property Rights*

The ECJ set aside the substantive findings of the CFI insofar as they were the result of a narrow examination, confined to the *jus cogens* criterion, instead of a full examination in the light of the general principles of EC law.<sup>105</sup> Pursuant to Article 61 of the ECJ Statute, it also gave the final judgment on the matter,<sup>106</sup> and found that the right to judicial

102. *Id.* ¶ 325.

103. *See supra*, Section I.

104. Clearly, at the time the CFI decision on *Kadi* was pronounced, the procedure had not been amended, but, interestingly enough, the court’s assessment refers to the present procedure rather than to that existing at the relevant time. In doing so, the court’s proposed analysis was not exclusively intended to support its conclusions for the case at stake, but rather appears to direct policy.

105. Case C-402/05 P, *Kadi*, ¶ 330.

106. *Id.* ¶ 331.

protection had been infringed and that a procedural violation of the right to property had also occurred.

The ECJ established that “the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.”<sup>107</sup> The reasoning leading to the conclusion that a manifest violation of the rights of defense had occurred outlines a proposal for a human rights-compatible blacklisting mechanism:

[T]he effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which . . . the name of a person or entity is included in the list . . . , means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.<sup>108</sup>

These requirements actually overlap with the findings of the CFI regarding the procedures that EU institutions are bound to observe in the management of the EU autonomous sanctions.<sup>109</sup> A unified regime for individual sanctions would seem to emerge from the combined reading of these two judicial analyses. The adoption of the same treatment would indeed be coherent with the analogy of the situations of the proscribed individuals, irrespective of the formal authority deciding their inclusion on the suspects' list.

The pattern for anti-terrorism sanctions suggested by the ECJ takes into account the need for flexibility in enforcing human rights. The court concedes that the “surprise factor” is essential for the effectiveness of the measures at stake and justifies the postponement of the intervention of the court.<sup>110</sup> It stresses, on the other hand, that the mere fact that an act concerns national security and terrorism does not exempt the restrictive measures contained therein from judicial review.<sup>111</sup> It thus goes against the trend inaugurated by the ECHR in *Behrami* and the CFI in *Kadi* according to which judicial review would in any event interfere with the political endeavor to maintain peace and security. According to the ECJ, the task of

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107. *Id.* ¶ 334.

108. *Id.* ¶ 336.

109. See the CFI judgments in the *OMPI*, *Sison*, and *Stichting* cases, *supra* note 46.

110. Case C-402/05 P, *Kadi*, ¶¶ 338–340.

111. *Id.* ¶ 343.

EC judicature is to apply, in the course of judicial review, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information utilized and, “on the other, the need to accord the individual a sufficient measure of procedural justice.”<sup>112</sup> This view is in line with the well-established jurisprudence of the ECHR on national terrorism, requiring a fair balance to be struck between security concerns and fundamental rights of suspected individuals.<sup>113</sup>

The ECJ’s assessment of the blacklisting mechanism as currently designed is motivated by the mechanism’s two main pitfalls. One is the absence of a procedure for communication to the individuals concerned of the evidence that led to their inclusion on the list and the consequent freezing of funds.<sup>114</sup> The other deficiency, tightly connected with the former, is the lack of a procedure for enabling the suspects to make their viewpoint known within a reasonable period after the adoption of the measure.<sup>115</sup>

The right to a fair trial is not the only right the ECJ considers to be infringed. In fact, the secrecy of the procedures also impacts two-fold the right to an effective legal remedy: (1) appellants do not have an opportunity to argue their case properly before EC judicature insofar as they are not adequately informed of the factual evidence against them, and (2) the court itself is not positioned to assess the lawfulness of the measure in the specific cases.<sup>116</sup> Consequently, the ECJ found that “the pleas in law raised by Mr. Kadi and Al Barakaat in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded.”<sup>117</sup>

As far as the right to property is concerned, the ECJ emphasizes that it is comprised in the general principles of EC law, but is not an absolute one. Its exercise “may be restricted, provided that those restrictions in fact

112. *Id.* ¶ 344.

113. See, amongst the latest authorities, Saadi v. Italy, ECHR judgment of 28 Feb. 2008, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search HUDOC Collection for “App. No. 37201/06,” then follow “Case of Saadi” hyperlink). On the balancing criteria used by the ECHR in terrorism cases, see Carmen Draghici, *International Organisations and Anti-Terrorist Sanctions: No Accountability for Human Rights Violations?*, 2 CRITICAL STUDIES ON TERRORISM 293 (2009).

114. Case C-402/05 P, *Kadi*, ¶¶ 345–347. This objection might be mitigated by the obligation of notification placed by Resolution 1735 (2006) on the State of nationality and residence. The actual access by individuals to the relevant information in their files will have to be assessed from case to case, as the designating State unilaterally decides what information is publicly releasable. See *supra*, Section I.

115. *Id.* ¶ 348.

116. *Id.* ¶¶ 349–351.

117. *Id.* ¶ 353.

correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.”<sup>118</sup>

In analyzing whether the impugned measure amounted to disproportionate interference, the ECJ observes that the freezing measure is a “temporary precautionary measure which is not supposed to deprive those persons of their property,” but, due to its general and prolonged application, it does constitute a “considerable” restriction.<sup>119</sup> Referring to the case law of the ECHR, the ECJ sets the task of determining “whether a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned”; similarly, it acknowledges that “the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest.”<sup>120</sup>

The result of the ECJ’s assessment is that the freezing of funds is neither an inappropriate nor a disproportionate measure *vis-à-vis* the aim of fighting the threat to international peace and security posed by terrorism.<sup>121</sup> The court also takes into account circumstances that mitigate the effects of the interference. On the one hand, there are the humanitarian exceptions allowing for funds designed to cover basic expenses, and the possibility of authorization of “extraordinary expenses” by the Sanctions Committee.<sup>122</sup> On the other hand, there is the existence of periodic re-examination of the lists at the U.N. level, as well as the possibility of direct petitions by individuals for review.<sup>123</sup>

However, the ECJ stresses that an interference with the right to the enjoyment of property must also meet procedural criteria in order to be deemed lawful. In particular, the person concerned has to be provided with “a reasonable opportunity of putting his case to the competent authorities.”<sup>124</sup> Absent the necessary procedural guarantees, the circumstances of the cases disclosed, according to the court, an unjustified restriction of the appellants’ right to property.<sup>125</sup> The ECJ decides, accordingly, that the relevant regulation has to be annulled insofar as it

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118. *Id.* ¶ 355.

119. *Id.* ¶ 358.

120. *Id.* ¶ 360.

121. *Id.* ¶ 363.

122. *Id.* ¶ 364.

123. *Id.* ¶ 365.

124. *Id.* ¶ 368.

125. *Id.* ¶¶ 369–371.

concerns the appellants. Nonetheless, it finds that the annulment with immediate effect could compromise the effectiveness of the measure, whereas its adoption against the appellants might have been otherwise appropriate.<sup>126</sup> Thus, it decides that the measure shall be maintained for three months after the delivery of the judgment, so that the EU Council may have an opportunity to redress the infringements found.<sup>127</sup>

The analysis put forward by the ECJ in order to ascertain the violation of due process rights and the procedural violation of the right to property contains useful indications as to how the terrorism blacklisting scheme should be reformed in order to pass the EC legality test. Insofar as the human rights principles invoked by the court do not have an exclusively European significance, these findings can be also considered as suggestions for U.N. reform of the mechanism with a view to ensuring international legality.

#### IV. CONCLUSIONS

Paradoxically, the *Kadi* appeal judgment illustrates both the interdependence and the mutual resistance of legal orders in the contemporary world. On the one hand, by founding the constitutional parameters of EC legality not exclusively on EC Treaty provisions but also on the common legal traditions of EC States and on international treaties, such as the ECHR, the judgment appears to uphold the view of a homogeneous legal phenomenon, in which barriers between formal sources are fading out. The attempt to preserve the international normative hierarchy theory, centered on Article 103 of the U.N. Charter and confining the controversy to the EC implementation of Security Council resolutions, also points in the same direction. Nonetheless, the *Kadi* philosophy by no means suggests that the various legal sources of human

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126. *Id.* ¶ 373. The substantive examination of the case by the ECJ does not aim at establishing guilt or exonerating the appellants. Therefore, the court does not exclude that the conduct of the appellants might have actually required the adoption of financial sanctions. It merely states that, in any event, the targeted individuals should be able to argue their case before a competent authority.

127. *Id.* ¶¶ 372–376. The ECJ does not offer concrete solutions as to how the EU institutions might proceed, though any such solution was arguably to include a review mechanism. Following the *Kadi* judgment, the European Commission provided the suspects with the U.N. Sanctions Committee's narrative summaries of reasons for their inclusion on the proscription list. After examining the litigants' comments on those reasons, the Commission passed Regulation 1190/2008 of 28 November 2008, confirming the presence of Kadi and Al-Barakaat on the list. However, on 30 December 2008 the Commission published the announcement 2008/C330/09 to the attention of persons and entities listed by the latest EC Regulations, in which suspects are informed that they may ask the Commission to reveal the factual grounds for their inclusion on the list, and challenge the regulations before the CFI.

rights obligations contribute to the creation of universal norms, binding on non-EU States, or on other international organizations, such as the U.N. and their decision-making bodies. Quite to the contrary, the court maintains an approach inspired by a fragmented view of the legal phenomenon, and focuses only on EU institutions.

The strength of this dualist paradigm, underpinning the conception of the EC as a self-contained regime, is that the EC legal order cannot be permeated by external obligations that are less protective of human rights and inconsistent with rule-of-law expectations. Conversely, the weakness of this stance is that it promotes a fragmentary vision of international law as a container for various regimes, each carrying its own set of principles, and thus fails to support the affirmation of universal human rights values enforceable in any circumstances under international law.

However, against the background of previous jurisprudence, it does have the undeniable merit of setting a bold precedent. At first glance, the moderate finding that procedural guarantees have to be added to the mechanism in the implementation phase at the EC level does not clash, in principle, with EC States' superior obligation, deriving from U.N. membership, to freeze the funds of listed individuals. Yet, if the evidentiary burden is not met for the EC review body, and individuals are de-listed at the EC rather than at the U.N. level, the collision between obligations becomes unavoidable. In that event, the primacy of U.N. commitments, which the ECJ attempts to leave undisputed, largely remains a mere theoretical concession.<sup>128</sup> Arguably, whether purposely or not, the *Kadi* judgment provides support for the legitimacy of disobedience before Security Council decisions impairing human rights.<sup>129</sup>

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128. The impression is that the ECJ wants to "have its cake and eat it, too." The court's two major contentions, the supremacy of U.N. decisions and the need to render them compatible with EU principles in the implementation phase, might be theoretically compatible, but the prospect for application is very slim. The court does not specify what the expectations from the EU Council are, but since the most critical issue on which the annulment is based is the absence of an avenue of appeal, presumably the Council ought to offer an opportunity for re-examination. One such means might be the establishment of an ad hoc panel for review, before which individuals can be heard immediately after their funds have been frozen. Thus, if, at EC level, the review panel finds that the factual basis for proscription is lacking—which is not unlikely, given the limited and discretionary public disclosure of information required by Resolution 1735 (2006) from the designating State—then the implementation act is annulled, and the U.N. binding decision infringed. In such a scenario, the clash between a U.N. and a EU decision becomes inevitable. The acknowledgment of the supremacy of a U.N. decision means that, in cases of conflict with a EU decision, the U.N. decision prevails. Whereas in practice, the U.N. decision will apparently be upheld only as long as there is no conflict.

129. This judgment may indeed set a precedent for domestic review of U.N. decisions, and for disobedience in case of conflict with national constitutional principles. In fact, there is no reason to assume that, outside the EU, States *uti singuli* cannot raise the objection of their fundamental laws in order to exert control over U.N. proscription measures. This may lead to a generalized disapplication

Certainly, the creation of self-contained regimes defending their constitutional principles may not be a comprehensive answer to the need of reforming the U.N. practice in such a way as to make the new self-attributed competences of the Security Council compatible with the human rights standards endorsed by the U.N. itself. Yet, in as much as it represents an authoritative critique of the blacklisting mechanism from a human rights perspective, it might serve as an incentive for U.N. internal reform. Not least because, while formally not challenging the U.N. resolutions, such a line of jurisprudence casts serious doubts on the lawfulness of the U.N. procedures in terms of human rights consistency, and eventually has a negative impact on the credibility of the Security Council.

Due to its innovative emphasis on EC constitutional values as a filter even before reinforced international law obligations, the *Kadi* ruling is bound to have further judicial and political echoes. While its effectiveness in terms of changing international counter-terrorism patterns is yet to be seen, from the viewpoint of a universal human rights discourse, the *Kadi* appeal judgment remains, perhaps, a missed opportunity.

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of the sanctions regime, or in any event, to a lack of certainty as to the implementation of sanctions. Therefore, the most efficient solution would be a reformed U.N. mechanism for listing and de-listing, so that U.N. decisions may be fully observed by States, absent constitutional legitimacy concerns.