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Global Security Challenges and Due Process of Law
The ECJ at the Crossroads between National, Regional and Universal Interests

Stanislas Adam[*]

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Introduction

The Grand Chamber of the European Court of Justice (hereafter, the ECJ) will as soon as mid-September 2008 pronounce much awaited judgments in the Cases of *Kadi* and *Al Barakaat International Foundation*.[1] These judgments will be pronounced in the context of the fight against terrorism by the United Nations and, more generally, by the international community after the terrorist attacks of 11 September 2001. They will put an end to an appeal procedure started by M. Kadi and Al Barakaat Foundation against the judgments by which the Court of First Instance of the European Communities (hereafter, the CFI) had dismissed their action for annulment of EC measures freezing their assets and all other financial resources as a result of sanctions decided by the Sanctions Committee 1267 of the UN Security Council (hereafter, the UNSC) against persons suspected of supporting terrorism.[2] The extent to which the ECJ will admit to indirectly review the legality of UNSC resolutions is at the core of these appeal procedures. The degree of judicial protection granted by the Community legal order to persons affected by such measures is a true test-case for the complex triangular relation between Community (and EU) law, the international legal order and the various legal orders of the EU Member States. Moreover, it will be one of the first opportunities for the ECJ to make its standpoint known about the *political questions* doctrine, whereby the high political sensitivity of the matter at stake would deprive it from any genuine judicial control.[3]

The main question that present article tries to tackle concerns the adequacy of the solutions proposed by the CFI in the light of the equivalence principle (*Solange*)

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[*] PhD. Research Fellow, Flemish Fund for Scientific Research, Ghent University (European Institute); Academic consultant, University of Namur (Projucit).

[1] ECJ, case C-402/05, *Kadi v. Council and Commission*, still pending; ECJ, case C-415/05, *Al Barakaat International Foundation v. Council and Commission*, still pending. M. Ali Yusuf was also a requesting party in case C-415/05 but abandoned his proceedings (see Order of the President of the ECJ of 13 November 2007).

[2] CFI, case T-315/01, *Kadi v. Council and Commission* [2005] E.C.R. II-3649; CFI, case T-306/01, *Yusuf and Al Barakaat v. Council and Commission* [2005] E.C.R. II-3533.

[3] The *political question* is a traditional element in the debate on judicial control in most Anglo-Saxon legal systems, especially the United States and the United Kingdom. See for a famous illustration of this doctrine, Supreme Court of the United States, *Baker v. Carr*, 369 US 186 (1962). This theory is often compared to the doctrine of the *actes de gouvernement* met in civilian legal systems such as France, Belgium or Italy.

developed by the ECtHR in the *Bosphorus* case.[4] The latter case concerned a Turkish airline that challenged the seizure of two planes by the Irish authorities as a result of the UN and EC sanctions against the Republic of Yugoslavia in the first half of the Nineties. Having lost its case before the Irish and Community Courts, Bosphorus started proceedings before the Strasbourg Court. The airline argued more particularly that it had been deprived of its property in a manner not compatible with article 1 of the first protocol to the ECHR. In a famous couple of paragraphs, the ECtHR presumed the absence of violation by Ireland of its obligations arising from the ECHR, *'as long as the [EC/EU] is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides'*.[5] However, the Court adds, *'any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient'*. Any other solution would endanger the Convention's role as a constitutional instrument of the European public order. The question arises whether the superficiality of judicial review provided for by the CFI in the Kadi and Yusuf/Al Barakaat cases could expose the EC/EU and its Member States to the risk of such a rebuttal.

A first section analyses the solutions brought by the CFI and compares them with another series of judgments where the CFI paid more attention to the fundamental rights of the listed parties (I). It is also important to briefly summarize the main constitutional issues raised by these cases (II). In a third section, some arguments are made in order to demonstrate that, although it should be emphasized that the task of the CFI was particularly difficult, other solutions were conceivable which better reconciled the various legal and political, individual and collective interests at stake (III.).

I. The two-fold case-law of the CFI

The fight against terrorism through targeted sanctions (or *smart sanctions*) at UN level is essentially organized by two series of instruments. There is on the one hand Resolution 1267[6] aimed to combat the Taliban regime in Afghanistan. This resolution created a special Committee entrusted with the identification and listing of all persons or entities whose funds and financial resources should be frozen as a result of their links with Usama bin Laden, Al-Qaeda or the Talibans. Resolution 1373,[7] on the other hand, is more concerned with combating terrorism in general and eventually created the Counter-

[4] ECtHR, *Bosphorus Hava Yollari Turzim ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2006, req. 45036/98.
[5] *Idem* at paras 155 and 156.
[6] Res. 1267 (1999), 15 October 1999. See also Resolution 1333 (2000), 19 December 2000 and Resolution 1390 (2002), 16 January 2002.
[7] Res. 1373 (2001), 28 September 2001.

Terrorism Committee. With regard to assets freezing, this Resolution differs from the abovementioned as it foresees in particular that Member States shall:

> '(f)reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.'[8]

The States members of the UN do not have any margin of appreciation to identify the persons and entities whose assets and financial resources should be frozen when targeted by the Committee 1267. They are on the contrary entrusted with the full responsibility of such identification in the context of Resolution 1373. These resolutions were implemented by distinct instruments in the EC/EU legal order, which in turn resulted in much different assessments of the legality of the sanctions by the CFI.

1. The identification of the targeted persons by a UN organ

The lists established by the Committee 1267 are also those of Common Position 1999/727/CFSP concerning restrictive measures against the Taliban.[9] These sanctions were for the first time implemented into Community law by Regulation 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan.[10] Articles 60 and 301 EC constitute the legal basis of this Regulation. These lists were further implemented by Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban[11] and Regulation 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.[12] Regulation 467/2001 was repealed by Council Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban.[13]

(a) *The priority given to security concerns over fundamental rights: the Cases of Kadi and Yusuf/Al Barakaat*

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[8] 1 *c*.
[9] 15 November 1999, *O.J.* 1999 L 294/1.
[10] 14 February 2000, *O.J.* 2000 L 43/1.
[11] 26 February 2001, *O.J.* 2001 L 57/1.
[12] 6 March 2001, *O.J.* 2001 L 67/1.
[13] 27 May 2002, *O.J.* 2002 L 139/9. On the wide scope recognised by the ECJ to this Regulation (881/2000), see case C-117/06, *Möllendorf* [2007] E.C.R. I-8361.

In *Kadi* and *Yusuf/Al Barakaat International Foundation*, the requesting parties had mainly advanced two series of arguments in order to challenge the EC assets freezing measures: on the one hand, the legal basis and, therefore, the competence of the Council to adopt them on the basis of articles 60 and 301 EC, in conjunction with Article 308 EC (*flexibility clause*); on the other hand, a breach of their fundamental rights, in particular the right to property, the right to be heard and the right to an effective remedy.

With regard to the first ground of annulment, the CFI recalled that the sanctions at stake concerned individuals or entities that could not be identified (any more) with or connected to a third State. This excluded measures adopted on the sole ground of Articles 60 and 301 EC, that exclusively concern governmental authorities of third countries.[14] However, considering that the policy objective pursued by the contested regulation (881/2002) could not be fully achieved by Articles 60 and 301 EC alone, the CFI argued that there was enough ground for considering that the requirement of consistency laid down in Article 3 EU combined with the bridge established between the pillars by Articles 60 and 301 EC and the flexibility clause of Article 308 could justify the adoption of Community sanctions towards non-State actors on grounds. This standpoint would be reinforced by the circumstance that states can no longer be regarded as the only source of threats to international peace and security and that, therefore, EC/EU institutions should be able to adapt their response to such an evolution.[15]

Before answering the arguments based on the fundamental rights, the CFI dealt with the general objection to its competence raised by the Council, the Commission and the United Kingdom. The latter had argued that the obligations imposed on the Community and its Member States by the UN Charter prevail over every other obligation of international, Community or domestic law. The CFI first ruled that UNSC resolutions, from the standpoint of international law, *'clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty'*.[16] This primacy would derive, for the relationship between the UN Charter and the domestic law of the Member States, from principles of customary international law, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[17] Regarding the relation between the UN Charter and international treaty law, the primacy would be expressly laid down in Article 103 of the UN Charter, which provides that *'(i)n the event of a conflict between the obligations of the Members of the United Nations under the (...) Charter and their obligations under any other*

[14] Case C-306/01, above at fn…, para. 133; case C-315/01, above at fn…, para. 97.
[15] Case C-306/01, *idem*, para. 169. Case C-315/01, *idem*, para. 133.
[16] Case C-306/01, *idem*, para. 231. Case C-315/01, *idem*, para. 181.
[17] This rule is codified in Art. 27 of the Vienna Convention on the law of Treaties.

international agreement, their obligations under the (...) Charter shall prevail', and this irrespective of the date of coming into being of both obligations. The CFI further reinforced this point of view by referring to Article 307 EC, a provision according to which the rights and obligations arising from international treaties concluded before the entry into force of the EC Treaty or, for acceding States, before the date of their accession, are not affected by the provisions of the EC Treaty. Considering the fact that five of the six founding Member States were a party to the UN Charter before that date, and all acceding States were also members of the UN before becoming members of the EC/EU, the EC Treaty would in no way impair the obligations arising from the UNSC resolutions or the decisions of its sanctions committees.[18]

The CFI then comes to the issue related to the binding character of the UN Charter on the EC/EU institutions. The CFI argues that, even though the EC/EU as an international organisation is not a party to the United Nations, it is bound by the San Francisco Charter. This would result from the EC/EU Treaties themselves. The Member States, by conferring the EC sanctioning powers that may cover UN measures, demonstrated their will to bind it by the obligations entered into by them under the Charter of the United Nations.[19] As a consequence, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community. Applying the same line of reasoning as that of the ECJ in the case *International Fruit Company* regarding the GATT Agreement,[20] the CFI therefore acknowledges that other treaties than those concluded by the EC as such may be binding for its institutions, beyond the scope of Article 300 (7) EC. The applicant's argument that the Community legal order is a legal order independent of the United Nations, governed by its own rules of law, is therefore rejected.[21]

Having acknowledged the binding character of the UNSC resolutions both for the Member States and for the Community institutions, the CFI had to determine the scope of judicial review to be exercised regarding EC measures implementing Common Positions adopted to give effect to UN restrictive measures. Recalling that judicial control is a general principle of Community law, the CFI emphasised that the UN measures at stake in this case (especially UNSC Resolution 1267) circumscribed the Member States' powers, with the result that they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration.[22] As a

[18] Case C-306/01, above at fn 2, para. 240; case C-315/01, above at fn 2, para. 190.
[19] Case C-306/01, para. 250. Case C-315/01, para. 200.
[20] ECJ, joined cases C-21 to 24/72, *International Fruit Company* [1972] E.C.R. 1219 esp. at para. 18.
[21] Case C-306/01, above at fn 2, para. 258; case C-315/01, above at fn 2, para. 208.
[22] Case C-306/01, para. 265. Case C-315/01, para. 214.

consequence, except for the right of self-defence contained in Article 51 of the UN Charter, determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone, acting under Chapter VII of the UN Charter. As such, these measures escape the jurisdiction of national or Community courts.[23] Since the contested Community acts simply reproduce these UNSC measures in the cases of Kadi and Yusuf/Al Barakaat, the CFI could not exercise a classical review of legality, especially regarding the compliance with Community standards of human rights. On the contrary, the Court would be bound, so far as possible, to interpret and apply the law of the UN in a manner compatible with the obligations of the Member States under the Charter of the United Nations.[24]

The CFI could have stopped its reasoning here, concluding that the individual sanctions at stake were lawful or rather that their respect for fundamental rights and freedoms could not be assessed. Strikingly enough, the CFI however claims a competence to indirectly review the lawfulness of the UNSC measures with regard to *ius cogens*, understood as a *'body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible'*.[25] This would result from the customary character of the rule enshrined in Article 5 of the Vienna Convention on the Law of the Treaties and from the fact that the UN Charter necessarily presupposes the existence of mandatory norms of international law. These mandatory norms would in particular cover the protection of the fundamental rights of the human person. A difference of wording between the *Kadi* and *Yusuf/Al Barakaat* judgments can be underlined here, namely the fact that the CFI qualifies such a review, in the first case, as "highly exceptional", whereas in the second case, the CFI vaguely declares that its control of the compliance with *ius cogens* occurs "in some circumstances".[26]

However, the CFI did not upheld any of the claims made by the applicants that their fundamental rights to property, to a fair hearing and to an effective remedy had been breached. The Court mentioned in this respect the availability of humanitarian exemptions and derogations, the importance and the legitimacy of the aims pursued by the assets freezing measures, the temporary character of the freezing, the periodical reviewing mechanisms at UN level, the existence of a procedure for the re-examination of individual cases before the Committee 1267 and, finally, the complete system of judicial review in Community law.

[23] Case C-306/01, para. 270. Case C-315/01, para. 219.
[24] Case C-306/01, para. 276. Case C-315/01, para. 225.
[25] Case C-306/01, para. 277. Case C-315/01, para. 226.
[26] Case C-306/01, para. 282. Case C-315/01, para. 231.

As further evidenced by the *OMPI*, *Sison* and *Al-Aqsa* judgments[27] and discreetly admitted by the CFI itself,[28] the "universal" standard of fundamental rights applied by the here was much lower than that usually resulting from the Community legal order. Concentrating on the merits of the pleas, the CFI did not tackle the tricky and much controversial issue whether *ius cogens* actually covers fundamental rights. This bypass could reveal in our opinion the consciousness of the CFI that the inclusion of fundamental rights in *ius cogens* currently remains extremely controversial among the actors the international community. It is also interesting to note that the CFI, when considering the alleged breach of an effective remedy, points to the fact that the persons affected by restrictive measures are essentially dependent on the diplomatic protection offered by Member States to their citizens.[29] The CFI adds that it is open to the persons involved to bring an action for judicial review based on domestic law against any wrongful refusal by the competent national authorities to submit their case to the sanctions committee for re-examination.[30] However, the CFI did not go so far as to recognize the mandatory character of such a judicial review when Community implementing measures are at stake.

(b) *A complementary argumentation and new obligations arising from Community law: the Cases of Ayadi, Hassan and Minin*

Early comments on those judgments of the CFI made it clear that this line of reasoning, both on the effect of the UNSC measures in the EC/EU legal order and on the issue of fundamental rights was highly controversial and, for many observers, unsatisfactory.[31]

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[27] See below, I.2.
[28] See for example Case C-306/01, above at fn 2, para. 289. Case C-315/01, above at fn 2, para. 238.
[29] Case C-306/01, para. 314. Case C-315/01, para. 267.
[30] Case C-306/01, para. 317. Case C-315/01, para. 270.
[31] J. ALMQVIST, 'A Human Rights Critique of European judicial Review: Counter-Terrorism Sanctions' (2008) 57 *I.C.L.Q.* 303-331; A. BIANCHI, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' (2007) 17 *E.J.I.L.* 909 et 910; T. BIERSTEKER, E. ECKERT (dir.), *Strengthening Targeted Sanctions through Fair and Clear Procedures*, White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006, 58 p; M. CREMONA, 'Community Report' *in* X.L. XENOPOULOS (ed.), *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law* (Nicosia, FIDE 2006 - National reports, 2006) 357-360; G DELLA CANANEA, 'Return to the due process of law: the European Union and the fight against terrorism' (2007) 32 *E.L. Rev.* 896-907; S. DEWULF, D. PACQUEE, 'Protecting Human Rights in the War on Terror: Challenging the Sanctions Regime Originating from Resolution 1267 (1999)' (2006) 24 *Netherlands Quarterly of Human Rights* 607-640; C. ECKES (2007) 44 *Common Market law Review* 1117-1129; from the same author, 'Judicial Review of European Anti-Terrorism Measures – The *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 *E.L.J.* 74-92; P. EECKHOUT, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations*, Walter Van Gerven Lectures (Groningen, Europa Law Publishing, 2005) 22-26 ; from the same author,

This certainly explains the soft evolution in the reasoning of the CFI noticed in the two subsequent judgments concerning restrictive measures affecting people listed by the UN sanctions committee 1267, in the cases of *Ayadi* and *Hassan*[32] and, later on, in the procedure started by M. *Minin*.[33] In these cases, the CFI rejected the claims made by the applicants and dismissed their request of annulment of Regulation 881/2002, essentially on the same grounds as in Kadi and Yusuf/Al Barakaat.[34] In particular, the CFI refused to decide in *Ayadi* that the contested measures were contrary to the subsidiarity principle. The existence and the nature of the sanctions adopted by the EC resulted from common positions of the EU, acting under the CFSP pillar. In this context, the individuals would be deprived of any right to challenge the lawfulness of the contested measures in light of

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'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit' (2007) 3 *E.C.L.R.* 183-206 ; from the same author, 'EC law and UN Security Council Resolutions – in search of the right fit' *in* A. DASHWOOD, M. MARESCEAU (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge, Cambridge University Press, 2008) 104-128 ; J. ETIENNE, 'Sur certains rapports entre le droit communautaire et le droit international public. Un bref commentaire de l'arrêt Yusuf et Al Barakaat du Tribunal de première instance des Communautés européennes' (2006) 2 *C.D.P.K.* 373-376 ; J. HELISKOSKI (2007) 44 *C.M.L. Rev.* 1143-1157 ; J.-P. JACQUE, 'Le Tribunal de première instance face aux résolutions du Conseil de sécurité des Nations Unies. « Merci monsieur le Professeur »' (2006) 19 *L'Europe des Libertés* 2-6; M. KARAYIGIT, 'The *Yusuf* and *Kadi* Judgments : The Scope of EC Competences in Respect of Restrictive Measures' (2006) 33 *Legal Issues of Economic Integration* 379-404 ; N. LAVRANOS, 'Judicial Review of UN Sanctions by the Court of First Instance' (2006) 11 *Eur. For. Aff. Rev.* 471-490; A. MIRON, 'La jurisprudence du Tribunal de première instance à propos de l'inscription sur les listes terroristes' (2007) 511 *R.M.C.U.E.* 526-531 ; M. NETTESHEIM, 'U.N. Sanctions against Individuals – A Challenge to the Architecture of European Union Governance' (2007) 44 *C.M.L. Rev.* 567-600 ; D. SIMON, F. MARIATTE, 'Le Tribunal de première instance des Communautés: Professeur de droit international?' (décembre 2005) *Europe* 6-10 ; T. UYEN DO (2005) 3 *R.D.U.E.* 637-640; W. VLCEK, 'Acts to Combat the Financing of Terrorism : Common Foreign and Security Policy at the European Court of Justice' (2006) 11 *E.F.A.R.* 491-507; R.H. VAN OOIK, R.A. WESSEL, 'De Yusuf en Kadi-uitspraken in perspectief. Nieuwe verhoudingen in de interne en externe bevoegdheden van de Europese Unie' (2006) 54 *S.E.W.* 230-241; S. ZAŠOVA, 'La lutte contre le terrorisme à l'épreuve de la jurisprudence du Tribunal de première instance des Communautés européennes' (2008) 74 *R.T.D.H.* 481-505. See also the report of the Committee on international monetary law of the International Law Association, Rio de Janeiro Conference (2008) 27-30. For a less critical standpoint, see R. BROWN, 'Kadi v. Council of the European Union and Commission of the European Communities : Executive Power and Judicial Supervision at European Level' (2006) *E.H.R.L.R.* 456-469; C. TOMUSCHAT, (2006) 42 *C.M.L. Rev.* 537-551.

[32] CFI, case T-253/02, *Chafiq Ayadi* [2006] E.C.R. II-2139 ; CFI, case T-49/04, *Faraj Hassan* [2006] E.C.R. II-52.

[33] CFI, case T-362/04, *Leonid Minin* [2007] II-2003.

[34] Case T-253/02, above at fn 32, paras 116 and 117. Case T-49/04, above at fn 32, paras 92 and 93.

the subsidiarity principle.[35] Appeal procedures have been started against the CFI's judgments before the ECJ.[36]

Other parts of these judgments are however more interesting. M. Ayadi argued that the conclusions reached by the CFI in the *Kadi* and *Yusuf* cases could not simply be transposed to his own situation. This was due to the fact that, according to him, the freezing of his assets was not temporary in nature but could be rather considered actual confiscation. The applicant also tried to convince the CFI that, contrary to what was decided in the two abovementioned judgments, there is no effective mechanism for reviewing the individual measures freezing funds adopted by the Security Council. M. Ayadi had written twice to the Irish authorities seeking their assistance in having him removed from the Sanctions Committee list. At the time of the hearing, this had not resulted in any reviewing procedure before the Committee 1267.[37] Partly because of this new elements and also as a result of the harsh criticism expressed in academic literature after the Kadi and Yusuf/Al Barakaat judgments, the CFI completed its argumentation in two ways.

A first complementary point refers to the alleged ineffectiveness of the exemptions and derogations from the freezing of funds. Here, the CFI analyses the system of humanitarian exemptions and derogations foreseen by the contested Regulation, as a result of UNSC Resolution 1452 (2002). Even if it concedes that the assets freezing is a particularly drastic measure with respect to the applicant, the importance of the aims pursued by the Regulation imposing those sanctions is such as to justify far-reaching negative consequences.[38] Moreover, the contested Regulation and the Security Council resolutions implemented by that regulation do not prevent the applicant from leading a satisfactory personal, family and social life, given the circumstances. It is for the national authorities which are best placed to take into consideration the special circumstances of each case, to determine in the first place whether such a derogation may be granted and then to ensure that it is reviewed and implemented in keeping with the freezing of the funds of the person concerned.[39]

The CFI then comes to a second element, namely on the one hand the alleged invalidity of the conclusions reached in the *Kadi* and *Yusuf/Al Barakaat* cases with regard to the

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[35] Case T-253/02, paras 109 to 111.
[36] ECJ, case C-403/06, *Ayadi v. Council and Commission*, still pending; ECJ, case C-399/06, *Hassan v. Council and Commission*, still pending.
[37] *Idem* at para. 102.
[38] Case T-253/02, above at fn 32, para. 123. Case T-94/04, above at fn 32, para. 99. Reference is made here by the CFI to the famous paragraph of the *Bosphorus* judgment pronounced by the ECJ. See ECJ, case C-84/95, *Bosphorus* [1996] E.C.R. I-3953 at para. 23.
[39] Case T-253/02, para. 132.

compliance of the contested measures with *ius cogens* and, on the other hand, the lacuna in the judicial protection of the persons and entities concerned.

The CFI recalled that the assets freezing measures were not confiscatory in nature but rather temporary and, as a result, did not affect the very substance of the right to property of the persons concerned.[40] The CFI then went on to discuss the review of legality of the listing of targeted individuals and entities by the sanctions committee. By adopting the *Guidelines for the conduct of its work*, the sanctions committee has intended to take account, so far as possible, of the fundamental rights of the persons affected by restrictive measures. Admittedly, the latter do not have a direct access to the sanctions committee, nor do they have any guarantee to be heard in their claims. Such a restriction is however not improper in light of the fundamental policy objectives pursued by the sanctions at stake.[41] The effectiveness of the mechanism provided for by the guidelines would be guaranteed, on the one hand, by the various formal consultation mechanisms intended to facilitate the reaching of a consensus between the States concerned with the inscription, and, more generally, by the obligation made by the UN to all its Member States to act in good faith. As it is demonstrated below, these conclusions seem to be contradicted by the reports of the sanctions committee 1267 itself.

The most interesting part of these judgments nonetheless relates to the particular obligations that are imposed by the CFI on the Member States of the Community when they receive a request for removal from the list. The CFI recalls that the sanctions committee has interpreted the UNSC resolutions in a sense that the targeted persons or entities have the right to present a request for review of their case to the government of the country in which they reside or of which they are nationals, for the purpose of being removed from the list in dispute. Since the EC Regulation at stake implements these UN measures, it should be interpreted in the same way.[42] Referring to the fundamental rights and freedoms guaranteed by the ECHR and which belong to the common constitutional traditions of the Member States, the CFI argues that the latter must ensure, so far as is possible, that interested persons are put in a position to put their point of view before the competent national authorities when they present a request for their case to be reviewed. Moreover, their margin of assessment must be exercised in such a way as to take due account of the difficulties that those persons may encounter in ensuring the effective protection of their rights, having regard to the specific context and nature of the measures affecting them.[43] As a result, a Member State should in principle exercise diplomatic protection when requested by an interested person to start an administrative de-listing procedure before the sanctions committee. The Member States are required to act

[40] *Idem* at para. 135. Case T-94/04, above at fn 32, para. 105.
[41] Case T-253/02, para. 141. Case T-49/04, para. 111.
[42] Case T-253/02, para. 145. Case T-49/04, para. 115.
[43] Case T-253/02, paras 146 and 147. Case T-49/04, para. 116 and 117.

promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination, if that appears to be justified in the light of the relevant information supplied. The CFI also maintains that any wrongful refusal by the competent authority to submit the case to the Sanctions Committee is subject to judicial review. Such a possibility would be confirmed by the order given by the *Tribunal de première instance* of Brussels to a Belgian governmental department to request the sanctions committee to remove the names of some individuals from the list.[44]

It should be emphasized that, contrary to what is argued sometimes, this reasoning of the CFI does not rest on the sole basis of Community law. On the contrary, it is essentially built on the fact that a UN organ (in this case, the sanctions committee) had identified the existence of an *obligation* for the Member States to exercise diplomatic protection and that Community law, for the abovementioned reasons, should as much as possible be interpreted in conformity with the UN legal order. At the time of writing, there were still some cases pending before the CFI, based on the same grounds as the requests of Kadi, Yusuf/El Barakaat, Hassan, Ayadi and Minin.[45]

2. The identification of the targeted persons by the EU

The CFI followed a different path in the context of Resolution 1373 and its implementing measures in EU law[46] and in Community law.[47] In this case, the UN measures at stake are concerned with the fight against terrorism in general. The Counter-Terrorism Committee created in this context, unlike Committee 1267, is not empowered with the identification of the persons and entities subject to restrictive measures. This responsibility lies with the Member States or the regional organisations empowered by them to do it.

(a) *An application of 'European' human rights satndards: PMOI*, *Sison* and *Al-Aqsa*

It was in the *PMOI* case,[48] better known as the case *Organisation des Mojahedines du Peuple d'Iran*, that the CFI had to review for the first time the lawfulness of sanctions adopted on grounds of Resolution 1373. This case concerned an organisation that had been proscribed in the United Kingdom according to the *Terrorism Act* 2000. As a result

[44] Civ. Brussels (réf.), 11 February 2005, *Sayadi and Vinck*, R.G. 2004/2435/A, not published.
[45] CFI, case T-318/01, *Omar Mohamed Othman*; CFI, case T-135/06, *Al-Faqih*; CFI, case T-136/06, *Sanabel Relief Agency*; CFI, case T-137/06, *Ghunia Abdrabbah*; CFI, case T-138/06, *Nasuf*.
[46] See especially Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, *O.J.* 2002 L 116/75.
[47] See especially Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *O.J.* 2002 L 160/26.
[48] CFI, case T-228/02, *People's Mujahidin of Iran* [2006] E.C.R. II-4665.

of UNSC Resolution 1373 and of the information provided for by the British authorities to the EU Council, the name of PMOI was included in the annex of the EC/EU assets freezing measures. Meanwhile, PMOI lost the two parallel actions it had brought against the prohibition before the Proscribed Organisations Appeal Commission and the High Court of England and Wales. PMOI therefore sought before the CFI the annulment of both the Common Positions and the EC decision by which its assets had been frozen.

The CFI first dismissed the request as far as it concerned EU Common Positions.[49] Recalling its previous case-law in the cases of *Segi*,[50] *Gestoras Pro Amnistia*[51] and *Selmani*[52] and implicitly comforted in this position by the ECHR,[53] the CFI decided that the action must be dismissed here as, in part, clearly inadmissible and, in part, clearly unfounded. The Community Courts have no competence to directly review the legality of measures adopted on grounds of the second pillar (CFSP). Moreover, article 46 of the EU Treaty, which describes the limited competences of Community Courts in the field of the third pillar (Police and judicial cooperation in criminal matters), does not recognize any right to lodge an action in annulment to individual applicants. The sole possibility in such circumstances is to ask the Court, according to Article 47 EU, to check that the EU, by adopting an act on grounds of the second or third pillar, did not disregard the Community *acquis* and competences.[54] It remains unclear whether the domestic Courts of the Member States would be able to set aside EU second or third pillar measures in case of a violation of fundamental rights. Such a proposal, which would depart from the *Foto-Frost* doctrine, had been suggested by Advocate General Paolo Mengozzi in his conclusions preceding the cases of *Gestoras pro Amnistia* and *Segi*[55] but has not been expressly upheld by the ECJ.[56] In this case, it was clear that the Council was competent to adopt the

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[49] *Idem*, para. 45.
[50] CFI (order), case T-338/02, *Segi and others v. Council* [2004] E.C.R. II-1647.
[51] CFI (order), case T-333/02, *Gestoras Pro Amnistia and others v. Council* [2004] Unpublished.
[52] CFI (order), case T-299/04, *Selmani v. Council and Commission* [2005] Unpublished.
[53] See ECtHR (decision on the admissibility), *Segi and others and Gestoras and others v. 15 Member States of the EU*, 23 May 2002, joined req. 6422/02 and 9916/02. In these cases, the ECHR dismissed the request lodged by the appellants on grounds of the fact that they would not be actual victims in the meaning of the Convention simply as a result of being listed in an annex to an EU Common Position.
[54] See e.g. ECJ, case C-170/96, *Commission v. Council (airport transit arrangements)* [1998] E.C.R. I-2763. See also for a recent application in the field of external relations, ECJ, case C-91/05, *Commission v. Council (Ecowas)* [2008] nyr.
[55] See the conclusions delivered on 26 Otcober 2006 in *Gestoras Pro Amnistia*, case C-354/04 P, and *Segi*, case C-355/04 P, esp. at para. 85.
[56] ECJ, case C-354/04 P, *Gestoras Pro Amnistia e.a.* [2007] E.C.R. I-1579; ECJ, case C-355/04 P, *Segi e.a.* [2007] E.C.R. I-1657. The ECJ only ruled at para. 56 of both judgments that *'it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure*

contested Common Position in order to implement UN assets freezing measures. It appeared from the particular circumstances of the case that the Council was aware of the Community competences since it made explicit reference to Articles 60 and 301 EC in the contested Common Position.[57]

More interestingly, the CFI, when it went on to examine the pleas on the merits, distinguished the type of judicial review it would exercise here and the limited analysis of *ius cogens* it had proposed in Kadi and Yusuf/Al Barakaat. According to the CFI,

> '(i)n the present case, (…) Security Council Resolution 1373 (2001) (…) does not specify individually the persons, groups and entities who are to be the subjects of (restrictive) measures. Nor did the Security Council establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them.' [58]

The CFI continued by arguing that the acts which specifically apply those restrictive measures to a given person or entity, such as the contested decision, do not come within the exercise of circumscribed powers and accordingly do not benefit from the primacy effect of UNSC measures highlighted in the Kadi and Yusuf/Al Barakaat judgments.[59] Moreover, the circumstance that the identification of the targeted persons and entities had already occurred in the Common Position, adopted under the EU realm, did not prejudice the autonomy of the Council acting on grounds of Articles 60 and 301 EC. Since it was not necessarily conditioned in its content and even in its existence by the Common Position, the Community measure at stake was fully subject to procedural safeguards such as the right to a fair hearing or to an effective remedy.[60] Without entering into the details of the analysis of the case provided for by the CFI, it suffices to say that the latter considered that the procedural rights recognised to the targeted persons and entities were insufficient, especially considering the seriousness of the sanctions.

The CFI distinguished the two phases of the procedure for the listing of persons. At a first level, the national competent authorities must instigate investigations or prosecute a person or entity on the basis of serious and credible evidence or clues. The person or entity concerned should be able to express its standpoint before those authorities. In the

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relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered'.

[57] CFI, case T-228/02, above at fn 48, paras 58 and 59.

[58] *Idem* at paras 99 ff.

[59] *Idem* at para. 103 *jct*° 104.

[60] *Idem* at paras 105 to 108.

second phase, the Council, acting by unanimity, must decide to include the party concerned in the disputed list, on the basis of precise information or material in the relevant file which indicates that such a decision has been taken. This inclusion is revised on a regular basis, and at least every six months. At this second level, the person or entity concerned must not necessarily be heard. A notification of the specific information or material in the file is in principle sufficient. The principle of loyal cooperation contained in Article 10 EC would indeed entail, 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 recognition of potential restrictions on access to that evidence or those clues, legally justified under national law on grounds of overriding public policy, public security or the maintenance of international relations.[61] If, however, the Council bases its decisions on intelligence communicated by representatives of the Member States without having been assessed by the competent national authorities, such information must be notified and a hearing must take place at Community level. In order to preserve the efficiency of the assets freezing measures, these elements should however not be communicated and the hearing should not occur before the initial implementation of the sanction. On the contrary, such guarantees are fully applicable to a subsequent decision to maintain a person or entity on the list. Admittedly, adds the CFI, overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations can at any time restrict the evidence communicated to targeted persons or entities or the possibility for them to be heard in their views.

These various requirements were not respected in this case.[62] There had been no specific hearing and the contested decision was vaguely motivated. The targeted organisation could therefore not prepare an adequate defence and was deprived of any effective remedy.[63] The CFI argued that, because of the lack of any genuine statement of reasons, it was not in a position to review the lawfulness of the Council's decision.[64] The CFI therefore annulled the contested measure.

The CFI confirmed this standpoint in the *Sison*[65] and *Al Aqsa*[66] judgments of July 2007. It is interesting to note that, notwithstanding these judgments, at the time of writing, PMOI,

[61] *Idem* at para. 124.
[62] *Idem* at para. 162.
[63] *Idem* at para. 164 to 166.
[64] *Idem* at paras 172 and 173.
[65] CFI, case T-47/03, *Sison* [2007] E.C.R. II-2047.
[66] CFI, case T-327/03, *Stichting Al-Aqsa* [2007] nyr.

Sison and Al Aqsa are still included in the annex to Regulation 2580/2001.[67] In particular, the resistance shown by the British government to implement the court's decision in the case of PMOI has been strongly denounced by some observers.[68] New requests have been introduced by *PMOI* before the CFI against its maintenance on the list.[69]

(b) *The improvement of the EU procedure of listing and de-listing*

Since then, the Council has improved the procedure of listing at EU level (Resolution 1373) in order to establish a clearer and more transparent procedure.[70] A summary of these procedures has been published in the form of a notice in the Official Journal.[71] A Working Party[72] was created and charged with examining proposals for the listing and de-listing and with preparing the regular review of the list. The Working Party recommends to the Council the listing or de-listing of persons or entities.

Moreover, for each person, group and entity subject to restrictive measures under Council Regulation 2580/2001, the Council provides a statement of reasons which is sufficiently detailed to allow those listed to understand the reasons for their listing and to allow the Community Courts to exercise their power of review where a formal challenge is brought against the listing. After a listing decision has been taken by the Council, the Council Secretariat informs each person, group and entity subject to restrictive measures under Council Regulation (EC) No 2580/2001, by sending a letter of notification to their address, wherever this is practicably possible. The letter includes elements like a description of the restrictive measures adopted, a mention of the humanitarian exemptions available, the Council's statement of reasons for the listing, a reference to the possibility for the person, group or entity to send a file to the Council with supporting documents, asking for their listing to be reconsidered, a reference to the possibility of an appeal to the

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[67] See in particular, for one of the last decisions to date, Council Decision 2007/868/EC of 20 December 2007, *O.J.* 2007 L 340/100.

[68] See J.-P. SPITZER, 'Bending the law does democracy no good' (6-12 March 2008) *European Voice* 9.

[69] CFI, case T-157/07, *People's Mujahidin of Iran*, still pending. See also CFI, case T-256/07, *People's Mujahidin of Iran*, still pending; CFI, case T-341/07, *Sison*, still pending; CFI, case T-348/07, *Stichting Al Aqsa*, still pending.

[70] See Factsheet, European Council, 'The EU list of persons, groups and entities subject to specific measures to combat terrorism', 15 July 2008, available at: www.consilium.europa.eu/uedocs/cmsUpload/080715_combat%20terrorism_EN.pdf.

[71] Notice for the attention of the persons, groups and entities on the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (see Annex to Council Decision 2007/445/EC of 28 June 2007), *O.J.* 2007 C 144/1.

[72] "Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism".

CFI in accordance with the EC Treaty or a request for consent of the listed person, group or entity to give public access to the statement of reasons. This list is also published in the Official Journal. The inclusion of a person or entity on the list is reviewed regularly and at least every six months. The persons and entities included in the list are invited to make their views known on this occasion.

It remains to be seen whether the CFI, which received several new requests in the context of assets freezing measures adopted on grounds of Regulation 2580/2001,[73] will consider these improvements sufficient to reverse its findings in the PMOI, Sison and Al-Aqsa cases.[74] Be it as it may, in two recent judgments both pronounced on 3 April 2008 (*Kongra-Gel*[75] and *Osman Ocalan*[76]), the CFI concluded that the sending of a statement of reasons according to the new procedure but after that an annulment procedure was started did not cover the unlawfulness of the contested act. These cases had indeed been introduced in 2002 and in 2004 and the Council, as a result of the POMI case, had sent a statement of reasons in April 2007. The CFI decided that a failure to state reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Community judicature.[77]

3. The debate on individual sanctions at the level of the UN Sanctions Committee

An important debate concerning the transparency of the procedures for listing and de-listing currently takes place at the level of the United Nations. Several studies and reports have been presented to the UN organs, in particular the Security Council, which underline the lack of procedural guarantees recognized to the persons targeted by individual sanctions, especially in the context of Resolution 1267.[78] Experts generally agree that the

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[73] See e.g. CFI, case T-49/07, *Sofiane Fahas*, still pending; CFI, case T-362/07, *Nouriddin El Fatmi*, still pending; CFI, case T-75/07, *Ahmed Hamdi*, still pending; CFI, case T-323/07, *Mohamed El Morabit*, still pending.

[74] See for a negative opinion regarding this question, D. MARTY, 'United Nations Security Council and European Union blacklists', Report, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 16 November 2006, especially at paras 21, 41 to 45 and 91.

[75] CFI, case T-253/04, *Kongra-Gel* [2008] nyr.

[76] CFI, case T-229/02, *Osman Ocalan (Kurdistan Workers' Party – PKK)* [2008] nyr.

[77] CFI, case T-253/04, above at fn 75, para. 101; CFI, case T-229/02, above at fn 76, para. 68.

[78] See e.g. B. FASSBENDER, *Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter*, Study commissioned by the United Nations – Office of Legal Affaires, Humbolt-Universität zu Berlin, 20 March 2006; T. BIERSTEKER, E. ECKERT (dir.), above at fn 31; Report of the Informal Working Group of the Security Council on General Issues of Sanctions, S/2006/997, 18 December 2006, esp. at pages 4 and 5; Fifth report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolutions 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2006/750, 31 July 2006.

severity of the assets freezing measures, even if understandable in the light of the importance of the objective they pursue, should require a minimal respect for due process. As a consequence, the UNSC created a *Focal Point for de-listing* by means of Resolution 1730 (2006) on 19 December 2006. Petitioners seeking to submit a request for de-listing can now do so either through the focal point or through the classical way of addressing a demand to the State of residence or citizenship. Arguably, this change in the procedure diminishes the dependence of the targeted persons and entities to the good will of the Member State from which they are citizen or resident. They eventually outdate in part the originality of the findings of the CFI in *Ayadi* and *Hassan*. To date, one State (France) has even decided that its citizens or residents should address their de-listing requests directly to the focal point.

On top of that, the UNSC adopted on 22 December 2006 Resolution 1735/2006 in order to improve in several respects the procedure for the listing of targeted persons and entities (statement of reasons and evidence by the requesting State, publicity given to the material presented, notification) but also in respect of the de-listing (e.g. the criteria to be followed by the Sanctions Committee) and of the exemptions. This Resolution facilitates the administrative treatment of the submissions by providing a model of cover sheet that should be used by the requesting State. These amendments were introduced in the *Guidelines* of the Committee on 12 February 2007.

Against this background, there is still no opportunity for a plaintiff to be directly heard by an independent and impartial organ. In particular, the de-listing continues to require a consensus at the sanctions committee, which is composed of representatives of all States members of the Security Council. Moreover, the decision as to which information can be disclosed to the person or entity whose assets are frozen continues to belong to the Member State of citizenship or residence. These elements, which maintain the very diplomatic and administrative nature of the sanctioning procedure, probably explain the paucity of cases where names were removed from the list.[79] This necessarily raises questions as to the effectiveness of the de-listing mechanism.

It is striking that the Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities expressly mentions the conclusions delivered by Advocate General Maduro in the Kadi and Al-Barakaat appeal procedures, emphasising that, according to the *amicus curiae*, the minimal standards of human rights were not reached in these cases.[80] If the ECJ was to follow this opinion and annul the EC Regulation at

[79] In 2007, only two individuals and thirteen entities had been de-listed. See the appendix to the Report of the Security Council Committee established pursuant resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2008/25, 8 January 2008.
[80] S/2008/324, 31 March 2008, p. 16.

stake, this could in the short term endanger the whole effectiveness of the sanctions system put in place against Al-Qaida, Usama bin Laden and the Taliban. As a result, the Team proposed the creation of an advisory organ independent from the sanctions committee and an improvement of the availability of the publicly releasable statements. Finally, in cases where the submitting States have not provided a publicly releasable statement of case, the Team recommends that the committee, as the party ultimately responsible for the quality of listings, compile one itself.

UNSC Resolution 1822 (2008), which was adopted a few months after the Team's report, directs the Committee, after a name is added to the list, to make accessible on the Committee's website a narrative summary of reasons for listing for the corresponding entry or entries, and to make accessible on the Committee's website narrative summaries of reasons for listing for entries that were added to the list before the date of adoption of the resolution.[81] This Resolution nonetheless remains silent on the issue of creating an organ independent from the Security Council and the Sanctions Committee.

II. The constitutional dimension of the *Kadi* and *Al Barakaat* procedures

The appeals pending before the ECJ in the *Kadi* and *Al Barakaat* cases undoubtedly belong to these cases fundamental for the architecture of the EC/EU as a constitutional legal order, at the same level with *Costa/Enel*, *ERTA*, *Francovich*, *Les Verts*, *Opinion 1/94*, *UPA* or, more recently, *Ecowas*, just to quote a few. The importance of the cases discussed in present paper is reflected by the impressive number of comments published on the *Kadi/Yusuf* judgments of the CFI.[82] Several factors explain the attention paid to these procedures.

Firstly, these cases are the first occasion for the ECJ to clarify the extent to which the UNSC Resolutions are binding for the EC/EU institutions, and the reciprocal obligations the EC/EU and its Member States owe to each other in this respect. Although the case-law of the Community Courts tends to prove that the Community institutions should act in conformity with public international law,[83] the effect of UN measures in the EC/EU legal order remains difficult to determine. The difficulty is reinforced by the fact that the EC nor the EU are party to the United Nations. The case law regarding the lack of direct effect of WTO law, and the corollary impossibility – except in specific circumstances – to

[81] Res. 1822 (2008), 30 June 2008, para. 13.
[82] See above at fn 31.
[83] See e.g. ECJ, case C-286/90, *Poulsen and Diva Navigation* [1992] E.C.R. I-6019 at para. 9; ECJ, case C-162/96, *Racke* [1998] E.C.R. I-3655 at paras 27 and 46; CFI, case T-115/94, *Opel Austria* [1997] E.C.R. II-39 at paras 90-94. See for a recent clarification of the conditions under which the validity of EC secondary legislation may be affected by international treaties, ECJ, case C-308/06, *Intertanko e.a.* [2008] nyr. at paras 43 to 45.

set aside EC measures in breach of the Marrakech agreements, are illustrative of the fact that the Community courts are not ready to allow international law to penetrate unconditionally and automatically the EC/EU legal order. This is all the more so that the fundamental rights at stake in cases like Kadi and Yusuf/Al Barakaat[84] belong to the fundamental principles of the Community legal order and, as a rule, should prevail over any measure of EC/EU secondary law. Against this background, it should not be denied that the ability of (supreme) courts to set aside UNSC resolutions or measures adopted by the sanctions committees is questionable, as far as one considers the essential peace and security goals they pursue. As we argued in the introduction, the potential denial of a genuine judicial review, even limited to manifest illegalities, invariably recalls the *political questions* theory.[85]

This leads to a second element underlining the constitutional importance of pending cases. The restrictive measures challenged in *Kadi* and *Al Barakaat* have particularly serious consequences for the appellants since they freeze all their assets or other financial resources, apart from the minimum necessary to survive. On top of that, the Cases at hand are especially sensitive since persons affected by restrictive measures have almost no access to a review in legality at UN level. The ability of Community Courts to answer adequately concerns that have emerged concerning the fundamental rights of targeted persons will undoubtedly be scrutinized with much attention by legal scholars.

A third element that ought to be assessed by the ECJ relates to the legal basis of the restrictive EC measures, in particular the scope given to Articles 60 and 301 EC, eventually read in conjunction with Article 308 EC. According to Articles 60 and 308 EC, 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, acting by qualified majority, shall take the necessary urgent measures to interrupt or to reduce, in part or completely, economic relations with one or more third *countries*, including with regard to the movement of capital and payments. Drafted at a period when economic sanctions were almost exclusively adopted against foreign States, these provisions do not seem to cover measures such as the recent UN 'smart sanctions', targeting private parties (individuals or [corporate] entities). However, the Council has deemed it possible to use

[84] Those rights are essentially the right to property, the right to a fair trial and to an effective remedy and even – provided the sanction is qualified as 'criminal' in nature – the right to see one's case solved by an independent and impartial tribunal.

[85] This was already made clear by the Commission and by Advocate General Maduro the appeal procedures lodged by Kadi and Al Barakaat International Foundation. See in particular para. 39 of the conclusions delivered on 16 January 2008 in the case of *Kadi* (C-402/05 P) and on 23 January 2008 in the case of *Al Barakaat International Foundation* (C-415/05 P).

Article 308 in conjunction with Articles 60 and 301 EC in order to adopt some of the EC restrictive measures. The future Lisbon Treaty solves this problem by adding in the provisions on economic sanctions that where a CFSP measure so requires, the restrictive measures may affect natural or legal persons and groups or non-State entities.[86] It is unclear whether the ECJ will endorse this multiple legal basis, or if it will judge, either that articles 60 and 301 EC alone were sufficient, as suggested by Advocate General Maduro,[87] either that the EC has no competence at all to adopt economic sanctions against individuals which implement CFSP measures.[88]

III. Critical comments

It is not our aim in this concluding part to discuss the whole range of legal problems surrounding the assets freezing measures adopted to combat terrorism. A particularly thorny question refers to the role the EC/EU can play in the implementation of these measures in the place of its Member States. In turn, this issue results in another one, even more difficult: what is the best balance between the legitimacy of the aims pursued by the Security Council and the respect for the fundamental values that once – at least partly – motivated the creation of the European Community? Even though it was not entrusted with an easy task, the CFI seems to have followed disputable paths in this respect. At the time of writing, the position of the ECJ is still awaited. It will certainly not resolve all problems, especially because the *Kadi* and *Al Barakaat* cases concern acts that were adopted before the (prudent) improvements of the listing and de-listing procedures at UN level. We would like to make here a few critical comments about the position of the CFI.

1. The quasi-immunity of EC measures implementing sanctions adopted by Committee 1267

A first element of criticism concerns the place recognised to UNSC Resolutions in the Community legal order.

We can follow the CFI when it considers that the Community cannot disregard the measures adopted by international organs to which all Member States are parties, at least when the charter which created this organ was signed and ratified by these Member States *bona fide*.[89] Such an obligation could probably solely result from the loyalty principle contained in Article 10 EC. This principle makes clear that the Community institutions

[86] New Art. 215 (2) TFEU.
[87] See abovementioned conclusions (fn 85) at paras 12 to 15.
[88] See for a standpoint that could imply such a result, R. BROWN, above at fn 19, 460 and 461.
[89] In our opinion, the rules laid down in Art. 307 EC do not much more than recalling that obligation to act *bona fide*.

cannot place the Member States in a situation where the latter are not able to respect their obligations arising from the UN Charter.

The CFI however goes a step further by maintaining that the EC is simply bound by UNSC resolutions and measures adopted by the sanctions committees. This is because the EC has assumed increasing competences in the implementation of these measures. Even though it is not sure that the ECJ will follow the CFI on this point, the parallelism made by the latter between the reasoning of the ECJ in *International Fruit Company* and the present discussion does not lack fundaments.

What is arguably less convincing is the use made by the CFI of Article 27 of the Vienna Convention on the Law of the Treaties and of Article 103 of the UN Charter in order to recognize a quasi immunity to the EC measures implementing sanctions decided by Committee 1267.[90] In other terms, there are reasons to maintain, in our opinion, that those provisions do not result in an absolute primacy of UNSC resolutions over primary law and the fundamental principles of the Community legal order. Article 27 prevents a party from invoking the provisions of its internal law as justification for its failure to perform a treaty. This rule does nothing but recalling the supremacy of international treaties on domestic law in general. The domestic courts of the UN Member States generally do not interpret this provision as a means to supersede constitutional requirements, in particular those concerning fundamental rights. Just to mention one famous example, this was again made clear by the German Constitutional Court (*Bundesverfassungsgericht*) in its ruling on the European Arrest Warrant, based on the intergovernmental EU Third Pillar.[91] Contrary to what the CFI argues, there exist cases where domestic Courts accepted to review – even if indirectly – the compatibility of UN sanctions with the fundamental principles of the domestic legal order.[92]

The reading proposed by the CFI of Article 103 of the UN Charter seems also subject to some criticism. According to this Article, *'(i)n the event of a conflict between the obligations of the Members of the United Nations under the (...) Charter and their obligations under any other international agreement, their obligations under the (...) Charter shall prevail'*. Firstly, this provision was drafted at a time when the Communities did not exist and the development of a supranational organization endowed with wide sovereign powers in Europe could not be foreseen. In practice, the EC acts as a "State" within its sphere of competences. It could be argued that this reality does not correspond

[90] To the sole extent that the EC is bound by the appreciation proposed by the Sanctions Committee.
[91] BVerfG, 2 BvR 2236/04 (*Europäischer Haftbefehl*).
[92] See for example, for a judgment pronounced in the context of sanctions adopted on grounds of Resolution 1267, C.E. (France), case 262626, *Association Secours Mondial de France*, 3 nov. 2004.

any more to the scope of Article 103, which only refers to *international* commitments of the Member States. This does not seem to be contradicted by Article 25 of the Charter, which merely recalls the *pact sunt servanda* customary rule of international law. Of course, such a statement does not prejudice the special respect UNSC resolutions deserve in the light of the exclusive competence recognized to this organ for the protection of international peace and security. Admittedly, the possible judicial control exercised on such measures should be adapted to the importance of the goals pursued by the Security Council and by its committees. Only serious factual inaccuracies or gross breaches of the fundamental principles of the internal legal order would result in setting aside implementing measures. However, refusing the principle of a judicial review as such is, in our opinion, going a step too far. As Advocate General Poiares Maduro rightly pointed out in his conclusions delivered in the *Kadi* and *Al Barakaat* cases, *'the right to effective judicial protection holds a prominent place in the firmament of fundamental rights'*.[93]

2. The potential consequences of an annulment of the contested Community measures

This raises another difficult issue, namely the potential consequences for the Member States of an eventual annulment by the Community judicature of the regulation at stake. The ECJ would undoubtedly suspend the annulment effect of its judgment until another Regulation replacing the former one is adopted. This seems to be justified in these cases by the danger that the targeted individuals profit from the period during which their assets are still available to make them disappear and, as a consequence, *de facto* endangering the efficiency of the whole sanctioning mechanism. The question is however interesting with regard to the division of powers and responsibilities between the Member States and the EC/EU. Advocate General Maduro argued in the abovementioned conclusions that:

> 'At first sight, it may not be entirely clear how Member States would be prevented from fulfilling their obligations under the United Nations Charter if the Court were to annul the contested regulation. Indeed, in the absence of a Community measure, it would in principle be open to the Member States to take their own implementing measures, since they are allowed, under the Treaty, to adopt measures which, though affecting the functioning of the common market, may be necessary for the maintenance of international peace and security. None the less, the powers retained by the Member States in the field of security policy must be exercised in a manner consistent with Community law. In the light of the Court's ruling in *ERT*, it may be assumed that, to the extent that their actions come within the scope of Community law, Member States are subject to the same Community rules for the protection of fundamental rights as the Community institutions themselves. On that assumption, if the Court were to annul the contested regulation on the ground that it infringed

[93] See above at fn 85, para. 52.

> Community rules for the protection of fundamental rights, then, by implication, Member States could not possibly adopt the same measures without – in so far as those measures came within the scope of Community law – acting in breach of fundamental rights as protected by the Court.'[94]

That conclusion is perfectly valid to the extent that there exist Community measures to be implemented by the Member States, despite the annulment of some of them by the ECJ and on condition that the judgment does not indirectly affect the validity of these measures. If, however, it is the basic Community measure which is annulled, as it would be the case here, Community law does not seem to prevent a Member State from itself implementing the UNSC resolutions and the decisions of the sanctions committees. This view is supported by various arguments. Firstly, the implementation of such measures does not belong, in cases such as Yusuf and Al Barakaat, to the exclusive competences of the EC. Secondly, the sole existence of a judgment of the ECJ by no means amounts to a "Community act" in a particular field of policy. In other terms, the findings made by the ECJ in an annulment judgment are not legislative in nature. As a result, they cannot condition the behaviour of the member States acting in the sphere of their own competences, without implementing Community law. Thirdly, it is true that an annulment would leave unaffected the EU Common Positions on grounds of which the annulled Regulation was adopted. However, the illegalities that could be denounced by the Court in this Regulation could equally affect these Common Positions, rendering impossible the application of the latter.

3. Issues of consistency

The CFI concluded that the primacy of the UNSC resolutions on the Community legal order resulted from the EC Treaty itself, in particular Article 307 and the references made to the observance of the international legal order along the Treaty of Rome. Coherence would imply, in our opinion, to balance this primacy with the fundamental principles on which this Treaty is based. The difference made by the CFI between two series of cases, characterized by a very different assessment of the human rights at stake, weakens the horizontal character of human rights in the Community legal order, departing in our opinion from Article 6 EU. Paradoxically, this element of criticism seems to be reinforced by the circumstance that the improvements brought to the identification procedure at EU level (Resolution 1373) do not benefit to those listed persons or entities who have been identified by the Committee 1267. These persons and entities are to date almost entirely dependent on the procedural evolutions at UN level.

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[94] *Idem* at para. 30.

On top of that, the CFI does not fully explain why it would not be competent to review the lawfulness of an identification made by a UN committee – unless with regard to *ius cogens* – but well to review the legality of a Common Position, despite the fact that the Community judicature enjoys no competence in the second pillar. This was precisely the case in PMOI, Sison and Al Aqsa since the identification of those persons and entities had already been made in a Common Position, before being implemented in the contested Community measures.

The reference to *ius cogens* is also problematic. This is not only because this concept refers to quite an abstract set of mandatory rules of international law which is much stranger to the review of legality usually proposed by Community Courts than the fundamental rights arising from the ECHR and the common constitutional traditions of the Member States. *Ius cogens* attracts much controversy as to its binding character for the UNSC when the latter adopts measures for the maintenance or restoration of peace and security. Its content is also far from clear-cut and does not seem to extend to the right to a fair hearing, to obtain a statement of reasons and to an effective remedy, all rights that were essentially at stake in the cases of *Kadi* and *Yusuf/Al Barakaat*.[95] An alternative solution could have been to assess the degree to which the UN Sanctions Committee takes into consideration the rights of due process of the targeted persons and entities. The Community Court would refrain from a judicial review *in concreto* 'as far as' the guarantees afforded at UN level are equivalent to that applicable in the Community legal order. Such an attitude could arguably incite the UN organs to improve the listing and de-listing procedures, more than it is currently the case.

4. The domestic legal orders as an alternative safeguard?

The reasoning of the CFI in the cases of *Ayadi* and *Hassan*, based on diplomatic protection, does not grant to the listed parties the procedural guarantees they deserve in the light of the seriousness of the contested measures.[96] The CFI's reasoning seems to disregard the fact that the only protection available under national law is in reality, in the context of the listings established by Committee 1267, that of the United Nations. As argued above, the various improvements brought to the UN procedure for listing and de-listing do not fundamentally affect the diplomatic character of the procedure before this Committee. Nor do they bring sufficient guarantees of due process for the listed parties.

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[95] I. COUZIGOU, 'La lutte du Conseil de sécurité contre le terrorisme international et les droits de l'homme' (2008) 1 *R.G.D.I.P.* 49-84.

[96] For a critical standpoint concerning the proportionality of the contested measures, see Y MOINY, 'Le contrôle, par le juge européen, de certaines mesures communautaires visant à lutter contre le financement du terrorisme' (2008) *J.D.E.* 137-143.

In reality, the practice in the Member States shows to a large extent that the dichotomy in the CFI case law is duplicated in the domestic legal orders of the Member States. There are already cases of parties listed on grounds of Resolution 1373 who won their case before the national judicature.[97] As far as we know, comparable cases do not exist in the realm of measures implementing Resolution 1267.

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It was not the intention of this paper to provide a full-range analysis of all the arguments that have been exchanged in academic literature and in public documents about the controversial position of the CFI towards UNSC resolutions or restrictive measures adopted by the sanctions committees. We rather wanted to make it clear that such a difficult task is quite new for the Community judiciary. It results directly from both the new security challenges faced by the international community and the willingness of the Member States to tackle them by common measures. Against this background, it remains that the theoretical foundations provided for by the CFI to justify its two-fold case law raise a non-negligible number of questions, especially concerning issues of inter-pillarity and of due process. The risk could not be excluded that the CFI's line of reasoning exposes the Community legal order to a rebuttal of the *Solange* findings made by the ECtHR in *Bosphorus*. The Community Courts enjoy here an exceptional opportunity to underline the procedural deficiencies before the Committee 1267. An annulment by the ECJ would undoubtedly increase pressure on UN organs to come closer to the due process requirements when freezing the assets and all other financial resources of persons and entities suspected of supporting terrorism.

[97] See in particular *A, K, M, Q & G v HM Treasury* [2008] EWHC 869 (Admin) (24 April 2008).