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Overcoming Dissonance to Reshape Coherence

The European Court of Justice, Terrorist Lists and the Rule of Law

Stanislas Adam*

This chapter highlights the ongoing dialogue entered into by Community Courts and political actors – either at UN, European or even domestic level – regarding the necessary balance between the efficiency of actions undertaken to combat terrorism through restrictive measures affecting individuals or entities and the respect for fundamental rights. The starting point is the judgment pronounced by the Grand Chamber of the European Court of Justice (hereafter, the ECJ) on 3 September 2008 in the *Kadi and Al Barakaat International Foundation* case (hereafter, the *Kadi* case/judgment).[1] The appellants in this case were included in UN lists of persons suspected of (aid to) terrorism. The dilemma the ECJ faced concerned the ability for Community Courts to review in full the legality of a Regulation whose normative content originates in a Resolution adopted by the UN Security Council (hereafter, the UNSC) or a committee placed under its auspices. Whereas the Court of First Instance (hereafter, the CFI) had drastically limited the scope for judicial review in this context, the ECJ on the contrary assumed the consequences of the autonomy of the Community legal order and annulled the disputed regulation. This was mainly rendered possible by firmly rejecting the idea that such review would amount to an indirect challenge of the legality of UN sanctions.

A correct understanding of the constitutional significance of this judgment first requires to look into the previous dichotomy in the case law of the CFI regarding the implementation of individual sanctions adopted at UN level (1) and into the initial attempts by the latter to soften the consequences of this discrepancy for the protection of fundamental rights in the Community legal order (2). As will be further demonstrated, the answer proposed by the ECJ in the *Kadi* judgment, that in essence follows the conclusions delivered by Advocate General (hereafter, A.G.) Poiares Maduro,[2] rests on a clear division of the Community and international legal orders. It is argued that this 'pluralistic approach'[3] enhanced a coherent protection of fundamental rights in the Community legal order, irrespective of whether the acts under scrutiny carry out UNSC measures or not (3). It is not the ambition of this chapter to enter into an in-depth analysis of the standards of fundamental rights applied by the ECJ in *Kadi*, nor to present all consequences of this judgment.[4] One rather tries

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1 ECJ: Joined Cases C-402/05 P and 415/05 P *Kadi and Al Barakaat Foundation v. Commission and Council* [2008] nyr. M. Ali Yusuf was also a requesting party in Case C-415/05 but abandoned the proceedings he had started (see Order of the President of the ECJ of 13 November 2007).

2 See the conclusions delivered on 16 January 2008 in Case C-402/05 P and on 23 January in Case C-415/05 P.

3 de Burca (2009) 65.

4 See Lavranos (2009); Rijken (2009); Della Cananea (2009); Moiny (2009); D'Aspremont – Dopagne (2008); Griller (2008); Gattini (2009).

to underline the conceivable parallels between the reasoning followed by the ECJ in this case with other recent judgments pronounced in the context of the fight against terrorism or, more generally, concerning the relations between the Community and the international legal orders. Finally, it is argued that the *Kadi* judgment reinforces the legitimacy of the ECJ as a key interlocutor in the global debate on how to balance fundamental rights with efficiency when combating international terrorism through restrictive measures (4).

1 The Previous Discrepancy in Judicial Review

The practice of international sanctions has dramatically evolved since the middle of the Nineties, particularly following the terrorist attacks of 11 September 2001. A great majority of the measures adopted by the UNSC to maintain or restore international peace and security formerly focussed on States. However, attention was increasingly paid to the harmful consequences such measures entailed for citizens not responsible for the situation which motivated the sanctions. Consequently, an increasing number of sanctions have been directed against individuals since the late Eighties. Theoretically, *smart sanctions* directly target individuals, groups or organisations held responsible for infringements of international law in order to balance collective peace and security goals with individual rights.[5] While at first sight it appeared simple, this exercise revealed difficult in practice.[6]

At UN level, the fight against international terrorism through *smart sanctions* is essentially binomial. Resolution 1267 (1999)[7], which aims to combat the Taliban regime in Afghanistan and is therefore known as the *Taliban Resolution*, set up a special Committee (hereafter, the Taliban Committee). The latter is entrusted with the elaboration and update of a blacklist of individuals and entities presumably associated with Usama bin Laden, including those in the Al-Qaeda organisation. The list is based on information provided by the States and regional organisations. Resolution 1373 (2001),[8] on the other hand, rather aims to fight terrorism in general by requiring the UN Member States to freeze all assets of persons, groups or entities when they committed, or attempted to commit terrorist acts or participated in or facilitated the commission of terrorist acts. This Resolution set up a Counter-Terrorism Committee which, contrary to the Taliban Committee, is not competent to identify those persons, groups or entities. As a result, whereas the States cannot depart from the list instituted by the Taliban Committee, they are fully responsible for such identification in the

5 See on this evolution: Reinisch (2001).

6 See on the controversy surrounding the opportunity to replace trade and diplomatic sanctions by restrictive measures affecting individuals, Vermeulen – De Bondt(2008) 380 and 381.

7 Resolution 1267 (1999), 15 October 1999. See also Resolution 1333 (2000), 19 December 2000 and Resolution 1390 (2002), 16 January 2002.

8 UNSC Resolution 1373 (2001), 28 September 2001.

context of Resolution 1373 (2001). Implemented by different instruments in the EC/EU legal order, these Resolutions eventually led to a striking discrepancy in the case law of the CFI.

a. The Taliban Committee's list

The lists elaborated by the Taliban Committee were annexed to Common Position 1999/727/CFSP concerning restrictive measures against the Taliban[9] and were subsequently (and for the first time) carried 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] Since their adoption, these lists have been updated on a regular basis, especially on grounds of successive amendments of the annex to Regulation 881/2002.[11]

Kadi, *Yusuf* and *Al Barakaat International Foundation* challenged Regulation 881/2002 by arguing that the EC was not competent to adopt such restrictive measures against individuals. They relied on the fact that Articles 60 and 301 EC only evoke sanctions targeting third countries and not persons, groups or entities, unless when the latter can be identified with the regime to be sanctioned. Furthermore, they claimed that their fundamental rights had been violated, in particular their right to property, their right to be heard (*audi alteram partem*) and their right to an effective remedy. It should be borne in mind that, at that time, persons, groups or entities targeted by restrictive measures neither had the opportunity to be heard by the Taliban Committee on the appropriateness of such measures, nor did they enjoy any opportunity to directly challenge their inclusion in the list. Any re-examination was subject to State's petition, with the result that the persons, groups and entities concerned were entirely dependant on the diplomatic protection afforded by States to their nationals. Moreover, a de-listing was – and is still – only possible if decided by the Taliban Committee by consensus, each of its members enjoying a right of veto.

Before answering the arguments based on fundamental rights, the CFI dealt with a general objection to judicial review raised by the Council, the Commission and the United Kingdom. According to the latter, 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.[12] This is especially the case when action is undertaken by the UNSC on grounds of Chapter VII in order to combat threats to the peace, breaches of the peace and acts of aggression. Consequently, no judicial review of EC measures would be

9 15 November 1999, OJ 1999 L 294/1.

10 14 February 2000, OJ 2000 L 43/1.

11 Council Regulation (EC) N° 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, 27 May 2002, OJ 2002 L 139/9.

12 According to Art. 103 UN Charter, *'(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'.*

possible to the extent that their normative content (in this case, the identification of persons, groups or entities suspected of terrorism) originates in decisions adopted by the Taliban Committee, since the latter is entirely incorporated in and placed under control of the UNSC. Otherwise, an annulment of the disputed EC acts could make it difficult if not impossible for the Member States to comply with their obligations resulting from the UN Charter.

The CFI substantially upheld this objection, considering that UNSC Resolutions (as well as decisions adopted by the Taliban Committee) of the type of those at stake, from the standpoint of international law, *'clearly prevail over every other obligation of domestic law or of international treaty law including, for those (States) 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'*.[13] This primacy would be inherent in the supremacy clause contained in Article 103 of the UN Charter and confirmed by Article 307 EC, providing that the EC Treaty does not affect the rights and obligations arising from international treaties concluded before its entry into force or, for acceding States, before the date of their accession.[14] Considering that five of the six founding Member States were a party to the UN Charter before that date, and that 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 the Taliban Committee.[15]

The CFI moreover argued that, even though the EU is not a party to the United Nations, it is bound by the San Francisco Charter. This results from the EC Treaty itself as the latter empowers the Community with sanctioning competences that are potentially covered by UN measures.[16] As a consequence, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in areas governed by the UN Charter, the provisions of that Charter have the effect of binding the Community. Applying the GATT line of reasoning,[17] the CFI acknowledged that treaties other than those concluded by the EC as such may be binding on latter's institutions, beyond the scope of Article 300 (7) EC.

Assuming what it deemed to be the normal consequence of both this primacy and the binding character of the UN Charter for the EC, the CFI drastically limited the scope of judicial review granted to *Kadi*, *Yusuf* and *Al Barakaat International Foundation*. In fact, much depends on the normative autonomy enjoyed by the Community institutions when implementing measures adopted at UN level. Considering that they are instituted and updated by a UN Committee,[18] in principle the lists disputed in these cases escape judicial scrutiny by national or Community courts.[19] Strikingly enough, this line of reasoning nevertheless did not imply a full immunity for the disputed act. Acting as if it was a court of the UN legal order, the CFI accepted a judicial control confined 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'*.[20]

On the merits, the CFI dismissed the claims of the applicants regarding their fundamental rights, mentioning in particular 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 sanctions, the periodical review mechanisms at UN level, the existence of a procedure for the re-examination of individual cases before the Taliban Committee and, finally, the complete system of judicial review available in Community law. As would be borne out further by the *OMPI*, *Sison* and *Al-Aqsa* judgments[21] and was even admitted by the CFI itself,[22] the 'universal' standard of fundamental rights here was much lower than the guarantees usually applicable within the Community legal order. In other terms, the Court's approach of the relations between acts of secondary Community law and Resolutions of the UN Security Council eventually led to curtailing the requirements regarding fundamental rights generally applicable before Community courts.

It is worth comparing the CFI's reasoning with that followed by the French *Conseil d'Etat* in annulment proceedings started by the *Association Secours Mondial de France* against measures adopted by the French Minister of economy, finance and industry implementing a list drafted by the Taliban Committee. This association challenged a decree subordinating any exchange operation, movement of capital or financial deal with this association, entailing an international dimension, to a preliminary authorisation.[23] Whereas explicitly confirming its judicial competence despite the circumstance that the disputed act gave effect to measures adopted at the level of the UN and the EC/EU, the review of legality proposed by the *Conseil d'Etat* was only marginal. The fact that the elements on grounds of which the association had been included in the list were classified for defence purposes, was deemed sufficient to justify the lack of motivation of the restrictive measures. Furthermore, the sole circumstance that this association had been included in the lists drafted by the Taliban Committee

[13] CFI: Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, para. 231; CFI: Case T-315/01 *Kadi v. Council and Commission* [2005] ECR II-3649, para. 181.

[14] Art. 307 EC. See on this provision the chapter of Nikolaos Lavranos in this book.

[15] Case T-306/01 above at fn 13, para. 240; Case T-315/01, above at fn 13, para. 190.

[16] Case T-306/01 *idem* para. 250; Case T-315/01 *idem* para. 200.

[17] ECJ, Joined Cases C-21 to 24/72 *International Fruit Company* [1972] ECR 1219, esp. at para. 18.

[18] Case T-306/01 above at fn 13, para. 265; Case T-315/01 above at fn 13, para. 214.

[19] Case T-306/01 *idem* para. 270; Case T-315/01 *idem* para. 219.

[20] Case T-306/01 *idem* para. 277; Case T-315/01 *idem* para. 226. This would stem 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.

[21] See below, 2.

[22] See for example CFI: Case T-306/01 above at fn 13, para. 289; CFI: Case T-315/01 above at fn 13, para. 238.

[23] C.E.: *Association Secours Mondial de France*, req. 262626, 3 Nov. 2004.

and subsequently implemented by the EU Council, excluded any error of assessment by the competent French Minister. Even if based on different theoretical grounds, the *Conseil d'Etat* being seemingly less reluctant than the CFI to identify a *political question* in this context,[24] the solutions reached by both courts were almost identical. By contrast, the Federal Tribunal of Switzerland explicitly endorsed the reasoning of the CFI on the primacy of UNSC resolutions in order to dismiss a request lodged against restrictive measures carried out by the bodies of the Federal Government.[25]

More generally, the reluctance of judges to even indirectly review the compatibility of resolutions adopted by the UNSC or by organs placed under its authority with superior principles of law, including human rights, is illustrated in recent judgments of the European Court of Human Rights (hereafter, the ECtHR)[26] and of the United Kingdom's House of Lords.[27]

[24] To put it briefly, the *political questions* doctrine means that a court may not pronounce a judgment on the merits in a case that is too political in nature. 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 of America, *Baker v. Carr*, 369 US 186 (1962). This theory is often compared to the doctrine of the *actes de gouvernement* met in (mostly) civilian legal systems such as France, Belgium or Italy.

[25] Federal Tribunal of Switzerland, *Youssef Mustapha Nada*, 14 November 2007, accessible at: www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm. M. Nada lodged an action before the European Court of Human Rights against Switzerland. The case was still pending when finishing this chapter.

[26] See in particular ECtHR (Grand Chamber): *Behrami and Behrami v. France* (App. No 71412/01) and *Sarmati* v. *France, Germany and Norway* (App. No 78166/01), 2 May 2007 (Decision on the admissibility); ECtHR: *Kasumaj v. Greece* (App. No 6974/05), 5 July 2007 (Decision on the admissibility); ECtHR: *Gajic v. Germany* (App. No 31446/02), 28 August 2007 (Decision on the admissibility); ECtHR: *Beric and others v. Bosnia and Herzegovina* (App. Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05), 16 October 2007 (Decision on the admissibility). It should be noted that the claims lodged by these applicants were rejected on grounds of the lack of competence of the ECtHR *vis-à-vis* military operations or the administration of a territory upon operational control of an international organisation which is not a party to the ECHR, such as the UN or NATO. It is however difficult to deny that at least some of these decisions reveal that the attitude adopted by the ECtHR tends to warrant a smooth implementation of measures adopted at the international level to maintain or to restore peace and security. See in particular De Sena – Vitucci (2009). See on the *Behrami* Case the chapter of Antonella Angelini in this book.

[27] See *Al Jedda, R v. Secretary of State for Defence* [2007] UKHL 58 (12 December 2007). Al Jedda, suspected of being a member of a terrorist group, challenged his detention by British troops in Irak without being charged with any offence. The House of Lords rejected his claim essentially on grounds of the obligations resting on the UN Member States on grounds of Art. 103 UN Charter.

b. The EU 'autonomous' list

This line of reasoning contrasts with the case law of the CFI in the context of Resolution 1373 (2001) and the measures implementing that Resolution in EU law[28] and in Community law.[29] Taking into account the room for manoeuvre left by this Resolution for the identification of targeted persons, groups and entities, the CFI opted here for a 'classical' review of legality and assessed the disputed Community measures in the light of fundamental rights as they are usually protected under EC law. The *Organisation des Modjahedines du peuple d'Iran* case (hereafter, the *OMPI* case)[30] concerned an organisation that had been proscribed in the United Kingdom according to the *Terrorism Act* 2000. As a result of Resolution 1373 (2001) and of the information provided for by the British authorities to the EU Council, all OMPI's assets had been frozen. Meanwhile, OMPI lost the two parallel actions it had lodged against the prohibition before the Proscribed Organisations Appeal Commission (hereafter, the POAC) and the High Court of England and Wales. OMPI therefore started proceedings against the EC/EU measures before the CFI. Significantly, when it went on to examine the pleas on the merits, the CFI emphasized that:

> '(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.' [31]

The restrictive measures did not come within the exercise of powers circumscribed at UN level and, accordingly, did not benefit from the primacy effect of UNSC resolutions or decisions of the Taliban Committee, highlighted in the *Kadi* and *Yusuf/Al Barakaat* judgments.[32] The CFI furthermore considered that EC implementing measures, adopted on grounds of Articles 60 and 301 EC, are not necessarily conditioned in their content and even in their existence by Common Positions. Despite the fact that Community Courts enjoy almost no competence regarding the latter, the CFI refused to apply here any 'paralysing

[28] See especially Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ 2002 L 116/75.

[29] See especially Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ 2002 L 160/26. It should be borne in mind that this Regulation only concerns non-EU residents. Restrictive measures against EU residents and carrying out Common Position 2001/931/CFSP are adopted by the Member States.

[30] CFI: Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council and Commission* [2006] ECR II-4665.

[31] *Idem* paras 99 ff.

[32] *Idem* para. 103 *juncto* 104.

effect' on judicial review, unlike in cases of normative similarity between the disputed act and a decision of the Taliban Committee. In light of the seriousness of the sanctions, the absence of any specific hearing and the vague motivation of the sanction, the CFI concluded that OMPI had not been able to prepare an adequate defence and had been deprived of any effective remedy.[33] The lack of a genuine statement of reasons deprived the CFI of any possibility to properly review the lawfulness of the disputed act.[34] As a result, OMPI's request for annulment was upheld. The CFI confirmed this standpoint in several subsequent cases.[35]

In the aftermath of the first *OMPI* and *Sison* and *Al Aqsa* judgments, the Council dramatically improved the procedure for listing individuals suspected of (aid to) terrorism.[36] Accordingly, the persons, groups and entities concerned may submit a request to the Council to obtain the statement of reasons for maintaining them on the list and may submit at any time to the Council a request that the decision to include or maintain them on the list should be reconsidered. On top of that, a 'Working Party 931' was set up with the specific mission of advising the Council on listing and de-listing requests, preparing regular review of the list and making administrative or legislative recommendations.[37]

Quite surprisingly, OMPI was not immediately removed from the EU autonomous list.[38] OMPI therefore challenged subsequent acts maintaining the assets freezing measures. In a first judgment of 23 October 2008, the CFI partly rejected the request made by OMPI against a decision maintaining the freezing of its funds and assets, which was based on the same evidence than the previously annulled act.[39] It held that the annulment of a measure for formal or procedural defects in no way prejudices the possibility to adopt a new measure on the basis of the same matters of law and fact as those serving as the basis for the annulled measure, *'provided that on this occasion (the competent authority)*

[33] *Idem* paras. 164 to 166.

[34] *Idem* paras. 172 and 173.

[35] CFI: Case T-47/03 *Sison v. Council* [2007] ECR II-73; CFI: Case T-327/03 *Stichting Al-Aqsa v. Council* [2007] ECR II-79; CFI: Case T-229/02 *PKK and KNK (Osman Ocalan) v. Council* [2008] ECR II-45; CFI: Case T-253/04 *Kongra-Gel and others v. Council* [2008] ECR II-46.

[36] 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), OJ 2007 C 144/1. See also OJ 2008 C 179/1 and OJ 2009 C 20/24.

[37] Decision of the Council of 28 June 2007 establishing a Council Working Party on the implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.

[38] See in particular, for a last decision, Council Decision 2008/583/CE of 15 July 2008, OJ 2008 L 188/21, esp. Annex, points 1.26, 2.3 and 2.19. The resistance shown in particular by the British government to implement the ECJ's judgment in the case of OMPI has been strongly denounced. See Spitzer (2008).

[39] CFI: Case T-256/07 *People's Mojahedin Organisation of Iran v. Council* [2008] nyr. OMPI lodged an appeal against this judgment before the ECJ. See ECJ: Case C-576/08 P *People's Mojahedin Organisation of Iran v. Council*, still pending.

observes the formal and procedural rules whose breach gave rise to the annulment and that the legitimate expectations of the persons concerned are duly protected'.[40] The CFI added that the rights of defence did not necessarily entail the right to be heard at a formal hearing, in so far as the targeted persons, groups or entities were able to make their case properly regarding the incriminating evidence and that the Council took sufficient consideration of the observations made on that occasion. By rejecting OMPI's claims, the CFI implicitly endorsed the improvements brought by the Council to the procedure leading to restrictive measures.

By contrast, the CFI declared void a subsequent decision maintaining OMPI on the lists notwithstanding the circumstance that an administrative authority of the United Kingdom (the POAC) had decided that there no longer exist any reason to justify the proscription of OMPI.[41] To put it briefly, the CFI observed that the Council was unable to explain the specific reasons that had led it to consider that the continued inclusion of OMPI in the list remained justified, in spite of the findings of fact made by the POAC.

This, however, was not the end to the OMPI judicial saga. The order proscribing OMPI in the United Kingdom was withdrawn in June 2008, following the dismissal of an appeal brought by the British Home Secretary against POAC's decision.[42] The Council nevertheless decided to maintain OMPI on the list. This decision followed a claim by France that it possessed new evidence that persons alleged to be members of this organization had taken part, in the past, to terrorist activities. In a judgment pronounced on 4 December 2008, the CFI upheld OMPI's requests against the new Council decision,[43] echoing the specific link made in previous judgments between EU restrictive measures and the risk assessment conducted by the competent national authority.[44]

This was partially because the new materials justifying the maintenance of OMPI on the list had not been communicated to this entity. The Council argued that it had adopted the disputed regulation in urgency, following the withdrawal of the national decision which formed the basis of the initial decision to freeze funds. Any interruption in the restrictive measures would have given the opportunity to OMPI to gain access to its funds and to render any subsequent sanction ineffective. The CFI rejected this argument and considered that the contested regulation disregarded the guidelines laid down in the aforementioned OMPI judgment.[45] Balancing the interests at stake, the CFI emphasized in particular that *'the Council's arguments totally fail to substantiate its claim that it was impossible for it to adopt the contested decision under a procedure that would have*

[40] CFI: Case T-256/07 *idem* para. 75.

[41] CFI: Case T-256/07 *idem* paras 167 to 187.

[42] See below, fn 94.

[43] CFI: Case T-284/08 *People's Mojahedin Organisation of Iran v. Council* [2008] nyr. France appealed this judgment before the ECJ. At the time of writing, the case was still pending. See ECJ: Case C-27/09 P *France v. People's Mojahedin Organization of Iran.*

[44] See CFI: Case T-228/02 above at fn 30, para. 124; CFI: Case T-256/07 above at fn 39, para. 133.

[45] See esp. CFI: Case T-228/02 above at fn 30, paras 120, 126 and 131.

respected the applicant's rights of the defence.'[46] In other words, it would have been possible to maintain the freezing order provisionally while communicating the new evidence justifying restrictive measures to OMPI. It was irrelevant in this respect that a statement of reasons had been sent by the Council to OMPI for enabling it to communicate its views. Such safeguards, laid down by the Council in the abovementioned Notice, only concern the right to an effective remedy *after* a final administrative decision has been adopted and not the right to a fair hearing *during* an administrative procedure. The CFI subsequently recalled that the list in question must be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned. According to the CFI:

> '[...] the procedure which may culminate in a measure to freeze funds under the relevant rules [...] takes place at two levels, one national, the other Community. In the first phase, a competent national authority, in principle judicial, must take in respect of the party concerned a decision meeting the definition in Article 1(4) of Common Position 2001/931. If it is a decision to instigate investigations or to prosecute, it must be based on serious and credible evidence or 'clues'. In the 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. Next, the Council must, at regular intervals, and at least once every six months, be satisfied that there are grounds for continuing to include the party concerned in the list at issue. Verification that there is a decision of a national authority meeting that definition is an essential precondition for the adoption, by the Council, of an initial decision to freeze funds, whereas verification of the consequences of that decision at the national level is imperative in the context of the adoption of a subsequent decision to freeze funds.'[47]

In a subsequent challenge of the funds-freezing measures, the Community Courts must, without substituting their own assessment of what is appropriate for that of the Council, not only establish whether the evidence relied on is factually accurate, reliable and consistent, but also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation. This information should moreover be capable of substantiating the conclusions drawn from it. Notwithstanding a specific request by the CFI, the Council was unable to communicate solid evidence of any new elements that could have justified the maintenance of the freezing of the assets of OMPI. Considering that this prevented the CFI from assessing whether the contested Regulation was well-founded in law, OMPI's plea concerning violation of the

[46] CFI: Case T-284/08 para. 39.

[47] *Idem*, para. 51. See also CFI: Case T-228/02 above at fn 30, para. 117.

right to an effective remedy was upheld. As a consequence, the Council finally removed OMPI from the EU autonomous list in January 2009.[48]

2 First Attempts towards Convergence: the *Ayadi*, *Hassan* and *Minin* Cases (CFI)

This two-pronged case law of the CFI resulted in a parallel discrepancy in the judicial protection afforded to persons, groups or entities essentially suffering from the same type of restrictive measures and, moreover, motivated by comparable objectives. This was especially striking since the ECJ had observed in the *Ocalan and Vanly* case that these restrictive measures have *'serious consequences'* for targeted persons and entities, including not only the prohibition of all financial transactions and financial services but also damages caused to their reputation and political activity.[49] For many observers, this situation was unacceptable in the light of the fundamental principles whereupon the Community is based.[50]

The CFI's sensitivity to this criticism appears in two subsequent judgments concerning restrictive measures affecting persons listed by the UN Taliban Committee, *Ayadi* and *Hassan*[51] and, later on, in the annulment proceedings started by Mr. *Minin*, albeit in a different legal and factual context.[52] The CFI eventually rejected the claims made by the applicants and dismissed their request seeking the annulment of Regulation 881/2002, essentially on the same grounds as in *Kadi* and *Yusuf/Al Barakaat*.[53] Interestingly however, these judgments laid down specific obligations on the EU Member States when they receive a request for removal from the list drafted by the Taliban Committee. Mr. Ayadi in particular had argued that he had twice requested the assistance of the

[48] See Council Decision 2009/62/EC of 26 January 2009 implementing Article 2 (3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2008/583/EC, OJ 2009 L 23/25.

[49] ECJ: Case C-229/05 P *PKK and KNK* v. *Council* [2007] ECR I-439, para. 110.

[50] See S. Adam (2009); Almqvist (2008); Bianchi (2007); T. Biersteker, E. Eckert (2006) 58; Cremona (2006) 357-360; G Della Cananea (2007); Dewulf – Pacquée (2006); Eckes (2007); Eckes (2008); Eeckhout (2005); Eeckhout (2007); Etienne (2006); Heliskoski (2007); Jacqué (2006); Karayigit (2006); Lavranos (2006); Miron (2007); Nettesheim (2007); Simon (2005); Uyen Do (2005); Vlcek (2006); Van Ooik – Wessel (2006); Zašova (2008). See also the report of the Committee on international monetary law of the International Law Association, Rio de Janeiro Conference (2008) 27-30. See also 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. For a less critical standpoint, see Brown (2006); Tomuschat (2006).

[51] CFI: Case T-253/02 *Chafiq Ayadi* [2006] ECR II-2139; CFI: Case T-49/04 *Faraj Hassan* [2006] ECR II-52.

[52] CFI: Case T-362/04 *Leonid Minin* [2007] II-2003.

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

Irish authorities in having him removed from the list but that, at the time of the hearing, no such procedure had been started before the Taliban Committee.[54]

The CFI argued that the de-listing procedure before the Taliban Committee, albeit not comparable with a genuine judicial review, took into account as far as possible the fundamental rights of the persons, groups or entities affected by restrictive measures. Admittedly, the latter did not have at that time a direct access to the Taliban Committee, nor did they have any guarantee to be heard in their claims. The CFI nevertheless considered that the Member States, in the light of the fundamental rights applicable in the Community legal order, must ensure that targeted persons, groups or entities are in a position to make their point before the competent national authorities when they present a request for their case to be reviewed. The margin of assessment that the authorities of those Member States enjoy in this respect 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 at UN level, having regard to the specific context and nature of the measures affecting them and taking due account of the fact that they might not be aware of the specific reasons that justified their inclusion in the list.[55]

Considering that persons, groups or entities targeted by restrictive measures are not entitled to be heard before any UN organ, the CFI moreover required Member States to act promptly. They should ensure that any request for de-listing is presented without delay and fairly and impartially to the Committee, with a view to a re-examination, if that appears to be justified in the light of the relevant information supplied. By this approach, the CFI, although partially founding its reasoning on the UN legal order, drew direct consequences from Community law for the exercise by the Member States of diplomatic protection. Any wrongful refusal by the competent domestic authority to submit the case to the Taliban Committee should be subject to judicial review.[56] Arguably, the fact that a UN organ (in this case, the Taliban Committee) had identified the existence of an *obligation* for the Member States to exercise diplomatic protection played a major role in the CFI's reasoning, all the more since Community law is to be interpreted as far as possible in light of UNSC Resolutions.

Be this as it may, these attempts by the CFI to soften the consequences of the *Kadi* line of reasoning understandably did not satisfy Messrs. Ayadi and Hassan, who appealed these judgments before the ECJ.[57] These cases reflect a

[54] *Idem* at para. 102.

[55] Case T-253/02, paras 146 and 147. Case T-49/04, para. 116 and 117.

[56] This was confirmed by the order given by the *Tribunal de première instance* of Brussels to a department of the Belgian government to request the Taliban Committee to remove the names of some individuals from the list. See Civ. Brussels (réf.), 11 February 2005, *Sayadi and Vinck*, R.G. 2004/2435/A, not published. This order however revealed ineffective in practice since these persons are still included in the list many years after that judgment.

[57] ECJ: Case C-399/06 P *Hassan v. Council and Commission* still pending; ECJ: Case C-403/06 P *Ayadi v. Council* still pending. Even if there was not yet a judgment on these appeals at the time of writing, there

broader discussion at UN level on how to balance efficiency with transparency and human rights standards when adopting smart sanctions. As a consequence of increasing concern regarding the list established by the Taliban Committee, the UNSC created a *Focal Point for de-listing*.[58] Petitioners seeking to submit a request for de-listing can now do so either through the focal point or through addressing a request to their State of residence or citizenship. This evolution was allegedly pushed by the claims of Mr. Kadi, a national of Saudi Arabia, who had never been able to persuade this country to submit a request for his de-listing to the Taliban Committee.[59]

The procedure for listing and de-listing too improved in many respects, especially regarding the motivation of the decision to include a name in the list and the administrative burden resting on the requesting State. Exemptions were moreover refined.[60] A few months after A.G. Poiares Maduro had delivered his opinions in the *Kadi* and *Yusuf/Al Barakaat* cases, the Analytical Support and Sanctions Monitoring Team even suggested the creation of an independent panel to review the lists and to require the Taliban Committee to make public its statement of reasons justifying the inclusion or the maintenance of names on the lists.[61] The UNSC was nonetheless reluctant to abandon to an independent body what it deemed to be a substantial part of its responsibility to maintain international peace and security. Resolution 1822 (2008) therefore merely provides that each proposal by a Member State to include a name on the consolidated list must identify those parts of the statement of the case that may be released to the public.[62] The Committee has to make accessible on its website a narrative summary of reasons for listing the corresponding entry or entries on the consolidated list.[63] The States receiving notification of the restrictive measures are required to take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the newly listed individuals and entities of the measures imposed on them as well as of any information on reasons for listing available on the Committee's website.[64] Alongside an improvement of the de-listing procedure, the Committee received the task to conduct by 30 June 2010 a one-off review of all names that were

seems to be no reason why the ECJ will not follow the same reasoning as in the *Kadi and Al Barakaat International Foundation* case, analysed in following section, and therefore reform the CFI's judgments.

[58] UNSC Resolution 1730 (2006), 19 December 2006.

[59] Hudson (2007) 219.

[60] UNSC Resolution 1735 (2006), 22 December 2006.

[61] 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, S/2008/324, 31 March 2008, esp. Section IV.

[62] Art. 6 *d in fine* Guidelines.

[63] Art. 6 *h* Guidelines. It is to be noted that some statements for reasons were not yet published at the time of writing (June 2009), especially those concerning individuals associated with the Taliban. Y. Moiny, above at fn 4, pp. 51 and 52.

[64] Art. 6 *j* Guidelines.

inscribed on the consolidated list as at 30 June 2008, in order to ensure that it is as updated and accurate as possible and to confirm that the listing remains appropriate.[65]

3 The Judgment of the ECJ in *Kadi*: Reintroducing Coherence through Reshaping Core Constitutional Principles

As mentioned in the opening remarks, the judgment of the ECJ of 3 September 2008 put an end to appeal proceedings started by *Kadi* and *Al Barakaat Foundation* against judgments whereby the CFI had dismissed their action for annulment of a Regulation freezing their assets and financial resources. Not surprisingly, the most important issue raised by these proceedings was whether the ECJ could exercise a full review of legality even when this would indirectly amount to reviewing a UNSC Resolution (*a*). However, the audacity of the ECJ's answer to this question, that followed a key ruling of the High Court of England and Wales (*b*), should not overshadow the Court's comity towards political actors involved in the fight against terrorism through smart sanctions (*c*).

a. Beyond impunity: a full review of legality as a safeguard of fundamental rights

In the judgment pronounced on 3 September 2008, the Court first recalls that the Community is based on the rule of law and the respect for fundamental rights. As a consequence, neither its institutions nor the Member States can avoid review of the conformity of their acts with the EC Treaty.[66] The ECJ justifies this solution by the fact that, as such, an annulment of the disputed Regulation would leave unaffected the international obligations stemming from UNSC Resolution 1267 (1999) and the decisions adopted by the Taliban Committee. Admittedly, the Community must respect international law in the exercise of its powers.[67] More particularly, Community institutions should attach *'special importance'* to the primary responsibility attributed to the UNSC when acting on grounds of Chapter VII of the UN Charter in order to maintain international peace and security.[68] This had already been made clear in *Bosphorus*, where the ECJ acknowledged that measures implementing UNSC Resolutions, in light of the importance of the aim(s) they pursue, could entail negative consequences, even of a substantial nature, for some individuals.[69] The Lisbon Treaty fully

[65] Art. 9 Guidelines.

[66] ECJ: Joined Cases C-402/05 P and 415/05 P above at fn 1, paras 281 to 285.

[67] See ECJ: Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9; ECJ: Case C-162/96 *Racke* [1998] ECR I-3655, para. 45. See also CFI: Case T-115/94 *Opel Austria* [1997] ECR II-39, paras 90 to 95.

[68] ECJ: Joined Cases C-402/05 P and 415/05 P above at fn 1, para. 294.

[69] ECJ: Case C-84/95 *Bosphorus* [1996] ECR I-3953, para. 23.

confirms this by stressing the respect that the EU must have for the principles of the UN Charter.[70] Significantly however, the ECJ added in *Kadi* that neither the principles governing the international legal order nor the EC Treaty can be understood as authorising any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms, which form the *'very foundations of the Community legal order'*.[71] Accordingly, the possibility to review in full the legality of any act of Community law must be considered to be the expression, in a Community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.[72]

It is interesting to observe how subtle the ECJ has been in reaching this conclusion, without tackling the tricky issue of the relationship between EC law and the UN Charter. The Court simply observes that *'supposing'* the UN Charter would be binding on the Community and its Member States according to Article 300 (7) EC, this would in any case not mean that the Charter enjoys any supremacy over EC primary law.[73] Even though the EU is not a Member of the UN and notwithstanding the fact that a UNSC Resolution cannot easily be equated with an international agreement binding on the Community, the ECJ dispells any ambiguity by stressing that such a Resolution may in no way affect the autonomy of the Community legal order. Nor may it prejudice the Court's competence to protect it. This part of the judgment obviously echoes A.G. Poiares Maduro's standpoint that *'in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law'*.[74] In this sense, the *Kadi* judgment is a perfect illustration, alongside for example the procedure for an opinion on an international agreement envisaged by the EC (Art. 300 (6) EC), of the constitutional function assumed by the ECJ in delineating the boundaries and controlling the interplay between the Community and international/domestic legal orders.

Consequently, the ECJ concluded that the fundamental rights of the appellants had been disregarded, in particular their right to be heard, their right to an effective remedy and, as a corollary, their right to property.[75] The disputed Regulation was therefore annulled. The *Kadi* judgment reflects in my opinion a correct understanding of the scope and limits of the Community Courts' competence and of the relations between the Community and the UN legal orders.

[70] Art. 3, para. 5 *in fine* TEU and 21, paras 1 and 2*c* TEU. See also Declaration 13 annexed to the Lisbon Treaty, which recalls that *'the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security'* (OJ 2008 C 115/343).

[71] ECJ: Joined Cases C-402/05 P and 415/05 P above at fn 1, paras 303 and 304.

[72] *Idem* paras 316 and 326.

[73] *Idem* paras 306 to 308.

[74] See the conclusions delivered on 16 January 2008 in Case C-402/05 P and on 23 January 2008 in Case C-415/05 P, above at fn 1, para. 23.

[75] ECJ: Joined Cases C-402/05 P and 415/05 P above at fn 1, paras 333 to 371.

Firstly, Article 27 of the Vienna Convention on the Law of the Treaties[76] and Article 103 of the UN Charter cannot result in an absolute supremacy of UNSC resolutions over EU primary law. The Community legal order is built upon the EC Treaty, which forms its constitutional charter and protects its autonomy, notably through the judicial mission assigned to the ECJ. This is especially true for basic principles of the Community legal order such as fundamental rights. For the same reason, Article 307 EC may not be interpreted as a *carte blanche* for interferences with the core principles whereupon the Community is founded.[77] Conversely, this rationale understandably invalidates a direct review by the Community Courts of the legality of UNSC Resolutions, even restricted to *ius cogens*. This is not so much because this concept is vague and controversial[78] but first and foremost because Community Courts would go beyond their role by *de facto* reviewing the legality of UNSC Resolutions, in the light of (supposed) peremptory norms of public international law.

Secondly, the *Kadi* judgment is a new vocal demonstration of the ECJ's constitutional maturity in the protection of the autonomy of the Community legal order. After all, just to mention one example, the logic in *Kadi* does not fundamentally differ from the protection of fundamental rights in German constitutional law offered by the *Bundesverfassungsgericht* in its ruling on the European Arrest Warrant (EAW).[79] Like the ECJ in *Kadi*, the German constitutional Court did not review directly the legality of the norm of 'international' law at stake (in this case, the EU Framework Decision on the EAW) but rather, reviewed measures implementing that norm at domestic level. Most importantly, while both admitting that international commitments have to be complied with, these Courts nevertheless give precedence to the constitutional foundations of the legal order from which they derive their legitimacy. In that sense, the ECJ's consistency in the protection of fundamental rights of persons, groups or entities targeted by restrictive sanctions, no matter their legal basis, reconciles the Community case law with the horizontality of human rights in the EC legal order.

Thirdly, the ECJ rightly points out that the improvements brought to the procedure for listing and de-listing before the Taliban Committee do not change its essentially diplomatic and intergovernmental nature, and for that reason do not justify any restriction in the judicial review of targeted sanctions by

[76] Article 27 VCLT (1969) prevents a party from invoking provisions of internal law to justify a failure to comply with a treaty.

[77] See on the articulation between Article 307 EC and the core principles of the EC legal order the chapter of Nikolaos Lavranos in this book.

[78] It is generally considered that *ius cogens* does not include the right to a fair hearing, to obtain a statement of reasons and to an effective remedy. See Couzigou (2008).

[79] BVerfG, 2 BvR 2236/04, 18 July 2005 (*Europäisches Haftbefehlsgesetz*). In this judgment, the German constitutional Court held the German Act implementing the EU Framework Decision on the EAW unconstitutional because it encroached upon the right of Germans not to be extradited in a disproportionate manner and because it lacked any possibility to judicially review a decision granting surrender.

Community Courts.[80] The Court's standpoint is all the more understandable since several studies and reports unequivocally criticise the lack of transparency of the sanctioning system under Resolution 1267 (1999).[81] At the same time, it fits better in a Community legal order based on the rule of law than the CFI's attempt to fill in the gap through diplomatic protection.

Although revolutionary in its consequences, the rationale behind *Kadi* perfectly reflects other cases where the ECJ balanced respect for international law with the necessary protection of the 'very foundations' of the Community legal order or the Community's interests. Whereas fully acknowledging the possibility for external sources of law to permeate the Community legal order, the ECJ demonstrates an incremental ability to protect the latter's integrity. This was already made clear in several opinions rendered by the ECJ on grounds of Article 300 (6) EC, especially those concerning the creation of the European Economic Area (EEA)[82] and the European Common Aviation Area (ECAA).[83] Consequently, and despite the different meaning long defended by some authors,[84] the ECJ confirmed the possibility to set aside international agreements concluded by the Community in breach of the EC Treaty.[85] The ECJ's propensity to protect Community interests is also reflected in the impossibility to plead before a Court of a Member State or before the ECJ that Community legislation is incompatible with some international agreements, even if they are binding on the EC.[86]

In order to be effective, the protection afforded by the ECJ must provide for a full review of legality of Community acts implementing international commitments in EC law. In that sense, the Court's dualistic approach in *Kadi* echoes the *Mox* judgment pronounced by the ECJ on 30 May 2006, albeit in a different context.[87] Neither the EC nor the Member States may, by way of concluding an

[80] On these improvements, see below, 4.

[81] See *e.g.* Fassbender (2006); T. Biersteker, E. Eckert (dir.) (2006); Report of the Informal Working Group of the Security Council on General Issues of Sanctions, S/2006/997, 18 December 2006, esp. at pp. 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.

[82] ECJ: Opinion 1/91 *EEA I* [1991] ECR I-6079; ECJ: Opinion 1/92 *EEA II* [1992] ECR I-2821.

[83] ECJ: Opinion 1/00 *ECAA* [2002] I-3493.

[84] See esp. Joliet (1981) 59, 60,198.

[85] ECJ: Case C-327/91 *France v. Commission* [1994] ECR I-3641.

[86] See, on the GATT/WTO, ECJ: Joined Cases C-21 to 24/72 *International Fruit Company* [1972] ECR 1219; ECJ: Case C-149/96 *Portugal v. Conseil* [1999] ECR I-8395, para. 47; ECJ (ord.): Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159 para. 24; ECJ: Joined Cases C-27/00 and 122/00 *Omega Air* [2002] ECR I-2569, para. 93; ECJ: Case C-377/02 *Léon Van Parys* [2005] ECR I-1465, para. 54. The Court recently extended this reasoning to the United Nations Convention on the Law of the Sea (UNCLOS). See ECJ: Case C-308/06 *Intertanko* [2008] ECR I-4057, paras 64 and 65.

[87] ECJ: Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635. See also Lavranos (2006) p. 349. In that case, the Commission sought a declaration by the ECJ that, by instituting dispute-settlement proceed-

international agreement or implementing a commitment under international law, affect the exclusive jurisdiction of the ECJ to rule on any dispute concerning the interpretation and application of Community law.[88] This does not only mean that legal sources external to the Community may not deprive the ECJ from the competences it enjoys according to the EC Treaty; it also means that they may not undermine the role of the ECJ as the ultimate guardian of Community law, as it results from the its judgments in *ERTA*[89] and *Les Verts*.[90]

b. The judicial interplay between the ECJ and the High Court of England and Wales

It is interesting to note that the High Court of England and Wales incidentally took part in the debate that led the ECJ to set aside the judgments of the CFI in the *Kadi* and *Yusuf/Al Barakaat* cases. Five individuals challenged freezing orders issued by the UK Government and implementing Resolutions 1267 (1999) and 1373 (2001). In a ruling adopted several months before the ECJ judgment in *Kadi*, the High Court expressed harsh criticism of the CFI's auto-limited judicial review.[91] Expressly sharing the standpoint of A.G. Poiares Maduro in his conclusions delivered in January 2008,[92] the High Court set aside the freezing orders on grounds *inter alia* that these orders overrode the listed persons' fundamental rights and disregarded the principle of legal certainty. Even if the ECJ's judgment of 3 September 2008 does not refer to this judgment, both procedures illustrate a comparable concern regarding the extent to which the legitimacy of the fight against terrorism may validate derogations to human rights and fundamental freedoms. Both procedures are illustrative of the (unspoken) judicial dialogue of Community and domestic courts in reshaping the rule of law in the context of smart sanctions.

The appeal lodged by Her Majesty's Treasury against the judgment of the High Court of Justice before the Court of Appeal of England and Wales (hereafter, the EWCA) is a new illustration of this interplay between Community and domestic judicatures. Whereas partly upholding the appeal, the EWCA confirmed the point made by the first judge that listed individuals are entitled to a 'merits based review', contrary to what the CFI had decided in the first *Kadi* judgment.[93]

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ings against the United Kingdom under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield, Ireland had failed to fulfil its obligations under Community law, especially Articles 10 EC and 292 EC.

88 Art. 220 EC *juncto* Art. 292 EC.

89 ECJ: Case 22/70 *Commission v. Council* [1971] ECR 263, para. 39.

90 ECJ: Case 294/83 *Parti écologiste Les Verts v. European Parliament* [1986] ECR 1339, para. 23.

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

92 See in particular paras 30 to 40 of the judgment cited at footnote 98.

93 *'[...] the court has power to consider an application for judicial review by a person to whom the [freezing order] applies as a result of designation by the [Sanctions] Committee and, on such an application, to ask the court, so far as it can, to consider what the basis of the listing was.'* See *A, K, M, Q & G v. HM Treasury* [2008] EWCA Civ 1187 (30 October 2008) paras 120 and 121.

It is precisely on grounds of a review of this kind that the EWCA, albeit in a different context, concluded that the closed material adduced by the Home Secretary could not reasonably be understood as meaning that the *People's Mojahedin Organisation of Iran* intended in future to revert to terrorism and subsequently forced the United Kingdom to lift the proscription of this organisation.[94] As said above, this eventually forced the Council to withdraw that organisation from the EU autonomous blacklist, even though after new judicial proceedings before the CFI.[95]

c. The subtle way through scrutiny and comity

That being said, it is certainly worth underlining the ECJ's ability to balance the admittedly far-reaching consequences of its judgment in *Kadi*, revealing a certain 'comity' *vis-à-vis* the political actors responsible for smart sanctions.[96]

Firstly, the Court maintains the effects of the annulled Regulation for a brief period not exceeding three months, in order to allow the Council to re-examine the case of Kadi and Al Barakaat. An annulment with immediate effect undoubtedly would jeopardise new restrictive measures, whereas it could not be excluded that funds-freezing measures be justified against the appellants.[97] More than a technical adjustment, this temporary suspension of the effects of the annulment illustrates the Court's eagerness to reconcile as far as possible judicial review with international commitments binding upon the EC and its Member States.[98]

Secondly, the ECJ to some extent anticipates some of the problems the EU Council would face in the re-examination of the case of Kadi and Al Barakaat. Even if the judgment does not provide full guidance in this respect, the Court observes that *'overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.'*[99] This is to avoid that persons or entities affected by restrictive sanctions claim the automatic communication of their

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94 *Lord Alton of Liverpool and others v. Secretary of State for the Home Department* [2008] EWCA Civ 443 (7 May 2008). The Court of Appeal dismissed an application by the Home Secretary for permission to appeal against the decision of the POAC on 30 November 2007 to allow an appeal by Lord Alton of Liverpool and thirty-four other members of the two Houses of Parliament against the Home Secretary's refusal to allow their application pursuant to remove OMPI from the list of proscribed organisations.

95 See above, 1.

96 See also Della Cananea (2009) 524-525.

97 ECJ: Joined Cases C-402/05 P and 415/05 P above at fn 1, paras 373 to 376.

98 See, for a recent example in the context of the annulment of a Council decision concluding an international agreement, ECJ: Joined Cases C-317/04 and 318/04 *Parliament v. Council (PNR)* [2006] ECR I-4721, paras 71 to 74.

99 ECJ: Joined Cases C-402/05 P and 415/05 P above at fn 1, para. 342. This reiterates a statement already made by the CFI in the OMPI judgment of 12 December 2006 (CFI: Case T-228/02 above at fn 30, para. 133).

whole file, an obligation which could have placed the Council in an awkward position *vis-à-vis* the Taliban Committee.[100] Moreover, in order not to jeopardize the surprise effect, no hearing is required before the adoption of the freezing measures.[101]

Another manifestation of comity is to be found in the Court's implicit reference to the *Solange* theory when it concludes that a generalised immunity from jurisdiction, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified *'for clearly that (UN) re-examination procedure does not offer the guarantees of judicial protection'*.[102] If the Court deems it necessary to proffer such a justification, it cannot be excluded that it could well also refrain from a judicial review *in concreto* 'as far as' the guarantees afforded at UN level would be equivalent to those applicable in the Community legal order. As will be illustrated in the next section, the negative presumption in the *Kadi* case provides an incentive for the UNSC and the Taliban Committee to reform the listing and de-listing procedures under Resolution 1267 (1999).

In order to comply with the judgment of the ECJ, the Commission communicated the narrative summaries of reasons provided by the Taliban Committee to Mr. Kadi and to Al Barakaat International Foundation. They were given the opportunity to comment on these grounds in order to be heard. Notwithstanding their observations, both Mr. Kadi and Al Barakaat International Foundation failed in their request to be de-listed. The Commission vaguely defended the maintenance of their names on the list by confirming their *'association with the Al-Qaida network'*.[103] New proceedings were brought by Mr. Kadi before the CFI, especially on grounds of the fact that the Council's decision, despite its far-reaching consequences, lacked any proper answer to the arguments put forward by him to plead the removal of his name from the list.[104] At the time of writing, other proceedings were still pending whereby individuals, groups and entities pursue the annulment of Community measures implementing Resolution 1267 (1999) on the same grounds as in the *Kadi* case.[105]

[100] Only the statement of reasons is made publicly available at UN level. It consists in a (relatively short) summary of the motivation justifying the inclusion or maintenance of a name on the list.

[101] ECJ: Joined Cases C-402/05 P and 415/05 P above at fn 1, para. 341.

[102] ECJ: Joined Cases C-402/05 P and 415/05 P above at fn 1, para. 322. See also on this implicit reference to the *Solange* theory, De Sena – Vitucci (2009) 223-225.

[103] Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ 2008 L 322/25.

[104] CFI: Case T-85/09 still pending.

[105] CFI: Case T-318/01 *Othman v. Council and Commission* still pending; CFI: Case T-135/06 *Al –Faqih v. Council* still pending; CFI: Case T-136/06 *Sanabel Relief Agency v. Council* still pending; CFI: Case T-137/06 *Abdrabbah v. Council* still pending; CFI: Case T-138/06 *Nasuf v. Council* still pending.

4 Reshaping the Rule of Law through Multi-Level 'Incentive Dialogue'

Admittedly, the case law of the Community Courts on smart sanctions so far has proactively influenced and determined the discussion and reasoning of politicians and judges regarding the fight against terrorism. The Community Courts' judgments on smart sanctions can therefore be regarded as the cornerstone of an 'incentive dialogue'. As underlined above, the Council, responding to the desiderata formulated by the CFI in the *OMPI, Sison* and *Al-Aqsa* judgments, significantly improved the procedure for an EU autonomous identification.[106] Nowadays, for each person, group or entity subject to restrictive measures under Council Regulation 2580/2001, the Council provides a statement of reasons that is sufficiently detailed to allow those listed to understand the reasons for their listing as well as to allow the Community Courts to exercise their power of review where a formal challenge is brought against that listing. The person, group or entity concerned may send a file to the Council with supporting documents asking for their listing to be reconsidered. The inclusion of a person or entity on the list is reviewed regularly and at least every six months. Each person, group or entity listed enjoys the opportunity to send observations to the Council. It remains to be seen whether the CFI will be satisfied with these improvements.[107] In two recent judgments both pronounced on 3 April 2008 (*Kongra-Gel*[108] and *Osman Ocalan*[109]), the CFI observed that in any case the sending of a statement of reasons according to the new procedure but after the submission of new annulment requests did not cover the unlawfulness of the disputed act.[110]

Most striking is the coherence brought in that dialogue by the *Kadi* judgment. The ECJ could only recognise – even if implicitly – that the restrictive measures adopted by the EC/EU on grounds of Resolution 1373 (2001) do not differ fundamentally from those adopted to carry out Resolution 1267 (1999), or more precisely the lists elaborated and updated by the Taliban Committee. Hence, both categories of measures entail analogous consequences for the persons, groups or entities whose names are mentioned in the lists. Arguably influenced by this similarity, the ECJ strongly rejected any attempt to diminish its role as a constitutional court in the field of fundamental rights. In that sense, the *Kadi* judgment sends a particularly unambiguous message to the EU

[106] 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.

[107] 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.

[108] CFI: Case T-253/04 above at fn 35 nyr.

[109] CFI: Case T-229/02 above at fn 35.

[110] CFI: Case T-253/04, above at fn 35, para. 101; CFI: Case T-229/02 *idem* para. 68.

institutions, the Member States and the UN organs competent to fight terrorism through smart sanctions regarding the constraints implied by the autonomy of the Community legal order.

Significantly, the procedures for listing and de-listing before the Taliban Committee remain diplomatic and intergovernmental in nature since no independent review of a decision to include or to maintain a name on a list is available, and this despite the common proposal made in this sense by Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland.[111] Moreover, de-listing still requires a consensus within the Taliban Committee. The State of citizenship or residence decides which information can be disclosed to the person or entity whose assets are frozen. These procedures clearly do not protect human rights and individual freedoms with the same intensity as in the Community legal order.

Interestingly, the UN Analytical Support and Sanctions Monitoring Team anticipated the possible consequences of the judgment of the ECJ in *Kadi* on the procedures applicable before the Taliban Committee.[112] According to the Team, it could not be excluded that, in the future, the ECJ will decide to examine evidence behind the reasons for listing provided by the Committee, or even conduct a complete review of the listing decisions. This could eventually raise problems since not all evidence motivating decisions of the Taliban Committee are publicly available. In these circumstances, the risk that the ECJ considers itself not to be in a position to fully review the legality of the restrictive measures cannot be underestimated. Acknowledging that the solution to such a dilemma depends on the circumstances, the Team nevertheless believes that *'the Committee may benefit from consideration of listings by the courts, assessing their judgments against the full body of evidence available'*.[113]

The case law of the ECJ simultaneously finds an echo in the recent Commission Proposal for a Council Regulation amending Regulation 881/2002[114] and following Resolution adopted by the Parliament the day after the judgment of the ECJ in *Kadi*.[115] The Commission promotes an upgrading and a clarification of the procedures applicable for the inclusion, maintenance or withdrawal of a name on the lists implementing decisions of the Taliban Committee. Fully in

[111] See the identical letters dated 23 June 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the general Assembly and the President of the Security Council, S/2008/428.

[112] Ninth report of the Analytical Support and Sanctions Monitoring Team, submitted pursuant to resolution 1822 (2008) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2009/245, 11 May 2009.

[113] *Idem* para. 23.

[114] Commission's proposal for a Council regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, COM(2009) 187 final, 22 April 2009.

[115] Resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights (2008/2031(INI)).

line with the coherence pursued by the ECJ in *Kadi*, the new procedure would be similar to the mechanism for the adoption of EU 'autonomous' sanctions. The proposal nevertheless preserves the surprise effect of the smart sanctions system since the Commission is to take a provisional decision to freeze the funds and economic resources of the individual or entity identified by the Taliban Committee. Against this background, the Commission is required to send the statement of reasons to this individual or entity without delay, in order to give him/her/it the opportunity to express his/her/its views. Before adopting a final decision, the Commission examines the arguments put forward by persons targeted by the UN and consults an advisory committee of experts of the Member States.[116] In parallel, the proposal also addresses the situation of those persons, groups and entities listed before the ECJ's judgment in order to respect their rights of defence, in particular their right to be heard. Accordingly, those persons, groups or entities concerned should be able to submit a request to the Commission in order to obtain the statement of reasons on grounds of which the Taliban Committee included them on the list and, eventually, to make observations.

If confirmed, the approximation of the two procedures will allegedly result in a more coherent system of EU restrictive measures, whether the latter implement UN lists or not, although it will not necessarily imply a full parallelism between both regimes since the political authority holding competence over (de)listing is different in each case.[117]

5 Conclusion

The above analysis underlines the critical role assumed by Community Courts in promoting the rule of law in the current multi-levelled dialogue surrounding the fight against terrorism. Based on the idea that collective security purposes primarily pursued by the UNSC cannot justify – beyond reasonable limits – derogations to the core principles upon which the Community legal order is based, the *Kadi* judgment is seminal in this respect. Almost one year later, one may conclude that the ECJ's approach does not fundamentally threaten the fundaments of the UNSC smart sanctioning regime. Rather, it is suggested here that the ECJ, by convincingly balancing the various interests at stake,[118] subtly disavowed the discrepancy resulting from the case law of the CFI and simultaneously denounced the lack of procedural guarantees before the Taliban Committee, without fundamentally jeopardising the efforts under-

[116] This is a mere codification of the practice followed by the Commission since the judgment of 3 September 2008. See the Report on the implementation of the revised Strategy on Terrorist Financing, 8864/1/09, 5 May 2009 6.

[117] The Commission is competent under Regulation No 881/2002 (UN lists) whereas the Council is competent under Regulation No 2580/2001 (EU autonomous lists).

[118] 'Editorial Comments' [2008] *C.M.L. Rev.* 1578.

taken by the international Community to devitalise the roots of terrorism.[119] The incentive effect of this case law clearly appears in the recent proposal made by the Commission for an improvement of the Regulation implementing decisions of the Taliban Committee. It remains to be seen whether this dialectical reshaping of the rule of law will be sufficiently echoed at the UN to bring about a reversal of the 'negative' – and implicit – *Solange* presumption by the ECJ in the *Kadi* judgment, a shift that undoubtedly could facilitate a smooth implementation of restrictive sanctions. Whatever the final result may be, the refusal by the ECJ to recognise any *supra*-constitutional status to UNSC resolutions in EU law encourages a global remodelling of the regime of smart sanctions with the aim of appropriately balancing individual rights and collective interests in the fight against international terrorism.

[119] For that reason, I do not share the view that the ECJ failed in that it did not enunciate more precisely the procedure to be followed for an initial inclusion in the EU list of persons, groups or entities targeted by the Taliban Committee or for their maintenance on that list. See Moiny (2009) 51, 52.

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