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Abstract

This Article seeks to examine the relationship between European Union ("EU") law, international law, and the protection of fundamental rights in light of recent case law of the European Court of Justice ("ECJ") and the Court of First Instance ("CFI") relating to economic sanctions against individuals. It first looks at the judgment in Kadi. After a short presentation of the factual and legal background, it explores the question of whether the EU has competence to adopt smart sanctions. It then examines whether the EU is bound by resolutions of the UNSC, whether the ECJ has jurisdiction to review Community measures implementing such resolutions, and looks at the applicable standard of judicial scrutiny. It analyzes the contrasting views of the CFI, the Advocate General, and the ECJ, taking account also of the case law of the European Court of Human Rights ("ECtHR" or "Strasbourg Court"). Further, the Article explores the consequences of annulling the contested regulation. It then turns to discussing CFI case law in relation to sanctions lists drawn up not by the UNSC but by the Community. The Article concludes by welcoming the judgment of the ECJ. While its reasoning on the issue of Community competence is questionable, once such competence is established, it is difficult to support the abrogation of Community standards for the protection of fundamental rights. Such standards should ensure procedural due process while recognizing the importance of public security.

EU LAW, INTERNATIONAL LAW, AND ECONOMIC SANCTIONS AGAINST TERRORISM: THE JUDICIARY IN DISTRESS?

*Takis Tridimas**
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INTRODUCTION

This Article seeks to examine the relationship between European Union ("EU") law, international law, and the protection of fundamental rights in light of recent case law of the European Court of Justice ("ECJ") and the Court of First Instance ("CFI") relating to economic sanctions against individuals. On September 3, 2008, the ECJ delivered its long-awaited judgment in *Kadi v. Council* on appeal from the CFI.[1] In its judgment under appeal,[2] the CFI had held that the European Community is competent to adopt regulations imposing economic sanctions against private organizations in pursuance of United Nations Security Council ("UNSC") Resolutions seeking to combat terrorism; that although the Community is not bound directly by the United Nations ("UN") Charter, it is bound pursuant to the Treaty Establishing the European Community ("EC Treaty") to respect international law and give effect to UNSC resolutions; and that the CFI has jurisdiction to examine the compatibility of Community regulations implementing UNSC resolutions with fundamental rights not as protected by the Community but as protected by *jus cogens*.[3] On appeal, following the Opinion of Advocate General Maduro, the ECJ rejected the CFI's approach.[4] It held that UNSC resolutions are binding only in international law.[5] It subjected the contested regulations to full review under Community

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1. *See generally* Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P (ECJ Sept. 3, 2008) (not yet reported).

2. *See generally* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649; Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533.

3. *See generally Kadi*, [2005] E.C.R. II-3649; *Yusuf*, [2005] E.C.R. II-3533.

4. *See generally Kadi* (ECJ Sept. 3, 2008).

5. *Id.* ¶ 260.

human rights standards and found them in breach of the right to a hearing, the right to judicial protection and the right to property. *Kadi* is the most important judgment ever delivered by the ECJ on the relationship between Community and international law and one of its most important judgments on fundamental rights. It is imbued by constitutional confidence, commitment to the rule of law but also some skepticism towards international law. In the meantime, the CFI has delivered a number of other judgments on anti-terrorist sanctions assessing the limits of the "emergency constitution" at the European level. The purpose of this Article is to examine the above-referenced case law and explore the dilemmas and tensions facing the EU judiciary in seeking to define and protect the EU's distinct constitutional space. The Article is divided as follows. It first looks at the judgment in *Kadi*. After a short presentation of the factual and legal background, it explores the question of whether the EU has competence to adopt smart sanctions. It then examines whether the EU is bound by resolutions of the UNSC, whether the ECJ has jurisdiction to review Community measures implementing such resolutions, and looks at the applicable standard of judicial scrutiny. It analyzes the contrasting views of the CFI, the Advocate General, and the ECJ, taking account also of the case law of the European Court of Human Rights ("ECtHR" or "Strasbourg Court"). Further, the Article explores the consequences of annulling the contested regulation. It then turns to discussing CFI case law in relation to sanctions lists drawn up not by the UNSC but by the Community. The Article concludes by welcoming the judgment of the ECJ. While its reasoning on the issue of Community competence is questionable, once such competence is established, it is difficult to support the abrogation of Community standards for the protection of fundamental rights. Such standards should ensure procedural due process while recognizing the importance of public security.

I. *SANCTIONS LISTS ESTABLISHED BY THE UN*

A. *Kadi: The Factual and Legal Background of the Judgments*

Before the collapse of the Taliban regime, the UNSC adopted Resolution 1267 (1999)[6] and Resolution 1333 (2000)[7]

6. *See* S.C. Res. 1267, ¶ 4(b), U.N. Doc. S/RES/1267 (Oct. 15, 1999).

which required all Member States to freeze the funds and other financial resources owned or controlled by the Taliban and their undertakings. By Resolution 1267, the UNSC also decided to establish a Sanctions Committee responsible for ensuring that the Member States would take the necessary implementing action.[8] The Sanctions Committee was charged, in particular, with the task of drawing up a list of persons and entities whose funds would be frozen pursuant to the resolutions.[9] Taking the view that action by the Community was necessary to implement these resolutions, the EU Council adopted two Common Positions[10] under the Common Foreign and Security Policy ("CFSP"), which were, in turn, implemented by two Council Regulations[11] adopted on the basis of Articles 60 EC and 301 EC.[12]

After the collapse of the Taliban regime, the UNSC adopted two further resolutions[13] which also provided for the freezing of funds but this time they were directed against Osama bin Laden, members of the Al-Qaeda network, and the Taliban. Since these

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7. *See* S.C. Res. 1333, ¶ 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000).

8. *See* S.C. Res. 1267, *supra* note 6, ¶ 6.

9. *See id.* ¶ 6(d).

10. *See* Council Common Position No. 1999/727/CFSP, O.J. L 294/1 (1999) (concerning restrictive measures against the Taliban); Council Common Position No. 2001/154/CFSP, O.J. L 57/1 (2001) (concerning additional restrictive measures against the Taliban and amending Council Common Position 96/746/CFSP).

11. *See* Council Regulation (EC) No. 337/2000, O.J. L 43/1 (2000) (concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan); Council Regulation (EC) No. 467/2001, O.J. L 67/1 (2001) (prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Council Regulation (EC) No. 337/2000).

12. Consolidated Version of the Treaty Establishing the European Community, O.J. C 321 E/37 (2006) [hereinafter EC Treaty]. Article 301 of the European Community Treaty ("EC Treaty") states as follows:

> Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

EC Treaty, *supra*, art. 301, O.J. C 321 E/37, at 177. Article 60(1) EC states as follows: "If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned." EC Treaty, *supra*, art. 60, O.J. C 321 E/37, at 65.

13. *See generally* S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1453, U.N. Doc. S/RES/1453 (Dec. 24, 2002).

individuals no longer controlled the government of Afghanistan, the resolutions in question targeted solely non-state actors. Those resolutions were also implemented at the EU level. The Council adopted two new CFSP common positions[14] which were implemented respectively by Council Regulations 881/2002/EC[15] and 561/2003/EC.[16] This time, the Council relied as the legal basis for the adoption of the regulations not only on Articles 60 EC and 301 EC but also on Article 308 EC.[17] The Sanctions Committee amended and supplemented the sanctions list a number of times and each time the amendments were introduced in Community law by respective amendments to the Community regulations.

In *Kadi* and *Yusuf v. Council*, the applicants were respectively a Saudi Arabian national and a Swedish national who had been included in the lists drawn by the UNSC and, consequently, in the lists incorporated in implementing Community regulations.[18] They brought proceedings before the CFI seeking the annulment of those regulations alleging breach of their fundamental rights, namely the right to a fair hearing, the right to

14. *See generally* Council Common Position No. 2002/402/CFSP, O.J. L 139/4 (2002) (concerning restrictive measures against Osama bin Laden, members of the Al-Qaeda organization and the Taliban and other individuals, groups, undertakings, and entities associated with them and repealing Council Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP); Council Common Position of No. 2003/140/CFSP, O.J. L 53/62 (2003) (concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP).

15. *See generally* Council Regulation (EC) No. 881/2002, O.J. L 139/9 (2002) (imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban, and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan).

16. *See generally* Council Regulation (EC) No. 561/2003, O.J. L 82/1 (2003) (amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban).

17. Article 308 EC states as follows:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

EC Treaty, *supra* note 12, art. 308, O.J. C 321 E/37, at 179.

18. *See generally* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649; Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533.

respect property, and the right for effective judicial review.[19] Similar challenges were brought in other cases.[20] Given that the key judicial pronouncements were made in *Kadi*, that judgment will be used as the primary point of analysis, with references to the other judgments only where necessary to illustrate distinct points made therein. Notably, in *Yusuf* the challenge was launched by a Community national, bringing to the fore the fact that the contested regulation was the first time that the Community imposed economic sanctions directly against its own nationals.[21]

B. *EC Comptence: Roofs, Pillars, and Bridges*

1. The Problem of Competence

Although in *Kadi* the applicants did not raise the issue,[22] the

19. *See Kadi*, [2005] E.C.R. II-3649, ¶ 59; *Yusuf*, [2005] E.C.R. II-3533, ¶ 190. Initially, Kadi sought annulment of Council Regulation No. 467/2001 as amended by Commission Regulation No. 2062/2001. However, following the repeal of Council Regulation No. 467/2001 by Council Regulation No. 881/2002, which took place after the commencement of proceedings, the Court of First Instance ("CFI") considered the action directed against the new regulation in the interests of the proper administration of justice. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 52-58. A similar issue arose in *Yusuf v. Council. Yusuf*, [2005] E.C.R. II-3533, ¶¶ 71-77. The European Court of Justice ("ECJ") rejected the argument that the contested regulations were not proper regulations because they named specific persons and therefore lacked general application. *See* Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P, ¶ 241 (ECJ Sept. 3, 2008) (not yet reported).

20. *See generally* Minin v. Commission, Case T-362/04, [2007] E.C.R. II-2003; Ayadi v. Council, Case T-253/02, [2006] E.C.R. II-2139; Hassan v. Council, Case T-49/04, [2006] E.C.R. II-52; Sison v. Council, Case T-47/03, (CFI July 12, 2006) (not yet reported).

21. *See generally Yusuf*, [2005] E.C.R. II-3533. In the past, economic sanctions imposed by the Community against third countries may have had adverse incidental effects on Community enterprises but never targeted directly Community natural or legal persons. *See, e.g.*, The Queen, v. HM Treasury, Case C-124/95, [1997] E.C.R. I-81. In *Yusuf*, the Court of First Instance confirmed that the Council had power to adopt restrictive measures against Community nationals and persons established in the Community under Articles 60 EC and 301 EC. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 112. In *Minin v. Commission*, the CFI rejected an argument based on extra-territoriality. The applicant argued that the Community may not adopt legislation in relation to conduct originating outside the European Union ("EU") unless such conduct produces effects within the EU territory. The CFI held that, since the objective of the Common Foreign and Security Policy ("CFSP") is to preserve peace and strengthen international security, the Community has power to adopt economic sanctions to counteract conduct arising exclusively outside the EU since, otherwise, CFSP objectives could not be attained. *See Minin*, [2007] E.C.R. II-2003.

22. *See Kadi*, [2005] E.C.R. II-3649. The issue of competence was raised by the applicants in *Yusuf* and also in *Ayadi v. Council*, where the applicant raised arguments

CFI examined on its own motion whether the Community had competence to adopt economic sanctions against non-state actors. In the context of the cases, the issue of competence was unusually complex. It will be recalled that the contested regulations were adopted on the combined basis of Articles 301 EC, 60 EC, and 308 EC.[23] Article 301 EC fulfills a distinct function in the EU architecture. It empowers the Community to take action to serve CFSP objectives, thus enabling a transition (*passarelle*) from the second to the first pillar and providing a bridge between inter-governmentalism and Community methodology.[24] Action under Article 301 EC is the result of a two-stage procedure. In the first stage, the Council, acting under the CFSP, adopts unanimously a common position or a joint action laying down the guidelines that the Community must follow. In the second stage, the Council, acting by qualified majority and in its capacity as a Community institution, adopts measures, typically in the form of a regulation, which translate the political objectives of the CFSP into binding Community legislation. Notably, the EC Treaty makes no general provision for the implementation of CFSP common positions or joint actions via Community legislation. Economic sanctions are in fact the only area where an express provision is made for a transition between the first and second pillar.[25] Article 301 EC is the main such *passarelle* provision,[26] defining economic sanction by the Community as an action "to interrupt or to reduce, in part or completely, economic relations with one or more third countries." The provision reveals the *sui generis* ancestry of economic sanctions in Community law, which traditionally straddled foreign policy and trade relations.[27]

Since 2000, the Council has adopted a liberal interpretation of Article 301 EC, relying on it to adopt smart sanctions, i.e., sanctions targeting individuals and non-state actors.[28] An exam-

based on the principle of subsidiarity. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 82; *Ayadi*, [2006] E.C.R. II-2139, ¶¶ 82-85; *infra* notes 96-99 and accompanying text.

23. *See* EC Treaty, *supra* note 12, arts. 60, 301, 308, O.J. C 321 E/37, at 65, 177, 179.

24. *See* EC Treaty, *supra* note 12, art. 301, O.J. C 321 E/37, at 177.

25. *See id.*

26. *See id.* Article 60(1) EC is also a *passarelle* provision but it is subsidiary to Article 301 EC since, by its own terms, it only applies in the cases envisaged in Article 301 EC. *See* EC Treaty, *supra* note 12, art. 60, O.J. C 321 E/37, at 65.

27. *See* PANOS KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW 429-33 (2006).

28. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶ 90.

ple is provided by the sanctions regime against Mr. Milošević, the former President of Yugoslavia. In 1999, in response to constant violations of human rights committed by the government of the Federal Republic of Yugoslavia ("FRY"), the Council took measures against the FRY.[29] In 2000, upon the restoration of democracy and the election of a new president, the sanctions against the FRY were repealed but were maintained against Mr. Milošević and his associates as he continued to be perceived as a threat to the consolidation of democracy.[30] Although these new sanctions were targeted at individuals, the Council took the view that Articles 301 EC and 60 EC could still be relied upon, on the ground that the individuals in question could exercise political influence over the FRY, endangering its democratic process.[31]

This legislative practice found judicial endorsement in *Kadi*,[32] where the CFI drew a distinction between the situation before and after the collapse of the Taliban regime. With regard to the former, the CFI held that, in light of considerations of effectiveness and humanitarian concerns, Articles 60 EC and 301 EC should be interpreted as enabling the Community institutions to impose sanctions not only against entities or persons who physically control part of the territory of a third country and those who effectively control its government apparatus but also "against persons and entities associated with them and who or which provided them with financial support."[33] Thus, the CFI interpreted Articles 60 EC and 301 EC as empowering the Community to impose economic sanctions not only against states and their rulers but also against non-state actors who are associated with them or directly or indirectly controlled by them. This condition was fulfilled when the first wave of sanctions was adopted,[34] since at that time the Taliban controlled the greater

29. *See generally* Council Regulation (EC) No. 1294/1999, O.J. L 153/63 (1999) (concerning a freeze of funds and a ban on investment in relation to the Federal Republic of Yugoslavia ("FRY") and repealing Regulations (EC) No 1295/98 and (EC) 1607/98).

30. *See generally* Council Regulation (EC) No. 2488/2000, O.J. L 287/19 (2000) (maintaining a freeze of funds in relation to Mr. Milosevic and those persons associated with him and repealing Regulations (EC) Nos. 1294/1999 and 607/2000 and Article 2 of Regulation (EC No 926/98)).

31. *See id.* at 19.

32. *See Kadi*, [2005] E.C.R. II-3649, ¶ 90.

33. *Id.*

34. *See id.*

part of Afghan territory.

The situation after the collapse of the Taliban regime, however, was different. The contested regulation in *Kadi* went a step further since the sanctions targeted individuals who were neither associated with the incumbent government nor had links with a particular territory.[35] The CFI held that, in those circumstances, there was no sufficient link between the targeted individuals and the third country and therefore, Articles 301 EC and 60 EC could not by themselves empower the Community to impose sanctions.[36] Further, the CFI held that Article 308 EC could not by itself provide the legal basis for the contested regulation since the imposition of economic sanctions against terrorists could not be considered to be one of the objectives of the Community.[37] The sanctions in question did not fall within the scope of the common commercial policy since the Community's relations with a third country was not at issue. Nor could the regulation be justified in the interests of ensuring undistorted competition in the internal market.[38] The CFI also rejected the argument that the maintenance of international peace and security could be considered as a general objective of the Community.[39]

35. *See id.* ¶¶ 90-94. In fact, the Community has imposed such smart sanctions against individuals a number of times within the last decade but they had not been questioned before judicially. All such sanctions present the same characteristics as those in *Kadi*. They originated from United Nations Security Council ("UNSC") resolutions, were adopted at EU level by CFSP measures, and became legally binding by Community regulations adopted on the basis of Articles 60 EC, 301 EC and 308 EC. *See, e.g.*, Council Regulation (EC) No. 305/2006, O.J. L 51/1 (2006) (imposing specific restrictive measures against persons suspected of involvement in the assassination of the former Lebanese Primer Minister Rafiq Hariri); Council Regulation (EC) No. 1183/2005, O.J. L 193/1 (2005) (imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo); Council Regulation (EC) No. 1184/2005, O.J. L 193/9 (2005) (imposing certain specific restrictive measures directed against certain persons impeding the peace process and breaking international law in the conflict in the Darfur region in Sudan); Council Regulation (EC) No. 560/2005, O.J. L 95/1 (2005) (imposing certain specific restrictive measures directed against certain persons and entities in view of the situation in Côte d'Ivoire); Council Regulation (EC) No. 1763/2004, O.J. L 315/14 (2004) (imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia ("ICTY")).

36. *See, e.g.*, Minin v. Commission, Case T-362/04, [2007] E.C.R. II-2003, ¶¶ 67-68; Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶¶ 93-97; Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533, ¶¶ 128-33.

37. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 116-17.

38. *See id.* ¶ 111.

39. *See id.* ¶ 118.

Rather, it fell within the Second Pillar of the Union. Notably, the CFI held that Article 308 EC cannot be used to attain one of the objectives of the Treaty of the European Union on the ground that its elevation to an inter-pillar basis would run counter to the constitutional architecture of the distinct pillars.[40]

Nevertheless, the CFI held that Article 308 EC in conjunction with Articles 301 EC and 60 EC gave power to the Council to adopt the contested regulation.[41] First, it pointed out that Articles 60 EC and 301 EC are wholly special provisions in that they enable the Council to take action to achieve the objectives not of the Community but of the Union.[42] Secondly, under Article 3 of the Treaty of the European Union, the EU is to be served by a single institutional framework and ensure the consistency of its external activities as a whole.[43] Just as all the powers provided for by the EC Treaty may prove to be insufficient to allow the institutions to act in order to attain one of the objectives of the Community, so the powers to impose economic sanctions provided for by Articles 60 EC and 301 EC may prove to be insufficient to allow the institutions to attain the objective of the CFSP. The CFI found that "[t]here are therefore good grounds for accepting that, in the specific context contemplated by Articles 60 EC and 301 EC, recourse to the additional legal basis of Article 308 EC is justified for the sake of the requirement of consistency laid down in Article 3 EU."[44]

On appeal, Advocate General Maduro rejected the legitimacy of recourse to Article 308 EC but opined that Articles 60 EC and 301 EC are by themselves sufficient legal bases.[45] First, he employed a textual argument.[46] He pointed out that the only requirement provided for in Articles 301 EC and 60 EC is that the Community measures adopted thereunder must interrupt or reduce economic relations with third countries.[47] The Treaty does not regulate what shape the measures should take, who

40. *See Kadi*, [2005] E.C.R. II-3649, ¶ 120; *Yusuf*, [2005] E.C.R. II-3533, ¶ 156.

41. *See Kadi*, [2005] E.C.R. II-3649, ¶ 122.

42. *See id.* ¶ 124.

43. *See id.* ¶ 126.

44. *See id.* ¶¶ 127-28.

45. *See* Opinion of Advocate General Maduro, Kadi v. Council, Case C-402/05, ¶¶ 11-12 (ECJ Jan 16, 2008) (not yet reported).

46. *See id.* ¶ 12.

47. *See id.*

should be the target or who should bear their burden.[48] He reasoned that, by adopting sanctions against entities located in third countries, economic relations between the Community and these countries are also inevitably affected.[49] Secondly, he argued that the CFI's restrictive reading of Article 301 EC deprived it of much of its practical use as it disabled the Community from adapting to modern, mutating threats to international peace and security.[50]

The ECJ found the Advocate General's reasoning unconvincing.[51] It held that the contested sanctions could not be adopted solely on the basis of Articles 60 EC and 301 EC since they did not bear any link to the governing regime of a third country.[52] The essential purpose and object of the contested regulation was to combat international terrorism and not to affect economic relations between the Community and the third countries where the listed persons were located.[53]

The ECJ took the view that the contested sanctions could be adopted on the combined legal basis of Articles 60 EC, 301 EC, and 308 EC but for reasons different from those accepted by the CFI.[54] It found the bridge rationale of the CFI lacking. First, it held that, although Articles 60 EC and 301 EC establish a bridge between the imposition of economic sanctions by the Community and CFSP objectives, such a bridge does not extend to other provisions of the EC Treaty. Action under Article 308 EC can only be undertaken in order to attain one of the objectives of the Community, which cannot be regarded as including the objectives of the CFSP.[55] Secondly, the Court took the view that recourse to Article 308 EC would run counter to the inter-pillar nature of the Union.[56] The constitutional architecture of the

48. *See id.*

49. *See id.* ¶ 13.

50. *See id.* According to Advocate General Maduro, excluding non-state actors from economic relations with third countries would amount to ignoring "a basic reality of international economic life: that the governments of most countries do not function as gatekeepers for the economic relations and activities of each specific entity within their borders." *Id.*

51. *See* Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P, ¶¶ 163-65 (ECJ Sept. 3, 2008) (not yet reported).

52. *See id.* ¶¶ 166-67.

53. *See id.* ¶¶ 166-69.

54. *See id.* ¶¶ 195-96.

55. *See id.* ¶¶ 197-201.

56. *See id.* ¶ 203.

pillars, as intended by the framers of the Treaties, militated against any extension of the bridge to articles of the EC Treaty other than those that explicitly created a link.[57] Finally, employing the rationale of Opinion 2/94,[58] it held that Article 308 EC, being an integral part of an institutional system based on the principle of enumerated competences, cannot serve as a basis for widening the scope of Community powers beyond the framework created by the EC Treaty provisions defining its tasks and activities.[59]

But, in a somewhat surprising volte-face the ECJ found that Article 308 EC was correctly included in the legal basis of the contested regulation.[60] It reasoned that, although Articles 60 EC and 301 EC authorized only sanctions against states, recourse to Article 308 EC could be made to extend their limited ambit *ratione materiae,* provided that the other conditions for its applicability were satisfied.[61] Inasmuch as they provide for Community powers to impose economic sanctions in order to implement CFSP action, Articles 60 EC and 301 EC are the expression of an implicit and underlying Community objective, namely that "of making it possible to adopt such measures through the efficient use of a Community instrument."[62] This, the Court held, was a Community objective for the purposes of which the residual clause of Article 308 EC can be utilized.[63] The Court also found that the second condition of Article 308 EC, namely that the measure must relate to the operation of the common market, was also fulfilled so that it was possible to adopt the contested regulation on the basis of the combined basis of Articles 60 EC, 301 EC, and 308 EC.[64] This novel and somewhat esoteric reasoning raises a number of objections, which will be discussed in the next Section.

57. *See id.* ¶ 202.
58. *See id.* ¶ 203.
59. *See id.*
60. *See id.* ¶¶ 211-13.
61. *See id.* ¶¶ 211-16.
62. *See id.* ¶ 226.
63. *See id.* ¶ 227.
64. *See id.* ¶ 235.

2. A Critique: Adapting the Greek Temple to Withstand Twenty-first Century Tremors

The issue of Community competence is highly problematic and *Kadi* can justly be seen as a borderline case. In view of the language of Article 301 EC, establishing Community competence requires a leap of faith. If such a leap is to be performed at all, it can be performed more persuasively by relying solely on Articles 60 EC and 301 EC rather than invoking Article 308 EC.

There are, in fact, powerful arguments against Community competence. It may be argued that, as a *passerelle* provision, Article 301 EC should be interpreted restrictively. An unduly broad interpretation would undermine the separation of pillars and the distinct methods of integration and legal instruments (or lack thereof) ascribed to the Second Pillar. Furthermore, in a legal system which abides by the rule of law, the power of public authorities, especially supra-national ones, to impose sanctions on individuals should be interpreted narrowly. Granting to the Community a broad power to impose such sanctions means, inevitably, less democracy since sanctions can find their way to the national statute book directly from the UN Sanctions Committee without going through any kind of parliamentary control at national or EU level.[65]

The above arguments however are not conclusive. As regards democracy, the resulting deficit should be filled by ensuring vigorous judicial control and enhancing parliamentary scrutiny, rather than by denying competence to the Community, if such competence can rest on the Treaty. As regards the nature of Article 301 EC as a *passarelle* provision, the starting point should be its objectives. The scope of measures that can be adopted on its basis can only be properly determined by reference to its aims. Article 301 EC seeks to enable the transition from political decisions reached under the auspices of CFSP to

65. *See* M v. Her Majesty's Treasury, ¶ 39 [2006] EWCA 171 (appeal from the High Court of Justice QB Division). Under Articles 301 EC and 60 EC, economic sanctions are adopted by the Council on a proposal from the Commission without any involvement on the part of the European Parliament. Article 308 EC provides for the consultation of the Parliament but this is a benign input since the Council is not required to follow Parliament's opinion. By virtue of Article 249 EC, the contested regulation became part of the law of the land in each of the Member States from the time of its entry into force without the need for any implementing measures. Indeed, English courts have refused to question its validity in the light of the CFI's ruling in Kadi. *See id.*

concrete legislative measures.[66] Its objective is, in fact, to facilitate a transition between the pillars rather than to prevent it.[67] As the CFI pointed out, Article 3 Treaty on European Union ("TEU") mandates that the Union is to be served by a single institutional framework and stresses specifically the need to "ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies."[68] There is nothing to prevent the judiciary from interpreting the EC Treaty in light of the TEU. Such interpretation to ensure consistency is in fact dictated by the unity of purpose, which underlies the founding Treaties and accords with the duty of sincere cooperation provided for in Article 10 EC.

It is worth outlining in this context the rationale of smart sanctions. In contrast to comprehensive sanctions which burden a country as a whole, smart sanctions target specific institutions, groups or individuals. They developed and gained increasing prominence in the 1990s as the UN sought to explore more effective ways to fulfill its function of maintaining international peace and security. In view of their perceived advantages, smart sanctions have become the favored heavy hand of preventive diplomacy. By targeting decision-makers and elites, they put coercive pressure on specifically designated individuals, thus maximizing their effectiveness while minimizing the unintended negative humanitarian impact on large segments of the population.[69] Irrespective of their possible drawbacks as instruments of foreign policy,[70] it is difficult to avoid the conclusion that the general population of the targeted country is much more likely to suffer less by the imposition of targeted sanctions than by the imposition of general ones. From the humanitarian point of view, and also from the point of view of adverse legal

66. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶¶ 122-31.

67. *See id.*

68. *See id.* ¶ 126.

69. *See* SWISS FED. OFFICE FOR FOREIGN ECON. AFFAIRS, 2ND INTERLAKEN SEMINAR ON TARGETING UNITED NATIONS FINANCIAL SANCTIONS ¶¶ 17-19 (1998); SWISS FED. OFFICE FOR FOREIGN ECON. AFFAIRS, SECOND INTERLAKEN SEMINAR ¶ 5 (1999); *see also* THE SWISS CONFEDERATION, TARGETED FINANCIAL SANCTIONS: A MANUAL FOR DESIGN AND IMPLEMENTATION (2001). All documents available at: http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en.

70. *See* HOUSE OF LORDS SELECT COMMITTEE ON ECONOMIC AFFAIRS, THE IMPACT OF ECONOMIC SANCTIONS (2007) (providing a detailed analysis of imposed economic sanctions); *cf.* Daniel W. Drezner, *How Smart are Smart Sanctions?*, 5 INT'L STUDIES REV. 107 (2003).

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

As the CFI accepted, Article 301 EC was designed to enable the Community to comply with international commitments of the Member States, especially those undertaken under the auspices of the UN.[71] It is correct, as the ECJ pointed out,[72] that an exact correlation between Article 41 of the UN Charter which authorizes the Security Council to adopt economic sanctions and Article 301 EC cannot be drawn. The fact, however, that Article 301 EC refers only to the imposition of economic sanctions on third countries does not mean that the authors of the Treaty purposefully excluded sanctions against non-state organizations. At the time when that provision was introduced by the TEU, smart sanctions simply did not exist as instruments of foreign policy.[73]

If applied consistently, a narrow interpretation of Article

71. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶ 202.

72. *See* Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P, ¶¶ 173-75 (ECJ Sept. 3, 2008) (not yet reported).

73. *See*, KOUTRAKOS, *supra* note 27, at 431-32. Article 41 authorizes the UNSC to take measures, which "may include complete or partial interruption of economic relations." U.N. Charter, art. 41. Article 301 EC, by contrast, refers to "action by the Community to interrupt or to reduce, in part or completely, economic relations *with one or more third countries*" (emphasis added). EC Treaty, *supra* note 12, art. 301, O.J. C 321 E/37, at 177. This difference in terminology however is by no means conclusive. Prior to the introduction of Article 301 by the Treaty on the European Union ("TEU"), economic sanctions against third countries were imposed on the basis of Article 133 EC on the common commercial policy. That provision was designed to serve trade policy objectives and its use for the adoption of sanctions pursuing foreign policy objectives was controversial. With the insertion of Article 301 EC, the drafters of the TEU sought to avoid discrepancies between CFSP objectives and the implementing powers of the Community. Article 301 EC did not refer to non-state actors since at the time of its introduction smart sanctions were not used as an instrument of foreign policy. *See* Gudrun Zagel, *Sanctions of the European Community: A Commentary on Art. 301 TEC*, 5-6 LAW OF THE EUROPEAN UNION (forthcoming), *available at* http://ssrn.com/abstract=862024; KOUTRAKOS, *supra* note 27, at 428-33.

301 EC would appear to lead to odd practical results. It would be possible for the Community to impose sanctions on non-state entities who finance a rogue regime or a rebel group which exercises de facto control over part of the territory of a country but, as soon as the rogue regime falls or the rebel group is defeated, the Community would no longer be able to renew the sanctions even if the targets continued to pose a substantial and imminent threat to the political stability of the country in question. This would hardly be compatible with the need to maintain international peace and stability, which is one of the key objectives of the CFSP and the underlying aim of Article 301 EC.[74] In short, a narrow interpretation of Article 301 EC would be based on a formalistic distinction between state and private action, which would not do justice to the forces that shape the sources and exercise of political power.

There are, in summary, four arguments in favor of Community competence. First, as the Advocate General opined,[75] the language of Article 301 EC does not exclude the imposition of sanctions against individuals. Secondly, a historical interpretation of the provision suggests that the authors of the Treaty had no intention to exclude such sanctions.[76] Thirdly, a teleological and evolutionary interpretation favor competence to impose sanctions against non-state actors.[77] Finally, such interpretation appears suited to the nature of Article 301 EC as a *pasarelle* provision which provides a bridge between the first and the second pillar.

Thus, if it is to be accepted that the Community has competence, it is submitted that the appropriate basis should be found in Articles 301 EC and 60 EC and that recourse to Article 308 EC is superfluous. As Advocate General Maduro noted, Article 308

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74. *See* EC Treaty, *supra* note 12, art. 301, O.J. C 321 E/37, at 177; Minin v. Commission, Case T-362/04, [2007] E.C.R. II-2003, ¶ 107. A further argument in support of the view that Articles 301 and 60 EC are sufficient legal basis is that these provisions refer to "third countries," as opposed to "third states." The term "countries" is wider than "states" and appears to encompass the population rather than solely the government or the concept of public power in the sense of *etat*. *See* EC Treaty, *supra* note 12, arts. 60, 301, O.J. C 321 E/37, at 65, 177.

75. *See* Opinion of Advocate General Maduro, Kadi v. Council, Case C-402/05, ¶ 11-12 (ECJ Jan 16, 2008) (not yet reported).

76. *See* KOUTRAKOS, *supra* note 27, at 431.

77. *See* Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P (ECJ Sept. 3, 2008) (not yet reported).

EC cannot serve as an inter-pillar bridge.[78] It is strictly an enabling provision which provides the means but not the objective.[79] Either, a measure targeting non-state actors comes within the objectives of the CFSP, in which case it can be adopted under Article 301 EC, or it does not, in which case Article 308 EC cannot be used as its basis. Increasing the quantity of legal bases cannot improve their quality.

At this juncture, it is worth looking closer at the reasoning of the ECJ. The Court held that Article 308 EC could be used because the conditions for its application were fulfilled.[80] These are, that action must be necessary to achieve Community objectives and that such action must relate to the operation of the common market. It is however difficult to see how these prerequisites are fulfilled.

The Court appears to draw a distinction between the ultimate objectives pursued by the underlying CFSP common position, which was to maintain international peace and security, and a separate, instrumental, objective of the contested regulation, namely to prevent certain persons associated with terrorism from having at their disposal economic resources.[81] While Article 308 EC could not be utilized to fulfill directly the first, it could be utilized to fulfill the second. The Community objective pursued, in fulfillment of which Article 308 EC could be resorted to, was not to combat terrorism but to make it possible to adopt the measures envisaged by Article 60 EC and 301 EC "through the efficient use of a Community instrument."[82] This distinction however appears to put the cart before the horses: If Articles 60 EC and 301 EC only authorize the imposition of sanctions against states, as the Court proclaimed that the do, how can it be said that their objectives include the imposition of sanctions against individuals? In effect, the Court's reasoning confuses means with objectives.[83] It appears to accept that there is a

78. *See* Opinion of Advocate General Maduro, Kadi v. Council, Case C-402/05, ¶ 15 (ECJ Jan 16, 2008) (not yet reported).

79. *See id.*

80. *See Kadi*, ¶ 212 (ECJ Sept. 3, 2008).

81. *See id.* ¶ 221 (discussing the United Kingdom's adherence to the view).

82. *See id.* ¶ 226.

83. *See id.* ¶ 235. The ECJ derived support from Article 60(2) but it is hard to see how this provision can come into play. *See id.* ¶ 235. Article 60(2) enables a Member State to take unilateral measures against a third country with regard to capital movements and payments. Such measures may be taken, for serious political reasons and on

Community objective to facilitate the imposition of economic sanctions through Community measures in order to implement CFSP goals, which exist beyond and above the wording of Articles 301 EC and 60 EC. If that is the case, it means that those provisions have a purely subordinate role similar to that of Article 308 EC and, if so, their scope should not be extended by recourse to another means clause such as Article 308 EC. The Court's conclusion in fact undermines its earlier finding that Article 308 EC cannot be used to pursue CFSP objectives.

The rationale underlying the second condition for the application of Article 308 EC, namely that the measure must relate to the operation of the common market,[84] appears equally flawed. The Court held that, if economic sanctions were imposed unilaterally by each Member State, the multiplication of national measures might affect the operation of the common market. Such measures could affect interstate trade, especially the movement of capital and payments and the right of establishment. In addition, they could create distortions of competition, since any differences between state sanctions could operate to the advantage or disadvantage of the competitive position of certain economic operators.[85]

This reasoning does not appear persuasive for the following reasons. The purpose of the sanctions is clearly not to regulate the common market but to combat terrorism. Any effects that they may have on free movement are incidental. In defining the scope of harmonization action under Article 95 EC, the ECJ has held that there must be a need to eliminate substantial or "appreciable" distortions in competition.[86] In the present case, there is scant evidence that such distortions might arise in the absence of Community legislation and, in any event, the ECJ did not attempt to engage in any inquiry to determine the threshold of appreciability. Similarly, under established case law, a mere

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grounds of urgency, in the absence of Community economic sanctions adopted under Article 60(1). It is not easy to see how Article 60(2) can have a bearing on the competence of the Community under Article 60(1). It is conditioned by the same requirement, namely that the measures must be "against third countries" as opposed to non-state actors. The Court's reasoning appears to contradict its earlier findings that Article 308 EC cannot be utilized to fulfill Union as opposed to Community objectives. *See* EC Treaty, art. 60, O.J. C 321 E/37, at 65.

84. *See Kadi*, ¶¶ 230-35 (ECJ Sept. 3, 2008).

85. *See id.* ¶ 230.

86. *See* Germany v. Parliament, Case C-376/98, [2000] E.C.R. I-8419, ¶ 106.

risk of disparities between national rules and a theoretical risk of obstacles to free movement or distortions of competition is not sufficient to justify the use of Article 95 EC.[87] The Community has competence to adopt a harmonization measure only if it designed to prevent, and capable of preventing, actual or foreseeable obstacles to trade or distortions in competition. Although recourse to Article 95 EC is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[88] It does not appear that the contested regulation in *Kadi* fulfills this test. As the CFI pointed out, the implementation of the UNSC resolutions by the Member States would not pose a serious danger of discrepancies in the application of sanctions.[89] For one thing, the UNSC resolutions contained clear, precise and detailed definitions and obligations that left scarcely any room for interpretation. For another, the importance of the sanctions was so great that there was no reasonable danger of inconsistent application at the national level.[90] Taken at face value, the Court's rationale in *Kadi* suggests that the threshold which triggers the application of Article 308 EC, a residual provision, is much lower than the threshold which triggers Article 95 EC, the main internal market tool of the Treaty.[91] This is however hardly what the Court must have intended. A clarification of the law in this context is now urgently needed.

The final argument used by the Court also raises objections. The Court held that adding Article 308 EC to the legal basis of the contested regulation enables the European Parliament to take part in the decision-making process, whereas Articles 60 EC and 301 EC provide for no such role for the Parliament. This argument echoes of *Titanium Dioxide* and recognizes the democratic deficit in the imposition of sanctions. It is, however, not

87. *See* Germany v. Parliament, Case C-380/03, [2006] E.C.R. I-11573, ¶ 37; *see also* Alliance for Natural Health v. Sec'y of State for Health, Joined Cases C-154/04 and C-155/04, [2005] E.C.R. I-6451, ¶ 28.

88. *See, e.g., Germany*, [2006] E.C.R. I-11573, ¶¶ 39-41; *Alliance for Natural Health*, [2005] E.C.R. I-6451, ¶ 29; Neth. v. Parliament, Case C-377/98, [2001] E.C.R. I-7079, ¶ 15.

89. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶ 113.

90. *See id.*

91. *See id.* ¶¶ 128-30.

capable of triggering the application of Article 308 EC or any other legal basis where its substantive conditions are not fulfilled.[92]

All in all, the ECJ's reasoning on competence does not appear convincing. Similarly, the distinction drawn by the CFI between sanctions against the *de jure* or *de facto* rulers of a country, which can be imposed solely on the basis of Articles 301 EC and 60 EC, and sanctions which have no link with the rulers or the territory of a third country, which can only be imposed with the aid of Article 308 EC, appears somewhat artificial and fraught with practical difficulties.[93] In its judgment in *Minin v. Commission*, which was delivered by the CFI after its judgment in *Kadi*, but before the ECJ's decision, the CFI itself endorsed sanctions based solely on Articles 301 EC and 60 EC against Charles Taylor, the former Liberian President, members of his family, and senior officials of his former regime, to avoid them from interfering in the restoration of peace and stability in Liberia, although they no longer controlled its government or any territory.[94] In *Minin* the CFI relied on the correct criterion, namely, the scope and objectives of the UNSC, which the Community sanctions sought to implement.[95] A sufficient link with the territory of a country exists where the targeted individuals can be said to be a threat to international peace and security by seeking to undermine stability in the region.

Two further points may be made in relation to competence. Notably, in *Ayadi v. Council*, a case decided by the CFI after its judgment in *Kadi*, but before the ECJ's decision in that case, the CFI found that the principle of subsidiarity cannot be used as an autonomous ground of review in the sphere of Articles 301 EC and 60 EC.[96] The applicant had contended that the Member States were better placed to determine which measures were necessary to implement the UNSC resolutions and that, by compromising their freedom of choice, the contested regulation failed

92. *See id.* ¶¶ 122-35; *cf.* Commission v. Council (Directive on Waste), Case C-155/91, [1993] E.C.R. I-939 (distinguishing *Titanium Dioxide* and placing limits on the argument of democracy).

93. *See* Minin v. Commission, Case T-362/04, [2007] E.C.R. II-2003, ¶¶ 61, 68; Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533, ¶ 125.

94. *See Minin*, [2007] E.C.R. II-2003, ¶ 68-74.

95. *See id.*

96. *See* Ayadi v. Council, Case T-253/02, [2006] E.C.R. II-2139, ¶¶ 108-14.

to abide with subsidiarity.[97] The CFI held that, even if it were assumed that economic sanctions did not fall within the exclusive competence of the Community, there was no room for subsidiarity.[98] Articles 60 EC and 301 EC enable the Community to act only where such action is deemed to be necessary to attain CFSP objectives. Thus, in relation to the economic sanctions, the Treaty confers on the Union the power to determine whether action by the Community is necessary and such determination falls within the discretion of the Union. But even if subsidiarity was applicable, the uniform implementation of the UNSC resolutions could be better achieved by Community action rather than by action on the part of each Member State.[99]

Finally, it will be noted that the discussion about competence would be otiose if the Lisbon Treaty came into force. Article 215(2) on the Treaty of the Functioning of the European Union ("TFEU") expressly grants the Council power to adopt restrictive measures against individuals, groups and non-state groups on the basis of a CFSP decision.[100]

C. *The Status of UNSC Resolutions Under EC Law*

Once it is established that the Community has competence to adopt the contested sanctions, the next issue to consider is the effect of UNSC resolutions in the Community legal order. It is clear that, as a matter of international law, the UN Charter takes precedence over the domestic law of its Member States and such primacy extends to UNSC resolutions.[101] But where does Com-

97. *See id.* ¶ 113.

98. *See id.* ¶¶ 110-13.

99. *See Ayadi*, [2006] E.C.R. II-2139, ¶¶ 108-14; *see also* Minin v. Commission, Case T-362/04, [2007] E.C.R. II-2003, ¶¶ 76, 89.

100. *See* Draft Treaty of Lisbon (Reform Treaty) art. 215(2), O.J. C 306/01, at 144 (2007), *opened for signature* Dec. 13, 2007 (not yet ratified) [hereinafter Reform Treaty]. Article 215(2) Treaty on the Functioning of the European Union ("TFEU") is the successor of Article III-322(2) of the Constitutional Treaty. Notably, although the Lisbon Treaty excludes the jurisdiction of the ECJ from CFSP issues, it provides for an exception in relation to sanctions imposed under Article 215(2), which can be challenged by way of direct action through Article 275 TFEU. *See* Reform Treaty, *supra*, art. 1, 275(2), O.J. C 306/01, at 30, 166.

101. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶¶ 182-84; Military & Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 440 (Nov. 26). The primacy of the Charter over the domestic law of the States derives from customary international law as consolidated in Article 27 of the Vienna Convention on the Law of Treaties of May 23, 1969 which states that a contracting party may not invoke the provisions of its domestic law as a justification for its failure to perform a treaty. *See* Vienna Convention

munity law fit in the international law universe? The CFI held that the Community is not bound by the UN Charter by virtue of public international law, since it is not a member of the UN or an addressee of the resolutions of the Security Council, but is bound by virtue of the EC Treaty itself.[102] It based the primacy of the UN Charter on the combined effects of Articles 307(1) EC[103] and 297 EC[104] and the theory of substitution. Article 307(1) EC, which was central to the CFI's reasoning, seeks to preserve the binding effect of international agreements concluded by Member States before they assumed obligations under the EC Treaties. The CFI pointed out that, at the time when they concluded the EC Treaty, the Member States were bound by their obligations under the UN Charter.

Referring to *International Fruit Co. NV v. Produktschap Voor Groenten en Fruit*,[105] it held that, by concluding the EC Treaty between them, the Member States could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under the UN.[106] It followed that the Community must respect Member States' obligations under the Charter. The CFI derived further support for primacy from the theory of substitution. This theory, first developed in *International Fruit*[107] posits that, where under the EC Treaties the Community assumes powers previously exercised by the Member States in an area governed by an international agreement, the provisions of that agreement become binding on the Community. Thus, insofar as the powers necessary for the performance of the Member States' obligations under the UN Charter have been transferred to the Community, there are knock-on effects for both the Member States and the Community. On the one

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on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The primacy of the Charter over other international agreements is expressly laid down in Article 103 of the Charter and extends even to posterior agreements. *See* Vienna Convention, *supra*, art. 30; U.N. Charter, art. 103.

102. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 192, 203-04; Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533, ¶¶ 242-57.

103. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 188-91; EC Treaty, *supra* note 12, art. 307, O.J. C 321 E/37, at 178.

104. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 188-91; EC Treaty, *supra* note 12, art. 297, O.J. C 321 E/37, at 174.

105. *See Kadi*, [2005] E.C.R. II-3649, ¶ 195; Int'l Fruit Co. NV v. Produktschap Voor Groenten en Fruit, Joined Cases 21-24/72, [1972] E.C.R. 1219, ¶ 11.

106. *Kadi*, [2005] E.C.R. II-3649, ¶ 195; *Int'l Fruit*, [1972] E.C.R. 1219, ¶ 11.

107. *Kadi*, [2005] E.C.R. II-3649, ¶¶ 188-89; *Int'l Fruit*, [1972] E.C.R. 1219, ¶ 18.

hand, the Member States undertake, pursuant to public international law, to ensure that the Community itself should exercise those powers in accordance with the UN Charter. On the other hand, by assuming powers previously exercised by Member States in the area governed by the UN Charter, the Community becomes bound by its provisions.[108] The primacy of the Charter was further reiterated by Article 297 EC which was specifically introduced in the Treaty for that purpose.[109]

Having established that the Community was bound by the UN Charter, the CFI reached the conclusion that it was barred from reviewing the validity of the contested regulation on the basis of Community law.[110] Since the regulation implemented a UNSC resolution, review of the former would inevitably carry with it incidental review of the latter, which would be incompatible with the primacy of the Charter. The CFI accepted however that UNSC resolutions must observe the fundamental peremptory provisions of *jus cogens* and proceeded to examine whether the contested sanctions complied with them.

By this construct, the CFI sought to reach a golden balance. It affirmed the primacy of the UN Charter over Community law while subjecting the Security Council to principles endogenous to the legal system at the apex of which it stands. This reasoning however is neither logically inevitable nor constitutionally secure. The CFI clearly took an internationalist approach rather than a constitutionalist one. Not only did it view UN and Community law in a strong hierarchical relationship but accorded to UN primacy its fullest weight allowing it to perforate the constitutional boundaries of the Community legal order. The opposite view, endorsed by the ECJ and Advocate General Maduro, is preferable. The primacy of the Charter operates in the field of

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108. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 198-203. As the President of the CFI put it, the Community became the "de facto successor to the obligations of the Member States under Article 25 of the United Nations Charter." Order of the President of the Court of First Instance, Yusuf v. Council, Case T-306/01 R, [2002] E.C.R. II-2387, ¶ 87.

109. *See Kadi*, [2005] E.C.R. II-3649, ¶ 188. Article 297 requires that:

> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take . . . in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

EC Treaty, *supra* note 12, art. 297, O.J. C 321 E/37, at 174.

110. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 193-204, 215-16, 221.

international law. The effect of international obligations within the Community legal order must be determined by reference to conditions set by Community law, and no provision of the Treaty abrogates the application of fundamental rights.

It is worth examining at this juncture the relationship between Community and international law in more detail. None of the arguments used by the CFI suggest that the UNSC resolutions may take unqualified precedence over fundamental rights as protected by Community law. Articles 307 EC and 297 EC are exceptional provisions of the Treaty, which, under certain conditions, authorize deviant conduct on the part of the Member States to serve international law commitments.[111] They do not impose on the Community an obligation to suspend the application of fundamental constitutional principles. The CFI's reading of Article 307 EC appears selective. Article 307 EC expressly states that, to the extent that pre-existing international agreements concluded by one or more Member States are incompatible with Community law, the Member States in question "shall take all appropriate steps to eliminate the incompatibilities established."[112] This imposes a best efforts obligation which has received an interpretation favorable to the Community. The case law under Article 307 EC seeks to minimize breaches to the integrity of the Community legal order caused by pre-existing international obligations rather than to give a *carte blanche* to the Member States to depart from fundamental constitutional principles.[113] It is simply not convincing to argue that all tasks that

111. *See* EC Treaty, *supra* note 12, arts. 297, 307, O.J. C 321 E/37, at 174, 178.

112. EC Treaty, *supra* note 12, art. 307, O.J. C 321 E/37, at 178.

113. *See* Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P, ¶¶ 304-07 (ECJ Sept. 3, 2008) (not yet reported). Thus, as interpreted by the ECJ, Article 307 EC requires the Member State to take specific steps and exhaust all avenues available in order to eliminate all incompatibilities with Community law arising from the international agreement in question. *See* Commission v. Portugal, Case 62/98, [2000] E.C.R. I-5171, ¶¶ 49-50. The ECJ has interpreted Article 307 EC as "a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement." Attoney-General v. Burgoa, Case 812/79, [1980] E.C.R. 2787, ¶ 9. Nevertheless, it does not entail a duty of active cooperation upon the Community and the latter is not required to take into account agreements between its Member States and third parties when acting within its competences. Opinion of Advocate General Capotorti, Attoney-General v. Burgoa, Case 812/79, [1980] E.C.R. 2787, ¶ 2 (Operative Part). While Article 307 EC allows Member States to honor obligations owed to non-member States under international agreements preceding the Treaty, it does not authorize them to exercise rights under such agreements in intra-Community relations. *See* Commission v. Austria, Case 203/03, [2005] E.C.R. I-935, ¶¶

the Member States, or the Community in their lieu, are called upon to take at any time in the future as a result of UNSC resolutions are *simpliciter* exempted from the fundamental guarantees of Community law.

More importantly, Article 307 EC may not take precedence over fundamental rights, the protection of which the ECJ ensures in fulfilling its function under Article 220 of the Treaty.[114] As the ECJ and Advocate General Maduro stated on appeal, Article 307 EC may not grant UNSC resolutions with a "supra-constitutional" status and render Community measures implementing UN law immune from judicial review.[115] In the light of article 6(1) EU, under no circumstance may the Community depart from its founding principles, in particular, respect for human rights and fundamental freedoms.[116] The case-law of the ECJ also demonstrates its serious commitment to the rule of law under which measures in breach of human rights are excluded from the Community legal order.[117] Thus, neither Article 297 EC nor Article 307 EC may permit any derogations from the principles laid down in Article 6(1) TEU which form part of the very foundations of the Community legal order.[118]

An important case in this context is *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transportation, Energy & Com-*

57-59; Commission v. Luxembourg, Case 473/93, [1996] E.C.R. I-3207, ¶ 40; *see also* Opinion of Advocate General Maduro, Commission v. Austria, Joined Cases C-205 & C-249/06 (ECJ July 10, 2008) (not yet reported).

114. *See Kadi*, ¶ 304 (ECJ Sept. 3, 2008).

115. *See Kadi*, ¶ 304 (ECJ Sept. 3, 2008); Opinion of Advocate General Maduro, Commission v. Austria, Joined Cases C-205 & C-249/06, ¶ 25 (ECJ July 10, 2008) (not yet reported). For instance, in the United States, though the UN Charter is considered the "supreme law of the land" by virtue of Article VI of the U.S. Constitution, it is not the case that UNSC resolutions prevail over "posterior" federal law. In accordance with the "later-in-time" principle, Congress may validly adopt statutes contrary to pre-existing UNSC resolutions. *See Diggs v. Schultz*, 470 F.2d 461, 466-67 (D.C. Cir. 1972) (noting that the "Byrd Amendment," a Congressional statute which sought to re-establish trade with Rhodesia in violation of a previous UNSC resolution, was constitutional); *see, e.g.*, Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 EUR. J. INT'L L. 751-81 (2004); James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421-36 (1998).

116. *See Kadi*, ¶ 303 (ECJ Sept. 3, 2008).

117. *See, e.g.*, Schmidberger v. Austria, Case C-112/00, [2003] E.C.R. I-5659; Johnston v. Royal Ulster Constabulary, Case 222/84, [1986] E.C.R. 1651; Parti écologiste "Les Verts" v. Parliament, Case 294/83, [1986] E.C.R. 1339.

118. *See Kadi*, ¶¶ 303-04 (ECJ Sept. 3, 2008).

munications,[119] which arose from the sanctions imposed on the Federal Republic of Yugoslavia. The Irish authorities had impounded an aircraft which Bosphorus Airways, a Turkish company, had leased from the Yugoslav national airline on the basis of a Council regulation which, in implementation of a UNSC resolution, required Member States to impound Yugoslavian assets. The Court dismissed the argument of Bosphorus that its right to property and its freedom to pursue a commercial activity had been infringed.[120] The judgment makes clear that Community regulations must be interpreted in the light of UNSC resolutions which they seek to implement, and that the importance of UN objectives may justify substantial limitations on fundamental rights.[121] It does not, however, establish that the ECJ may not review Community measures that give effect to UNSC resolutions. *Bosphorus* was, in fact, a case where the Court was preoccupied with the interpretation of a Council regulation imposing sanctions and not its validity, which was not in issue in the proceedings.

In *Kadi* the ECJ asserted the "constitutional hegemony" of the EU,[122] reiterating that that an international agreement cannot affect the allocation of powers fixed by the Treaties and consequently the autonomy of the Community legal order.[123] The judgment is less accommodating to the primacy of the UN than might have been expected. While it accepted that special importance must be attached to UNSC resolutions, it doubted that immunity for judicial review was an attribute of such resolutions as a matter of international law[124] and placed emphasis on the need to accommodate the implementation of UNSC resolutions

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119. *See* Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transp., Energy & Commc'ns, Case C-84/95, [1996] E.C.R. I-3935.

120. *See id.* ¶¶ 2, 19.

121. *See id.* ¶¶ 21-27. In subsequent proceedings, the judgment of the ECJ was confirmed by the European Court of Human Rights ("ECtHR" or "Strasbourg Court"). *See* Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, 42 Eur. Ct. H.R. 1 (2006).

122. *See* Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2002 (2000) (using the phrase "constitutional hegemony").

123. *See* Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P, ¶ 282 (ECJ Sept. 3, 2008) (not yet reported).

124. *See id.* ¶¶ 298-99. The ECJ pointed out that the Charter does not impose the choice of a particular model for the implementation of UNSC resolutions and leaves the Member States free to decide. It did not therefore exclude judicial review of the internal lawfulness of the contested regulation under EC law. *See id.*

to the ECJ legal order rather than the converse, which lay at the heart of the CFI's reasoning.[125]

The ECJ held that, even if obligations arising from UNSC resolutions were to be classified in the internal hierarchy of Community law norms, under Article 300(7) EC they would take precedence over secondary Community law but not over the Treaty itself and other sources of primary law such as the protection of fundamental rights.[126]

1. Lessons from Strasbourg

It is pertinent to examine here the attitude of the ECtHR towards the UN Charter. The Strasbourg Court recently had the opportunity to explore the relationship between the Convention and international law in *Behrami v. France* and *Saramati v. France*[127] which arose from the Kosovo conflict of 1998 to 1999. The Behramis complained of death and injury caused to two children by the explosion of undetonated cluster bombs which had been dropped by North Atlantic Treaty Organization ("NATO"). At that time, the supervision of de-mining fell within the mandate of United Nations Mission in Kosovo ("UNMIK").[128] Mr. Saramati complained of his extra-judicial detention by officers acting on the orders of NATO'S Kosovo Force ("KFOR"), the security force established in Kosovo by UNSC Resolution 1244 (1999).[129] The Behramis invoked Article 2 of the Convention and Mr. Saramati relied on Articles, 5, 6(1) and 13.[130]

Two issues arose in the case: First, in what circumstances may action by organs of a state be attributed to the United Nations rather than to the state itself? Secondly, where action is so attributable, should the ECtHR decline jurisdiction? The first issue is answered by the Draft Articles of the International Law Commission on the responsibility of International Organisa-

125. *See id.* ¶ 300.

126. *See id.* ¶¶ 307-09.

127. *See* Behrami v. France and Saramati v. France, 45 Eur. Ct. H.R. 10 (2007). For other cases where the Strasbourg Court examines the relationship between the Convention and the UN Charter, see Al-Adsani v. United Kingdom, 34 Eur. Ct. H.R. 11 (2002); Banković v. United Kingdom, 44 Eur. Ct. H.R. 5 (2001).

128. *See* Press Release, United Nations Interim Administration Mission in Kosovo, UN Set to Transfer Demining Activities to Kosovo Authorities (Dec. 21, 2001).

129. *See Behrami*, 45 Eur. Ct. H.R. 10, ¶¶ 8-14 (2007).

130. *See id.* ¶¶ 61-62.

tions, to which the ECtHR relied.[131] Under Article 5, where a state organ is placed at the disposal of an international organization, its conduct is to be attributed to the latter if the organization "exercises effective control over that conduct."[132] The ECtHR drew a distinction between, on the one hand, delegation of UN powers and, on the other hand, authorization granted by the UN to carry out functions which it cannot itself perform. In the circumstances, the Court found that, by Resolution 1244 (1999), the UN had delegated its powers to establish international security and civil presences to UNMIK and KFOR. Their actions were therefore directly attributable to the UN.

The ECtHR then proceeded to examine the implications of this finding for its jurisdiction and, more generally the relationship between the Convention and the UN acting under Chapter VII of its Charter.[133] In a deferential judgment, it attributed particular significance on the imperative nature of maintaining peace and security as the principal aim of the UN and the powers accorded to the UNSC under Chapter VII to fulfill that aim.[134] In doing so, it appeared to concede that the aim of maintaining peace and security and the uniqueness of the UN takes priority or, at least, conditions heavily the aims of the European Convention on Human Rights. It held that, since operations established by UNSC Resolutions are fundamental to the mission of the UN and rely for their effectiveness on support from Member States, the Convention cannot be interpreted in a manner which would subject acts of the Contracting Parties covered by such resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfillment of the UN's key mission in this field, including the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution that were not provided for in the text of the Resolution itself.[135]

In response to the applicants' argument that the substantive and procedural protection of fundamental rights provided by KFOR was not equivalent to that under the Convention, the

131. *See id.* ¶ 28(1).
132. *Id.* ¶ 30.
133. *See id.* ¶ 121.
134. *See id.* ¶ 148.
135. *See id.* ¶ 149.

ECtHR distinguished *Bosphorus*[136] on the ground that the circumstances in *Behrami*[137] were different. In *Bosphorus* the seizure of the applicant's leased aircraft had been carried out by the authorities of the respondent state on its territory and following a decision by one of its ministers.[138] In *Behrami*, the acts and omissions of KFOR and UNMIK could not be attributed to the respondent states since they did not take place on their territory or by virtue of their authorities.

Notably, *Behrami* was distinguished by the House of Lords in *Al Jedda*.[139] The appellant had been detained by British troops in Iraq and complained that his detention infringed his rights under Article 5(1) European Convention on Human Rights ("ECHR").[140] Although he had not been charged with any offence, his internment was deemed necessary, as he was a suspected terrorist.[141] The Secretary of State argued that his detention was attributable to the UN but the House of Lords distinguished *Behrami* on the ground that the multinational force in Iraq had been established by the coalition states and not at the behest of the UN.[142] Having established that the applicant's detention was attributable to the UK authorities and not to the UN, the House of Lords proceeded to examine the relationship between the UN Charter and the Convention. Although Lord Bingham acknowledged the "paramount importance" of the Convention, after revisiting the objectives and basic tenets of the UN Charter, he resolved the conflict in favor of UN primacy.[143] He acknowledged that the ECHR has a special character as a human rights instrument but adopted an internationalist perspective holding that Article 103 gave precedence to the Charter over any other agreement and left no room for any excepted category, save for *jus cogens*.[144]

In *Kadi*, the ECJ dismissed the relevance of *Behrami* on two

136. *See* Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, 42 Eur. Ct. H.R. 1 (2006).

137. *See Behrami*, 45 Eur. Ct. H.R. 10, ¶ 145 (2007).

138. *See Bosphorus*, 42 Eur. Ct. H.R. 1 (2006).

139. *See* R (on the application of Al Jedda) v. Sec'y of State for Defence [2007] U.K.H.L. 58, [2006] EWCA Civ. 327.

140. *See id.* ¶ 1.

141. *See id.* ¶ 2.

142. *See id.* ¶ 3.

143. *Id.* ¶ 27.

144. *See id.* ¶ 35.

grounds. First, it held that the legal and factual setting of the case was fundamentally different and, secondly, it asserted the ideological autonomy of the Community legal order.[145] The Convention is designed to operate primarily as an interstate agreement, which creates obligations between the Contracting Parties at the international level and provides only minimum protection.[146] The EC Treaty, by contrast, has founded an autonomous legal order, within which states as well as individuals have immediate rights and obligations and on the basis of which the ECJ ensures respect for fundamental rights as a "constitutional guarantee."[147]

There is no denying that there are important differences between *Behrami* and *Kadi*. While the former involved actions directly attributable to the UN, in the latter the Member States acted as sovereign actors giving effect to UNSC resolutions.[148] The ECtHR accepted as much in *Behrami,* by distinguishing the case from *Bosphorus*.[149] Furthermore, the distinct feature of *Kadi* is that the UN resolutions in issue were in fact not general but concrete and individual in nature, akin to national administrative acts, since they specified the persons on whom they applied. This made the availability of judicial review all the more imperative.

A final argument examined by the ECJ was whether it should abstain from exercising review under Community law on the ground that the procedures available under the system of sanctions set up by the UN offered adequate protection of fun-

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145. *See* Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P, [2005] E.C.R. II-3649, ¶ 282.

146. The EU Charter expressly views the Convention as providing a minimum threshold. *See* Charter of Fundamental Rights of the European Union art. 52(3) O.J. C 364/01, at 21 (2000) [hereinafter EU Charter].

147. *See* Opinion of Advocate General Maduro, Kadi v. Council, Case C-415/05, ¶¶ 21, 37 (ECJ Jan. 23, 2008) (not yet reported); Kadi v. Council, Joined Cases C-402/05 P & C-415/05 P, ¶¶ 316-17 (Sept. 3, 2008) (not yet reported).

148. *See* Behrami v. France and Saramati v. France, 45 Eur. Ct. H.R. 10, ¶ 129-42 (2007); *Kadi*, [2005] E.C.R. II-3649, ¶¶ 11-45. There are also obvious differences between *Kadi* and *R* (on the application of Al Jedda) *v. Sec'y of State for Defence.* Although in the latter the House of Lords accepted that the actions of the British troops were attributable to the United Kingdom and not to the UN, the factual setting and the legislative framework of the case were fundamentally different. *See* R (on the application of Al Jedda) v. Secretary of State for Defence [2007] U.K.H.L. 58, [2006] EWCA Civ. 327, ¶¶ 3, 18-39; *Kadi*, ¶¶ 11-45 (ECJ Sept. 3, 2008).

149. *See Behrami*, 45 Eur. Ct. H.R. 10, ¶ 145 (2007); Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, 42 Eur. Ct. H.R. 1 (2006).

damental rights.[150] It held that the UN procedure, although it had been strengthened since the contested sanctions were adopted, could not justify a generalized immunity from its jurisdiction.[151] It was in essence diplomatic and intergovernmental rather than judicial in nature, lacking basic process rights. The persons concerned did not have the right to a hearing or the right to see the evidence. Nor did the Sanctions Committee have an obligation to give reasons for refusing removal from the sanctions list.[152]

2. *Jus Cogens*: But What Does it Mean?

It will be remembered that, according to the CFI, the primacy of the UN Charter prevented review of the contested regulations on grounds of fundamental rights as protected by Community law but did not preclude review on grounds of compatibility with *jus cogens*. In carrying out such review, the CFI found that the requirements of *jus cogens* were met. The ECJ, by contrast, following the Opinion of Advocate General Maduro, subjected the sanctions to full review under EC fundamental rights standards and found them lacking. We will examine in turn the reasoning of the CFI and the ECJ in more detail.

The CFI took a rule of law-bound view of international law encouraging the constitutionalization of UNSC action in terms as inoffensive as possible to the Security Council. Although it was wrong not to subject the contested measure to full review under EC standards, its judgment merits attention for its approach to international law. The CFI posited, in effect, two principles: that the UNSC is bound by *jus cogens* and that the rights pleaded by the applicant were part of it.

It is indeed widely, albeit not universally, accepted that although the Security Council may transgress on treaty or international customary law, it is bound to respect *jus cogens*.[153] A number of considerations support this view. *Jus cogens* is made up of peremptory rules which represent universal values and, as the

150. *See Kadi*, ¶¶ 76-78 (ECJ Sept. 3, 2008).

151. *See id.* ¶ 321.

152. *See id.* ¶¶ 321-26.

153. *See* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 423-88 (2006); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 187-91 (2004).

name suggests, may admit no waiver.[154] The powers of the UNSC derive from states that are bound by international law. In accordance with the principle of *"[n]emo plus juris ad alium transferre potest, quam ispe haberet,"* states cannot transfer more powers to the UNSC than they themselves have.[155] Judicial dicta also point to this direction. Notably, in the *Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.)* (*"Bosnia Genocide Convention"* case), Judge Lauterpacht took the view that a resolution which breaches norms of *jus cogens* is not binding on states.[156] Further, although the Security Council is the most potent global institution,[157] it has not been vested with unlimited legislative powers and, under Article 24(2) of the Charter, in discharging its duties, it is bound to act in compliance with "the Purposes and Principles of the United Nations."[158]

The CFI was therefore correct to conclude that UNSC resolutions must comply with peremptory norms of general interna-

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154. *See id.* at 424 (referencing further bibliography); *see also infra* notes 162-69 and accompanying text.

155. *See* T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 NETH. Y.B. OF INT'L L. 33, 82 (1995); *see generally* DE WET, *supra* note 153; *cf.* THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 397, 404 (Bruno Simma ed., 1994) [hereinafter Commentary on the UN Charter].

156. *See* Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325, 440-41 (Sept. 13); Bosn. & Herz. v. Yugo., 95 I.L.R. 1, 158-59 (I.C.J. 1993); *see generally* Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1 (1994-95).

157. *See generally* Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT'L L. 59 (2005).

158. *See* EU Charter, *supra* note 146, art. 24(2), at 13. The scope and nature of the limits imposed on its powers are a matter of some debate but, at the very least, Article 24(2) means that the SC cannot act "arbitrarily." *See* Commentary on the UN Charter, *supra* note 155, at 448, ¶ 10; *see generally* Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517 (1999); *cf.* HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 254 (1951). For more critical views of the powers of the UNSC as a global legislator, see generally Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative*, 28 FORDHAM INT'L L.J. 542 (2004); Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. OF INT'L L. 593 (2003); Jane E. Stromseth, *An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390*, 97 AM. SOC'Y INT'L L. PROC. 41 (2003); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. OF INT'L L. 901 (2002).

tional law.[159] But what is *jus cogens?* Article 53 of the 1969 Vienna Convention on the Law of the Treaties ("Vienna Convention") defines *jus cogens* as peremptory norms of general international law that are accepted and recognized by the international community of states as a whole as norms from which no derogation is permitted. In fact, the concept of *jus cogens* is far from clear.[160] Although it is accepted that human rights fall within its scope, disagreement persists as to the precise rights

159. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶ 231. The question whether the UNSC Council is bound by *jus cogens* is distinct from the question of which judicial bodies might have jurisdiction to apply *jus cogens* and for what purposes. The issue of jurisdiction was not examined separately by the CFI but it can be accepted that it was correct to assert such jurisdiction. Given that the application of public international law is decentralized and that the International Court of Justice ("ICJ") itself has no jurisdiction to review directly decisions taken by UN organs, States should be entitled, as a last resort, to review the validity of UNSC resolutions under *jus cogens.* Otherwise, there would be no judicial forum where compliance with the peremptory rules of international law could be enforced. The ICJ has accepted that States could rely on their right of last resort to question the validity of UNSC resolutions subject to two limitations. *See* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151 (July 20). First, UNSC resolutions are presumed to be lawful and, consequently, it is for the States to prove that the UNSC measure has breached *jus cogens.* Secondly, the right of last resort should be restrictively interpreted since otherwise the effectiveness of UNSC resolutions would be prejudiced. *See id.* Although the CFI did not expressly refer to the right of last resort, it appears that it endorsed it implicitly. It underlined that reviewing the validity of UNSC resolutions was "highly exceptional[ ]" and did so not directly but collaterally in order to determine the validity of the implementing Community legislation. *See Kadi,* [2005] E.C.R. II-3649, ¶ 231.

160. *See generally* Gennady M. Danilenko, *International* Jus Cogens*: Issues of Law-Making,* 2 EUR. J. INT'L L. 42 (1991). Some authors find the basis of *jus cogens* in the moral conscience and beliefs of mankind. Understood that way, it is linked to postulates of natural law according to which, in establishing their contractual relationships, states do not act in absolute freedom but are bound by fundamental principles deeply-seated in the international community. Other authors, relying on the definition laid down in the Vienna Convention, argue that *jus cogens* needs the acceptance and recognition of the international community as a whole. In other words, the designation of a norm as part of *jus cogens* needs the active participation of states in the law-making process. *See id.* Article 53 of the Vienna Convention requires the acceptance and recognition of the rule by "the international community of states as a whole." Vienna Convention, *supra* note 101, art. 53. This expression has been interpreted in three different ways, namely, (a) as a condition for unanimity where all states must give their acceptance and recognition in the law-making process of *jus cogens*; (b) as a majority rule where a number of states would fashion rules binding upon a dissenting minority; and (c) as an achievement of a genuine consensus among all essential components of the modern international community. Whereas the rule of unanimity seems clearly inoperative, the two others represent opposite interests between third-world countries, which would wish to see the UN General Assembly into *jus cogens* law-maker, and powerful countries which are reluctant to loose protagonism in the law making process. *See generally* Danilenko, *supra.*

that may be included thereunder. In *Kadi*, the applicant alleged that the contested regulation had breached the right to a fair hearing, the right to property and the right to an effective judicial review.[161] Although these rights have long been recognized as fundamental in the Community legal order, it is by no means obvious that they can be considered as *jus cogens*.

One theory asserts a hierarchy of rights in international law and regards as *jus cogens* human rights from which derogations are not possible under international agreements even in times of emergency.[162] Such non-derogable rights that must be respected by states are contained in Article 4(2) of the International Covenant on Civil and Political Rights ("ICCPR").[163] The rationale behind this theory is that, in order to respect cultural diversity, a higher threshold for the intervention of the international community is required and thus, *jus cogens* is viewed as a minimalist concept. If that approach were to be followed, one would conclude that the CFI erred in considering that the rights invoked by the applicant fell within the scope of *jus cogens*[164] since they are not listed in Article 4(2) ICCPR.

It has been suggested however that the fact that a right is derogable does not preclude it from being *jus cogens*. Derogable rights can be considered as *jus cogens* in so far as the conditions laid down by Article 53 of the Vienna Convention are fulfilled.[165] This argument seems consistent with the opinion of the UN Human Rights Committee ("UNHRC") which, despite the word-

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161. *See Kadi*, [2005] E.C.R. II-3649, ¶ 59.

162. *See* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986); Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12 EUR. J. INT'L L. 917 (2001).

163. *See* International Covenant on Civil and Political Rights art. 4(2), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. These rights are the right to life, the prohibition of torture or cruel and degrading treatment, the prohibition of slavery and servitude or civil imprisonment, the impermissibility of retroactive punishment, and the right to recognition as a person before the law and freedom of thought, religion and conscience. *See id.*

164. *See* Piet Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit.*, 3 EUR. CONST. L. REV. 183, 195-97 (2007) (arguing that the analysis of the CFI on *jus cogens* is not persuasive).

165. *See* Vienna Convention, *supra* note 101, art. 53. When the Vienna Convention alludes to "non-derogation," it does not refer to derogations in case of emergency, but to derogation via concluding an International Treaty. Whereas the first type of derogation only limits temporarily a right, the second type allows contracting parties to replace public order norms by private autonomy and it is this kind of derogation that *jus cogens* does not allow. *See* ORAKHELASHVILI, *supra* note 153, at 53-60.

ing of the ICCPR, has qualified the right to a fair hearing as "non-derogable,"[166] and also with the International Criminal Tribunal for Yugoslavia which in *Prosecutor v. Tadiæ* held that the right to a fair trial was a condition *sine qua non* for the validity of the UNSC resolution creating that Tribunal.[167] Ultimately, therefore, the criterion of non-derogability may not be decisive in determining which human rights are to be considered as part of *jus cogens*.

Be this as it may, in *Kadi* the CFI followed a broad understanding of *jus cogens*, encompassing under it all the rights pleaded by the applicants. In its reasoning, the function of *jus cogens* was not to exclude rights which would otherwise be applicable but to lower substantially the degree of judicial scrutiny by pushing well back the threshold of review.[168]

In relation to the right to property, the CFI pointed out that only an arbitrary deprivation of property might be regarded as contrary to *jus cogens*.[169] This was not the case for a number of reasons. The measure pursued an objective of fundamental public interest for the international community; freezing of funds was a temporary precautionary measure which did not affect the right to property as such but only the use of financial assets; the UNSC resolutions in issue provided for a procedure for reviewing the system of sanctions; and there was also a procedure which enabled the persons concerned to present their case to the Sanctions Committee through the state of their nationality or residence.[170] Furthermore, the CFI placed particular emphasis on the fact that the applicable rules provided a derogation from the freezing of funds necessary to cover basic expenses (e.g., foodstuffs, rent, and medicines) and thus, any degrading or inhuman treatment was avoided.[171]

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166. *See* U.N. Office of the High Comm'r of Human Rights, *General Comment 29, States of Emergency (Article 4)*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

167. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment in the Appeals Chamber, ¶¶ 41-47 (July 15, 1999).

168. *See* Eeckout, *supra* note 164, at 196 (criticizing the CFI's light touch review).

169. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶¶ 241-42; Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-2387, ¶ 293.

170. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 247-49; *Yusuf*, [2005] E.C.R. II-2387, ¶¶ 298-302; Ayadi v. Council, Case T-253/02, [2006] E.C.R. II-2139, ¶¶ 135-36; Hassan v. Council, Case T-49/04, [2006] E.C.R. II-52, ¶¶ 105-09.

171. *See Kadi*, [2005] E.C.R. II-3649, ¶ 241; *Yusuf*, [2005] E.C.R. II-2387, ¶¶ 291, 312; *see also Ayadi*, [2006] E.C.R. II-2139, ¶¶ 119-33. In *Hassan*, the Court rejected that

In relation to the right to be heard, the CFI drew a distinction between the right to a hearing before the Council and before the Sanctions Committee. Before the former, it held that such right was not applicable since the Council did not enjoy any discretion in implementing UNSC resolutions.[172] As regards the procedure before the Sanctions Committee, the CFI did acknowledge that any opportunity for the applicant to present his views on the evidence adduced against him was excluded. Nonetheless, the CFI took the view that this was an acceptable restriction given that what was at stake was a temporary precautionary measure restricting the availability of the applicant's property.[173]

Finally, in relation to the right of judicial review, the CFI

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the exemptions and derogations from the freezing of the funds were ineffective. First, though the applicant was deprived from leading a normal life, these negative consequences were justified in the light of the objective pursued, that is, to combat by all means international terrorism. Secondly, the applicant was not prevented from leading a satisfactory life, because it could still purchase everyday consumer goods. Thirdly, the contested regulation did not deprive the applicant from carrying on a business or trade activity. It only limited the free receipt of the income from such an activity. Finally, the Court indicated that Member States refusing to issue an administrative license necessary to carry out a self-employed activity (taxi-driving license) without taking into account the applicant's needs and without consulting with the Sanctions Committee, would be a misinterpretation or misapplication of the contested regulation. *See Hassan*, [2006] E.C.R. II-52, ¶¶ 69-102.

172. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 257-58; *Yusuf*, [2005] E.C.R. II-2387, ¶¶ 327-28.

173. *See Kadi*, [2005] E.C.R. II-3649, ¶¶ 273-74. In *Hassan*, in support of his arguments, the applicant relied on two cases decided by the U.S. Court of Appeals for the District of Columbia decided a few months before 9-11. In *National Council Resistance of Iran*, the U.S. Court of Appeals ruled that, in failing to demonstrate that a pre-designation notice and hearings would put at stake the security of the United States or other foreign policy goals, the Secretary of State had violated due process. *See* Nat'l Council Resistance of Iran (NCRI) v. Dep't of State, 251 F.3d 192, 204-09 (D.C. Cir. 2001). Contrary to the applicant's submissions in *Hassan*, however, it is not clear whether this judgment remains valid authority post 9-11. In fact, different Federal Circuits have issued contradictory rulings as to whether organizations designed as "Global Terrorists" under Executive Order 13,224 should be entitled to pre-designation. For instance, in *Holy Land Foundation for Relief & Development v. Ashcroft*, it was held that pre-designation and hearing requirements as recognized in the *NCRI* case were required. *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 163 (D.C. Cir. 2003). Conversely, in *Global Relief Foundation, Inc. v. O'Neill*, it was held that, in times of emergency, the applicant was not constitutionally entitled to pre-designation and post-designation and hearings were deemed sufficient. *See* Global Relief Found., Inc. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002); *see also* Eric Broxmeyer, *The Problems of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act*, 22 BERKELEY J. INT'L L. 439, 446-56 (2004) (supporting a post-designation, yet direct and written notice, but rejecting disclosure of classified information). In any case, the CFI categorically stated that rulings of American Courts "have no

held that it was not within the judicial province to verify the existence of a threat to international peace and security or to determine the appropriateness of the measures for confronting or settling such a threat.[174] It acknowledged that there was no judicial remedy available to the applicant since the Security Council had not established an independent international court responsible for ruling in actions brought against decisions of the Sanctions Committee. It accepted, however, that the resulting lacuna was not in itself contrary to *jus cogens*.[175] It pointed out that the right of access to the courts, which is recognized by Article 8 of the Universal Declaration of Human Rights and Article 14 of the ICCPR, is not absolute.[176] It identified, in particular, two types of limitation. First, derogations may be introduced at a time of public emergency which threatens the life of the nation.[177] Secondly, even when such exceptional circumstances do not obtain, there are "inherent restrictions" to the right, such as the limitations generally recognized by the community of nations to fall within the doctrine of state immunity.[178] The CFI held that the immunity from jurisdiction which resolutions of the Security Council enjoy as a rule in the domestic legal order of the Member States of the United Nations is an inherent limitation to the applicant's right of access to a court.[179] This limitation is justified both by the nature of the decisions that the Security Council takes under Chapter IV of the UN Charter and by the legitimate objective pursued.[180]

Ultimately, the CFI's judgment was that "the applicant's interest in having a court hear his 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."[181] The CFI saw the judicialization of diplomatic protection as a way of compensating for the lack of

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bearing on the circumstances of this case" as they did not concern sanctions imposed by the UNSC. *See Hassan*, [2006] E.C.R. II-52, ¶ 94.

174. *Kadi*, [2005] E.C.R. II-3649, ¶ 219.

175. *See id.* ¶ 286.

176. *See id.* ¶ 287.

177. *See id.*

178. *See id.*

179. *See id.* ¶ 288.

180. *See id.* ¶¶ 287-90.

181. *See id.* ¶ 289.

sufficient remedies at international level[182] and turned to national courts to fill the lacuna of judicial protection left by its deference to the UNSC. In *Kadi* it pointed out that it is open to the persons concerned to bring an action for judicial review based on domestic law against any wrongful refusal by the national authorities to submit their case to the Sanctions Committee for reconsideration.[183] Subsequently, in *Ayadi* and *Hassan v. Council,* which were decided before the ECJ's judgment in *Kadi,* it raised the standard by holding that the UNSC resolutions did not oppose to obligations stemming from general principles of EU law, pursuant to which the member states must "ensure, so far as possible, that the interested persons are put in a position to put their point of view before the competent national authorities where they present a request for their case to be reviewed."[184] Thus, rediscovering the spirit of *Commission v. Jégo-Quéré,*[185] the CFI required Member States to provide for judicial review of a refusal by national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals.[186] It held that prompt state action before the Sanctions Committee is required, unless the state concerned puts forward sufficient reasons justifying its refusal to act, which are then submitted to the scrutiny of the judiciary.[187]

This "judicialization" of diplomatic protection falls well short of the requirements of the right to judicial protection as understood in Community law proper. The CFI's reasoning is, in effect, unconvincing because it creates a huge crater in the right to judicial protection.

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182. Annemarieke Vermeer-Künzli, *Restricting Discretion: Judicial Review of Diplomatic Protection,* 75 NORDIC J. INT'L L. 279, 279-307 (2006) (arguing that recent developments in national judiciaries have restricted the degree of discretion enjoyed by states when refusing to exercise diplomatic protection); *see, e.g.,* Abbasi v. Sec'y of State for Foreign and Commonwealth Affairs, [2002] EWCA Civ. 1598 (C.A. 2002) *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html.

183. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶ 270.

184. Ayadi v. Council, Case T-253/02, [2006] E.C.R. II-2139, ¶ 147; Hassan v. Council, Case T-49/04, ¶ 117 (CFI July 12, 2006) (not yet reported).

185. Commission v. Jégo-Quéré, Case C-263/02 P, [2004] E.C.R. I-3425. In that case, the ECJ called upon Member States to fill the gap left by its restrictive interpretation of the conditions that must be fulfilled under Article 230(4) EC in order for individuals to have *locus standi* to seek judicial review of Community acts directly before the Community courts.

186. *See Ayadi,* [2006] E.C.R. II-2139, ¶ 152; *Hassan,* ¶ 121 (CFI July 12, 2006).

187. *See Hassan,* ¶ 121 (CFI July 12, 2006).

Save for review on grounds of *jus cogens*, the CFI was reluctant to interfere with the decision-making powers of the Security Council. It thus refused to review whether there was a threat to the international peace and security holding that it would be impossible to carry out such a review without trespassing on the Security Council's prerogatives under Chapter VII in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat.[188] Thus, deference to the UNSC is twofold. The CFI renounced power to adjudicate on whether reliance on Chapter VII was appropriate and also on whether targeted sanctions were appropriate means to counter terrorism. Thus, the CFI denied the application of the proportionality principle to assess the validity of the UNSC resolutions.[189] Subsequently, however, in *Ayadi* it affirmed that judicial recourse to proportionality implicitly takes place when balancing the protection of fundamental rights vis-à-vis the objectives that the Community legislation, and by extension the parent UNSC resolution, sought to attain.[190] The CFI's reluctance to question the Security Council's discretion reflects the traditional approach to the interpretation of Article 39 of the Charter, under which it is for the Security Council alone to determine the existence of a threat to the peace and security of the international community. In other words, Article 39 of the UN Charter gives full discretion to the UNSC. It is a political decision which falls outside the scope of judicial review.[191]

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188. *Kadi*, [2005] E.C.R. II-3649, ¶ 284.

189. However, some authors have sustained that the Security Council must comply with this principle when discharging its powers under Chapter VII. *See, e.g.*, Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506 (1995) (opining that, though a strict proportionality test cannot be applied, the Security Council is not empowered to adopted "excessive disproportional" measures).

190. *See* Ayadi v. Council, Case T-253/02, [2006] E.C.R. II-2139, ¶ 104.

191. *See, e.g.*, Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aeriel Incident at Lockerbie, [1992] I.C.J. 3, 66, 176 (dissenting opinion of Weeramantry, J.). For a more nuanced view, see generally Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L. J. 81 (1999), who argues that the UNSC does not have exclusive authority to determine whether a matter constitutes a threat to the international peace and security and that that authority is shared with the General Assembly and the ICJ. Thus, she rejects that decisions adopted under Chapter VII are "non-justiciable." The author favors limited judicial review of UNSC resolutions, which is tempered by a political question doctrine approach and takes account of, "(a) matters relating to the exigency of the circumstances; (b) matters relating to the nature of

By contrast, in *Kadi* Advocate General Poiares Maduro refused to follow the political question doctrine and appeared reluctant to concede that the Court may carry out only marginal review.[192] Quoting the dissenting opinion of Justice Murphy in *Korematsu v. United States*,[193] he opined that the maintenance of peace and security cannot preclude courts from exercising their function of review. The role of the judiciary in time of terrorism is twofold: to verify whether the claim that extraordinarily high security risks exist is substantiated, and also ensure that the measures adopted strike a proper balance between the nature of the security risk and the extent to which these measures encroach upon the fundamental rights of individuals.[194] While the ECJ did not delve on the first point, it certainly agreed on the second.

3. The Response of the ECJ: Confidence and Distrust

In contrast to the judgment of the CFI, the ECJ's approach displays constitutional confidence and distrust towards any invasion on due process. Recalling the spirit of *Parti écologiste "Les Verts" v. Parliament*,[195] the Court began by stating that effective judicial protection is a general principle of Community law which emanates from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the ECHR. It also referred by way of supporting argument to Article 47 of the EU Charter of Fundamental Rights, thus entrenching a recent tendency to view its provisions as a legitimate source of inspiration despite the fact that, formally, it has no binding force.[196]

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the legal question raised; and (c) matters relating to the process by which the resolutions were adopted." *Id.* at 135-36. In her opinion, where the strength of the international norm at issue is significant, such as *jus cogens*, the political question doctrine should not apply.

192. Opinion of Advocate General Poiares Maduro, Kadi v. Council, Case C-402/05 P, ¶¶ 34-40 (ECJ Jan. 18, 2008).

193. Opinion of Advocate General Poiares Maduro, Kadi v. Council, Case C-402/05 P, ¶ 34 (ECJ Jan. 18, 2008) (quoting Korematsu v. U.S. 323 U.S. 214, 233-34 (1944) (Murphy, J., dissenting)).

194. *See id.* ¶ 35.

195. Parti écologiste "Les Verts" v. Parliament, Case 294/83, [1986] E.C.R. 1339.

196. *See* Kadi v. Council, Joined Cases C-402 & 415/05 P, ¶ 335 (ECJ Sept. 3, 2008) (not yet reported); *see generally* Charter of Fundamental Rights of the European Union, O.J. C 364/01 (2000). The ECJ broke its silence and referred to the Charter for the first time in *Parliament v. Council*, Case C-540/03, [2006] E.C.R. I-5769, ¶ 38. For subse-

The Court held that the principle of judicial protection requires that the Community authorities must communicate to the persons concerned the grounds on which their names have been included in the sanctions list. The requirement to notify reasons serves both an instrumental and a rule-of-law–based rationale. It enables those affected to defend their rights and also facilitates the exercise of judicial review by the Court.[197] It agreed with the CFI that, in the circumstances of the case, advance communication to the appellants of the reasons for their inclusion in the sanctions lists or granting them in advance the right to be heard would prejudice the effectiveness of the sanctions. A freezing of assets order can only be effective if it has an element of surprise and no advance warning is given. The Court also accepted that overriding public policy considerations may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard.[198] The ECJ thus impliedly recognized the need for protecting information derived from intelligence sources.

This did not mean, however, that the contested economic sanctions would be immune from judicial review. This point was developed further by Advocate General Poiares Maduro, who rejected the argument that the fight against terrorism is a "political question" unfit for judicial determination. While conceding that the ECJ operates in an increasingly interdependent world where the authority of other international bodies must be recognized, the Advocate General highlighted that the Community judiciary cannot "turn its back on the fundamental values"[199] which it is bound to protect. Measures intended to suppress international terrorism cannot enjoy judicial immunity, the reason being that "the political process is liable to become overly responsive to im-

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quent references, see, e.g., *Unibet (London) Ltd. v. Justitiekanslern*, Case C-432/05, [2007] E.C.R. I-2271, ¶ 37; *Advocaten Voor de Wereld VZW v. Leden van de Ministerraad*, Case C-303/05, [2007] E.C.R. I-3633, ¶ 46; *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, Case C-341/05, [2007] E.C.R. I-11767, ¶ 91.

197. *See Kadi*, ¶¶ 336-37 (ECJ Sept. 3, 2008). This dual rationale has been reiterated in previous case law. *See* Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (Unectef) v. Heylens, Case 222/86, [1987] E.C.R. 4097, ¶ 15; Dansk Rørindustri v. Commission, Joined Cases C-189, 202, 205-08, 213/02 P, [2005] E.C.R. I-5425, ¶¶ 462-63. For a more general discussion of process rights see TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 371 (2d ed. 2006).

198. *See Kadi*, ¶ 342 (ECJ Sept. 3, 2008).

199. Opinion of Advocate General Poiares Maduro, Kadi v. Council, Case C-402/05 P, ¶ 44 (ECJ Jan. 18, 2008).

mediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few."[200] This was echoed by the Court, which found that it was the judiciary's task to apply "techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice."[201] Accordingly, the balance lay in mandating the Council to communicate inculpatory evidence against the appellants either concomitantly with the adoption of the contested regulation or within a reasonable period thereafter. Owing to the Council's failure to do so, the ECJ ruled that the applicants' right of defense, particularly their right to be heard, had been violated.[202] Further, since the Court was deprived from investigating the evidence supporting the freezing of assets, it could not exercise review and, as a result, the right to effective judicial protection had also been breached.[203] The Court identified the source of violation as being both the statutory framework and the Council's practice.[204] Neither the contested regulation nor the CFSP Common Position which formed its basis provided for a procedure for the notification of evidence; furthermore, at no time did the Council inform the appellants of such evidence.[205]

The ECJ did not delve on the question whether, if reasons for the inclusion of the appellants' names in the list had been provided *ex posto facto*, i.e., in the course of the judicial proceedings, the breach of fundamental rights would have been undone. It merely restricted itself to pointing out that the infringement had not been remedied in the course of the action as an additional reason for establishing a violation.[206] If process rights, however, are to have any meaning, it is difficult to see how the requirement of reasoning can be complied with retrospectively.[207]

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200. *Id.* ¶ 45.

201. *See Kadi*, ¶ 344.

202. *See id.* ¶¶ 345-53.

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.* ¶ 350.

207. This issue was examined also by the CFI in *Organisation des Modjahedines du People d'Iran (OMPI) v. Council*, Case T-228/02, [2006] E.C.R. II-4665.

A distinct feature of the ECJ's reasoning, which differentiates its approach from that of the CFI, is that it conceded little ground to the source of the security concerns, namely the fact that the sanctions originated from the UNSC. It accepted that the Community must respect international law and, in that context, attach "special importance" to UNSC resolutions,[208] but this did not translate to granting any special status to Community measures adopted to comply with such resolutions when reviewing their compatibility with fundamental rights. Similarly, the ECJ accepted that it must balance "legitimate security concerns"[209] and heed to "overriding considerations to do with safety or the conduct of the international relations of the Community and its Member States,"[210] but by doing so, it emphasized the nature of the interests at stake rather than the UNSC as their ultimate exponent. The judgment is Euro-centric rather than internationalist.

In relation to the right to property, the Court recalled that it is not an absolute right and its exercise may be restricted subject to two conditions. Such restrictions must (a) pursue a public interest objective and (b) meet the standard of proportionality, i.e., they must not constitute a disproportionate and intolerable interference impairing the very substance of the right.[211] The ECJ found that, in principle, such justification existed. Drawing on the case-law of the ECtHR, it acknowledged that the Community legislature enjoys a "great margin of appreciation" in choosing the means to attain public interest objectives and ascertaining their adequacy.[212] Referring to its judgment in *Bosphorus*, it stressed the importance of adopting effective measures to combat terrorism in order to maintain international peace and security and accepted that such an imperative objective may justify even substantial collateral effects on *bona fide* third parties.[213] Accordingly, freezing of assets as a means of counter-terrorism could not be qualified as a disproportionate restriction

208. *See* Kadi v. Council, Joined Cases C-402 & 415/05 P, ¶ 294 (ECJ Sept. 3, 2008) (not yet reported).

209. *See id.* ¶ 344.

210. *See id.* ¶ 342.

211. *See id.* ¶ 355.

212. *See* J.A. Pye (Oxford) Ltd. v. U.K., App. No. 44302/02, 2007-__ Eur. Ct. H.R. __, §§ 55, 75 (GC Aug. 30, 2007) (not yet reported).

213. *See Kadi*, ¶ 361 (ECJ Sept. 3, 2008).

on the right to property. The Court took into account that, under the UN sanctions scheme and the Community legislation giving effect to it, the freezing of funds to cover certain basic expenses could be lifted upon request of the affected parties.[214] Furthermore, the UNSC resolutions provided for a mechanism of periodic re-examination of the sanctions imposed and a procedure whereby affected parties could raise their claims.

Nevertheless, the ECJ found that, as applied to Mr. Kadi, the contested regulation breached the right to property because it violated due process standards which are an integral part of that right.[215] Insofar as it concerned Mr. Kadi, the contested regulation was adopted without furnishing any guarantee enabling him to put his case to the competent authorities and therefore constituted an unjustified encroachment upon his right to property.

D. *Exploring the Consequences of Annulment*

Although the ECJ annulled the contested regulation, it decided to maintain temporarily its effects in relation to the appellants exercising its jurisdiction under Article 231 EC.[216] Since the regulation was vitiated by procedural rather than substantive defects, it could not be excluded that the imposition of sanctions on the appellants might prove to be justified. If the regulation was annulled with immediate effect, there was a risk that the appellants might take steps before a new regulation was enacted to avoid the refreezing of their funds. On that basis, the Court maintained its effects in force for a period of three months.[217] Such use of Article 231 is neither novel nor controversial. The annulment of the regulation, however, raises a number of interesting issues. First, what is the precise scope of the ruling? In particular, would it be possible for the Council to refuse the disclosure of evidence to the parties concerned on security grounds? Secondly, might there be a possibility of a claim in damages following the annulment of the regulation? Finally,

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214. *See id.* ¶ 364.

215. See, to that effect, the judgment of the European Court of Human Rights in *Jokela v. Finland*, 2002-IV Eur. Ct. H.R. 1, §§ 45, 55.

216. Article 231(2) states that, where it considers it necessary, the Court may state which of the effects of a regulation which it has declared void will be considered as definitive. EC Treaty, *supra* note 12, art. 231(2), O.J. C 321 E/37, at 146 (2006).

217. *See* Kadi v. Council, Joined Cases C-402 & 415/05 P, ¶ 376 (ECJ Sept. 3, 2008) (not yet reported).

would it be possible for the UNSC resolution to be implemented not by means of a new Community regulation but by means of national measures adopted at the Member State level?

The first question is not answered by the judgment. While the ECJ declared that the Council had to communicate inculpatory evidence to the appellants, it also recognized the limiting effect of overriding considerations pertaining to security and the Community's international relations.[218] On that ground, one would expect that certain evidence may be withheld from the parties concerned or that the Council may be required to disclose it to the Court with a view to the latter determining whether it should be communicated to the applicants. Inevitably, the judgment in *Kadi* opens the door for security issues to be litigated before the Community judicature. The CFI judgments relating to Community, as opposed to UN, sanctions are more nuanced than the ECJ's judgment in *Kadi* and may provide some guidance here.[219]

Regarding the possibility of a damages claim, the ECJ found that the right to be heard and the right to judicial protection, albeit not the right to property, were "patently not respected."[220] Such use of language may well open the way for a claim in damages by the successful appellants. Under established case law, the Community may be liable for loss arising from normative action if there has been a serious violation of a rule of law intended to grant rights to individuals, the concept of serious violation being understood as a manifest and clear disregard of the limits of discretionary powers.[221] It is submitted, however, that, irrespective of other hurdles that an action in damages would encounter, the threshold of seriousness is highly unlikely to be met in this case. Any attempt here to broaden the conditions of institutional liability would be unwise.[222]

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218. *See id.* ¶ 342.

219. *See infra* Part II.

220. *See Kadi*, ¶ 334 (ECJ Sept. 3, 2008).

221. *See, e.g.*, Laboratoires Pharmaceutiques Bergaderm v. Commission, Case C-352/98 P, [2000] E.C.R. I-5291.

222. The detailed examination of a possible claim in damages falls beyond the scope of this Article. Suffice it to make here the following points. First and foremost, the adoption of the contested regulation does not appear to exceed manifestly and gravely the limits of the Council's discretion given the novelty of the issue, the importance of anti-terrorist policies, and the fact that the ECJ had never before examined the effect of UNSC resolutions in the EC legal order and their effects on fundamental

The third question raises some interesting issues. The effect of the annulment of the contested regulation is that the Member States are in breach of their obligations under the UN Charter. To rectify the breach, it falls on them to adopt new legislation to transpose the UNSC resolutions and they can do so either separately by means of national legislation or acting together through the Community. It could be argued that competence to adopt economic sanctions is an exclusive Community competence and, consequently, the Member States could not step in to implement the resolutions. It will be remembered that in *Ayadi* the CFI left open the issue whether the Community competence under Articles 60 and 301 is exclusive, although it clearly found no place for the principle of subsidiarity in the application of these provisions.[223] In the ECJ's reasoning, competence could not be established for the adoption of the contested regulation without recourse to Article 308.[224] This suggests that the Community's competence to adopt the contested sanctions is shared with that of the Member States since competence under the residual clause of Article 308 is *ex hypothesi* shared. Furthermore, in adopting a common position under CFSP, Member States are not bound to entrust its implementation to the Community. They are, in principle, free to mandate the Member States to take action at the national level. If so, it would be open to gov-

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rights. Further, the establishment of a causal link would not be straightforward but would not be impossible although previous case law may stand against it. Since the sanctions were adopted to comply with UNSC resolutions, failure to heed which would expose the Member States to liability under international law, it might be arguable that any loss suffered by the claimants would be attributable not to the EC but the UN. This is the position taken by the CFI in *Dorsch Consult Ingenieurgesellschaft v. Council*, Case T-184/95, [1998] E.C.R. II-667 (confirmed on appeal on other points, Dorsch Consult Ingenieurgesellschaft mbH v. Council, Case C-237/98, [2000] E.C.R. I-4549), and also in *Hassan*, Case T-49/04, ¶ 117 (CFI July 12, 2006) (not yet reported), another economic sanctions case decided by the CFI after *Kadi*. In that case, the applicant also sought damages but his application was rejected, *inter alia*, on the ground that, even if there had been illegal conduct and loss, which the CFI rejected, such loss was causally connected not to the adoption of Community legislation but to the UNSC to which the legislation gave effect. Neither case however provides an absolute bar. *Dorsch* can be distinguished form *Kadi* because it concerned a claim in damages for lawful action, as opposed to a violation of law. Furthermore, attributing any injurious consequences to the UN rather than the EC does not fit well with the express statement of the ECJ in *Kadi* that the UN Charter does not impose on its Member States the choice of a particular model for the implementation of UNSC resolutions. *Kadi*, ¶ 298; *see infra* note 247 and accompanying text.

223. Ayadi v. Council, Case T-253/02, [2006] E.C.R. II-2139, ¶¶ 105-14.

224. *Id.* ¶ 111.

ernments to implement the UNSC resolutions by adopting a new CFSP common position which no longer provided for Community action via Articles 60, 301, and 308, but for action at the national level.[225] But this is not the end of the inquiry. A related question is this: assuming that it were open to the Member States to implement the UNSC resolutions by national measures, would such measures be required to comply with fundamental rights as protected in Community law? It is highly arguable that they would. By taking implementing measures, the Member States would be acting within the scope of Community law for the purposes of the application of fundamental rights,[226] since in *Kadi*, for better or for worse, the ECJ already acknowledged that unilateral action at the national level was liable to interfere with free movement of capital and payments and the right of establishment and also create distortions in the conditions of competition.[227] There is also an additional consideration. The principle of separation of powers, which is itself enshrined in Article 220 EC, requires that it should not be possible for Member States to escape judicial review and evade a judgment of the ECJ, by implementing a CFSP common position at the national level, in circumstances where the ECJ has already declared that its implementation by the Community fails to respect fundamental rights.[228]

II. *SANCTIONS LISTS ESTABLISHED BY THE EC*

A. *Legislative Background*

The CFI had the opportunity to examine challenges against

225. A possible limitation to that course of action might be imposed by the duty of loyalty, laid down in Article 10 EC, which is pervasive in EC law. It might be argued that delegating the implementation of the UNSC resolutions and CFSP common positions to the Member States rather than to the Community would run counter to the judgment in *Kadi* where the ECJ already acknowledged the risk to intra-state trade if the sanctions were implemented unilaterally.

226. *See, e.g.*, Tiléorassi v. Pliroforissis, Case C-260/89, [1991] E.C.R. I-2925; Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, Case C-71/02, [2004] E.C.R. I-3025.

227. *See* Kadi v. Council, Joined Cases C-402 & 415/05 P, ¶ 230 (ECJ Sept. 3, 2008) (not yet reported).

228. A further argument may be derived from Article 307(2) EC. If the Member States were required to introduce sanctions in their domestic law so as to comply with their international responsibilities under the UN Charter, they would still be under an obligation pursuant to Article 307(2) EC, to eliminate any incompatibilities with EC law and therefore respect fundamental rights as interpreted by the ECJ.

economic sanctions imposed by the European Community in a number of cases which were decided after its judgment in *Kadi* but before the ECJ delivered its judgment in that case.[229] These cases differ from *Kadi* in that the contested lists were not adopted at the UN level but by the Community institutions acting in implementation of UNSC resolutions drafted in more general terms. The leading case in this category is *Organisation des Modjahedines du People d'Iran (OMPI) v. Council* ("*OMPI*")[230] but, before discussing the judgments in detail, it is necessary to present briefly the legislative background.

The origins of these cases lie in UNSC Resolution 1373[231] which provided for strategies to combat the financing of terrorism. Paragraph 1(c) states that all states must freeze without delay funds and other financial assets or economic resources of persons who are associated with terrorism.[232] The resolution was implemented in the EU by Common Position 2001/930/CFSP on combating terrorism[233] and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.[234]

Articles 2 and 3 of Common Position 2001/931 mandate the European Community to order the freezing of funds and other economic resources of persons, groups and entities listed in the Annex.[235] The key provision is that of Article 1(4) which states that the list in the Annex is to be drawn up on the basis of precise information which indicates that a decision has been taken by a competent authority in respect of the persons concerned, irrespective of whether it relates to the instigation of investigations or prosecution for a terrorist act, or an attempt to perpetrate, participate, or facilitate such an act.[236] The decision must be based on serious and credible evidence or clues, or con-

229. *See infra* notes 243-47 and accompanying text.

230. Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665.

231. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

232. Under the terms of Paragraph 1(c), the sanctions apply, to persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; to entities owned or controlled by such persons; and to persons and entities acting on behalf of, or at the direction of, such persons and entities. *Id.* ¶ 1(c).

233. Council Common Position No. 2001/930/CFSP, O.J. L 344/90 (2001).

234. Council Common Position No. 2001/931/CFSP, O.J. L 344/93 (2001).

235. *See id.* arts. 2-3, O.J. L 344/93, at 94 (2001).

236. *See id.* art. 1(4), O.J. L 344/93, at 94 (2001).

demnation for such deeds. "Competent authority" is understood to mean a judicial authority or, where judicial authorities have no competence in the relevant area, an equivalent authority. According to Article 1(6), the names of persons and entities in the list in the Annex are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list.[237]

Common Position 2001/931 was transposed into Community law by Council Regulation No. 2580/2001.[238] Article 2 of the Regulation provides for the freezing of assets of the persons, groups and entities included in a sanctions list which is to be determined by a Council Decision.[239] It also mandates the Council, acting by unanimity, to establish, review and amend that list in accordance with the provisions laid down in Common Position 2001/931.[240] Since the initial sanctions list was intro-

237. *See id.* art. 1(6), O.J. L 344/93, at 94 (2001).

238. Council Regulation No. 2580/2001, O.J. L 344/70 (2001). That regulation, as the contested regulation in *Kadi* and *Yusuf*, was adopted on the basis of Articles 60 EC, 301 EC, and 308 EC.

239. Council Regulation No. 2580/2001, art. 2, O.J. L 344/70, at 72 (2001).

240. Article 2 of the Regulation provides in full as follows:

1. Except as permitted under Articles 5 and 6:
   (a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;
   (b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.
2. Except as permitted under Articles 5 and 6, it shall be prohibited to provide financial services to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.
3. The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931/CFSP; such list shall consist of:
   (i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;
   (ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;
   (iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii); or
   (iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points (i) and (ii).

duced in December 2001,[241] the Council has adopted various common positions and decisions updating the lists respectively provided by Common Position 2001/931[242] and Regulation No. 2580/2001.[243]

B. *Case Law of the CFI*

The applicants in *OMPI*,[244] *KONGRA-GEL v. Council*,[245] *Ocalan Acting on Behalf of Kurdistan Workers' Party (PKK) v. Council* ("*PKK*"),[246] *Al-Aqsa v. Council*,[247] and *Sison v. Council*[248] had their names included in sanction lists and brought proceedings before the CFI seeking their annulment.[249]

The basic findings made by the CFI may be summarized by reference to the judgment in *OMPI*. In that case, the CFI held that the Community standards for the protection of fundamental rights applied in relation to the contested measures.[250] It distinguished the case from *Kadi* on the ground that, in *Kadi*, the Community institutions had merely implemented resolutions of the UNSC and decisions of its Sanctions Committee which did not authorize the Community to provide for any mechanism for the examination of individual situations.[251] In *OMPI*, by con-

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Id.

241. *See* Council Decision No. 2001/927/EC, O.J. L 344/83 (2001) (establishing the list provided for in Article 2(3) of Council Regulation (EC) No. 2580/2001).

242. Council Common Position No. 2001/931/CFSP, O.J. L 344/93 (2001).

243. Council Regulation No. 2580/2001, O.J. L 344/70 (2001).

244. Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665.

245. KONGRA-GEL v. Council, Case T-253/04 (CFI Apr. 3, 2008) (not yet reported).

246. Ocalan Acting on Behalf of Kurdistan Workers' Party (PKK) v. Council, Case T-229/02 (CFI Apr. 3, 2008) (not yet reported) [hereinafter *PKK*].

247. Al-Aqsa v. Council, Case T-327/03 (CFI July 11, 2007) (not yet reported).

248. Sison v. Council, Case T-47/03 (CFI July 11, 2007) (not yet reported).

249. In *Organisation des Modjahedines du People d'Iran (OMPI) v. Council*, the applicant was an organization founded in 1965 seeking regime change in Iran. In *Ocalan Acting on Behalf of Kurdistan Workers' Party (PKK) v. Council* ("*PKK*") the applicant challenged the imposition of sanctions against the Kurdistan Workers Party, a political organization established in 1978 with the objective of seeking the Kurds' right to self-determination. In *KONGRA-GEL v. Council*, the applicants were the People's Congress of Kurdistan, considered to be an alias of the PKK. In *Al-Aqsa v. Council* the applicant was an Islamic social welfare foundation governed by Netherlands law. In *Sison v. Council*, the applicant was the head of the Communist Party of the Philippines.

250. Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665, ¶¶ 153-55.

251. *See id.* ¶¶ 99-108.

trast, although UNSC Resolution 1373 provided that all states must freeze terrorist assets, it did not specify individually the persons and entities who were to be subject of the sanctions. Thus, the Community acts which specifically applied the sanctions did not come within the exercise of Community circumscribed powers and were not covered by the principle of primacy of UN law under Article 103 of the UN Charter.[252] The CFI then proceeded to examine the requirements of the right to a hearing, the duty to give reasons and the right to judicial protection and found that they were breached.[253]

Following the ECJ's judgment in *Kadi,* this distinction between sanctions lists dictated by the UN and those established by the EU is no longer material for the purposes of determining the application of EC human rights standards. It is nonetheless interesting to discuss in more detail the CFI findings in *OMPI* and its progeny as the legislative framework of the sanctions in those cases was different.

1. The Right to a Hearing

The CFI's analysis in *OMPI* was more detailed and nuanced than the ECJ's approach in *Kadi* so much so that it makes *OMPI* one of the most important judgments delivered by the Community courts on the right to a hearing. The CFI began by recalling that, in principle, the right to be heard requires, first, that the party concerned must be informed of the evidence adduced against it and, secondly, be afforded the opportunity to respond effectively. It took the view that the contested measure was not a true legislative act of general application in relation to which the persons affected do not have the right to be heard.[254] It accepted that the contested Council decision freezing the assets of the applicants had the same general scope as Regulation 2580/2001 and was an integral part of it, but held that the regulation was not of an exclusively legislative nature: although it was of general application it was of direct and individual concern to the applicant, to whom it referred by name.[255] It also rejected the argument that the right to a hearing should be denied to the

252. *See id.* ¶¶ 99-102.
253. *See id.* ¶¶ 103-08.
254. *See id.* ¶¶ 95-98.
255. *See id.* ¶¶ 97-98.

parties concerned solely on the ground that neither the ECHR nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature.[256] Thus, the CFI extended the application of the right to a hearing to economic sanctions imposed in the interests of preventing terrorism and, consistent with Article 52(3) of the EU Charter, appeared to view the ECtHR as providing a minimum rather than a maximum of human rights protection in the EU legal order. It will be remembered that this view was essentially endorsed by the ECJ in *Kadi*.[257]

The CFI also pointed out that the Security Council had not established any specific rules concerning the procedures for freezing funds, or safeguards or judicial remedies to ensure the protection of the persons affected.[258] The significance of this statement is not clear but appears to suggest that, if the UN had established procedures and remedies in relation to the imposition of economic sanctions, the CFI would have taken them into account in determining whether the Community standards were properly adhered to. In a similar spirit, the ECJ in *Kadi* rejected the argument that it should abstain from judicial review on the ground that UN sanctions procedures provided alternative protection on the ground that those procedures were diplomatic rather than judicial in character.[259] Nevertheless, the degree to which the ECJ might accept the UN as a proxy for the safeguarding of fundamental rights, if due process were more developed at the UN level, remains an open question.[260]

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256. *See id.* ¶¶ 95-98.

257. *See* Kadi v. Council, Joined Cases C-402 & 415/05 P, ¶¶ 316-17 (ECJ Sept. 3, 2008) (not yet reported).

258. *See* Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665, ¶¶ 99-102.

259. *See Kadi*, ¶ 326 (ECJ Sept. 3, 2008).

260. It will be remembered that in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 2005-VII Eur. Ct. H.R. 109, the ECtHR accepted that action taken by the contracting states to comply with obligations flowing form membership to international organizations was justified on condition that such organizations provided protection to fundamental rights which was equivalent to that offered by the Convention both as regards substantive guarantees and mechanisms controlling their observance. It could be argued that the ECJ should afford similar comity-based respect to any standards elaborated at the UN level. This will facilitate respect for the primacy of UN law while ensuring respect for the rule of law and encouraging the development of common standards at the global level. There are doctrinal objections to such an approach, albeit they are not insuperable. This kind of deference to standards of other international organizations might not be appropriate to a legal order, such as the EU, which

The CFI drew a distinction between the initial decision to freeze assets and the subsequent decisions to maintain the sanctions.[261] The procedure leading to the initial decision is taken at two levels, one national and the other Community. In the first stage, in accordance with Article 1(4) of Common Position 2001/931,[262] a competent national authority must take a decision that the party concerned is associated with terrorist acts. That decision must be based on serious and credible evidence or clues. In the second stage, the Council acting unanimously must decide to include the party concerned in the list on the basis of precise information which indicates that such a national decision has been taken.

The CFI held that the right to a fair hearing must be safeguarded primarily in the first stage, i.e., before the national authorities.[263] It is at that stage that the party concerned must be placed in a position in which he can effectively present his views on the evidence, subject to possible restrictions on the right to a fair hearing which are justified in national law on grounds of public policy, public security or the maintenance of international relations.[264]

By contrast, the right to a hearing has a relatively limited scope in the second phase of the procedure, which unravels at the Community level. The party concerned must be afforded the opportunity to make his views known only on whether there is specific information in the file which shows that a decision meeting the definition laid down in Article 4(1) of Common Position 2001/931 was taken at the national level. Observance of the right to a fair hearing does not in principle require that the party concerned be afforded again at that stage the opportunity to express his views on the appropriateness and well-foundedness of that decision, as those questions may only be raised at the national level. Likewise, in principle, it is not for the Council to decide whether the proceedings opened against the party con-

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does not restrict itself to providing only minimum standards for the protection of fundamental rights and which, moreover, professes to be an autonomous legal order as opposed to a mere international agreement. *See* Opinion of Advocate General Poiares Maduro, Kadi v. Council, Case C-402/05 P, ¶¶ 21, 37 (ECJ Jan. 18, 2008).

261. *See OMPI*, [2006] E.C.R. II-4665, ¶ 114.

262. Council Common Position No. 2001/931/CFSP, O.J. L 344/93 (2001).

263. *See OMPI*, [2006] E.C.R. II-4665, ¶ 119.

264. *See id.*

cerned and resulting in that decision, as provided for by the national law of the relevant Member State, was conducted correctly, or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the competent national courts under the oversight of the European Court of Human Rights.[265]

The CFI based this limitation of its review function on the principle of sincere cooperation provided in Article 10 EC which underpins the whole EU legal order.[266] It held that Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001 introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism.[267] In that context, the principle of sincere cooperation entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are "serious and credible evidence or clues" on which its decision is based and in respect of recognizing potential restrictions on access to the evidence on grounds of public policy, public security or the maintenance of international relations.

The CFI, however, provided for an exception from this deferential approach. It held that the above considerations are valid only insofar as the evidence or clues in question were in fact assessed by the competent national authority. If, in the course of the procedure before it, the Council bases its initial decision or a subsequent decision to freeze funds on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority, that information must be considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at the Community level, not having already been so at the national level.[268] The CFI appears to leave itself here sufficient margin of manuevering to intervene in ex-

265. *See id.* ¶ 121. The CFI derived support for those findings from *Le Pen v. Parliament*, Case T-353/00, [2003] E.C.R. II-1729, ¶ 91, upheld by *Le Pen v. Parliament*, Case C-208/03 P, [2005] E.C.R. I-6051.

266. *See* Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665, ¶ 122.

267. *See id.* ¶ 124.

268. *See id.* ¶ 126.

ceptional circumstances, but the scope of this exception is somewhat ambiguous. It is not clear whether it is open to the applicant to argue in all cases that the evidence was not in fact assessed properly by the national authority, i.e., that the national authority did not follow the requisite degree of scrutiny and care. If so, the way is open for the CFI to revisit the national proceedings with a view to determining whether the Council had the power to include the party's name in the list, thus undermining the duty of cooperation on the basis of which the CFI limited its own role.

It appears that, at the very least, the Council must afford to the person concerned the opportunity to express its views if it bases its decision on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority. This exception is based on the understanding that the Council is not bound by the EU Common Position, i.e., it does not have to include in the list all the persons included in the Common Position.[269] It follows that, in deciding whether to include a particular person or entity in the list, it exercises discretion and may take account of information not placed before the competent national authority. In such a case therefore it must afford to the person concerned the right to express his views, thus closing the remedial gap left by the lack of intervention of the national authority.

Despite the purposeful reiteration of the application of the right to a hearing as a matter of principle, the CFI recognized that it is subject to comprehensive limitations in the interests of the overriding requirement of public security.[270] These limitations concern the timing of notification of the evidence, the type of evidence that may be notified, and the opportunity to present views on the evidence. In short, they permeate all of its aspects.

Understandably, the CFI held that notifying the evidence and granting a hearing before the adoption of the decision to

269. The CFI also held that, when the Community implemented the EU Common Position, it did not act under powers circumscribed by the will of the Union or that of its Member States. It derived this from the wording of Article 301 EC, according to which the Council is to decide on the matter "by a qualified majority on a proposal from the Commission," and that of Article 60(1) EC, according to which the Council "may take," following the same procedure, the urgent measures necessary for an act under the CFSP. *Id.* ¶ 106.

270. *See id.* ¶ 124.

freeze funds would be liable to jeopardize the effectiveness of the sanctions and thus incompatible with the public interest objective of preventing terrorism.[271] An initial measure freezing funds must, by its very nature, be able to benefit from a surprise effect and be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented.[272] However, the evidence must be notified to the party concerned, insofar as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds.[273] The CFI also accepted that, although in principle the parties concerned must have the opportunity to request an immediate re-examination of the initial measure freezing their funds, such a hearing after the event is not automatically required in the context of an initial decision to freeze funds. The requirements of the rule of law are safeguarded by their right to seek judicial review before the CFI.[274]

With regard to the evidence to be notified, the CFI recognized that overriding security concerns or considerations relating to the conduct of the international relations of the Community and its Member States may preclude the communication of certain evidence to the parties concerned and, therefore the hearing of those parties with regard to such evidence.[275] The CFI took the view that such restrictions are consistent with the constitutional traditions of the Member States and the case law of the ECtHR.[276]

The CFI then proceeded to indicate the type of evidence

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271. *See id.* ¶ 128.

272. *See id.*; Sison v. Council, Case T-47/03, ¶ 175 (CFI July 11, 2007) (not yet reported); Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533, ¶ 308. This was endorsed by the ECJ in *Kadi.* Kadi v. Council, Joined Cases C-402 & 415/05 P, ¶ 340 (ECJ Sept. 3, 2008) (not yet reported).

273. *See* Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665, ¶ 129.

274. *See id.* ¶ 130. The above limitations do not apply to subsequent Council decisions maintaining the freezing of funds. Once assets have been frozen, it is no longer necessary to ensure a surprise effect to guarantee the effectiveness of the sanctions so that any subsequent decision maintaining the sanction must be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence. This obligation applies irrespective of whether the persons concerned expressly made a prior request to be heard. *See id.* ¶¶ 131-32.

275. *See id.* ¶ 133.

276. *See, e.g.*, Chahal v. United Kingdom, App. No. 22414/93, 1996-V Eur. Ct. H.R. 1831; Jasper v. United Kingdom, App. No. 27052/95, ¶¶ 52-53 (GC Feb. 16, 2000).

whose communication may be restricted in the circumstances of the case. It held that the restrictions apply primarily to the "serious and credible evidence or clues" on which the national decision to instigate an investigation or prosecution is based, but they may conceivably also apply to the specific content or the particular grounds for that decision, or even the identity of the authority that took it.[277] It is even possible that, in very specific circumstances, the identification of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardize public security, by providing the party concerned with sensitive information which it could misuse.[278]

2. The Obligation to State Reasons

It follows from the above that, in view of public security concerns, the right to a hearing is reduced in practice to a right to be notified of the evidence concomitantly, or as soon as possible thereafter, of the adoption of the economic sanction. The right to be heard after that is not "automatically" recognized. Given such severe limitations on the right to be heard, the requirement to state reasons becomes the central aspect of due process. Recalling established case law, the CFI held that the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the author of the measure in such a way as to enable the persons concerned to ascertain the reasons for it and enable the competent court to exercise its power of review.[279] The specific stipulations flowing from the requirement of reasoning depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given, and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.[280]

In relation to decisions imposing economic sanctions, the

277. *See OMPI*, [2006] E.C.R. II-4665, ¶ 136.

278. *See id.*

279. *See id.* ¶ 141.

280. *See, e.g.*, KONGRA-GEL v. Council, Case T-253/04, ¶ 95 (CFI Apr. 3, 2008) (not yet reported); Al-Aqsa v. Council, Case T-327/03, ¶ 58 (CFI July 11, 2007) (not yet reported); *see also* Arning v. Commission, Case 125/80, [1981] E.C.R. 2539, ¶ 13; Commission v. Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval), Case C-367/95 P, [1998] E.C.R. I-1719, ¶ 63; Germany v. Commission, Case C-301/96, [2003] E.C.R. I-9919, ¶ 87; Portugal v. Commission, Case C-42/01,

CFI rejected the argument that the statement of reasons may consist merely of a general, stereotypical formulation.[281] The Council is required to indicate the actual and specific reasons why it considers that the relevant rules are applicable to the party concerned.[282] This entails, in principle, that the statement of reasons must at least refer to the precise information or material in the relevant file which indicates that a decision has been taken by a competent national authority in respect of the person concerned[283] or, if the Council based its decision on information communicated to it by the Member States without it having been assessed by the national authority, then it must indicate why it considers that this information justifies the inclusion of the person concerned in the list.[284] This formulation appears to suggest that the Council is under an obligation to show that it was satisfied that the national authority assessed the evidence.[285]

Furthermore, given that the Council has discretion on which persons to include in the list,[286] the statement of reasons must refer not only to the statutory conditions of application of

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[2004] E.C.R. I-6079, ¶ 66; Westdeutsche Landesbank Girozentrale v. Commission, Joined Cases T-228 & 233/99, [2003] E.C.R. II-435, ¶¶ 278-80.

281. *See* Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665, ¶ 143.

282. *See, e.g.*, Roman Parra v. Commission, Case T-117/01, [2002] E.C.R. I-A-27, ¶ 31; Buzzanca v. Commission, Case T-218/02, [2005] E.C.R.-S.C. I-A-267 & E.C.R. II-1221, ¶ 74.

283. *See OMPI*, [2006] E.C.R. II-4665, ¶ 144.

284. *See id.* ¶¶ 125-26, 144.

285. The statement of reasons for a subsequent decision to freeze funds must indicate the actual and specific reasons why the Council considers, following re-examination, that there are still grounds for the freezing of the funds of the party concerned, where appropriate on the basis of fresh information or evidence. Furthermore, when the grounds of such a subsequent decision are in essence the same as those already relied on when a previous decision was adopted, a mere statement to that effect may suffice, particularly when the party concerned is a group or entity. *See OMPI*, [2006] E.C.R. II-4665, ¶ 151; KONGRA-GEL v. Council, Case T-253/04, ¶ 97 (CFI Apr. 3, 2008) (not yet reported).

286. The CFI held that, when unanimously adopting a measure to freeze funds under Regulation No. 2580/2001, the Council does not act under circumscribed powers. Article 2(3) of Regulation No 2580/2001, read together with Article 1(4) of Common Position 2001/931, is not to be construed as meaning that the Council is obliged to include in the disputed list any person in respect of whom a decision has been taken by a competent authority within the meaning of those provisions. This interpretation is confirmed by Article 1(6) of Common Position 2001/931, to which Article 2(3) of Regulation No 2580/2001 also refers, and according to which the Council is to conduct a review at regular intervals, at least once every six months, to ensure that there are grounds for keeping the parties concerned on the disputed list.

that regulation, but also the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.[287] Finally, the CFI confirmed that the statement of reasons must in principle be notified to the person concerned at the same time as the act adversely affecting him. A failure to state the reasons cannot be remedied *ex post facto* by notifying the person concerned of the reasons during the proceedings before the Community Courts.[288]

The CFI accepted, however, that the requirement to give reasons is subject *mutatis mutandis* to the same limitations on overriding grounds as those applicable to the right to a hearing.[289] Considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds. Thus, the Council may be precluded from, first, disclosing the serious and credible evidence or clues on which the national decision to instigate an investigation or prosecution is based; secondly, even from referring in detail to the specific content or the particular grounds of that decision; and thirdly, "in very specific circumstances," from disclosing the identity of the Member State or third country in which a competent authority has taken the decision in question.[290]

The CFI's findings at the level of principle are characterized by an unusual degree of equivocation. On the one hand, it is keen to assert the application of procedural rights and confirm that any concept of emergency constitution is internalized, i.e., remains subject to the prerequisites for human rights protection provided for by the Community legal order.[291] On the other

287. *See* Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665, ¶ 146.

288. *See, e.g.*, Michel v. Parliament, Case 195/80, [1981] E.C.R. 2861, ¶ 22; Dansk Rørindustri v. Commission, Joined Cases C-189, 202, 205-08, 213/02 P, [2005] E.C.R. I-5425, ¶ 463.

289. *See OMPI*, [2006] E.C.R. II-4665, ¶ 148.

290. *See id.* ¶¶ 136, 148.

291. In establishing the permissible exceptions from the requirement to give reasons, the CFI drew inspiration from Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Council Directive No. 2004/38, O.J. L 158/77 (2004)) and its pred-

hand, the scope for exceptions, which are recognized as coterminous for both the right to a hearing and the requirement to give reasons, is vast. Although the assessment of whether overriding grounds preclude a statement of reasons is reviewable by the CFI, it appears from the judgment that, in exceptional circumstances, public security interests may justify non-disclosure of the complete evidence.

Notably, the CFI recognized that limitations may be justified not only on grounds of public security but also in the interests of the conduct of the international relations of the Community and its Member States.[292] While it is not certain whether the degree of scrutiny that the Court will be prepared to undertake will be the same in the case of the second ground as in the first, the recognition of the integrity of international relations as an independent source of derogations may provide vital breathing space for the political decision-makers where evidence emanates from intelligence provided by third states.

3. The Right to Judicial Protection

The CFI held that effective judicial protection is ensured by the right of the parties concerned to challenge a decision imposing a freezing of assets under Article 230(4) EC.[293] It also held that its power of review extends to the assessment of the facts relied on as justifying the imposition of a sanction and the evidence on which that assessment is based.[294] The Court must ensure observance of the right to a fair hearing and the requirement of reasoning. It must, moreover, assess that the overriding considerations relied on exceptionally by the Council in order to derogate from those rights are well-founded.[295] In the circumstances of the case, and owing to the limitations imposed on pro-

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ecessor Directive 64/221/EEC both in relation the requirement of reasoning and in relation to the right to judicial review. *See id.* ¶¶ 141, 157. The reference to the Migrant Workers Directive and the established case law of the ECJ under it suggests that, in contrast to the position in *Kadi*, in matters falling within EU discretionary powers the CFI uses existing derogations to accommodate the threat of terrorism and, at least methodologically, does not view it as a super-derogation.

292. *See OMPI*, [2006] E.C.R. II-4665, ¶ 148.

293. *Id.* ¶ 152. The adequacy of a challenge under Article 230(4) EC has also been accepted by the ECtHR. *See* Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, 2005-VII Eur. Ct. H.R. 109.

294. *See OMPI*, [2006] E.C.R. II-4665, ¶ 154.

295. *See id.*

cedural rights, the CFI pointed out that judicial review is all the more imperative being the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights.[296] The Community Courts must thus be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential. The CFI thus put to rest the view that the executive may withhold evidence from the court or that they may oust the jurisdiction of a judicial body by invoking public security prerogative.[297] It left open, however, the question of whether the confidential information may be provided only to the CFI or be made available also to the lawyers of the applicant. This was a separate issue on which it was not necessary for the Court to rule in the present action.[298]

The CFI acknowledged limitations on its power of review. First, it accepted that the Council enjoys broad discretion in adopting economic sanctions in implementation of CFSP policies.[299] Second, it conceded that the Community Courts may not substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council.[300] Third, it held that the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power.[301] That limited review applies, especially, to the Council's assessment of whether the imposition of penalties was appropriate in the circumstances

296. *See id.* ¶ 155.

297. This view finds support in the case law of the ECtHR. *See, e.g.*, Chahal v. United Kingdom, App. No. 22414/93, 1996-V Eur. Ct. H.R. 1831, ¶ 135; Öcalan v. Turkey, App. No. 46221/99, 2005-IV Eur. Ct. H.R. 210, ¶ 106.

298. See, in this context, *Chahal v. United Kingdom*, App. No. 22414/93, 1996-V Eur. Ct. H.R. 1831, ¶¶ 131, 144; *Jasper v. United Kingdom*, App. No. 27052/95, ¶¶ 51-53 (GC Feb. 16, 2000); *Al-Nashif v. Bulgaria*, App. No. 50963/99, ¶¶ 95-97 (ECtHR Judgment of June 20, 2002).

299. *See* Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665, ¶ 159.

300. *See id.*

301. *See id.*

and the factors that it took into account in this context.[302]

4. From Principles to Outcomes

In *OMPI*, the CFI came to the conclusion that the contested decision breached of the right to a hearing, the requirement to state reasons and the right to judicial review.[303] The applicant had not been notified of the evidence against it before proceedings commenced. Neither the initial decision to freeze its assets nor the subsequent decisions maintaining the freezing mentioned the "specific information" or "material in the file" showing that a decision justifying its inclusion in the disputed list had been taken by a competent national authority.[304]

Similarly, the CFI found that the requirement to state reasons had been violated.[305] It placed particular emphasis on the fact that the complete lack of statement of reasons prevented it from exercising its function of judicial review. A distinct feature of the case was that, at the hearing, the Council and the United Kingdom were not able to explain to the Court on the basis of which national decision the contested decision had been adopted.[306] The CFI stressed that the possibility of communicating the reasons after the application to the Court has been filed cannot fulfill the requirements of the right to a hearing.[307] The statement of reasons must appear in the contested decision or be provided "immediately thereafter,"[308] and must be "actual and specific."[309]

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302. *See id.*; Al-Nashif v. Bulgaria, App. No. 50963/99, ¶ 158 (ECtHR June 20, 2002).

303. *See OMPI*, [2006] E.C.R. II-4665, ¶ 165.

304. *See id.* ¶ 161.

305. *See id.* ¶ 164.

306. This was also the case in *Sison*. *See* Sison v. Council, Case T-47/03, ¶ 224 (CFI July 11, 2007) (not yet reported).

307. *See OMPI*, [2006] E.C.R. II-4665, ¶ 139; KONGRA-GEL. v. Council, Case T-253/04, ¶¶ 99-101 (CFI Apr. 3, 2008) (not yet reported). This is the established case law of the Community courts. *See, e.g.*, Michel v. Parliament, Case 195/80, [1981] E.C.R. 2861, ¶ 22; Dansk Rørindustri v. Commission, Joined Cases C-189, 202, 205-08, 213/02 P, [2005] E.C.R. I-5425, ¶ 463. The communication of the reasons during the proceedings places the applicant at a disadvantage since he cannot contest the reasoning when he files the application. The principle of equality of the parties before the Community Courts would accordingly be affected. *See* Casini v. Commission, Case T-132/03, ¶ 33 (CFI Sept. 15, 2005) (not yet reported); Buzzanca v. Commission, Case T-218/02, [2005] E.C.R. I-A-267, ¶ 62.

308. KONGRA-GEL v. Council, ¶ 102 (CFI Apr. 3, 2008).

309. Al-Aqsa v. Council, Case T-327/03, ¶ 61 (CFI July 11, 2007) (not yet re-

In *KONGRA-GEL*,[310] *PKK*,[311] and *Al-Aqsa*[312] the CFI also annulled the contested sanctions but based its judgment solely on breach of the right to reasoning.[313] The exclusive reliance on the requirement to give reasons does not seem attributable to the fact that the cases were heard by a different chamber[314] and appears to be a sign of the Court refining its reasoning.[315] In fact, given the severe limitations on the right to hearing recognized by the CFI and the fact that it may be reduced to no more than the right to be notified of the evidence at the time when the decision is adopted, it is difficult to see what it adds to the requirement to give reasons.

Notably, in *Sison* the CFI dissociated the right to receive evi-

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ported). In *Al-Aqsa*, the Council and the Dutch Government had argued that specific reasoning was not required since the applicants were well aware of the circumstances leading to their inclusion in the list. Their resources had been frozen by sanctions regulations of the Dutch Minister of Foreign Affairs adopted under national anti-terrorist legislation before, and in anticipation of, the adoption of the contested Community sanctions list. The applicant had unsuccessfully sought the annulment of the Dutch decision before a Dutch court. They were thus aware that the contested decision had been adopted in the light of the Dutch court order. The CFI dismissed that submission on the ground that it was based not only on mere speculation as to what the applicant might have been aware of but also on the mistaken premise that there was a clear and unambiguous link between the court order and the adoption of the contested. In the circumstances of the case, the mere fact that the applicant knew of the court did not suffice to mitigate the lack of reasoning. In the absence of any reasons, the applicant was not able to understand why the Council had added its name in the list. In particular, it was not able to establish whether the Council meant to take as the basis the Dutch terrorist law itself, or the court order or some other decision of which it had no knowledge. That state of uncertainty had been exacerbated by the fact that, before including its name in the list, the Council had refused the applicant's request for access to related documents on the ground that disclosure would undermine the protection of the public interest as regards public security and international relations. The Council's refusal may have led the applicant to consider that its inclusion in the list had been adopted having regard to confidential documents.

310. KONGRA-GEL v. Council, Case T-253/04 (CFI Apr. 3, 2008) (not yet reported).

311. *PKK*, Case T-229/02 (CFI Apr. 3, 2008) (not yet reported).

312. Al-Aqsa v. Council, Case T-327/03, ¶ 61 (CFI July 11, 2007) (not yet reported).

313. In *KONGRA-GEL* the challenge was against a Council decision freezing the applicant's assets for the first time while in *Al-Aqsa* and *PKK* it was against a Council decision maintaining the freezing order.

314. *OMPI* and *Al-Aqsa* were heard by the Second Chamber while *KONGRA-GEL* and *PKK* were heard by the Seventh. Judge Forwood was a common judge in all the above cases and acted as judge rapporteur in *KONGRA-GEL* and *PKK*.

315. Note however that in *Sison*, which was decided on the same day as *Al-Aqsa*, the ECJ based the annulment as in *OMPI* on the combined violation of the right to a hearing, the requirement to give reasons and the right to judicial protection.

dence from the right of access to documents flowing from the principle of transparency.[316] It held that the fact that Council had legitimately refused to disclose under Regulation 1049/2001[317] certain documents requested by the applicant on the ground that they were confidential[318] did not exonerate it from notifying the evidence adduced against the applicant. The public's right to access to documents is subject to different limitations than those applicable when the rights of defense are at stake.[319]

C. *Damages Claims*

A final point may be made here in relation to possible claims in damages. In *Sison*, the CFI annulled the inclusion of the applicant's name in the list drawn up by the EU but dismissed the action in damages.[320] Although one has much sympathy with its findings on the facts, its reasoning raises questions.

Recalling settled case law, the CFI pointed out that a failure to state reasons was not in itself sufficient for the Community to incur liability.[321] Conversely, a violation of the rights of defense may give rise to compensation,[322] provided that the existence of damage is proved, a causal link is established and, the violation is

316. *See* Sison v. Council, Case T-47/03, ¶ 209 (CFI July 11, 2007) (not yet reported).

317. Commission Regulation No. 1049/2001, O.J. L 145/43 (2001) (regarding public access to European Parliament, Council and Commission documents).

318. *See generally* Sison v. Council, Joined Cases T-110, 150, & 405/03, [2005] E.C.R. II-1429.

319. *See id.* ¶¶ 50-52 (holding that the particular interests affecting the requesting party cannot be taken into account when applying the exemptions contained in article 4 of the Regulation); Sison v. Council, Case T-47/03, ¶¶ 209-10 (CFI July 11, 2007) (not yet reported).

320. In *OMPI,* in addition to challenging the validity of its inclusion in the list, the applicant also sought damages but its claim was rejected as inadmissible as it had failed to state the grounds on which the damages claim was based.

321. *See* Sison v. Council, Case T-47/03, ¶ 238 (CFI July 11, 2007) (not yet reported). For previous case law, see, e.g., *Kind v. European Economic Community*, Case 106/81, [1982] E.C.R. 2885, ¶ 14; *AERPO v. Commission*, Case C-119/88, [1990] E.C.R. I-2189; *Eurocoton v. Council*, Case C-76/01, [2003] E.C.R. I-10091, ¶ 98; *Cordis v. Commission*, Case T-18/99, [2001] E.C.R. II-913, ¶ 79.

322. *See Sison*, ¶ 239 (CFI July 11, 2007). The case law accepts that the right to a hearing, in contrast to the requirement to give reasons, is a rule of law which is intended to grant right to individuals. *See* Fiskano v. Commission, Case C-135/92, [1994] E.C.R. I-2885, ¶¶ 39-40; Exporteurs in Levende Varkens v. Commission, Joined Cases T-481 & 484/93, [1995] E.C.R. II-2941, ¶ 102.

deemed sufficiently serious.[323] According to established case law, a serious breach occurs where the institution which has authored the act manifestly and gravely disregards the limits to its discretionary powers.[324] The CFI considered that the breach of the applicant's rights of defense was sufficiently serious but that, in the circumstances of the case, annulment was an adequate remedy.[325]

The CFI's reasoning is problematic. It held that, in the circumstances, it was unable to form a view on whether there was such a manifest error.[326] Given the lack of reasoning and the procedural irregularities that had been committed, it was unable to establish the basis on which the Council had decided to include the name of the applicant in the sanctions list. In particular, it was not clear whether the competent national authority on whose decision the Council relied was the Dutch Secretary of State or the Hague District Court. The CFI therefore could not form a judgment on whether, by including his name in the list, the Council had committed a manifest error of assessment.

This reasoning, however, does not appear persuasive. Since the rule of law whose violation gave rise to the alleged damage was a procedural one, i.e., the right to a hearing, the seriousness of the breach must be determined not by reference to the substantive decision of the Council to include the applicant's name in the list, but by reference to whether breach of the right to a hearing was in the circumstances of the case a serious violation. The judgment appears to apply the requirement pertaining to the intensity of violation to a rule other than that from which the alleged damage arose and thus confuses procedural rules and substantive standards. It would perhaps be preferable to take a bold stand to the effect that, given that the breach referred to a procedural rule, namely the right of defense, and the importance of the public interest involved, namely national security, in the circumstances of the case annulment was an adequate remedy.

The CFI also rejected the existence of causation.[327] It held

323. *See generally* Laboratoires Bergaderm v. Commission, Case C-352/98 P, [2000] E.C.R. I-5291.

324. *See, e.g., id.*

325. This was in fact stated by the CFI. *But see Sison*, ¶ 241 (CFI July 11, 2007).

326. *See id.* ¶ 242.

327. In *Hassan*, where the sanctions list had been established by the UNSC and not

that there was no causal link between the alleged damage and the adoption of the contested Community measures.[328] The alleged damages arose from a decision of the U.S. Office of Foreign Assets Control dated August 12, 2002 and a decision of the Dutch Minister of Finance dated August 13, 2002 which had already ordered the freezing of the applicant's assets in the Netherlands.[329] Likewise, the non-material damage caused by libelling the applicant as a terrorist could not be attributed to Community legislation, but to the Common Position, in relation to which the CFI lacked jurisdiction.[330]

In conclusion, although the CFI requires high procedural requirements in relation to decisions freezing funds, it has shown distaste for actions in damages. Allowing monetary relief would excessively hinder the discretion of the institutions in an area highly sensitive for the public interest. The rule of law is satisfied as long as applicants are entitled to prospective relief. Where the Council intends to re-adopt economic sanctions against successful applicants, it would only have to give them the opportunity to be heard and provide sufficient notice.[331]

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by the EU itself a claim in damages was rejected, *inter alia,* on the ground that, even if there had been illegal conduct and loss, which the CFI rejected, such loss was causally connected not to the adoption of Community legislation but to the UNSC to which the legislation gave effect.

328. *See Sison,* ¶ 243 (CFI July 11, 2007).

329. *See id.* ¶ 246.

330. However, the rationale of the CFI seems at odds with its finding that the Council does not act circumscribed by the will of the Union or that of the Member States. *See* Organisation des Modjahedines du People d'Iran (OMPI) v. Council, Case T-228/02, [2006] E.C.R. II-4665, ¶ 106; *Sison,* ¶ 247 (CFI July 11, 2007). Indeed, it is not clear why any adverse effects on the applicant's reputation can be attributed solely to the Common Position and not the implementing Community legislation. Insofar as the Union and the Community are distinct entities, both should bear liability for libelous statements.

331. Prospective relief puts an end to an ongoing violation but does not seek deterrence. Arguably, damages should be available where the Council fails to comply with a previous ruling of the CFI. Otherwise, the Council may not be deterred from committing the same violation repeatedly. A good example is provided by Case T-256/07, currently pending before the Court, where *OMPI* has brought a new action against an amended list on the grounds that the Council respected neither its right to a hearing nor the requirement to state reasons. If the CFI sides again with the applicant, the option of claiming damages may be opened. In the case currently pending before the CFI, the applicants have not sought compensation. *See* People's Mojahedin Organization of Iran v. Council, Case T-256/07 (pending case).

D. *Collateral Effects on Third Parties*

The imposition of economic sanctions may have collateral adverse effects on third parties. The ECJ and the ECtHR have perceived such effects as the inevitable consequence of pursuing public interest objectives. The *locus classicus* is *Bosphorus*,[332] where the ECJ held that the aims pursued by the sanctions against the Federal Republic of Yugoslavia were of such importance as to justify negative consequences even of a substantial nature for innocent commercial operators. In subsequent proceedings in Strasbourg, the ECtHR was content to defer to the choices of the ECJ and endorse its balance of the conflicting interests.[333] In *Ebony Maritime v. Prefetto della Provincia di Brindisi*[334] the ECJ held that Regulation No. 990/93 implementing UN sanctions against Yugoslavia[335] did not preclude an Italian law which provided for confiscation of the cargo where a vessel infringed the provisions of the Regulation even though the penalty of confiscation was imposed without any proof of fault on the part of the owner of the cargo. A similar approach has been taken by the ECtHR outside the sanctions field as regards the repercussions of restrictive state action on the property rights of third parties.[336]

The issue was recently revisited by the ECJ in *Möllendorf and Möllendorf-Niehuus*.[337] The applicants had entered into a contract for the sale of real estate but, after payment of the contract price, the Land Registry refused to register the transfer on the ground that the buyer was included in the list of persons subject to economic sanctions under Regulation 881/2002 implementing UNSC resolution 1390 (2002) against the Al-Qaeda net-

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332. Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport., Energy and Commc'ns and others, Case C-84/95, [1996] E.C.R. I-3953, ¶ 23.

333. Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, 2005-VII Eur. Ct. H.R. 109 (ECtHR June 30, 2005).

334. Ebony Maritime SA v. Prefetto della Provincia di Brindisi, Case C-177/95, [1997] E.C.R. I-1111; *see also* The Queen v. HM Treasury, Case C-124/95, [1997] E.C.R. I-81.

335. Commission Regulation No. 990/93, O.J. L 102/14 (1993) (concerning trade between the Community and the Federal Republic of Yugoslavia).

336. *See, e.g.*, Allgemeine Gold-und Silberscheideanstalt (AGOSI) v. United Kingdom, 108 Eur. Ct. H.R. (ser. A) at 21 (1987); Gasus Dosier-Und Fördertechnik GmbH v. Netherlands, 306-B Eur. Ct. H.R. (ser. A) at 46 (1995) (seizure of a third party's right to property).

337. Möllendorf and Möllendorf-Niehuus, Case C-117/06 (ECJ Oct. 11, 2007).

work.[338] The Court held that immovable property is an "economic resource," and that registration of the transfer amounted to making such a resource available to a listed person within the meaning of Article 2(3) of the regulation.[339] The Court interpreted Regulation 881/2002 in the light of the UNSC to which it intended to give effect and came to the conclusion that Article 2(3) applies to any mode of making available an economic resource. It also held that the above finding was not affected by the fact that the contract of sale and the agreement on transfer of ownership had already been concluded before the buyer was included in the list.[340] Such immediate effect flowed from Article 9 which stated that the regulation would apply notwithstanding any rights conferred by any contract entered into before its entry into force.

The judgment suggests that the ECJ will interpret a Community regulation heeding to, and closely following, the wording of the UNSC resolution to which it is intended to give effect.[341] Thus, the Court was reluctant to read any exceptions from the obligation to freeze assets provided for in Regulation 881/2002 which did not appear in its "parent" UNSC resolution.

The effect of the Court's findings in *Möllendorf* was that, since the completion of the property transfer was impossible, the sellers would be liable to repay the sale price to the buyers. The sellers argued that such liability made the sanctions incompatible with their fundamental right to property. The Court held

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338. *See id.* ¶¶ 22-40.

339. Article 2(3) of Regulation 881/2002 states that no economic resource may be made available, directly or indirectly, to, or for the benefit of, a person or entity listed in Annex I, so as to enable that person or entity to obtain funds, goods, or services. The sellers had argued that resources are made available within the meaning of Article 2(3) only where there is an economic imbalance between the consideration given and the assets purchased but, understandably, the Court had little sympathy for such a narrow interpretation of Article 2(3). Such an interpretation would not accord with the spirit of the financial sanctions for the following reasons: (a) it would require the court to determine on the facts of each case whether there was an economic balance in the transaction; (b) the very concept of "economic balance" would be difficult to define; (b) even if there was an economic imbalance in the transaction, it would be possible for a listed person to obtain an economic advantage by subsequently disposing of the property at a higher than the purchase price. *See* Council Regulation No. 881/2002, art. 2(3), O.J. L 139/9 (2002).

340. Möllendorf and Möllendorf-Niehuus, ¶¶ 60-61.

341. *See* Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport., Energy and Commc'ns, Case C-84/95, [1996] E.C.R. I-3953, ¶¶ 13-4; Aulinger v. Germany, Case C-371/03, [2006] E.C.R. I-2207, ¶ 30.

that the question whether, in view of the special features of the case, such an obligation to make repayment might be a disproportionate infringement of the right to property could not alter the finding that the registration of the transfer was prohibited. It added, however, that the requirements flowing from the protection of fundamental rights are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements. Accordingly, it was for the national court to determine whether, in view of the special features of the case, repayment of the monies received by the sellers would constitute a disproportionate infringement of their right to property and, if so, to apply the national legislation in question, as far as possible, so as to ameliorate those effects.

CONCLUSION

Kadi can justly be seen as the most important judgment ever delivered by the ECJ on the relationship between European Community and international law, and one of its most important judgments on human rights. It is imbued by confidence, liberalism, and a somewhat skeptical view of international law. The ECJ entrenches the constitutional credentials of the EC Treaty asserting the autonomy of the Community legal order vis-à-vis the UN and also the European Convention for the Protection of Fundamental Rights.

While the judgment attracts attention mostly for its stance on the UN Charter and the crucial issue of fundamental rights, the issue of competence is, to use a solecism, the elephant in the courtroom. The present authors have expressed some skepticism as to whether the Community has competence to adopt economic sanctions against non-state actors. Community competence is unusually marginal in this case and requires a leap of faith. It is submitted that such a leap can be performed but it should be done on the basis of a teleological and evolutionary interpretation of Article 301 EC, recognizing its nature as a *pasarelle* provision and the character of the EC Treaty as a living instrument, rather than on the basis of the judicial acrobatics of Article 308 EC. The reasoning of the ECJ, and also the CFI, in this respect do not appear wholly persuasive. *Kadi* singularly illustrates the fundamental tension between, on the one hand, the

principle of enumerated competences and, on the other hand, the functionality of political decision-making. The first is necessary for the Community to exist, since otherwise Member States would not agree to share their sovereignty; but the second is necessary for the Community to be useful. The EU judiciary has to struggle with this conundrum. *Kadi* reminds us, lest we forget, of a truth familiar to constitutional lawyers on both sides of the Atlantic, namely that an instrumental rationale is a *sine qua non* of judicial constitution building.

On the reception of international law into the Community legal order, the difference between the ECJ and the CFI could not be more striking. The CFI placed Community law in a firm hierarchy of international law norms at the apex of which stands the UN Charter.[342] In doing so, it promoted a systemic vision of international law as a coherent legal order[343] at the expense of denying the Community its own enclosed constitutional universe. This way, the CFI guaranteed the EU external legitimacy voicing the concerns of sovereign actors. Since the EU is itself a creature of international law, how can it ignore the UN Charter which stands above all other international agreements? The ECJ, by contrast, opted for internal legitimacy, addressing the citizenry. Within the EU constitutional space, the Council cannot act in violation of fundamental rights no matter what is the ultimate source of a measure.[344] In this model, the EU is a self-contained order, whose highest constitutional norms determine irrevocably the outer limits of its competence.

The CFI's approach is problematic. On the one hand, it asserts Community competence to implement UNSC resolutions but, on the other hand, it reduces protection for EU citizens or at least provides for a level of protection which may be lower than that guaranteed by the national constitutions. By opting for competence without protection, it reinforces a model of supra-national government which begs legitimacy. In fact, the issue of competence and the issue of fundamental rights protection are inextricably linked and the answer to the first predeter-

342. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649.

343. For a theoretical discussion of this approach and its implications, see Eyal Benvenisti, *The Conception of International Law as a Legal System* (Tel Aviv University Law Faculty Papers, Paper No. 83, 2008), *available at* http://ssrn.com/abstract=1124882.

344. *See* Kadi v. Council, Joined Cases C-402 & 415/05 P (ECJ Sept. 3, 2008) (not yet reported).

mines the answer to the second: either the Community has competence to impose sanctions on individuals, in which case Community human rights standards apply, or the matter is to be left entirely to the Member States to deal with.

The ECJ's commitment is preferable. The primacy of the Charter operates in the field of international law. The effect of international obligations within the Community legal order must be determined by reference to conditions set by Community law, and no provision of the Treaty abrogates the application of fundamental rights. Article 307, in particular, may not take precedence over fundamental rights, the protection of which the ECJ ensures in fulfilling its function under Article 220 of the Treaty. As Advocate General Poiares Maduro aptly put it, Article 307 may not grant UNSC resolutions "supra-constitutional" status. The ECJ established the "constitutional hegemony" of EU law echoing the principle of the U.S. Supreme Court that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[345]

The ECJ views its task as being to draw a balance between legitimate security concerns about the nature and sources of evidence and the process rights of the individual. In doing so, it appeared to concede limited ground that the sanctions originated from the UNSC. It accepted that the Community must respect international law and, in that context, attach "special importance" to UNSC resolutions but this did not translate to granting any special status to Community measures adopted to comply with such resolutions when reviewing their compatibility with fundamental rights. Similarly, the ECJ accepted that it must balance "legitimate security concerns" and heed to "overriding considerations to do with safety or the conduct of the international relations of the Community and its Member States," but by doing so, it emphasized the nature of the interests at stake rather than the UNSC as their ultimate exponent.

The ECJ did not consider that the interest at stake, namely international security, justified a lower standard of review. It is however somewhat strange that the Court approached due process by reference to the right to a hearing and the right to property but made no express reference to the requirement to give

345. Reid v. Covert, 354 U.S. 1, 16 (1957).

reasons. In view of the limitations applicable to the right to a hearing in anti-terrorist cases, the duty of public authorities to provide reasons becomes the key component of the right to judicial protection.

In *OMPI* and the other cases pertaining to sanctions lists drawn by the Community institutions and not by the UNSC, the CFI articulated the requirements of due process in more detail than the ECJ did in *Kadi*. The reason for this may be that the emphasis in each set of cases lay in different aspects. In *Kadi* the ECJ was preoccupied with asserting the rule of law and the existence of judicial review over Community action dictated by the UNSC. In *OMPI*, by contrast, free from the constraints of concrete UN lists, the CFI was preoccupied with the detailed requirements of procedural rights.

The CFI findings in *OMPI* appear to strike an acceptable balance. On the one hand, the CFI is keen to assert the application of procedural rights and confirm that any concept of emergency constitution is internalized, i.e., remains subject to the prerequisites for human rights protection provided for by the Community legal order. On the other hand, it recognizes that exceptions may be required with regard to the disclosure of evidence to the parties in order to accommodate concerns pertaining to the nature and sources of evidence. The scope of these exceptions is to be policed jealously by the judiciary. The CFI exercises procedural review, its intervention seeking to reinforce the legitimacy of anti-terrorist measures without putting into question the underpinning substantive policies. Drawing the balance between security and freedom remains a challenge for the judiciary of our times.