Judicial review of freezing orders due to a UN listing by European Courts *

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"The UN's little known watchlist is alarmingly arbitrary and seductive.
It faces a legal challenge in Europe".
The Economist, February 2nd to 8th 2008, p. 59.

1. Introduction

The right to a fair hearing and effective judicial review is a basic right, undisputed throughout Europe and embedded not only in EU-law, but also in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [1] and in the national law of all European states. The International Covenant on Civil and Political Rights (ICCPR) [2] includes this guarantee in its Article 14.

The implications of a right to a fair hearing and effective judicial review in the EU framework, namely in the case law of the courts of the European Union, are basically inspired by the ECHR and the case law of the European Court of Human Rights (ECourtHR) [3]. The respect for fundamental rights constitutes an integral part of the general principles of law protected by the European Court of Justice (ECJ) [4]. When safeguarding those rights, the Court – due to Article 6 EU – draws its inspiration from constitutional traditions common to the Member States, but always emphasizes on the other hand that "the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of community

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[1] Entered into force 1953.

[2] Entered into force 1976.

[3] L. SCHEEK, "The Relationship between the European Courts and Integration through Human Rights", *Heidelberg Journal of International Law*, 65, 2005, p. 837, p. 849-850, uses the picture of the Community Courts *borrowing* the ECHR-rights in the seventies.

[4] ECJ, 11 July 2007, case 11-70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *ECR*, p. 1125, para. 4.

law" [5]. In its *Hoechst* judgement, the ECJ attributed a "particular significance" [6] to the ECHR [7].

According to the case law of the ECourtHR,

– People whose civil rights are affected – e. g. due to freezing orders – must, pursuant to Article 6(1) ECHR have access to a court in order to be able to challenge such orders [8]. There, they must benefit from the requirements of a fair hearing [9]: Procedural equality [10], an adversarial process [11] and disclosure of relevant material [12], a reasoned decision [13], and – basically – the right to a public hearing [14]

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[5] ECJ, 13 December 1979, case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, *ECR*, p. 3727, para. 15; see also S. BREITENMOSER and A. HUSHEER, *Europarecht*, vol. II, 2nd ed., Zürich/Basel/Genf, Schulthess, 2002, p. 876, ECHR as a *Rechtserkenntnisquelle*, no. 1767.

[6] ECJ, 21 September 1989, joined cases 46/87 and 227/88, *Hoechst*, *ECR*, p. 2859, para. 13.

[7] See e. g. also the joint declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Charter of Human Rights and Fundamental Freedoms, 5 April 1977, *OJ*, no. C 103, 1977, p. 1; especially with regard to Article 6 ECHR also ECJ, 17 December 1998, case C-185/95 P, *Baustahlgewebe GmbH*, *ECR*, p. I-8417, para. 29.

[8] ECourtHR, 21 February 1975, *Golder v. United Kingdom*, Series A 18, para. 28-36; however, the right of access to court is not absolute, see ECourtHR, 28 May 1985, *Ashingdane v. United Kingdom*, no. 8225/78, Series A 93, para. 57.

[9] The requirements of a fair hearing pursuant to Article 6(1) ECHR have to be fulfilled in criminal proceedings, too. In addition, Article 6(2)-(3) ECHR is applicable only in the criminal sphere. See C. GRABENWARTER, *Europäische Menschenrechtskonvention*, 2nd ed., München, C.H. Beck, 2005, p. 283, no. 4.

[10] The *égalité d'armes* requires a fair balance between the parties: "Each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage *vis-à-vis* their opponent or opponents", ECourtHR, 27 April 2004, *Gorraiz Lizarraga and Others v. Spain*, Reports of Judgements and Decisions 2004-III, para. 56.

[11] According to ECourtHR, 26 June 1993, *Ruiz-Mateos v. Spain*, no. 12952/87, Series A 262, para. 63, this refers to "the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party".

[12] The material must be available to both parties; see for the evidence in the criminal sphere ECourtHR, 16 February 2000, *Rowe and Davis v. United Kingdom*, no. 28901/95, Reports of Judgements and Decisions 2000-II, para. 60.

[13] ECourtHR, 19 April 1994, *Van de Hurk v. Netherlands*, no. 16034/90, Series A 288, para. 61; *nota* however, that the entitlement to disclosure of relevant evidence is not absolute: In *Rowe and Davis v. United Kingdom*, *supra* note 12, the ECourtHR recognized in para. 65 that there can be restrictions due to competing interests if these restrictions are strictly necessary.

[14] According to ECourtHR, 12 November 2002, *Salomonsson v. Sweden*, no. 38978/97, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=38978/97%20%7C%2038978/97&sessionid=5755885&skin=hudoc-fr (checked 29 February 2008), para. 34, "public" in Article 6(1) ECHR implies "oral"; however, the guarantee is not seen to be absolute in a sense that any proceeding without the presence of the individual concerned leads to a violation of the ECHR, see in this context e. g. ECourtHR, 21 September 1993, *Kremzow v. Austria*, no. 12350/86, Series A 268-B, para. 63.

and effective participation [15]. The ECHR requires an independent and impartial tribunal [16] established by law which holds public hearings [17] and pronounces its judgements publicly [18] within a reasonable time [19]. At least once, a court fulfilling these requirements has to be able to decide on the merits of the case, which implies the full review of the questions of fact and of law, including also an examination of proportionality [20]. The court proceedings have to be effective too, which means that the judgements passed in accordance with the ECHR have to be executed [21].

- In addition, the listed person enjoys the specific guarantees pursuant to Article 6(2) and (3) ECHR if the listing falls within the ECourtHR's autonomous definition of a "criminal offence" [22].
- Finally, Article 13 ECHR provides an effective remedy before a national authority to every applicant who can show an arguable claim to be the victim of a violation of the rights guaranteed in the ECHR [23].

The current UN-sanctioning system of freezing, seizure and confiscation of (alleged) terrorists' money based on Security Council Resolutions [24] raises new questions with regard to the implications of the right to a fair hearing.

The sanctions follow the rationale of "starving the terrorists of money" [25] and have to be seen in the context that the UN, since the 1990s, has tried to use its

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[15] See for this aspect under the criminal sphere e. g. ECourtHR, 16 December 1999, *T. v. United Kingdom*, no. 24724/94, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=24724/94&sessionid=5857573&skin=hudoc-fr (checked 29 February), para. 83.

[16] See e. g. ECourtHR, 26 February 2002, *Morris v. United Kingdom*, no. 38784/97, Reports of Judgements and Decisions 2002-I, para. 58.

[17] Article 6(1) ECHR contains a list of exceptions.

[18] See e. g. ECourtHR, 8 December 1983, *Pretto and others v. Italy*, no. 7984/77, Series A 71, para. 20-28, where the ECourtHR stated, that the judgement did not necessarily have to be read out aloud.

[19] See e. g. ECourtHR, 26 September 1996, *Zappia v. Italy*, no. 24295/94, Reports 1996-IV, para. 23.

[20] ECourtHR, 23 June 1981, *Le Compte and others v. Belgium*, nos. 6878/75 and 7238/75, Series A 43, para. 51; A. Peters, *Einführung in die Europäische Menschenrechtskonvention*, München, C.H. Beck, 2003, p. 115.

[21] ECourtHR, 7 Mai 2002, *Bourdov v. Russia*, no. 59498/00, Reports of Judgements and Decisions 2002-III, para. 34.

[22] See the leading case ECourtHR, 8 June 1976, *Engel and others v. Netherlands*, Series A 22, para. 82.

[23] See e. g. ECourtHR, 6 April 2000, *Athanassoglou v. Switzerland*, Reports of Judgements and Decisions 2000-IV, para. 58; ECourtHR, 28 October 1999, *Wille v. Liechtenstein*, no. 28396/95, Reports of Judgements and Decisions 1999-VII, para. 75.

[24] E. g. UN Resolutions 1267 (1999), 1333 (2000), 1373 (2001), 1390 (2002), 1526 (2004), 1617 (2005), 1730 (2006).

[25] The 9/11 Commission Report. Final Report of the National Commission on Terrorist Attacks upon the United States, 1st authorized ed., 2005, http://www.gpoaccess.gov/911/pdf/fullreport.pdf (checked 29 February), p. 381.

sanctions as selectively as possible, labelling them therefore as "smart" or "targeted" sanctions. The target is not a State and its population but selected people or sectors of the economy [26].

At the heart of the smart sanctions system is blacklisting particular individuals and entities [27]. People considered to be involved with terrorist activities are listed and thus sanctioned. Targeted sanctions may generally include travel bans, arms embargoes, or financial sanctions such as the freezing of assets [28].

In recent judgements, European courts – supranational, international and national – had to deal with the question whether UN-sanctions can be reviewed with regard to the pertinent guarantees of fundamental rights, especially the right to a fair hearing.

This contribution will firstly summarize the relevant procedures of listing and de-listing at UN and EU/EC levels (2), and secondly give an overview of the European jurisprudence commenting on the possibility of a legal control of the listing measures (3). The second part will focus on CFI (A) and ECJ (B) judgments and then on some decisions given in other *fora* (C). Finally it will analyse the *status quo* and broach possible ways to extend the individual's protection by fundamental rights (4).

2. The UN and EU/EC freezing, seizure and confiscation regime

A. Listing, the procedure

In the Community, there are two ways to list a person – either the UN or the EU/EC specifies the person by name *in concreto*. This naming, by either the UN *or* the EU/EC, proved to be crucial for the scope of jurisdiction claimed by the courts of the EU [29]. The ECJ's recent *Kadi* judgement [30] harmonised the two areas *de facto* with regard to legal protection – however, at the moment it remains at least dubious whether there will be a total parallelism between the two scenarios [31].

1. First scenario: UN-listing

In the first scenario discussed here, the UN itself circumscribes the names of the people to be listed. This approach was chosen for the UN Resolutions directed against

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[26] L. VAN DEN HERIK, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual", *Leiden Journal of International Law*, 20, 2007, p. 797-798.

[27] P. FITZGERALD, "Managing "Smart Sanctions" Against Terrorism Wisely", *New England Law Review*, 36, 2002, p. 957-960.

[28] L. VAN DEN HERIK, *op. cit.*, p. 798.

[29] S. BARTELT and H. ZEITLER, "Intelligente Sanktionen zur Terrorismusbekämpfung in der EU", *EuZW*, 23, 2003, p. 712 -713; and F. MEYER and J. MACKE, "Rechtliche Auswirkungen der Terroristenlisten im deutschen Recht", *HRRS Strafrecht*, p. 445-446, http://www.hrr-strafrecht.de/hrr/archiv/07-12/index.php?sz=6 (checked 29 February 2008).

[30] ECJ, 3 September 2008, joined cases C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation*, not yet reported.

[31] This harmonisation applies only for the EU/EC – and not necessarily for other States, e. g. Switzerland, where the two scenarios *mutatis mutandis* still differ when it comes to legal protection, see *in extenso infra*.

Osama bin Laden, the members of Al-Qaida, the Taliban and everyone associated with them [32].

The task of drawing up a list with the names to be listed is trusted to a Sanctions Committee [33], a subsidiary organ of the Security Council in accordance with Article 29 UN-Charter [34]. The procedure to follow is contained in the Guidelines of the Committee for the conduct of its work [35]. The Sanctions Committee consists of all UN-members and makes its decisions by consensus [36]. The Member States propose, on the basis of information provided by their intelligence apparatus [37], the names which have to be listed. Due to the preventive nature of the sanctions [38], neither a criminal charge nor a conviction is compulsory for an inclusion [39]. The Guidelines enumerate in no. 6 (d) the information which *should* be presented by the proposing member. However, Articles 12 and 14 UN Resolution 1822 (2008) oblige the Member States to provide the Committee with a detailed statement of case [40].

If there is no objection from the other Member States within five days, the name will be listed [41].

After the listing, the State where the listed person is believed to be located and the State of which he is a national, is called upon to take reasonable steps according to its domestic laws and practices to notify or inform the individual concerned about the listing, its consequences and the procedure concerning de-listing. The State must also provide him with a copy of the *publicly releasable* portion of the statement of case [42]. The Member States themselves are empowered "to identify the parts of the statement of case that may be publicly released" [43]. According to Article 13 of UN

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[32] UN Resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1526 (2004), 1617 (2005), 1730 (2006), 1735 (2006); see for the concerned groups e. g. Article 2 *in initio* UN Resolution 1390.

[33] Article 6 UN Resolution 1267 (1999); Article 2 UN Resolution 1390 (2002).

[34] M. KOTZUR, "Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft/ Zur Entscheidung des EuG in der Rs. *Yusuf* u. a. gegen Rat", *EuGRZ*, 2006, p. 19-20; S. SCHMAHL, "Effektiver Rechtsschutz gegen "targeted sanctions" des UN-Sicherheitsrats?", *EuR*, 4, 2006, p. 566.

[35] Adopted 7 November 2002, last changed on 12 February 2007, see: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf (checked 29 February 2008), quoted henceforth as "Guidelines".

[36] Guidelines, nos. 2(a) and 4(a).

[37] S. SCHMAHL, *op. cit.*, p. 566.

[38] Guidelines, no. 6(c).

[39] *Ibid.*

[40] See the details in Article 4 UN Resolution 1735 (2006); see also Articles 2 UN Resolution 1617 (2005) and 2 UN Resolution 1822 (2008) referring to the terms "associated with".

[41] Guidelines, nos. 6(f) and 4(b); see the consolidated list online: http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf (checked 29 February 2008).

[42] Articles 11 UN Resolution 1735 (2006) and 17 UN Resolution 1822 (2008); Guidelines, no. 6(h).

[43] Articles 6 UN Resolution 1735 (2006) and 12 UN Resolution 1822 (2008).

Resolution 1822 (2008), the Sanctions Committee is directed to publish on its website a "narrative summary of reasons" for the listing [44].

At the European level, the mentioned Resolutions were implemented by the enactment of Common Position 2002/402/CFSP and Regulation no. 881/2002. The implementation by EU and EC – neither of them being members of the UN – are in accordance with the UN-Charter, which in its Article 48 (2) allows the Member States to use international agencies to carry out the decisions of the Security Council and its subsidiary organs.

The EU/EC adopts precisely the list established by the Sanctions Committee. Basically, there is neither a European margin of appreciation to omit names listed by the UN nor the competence in favour of the EU/EC to add other names [45]. However, according to the recent *Kadi* judgement of the ECJ [46], the Community authorities are bound to provide the listed person with a statement of reasons in order to comply with the fundamental rights of the Community [47] and – at least in theory – there seems to be a possible competence of the EU/EC – under certain conditions in certain cases – to de-list people from the European Regulation implementing the UN-Resolution [48].

2. Second scenario: European listing

In the second scenario, UN-Member States (all EU members are members of the UN) are given the authority to decide on their own whose name is added to a terrorist-list according to which sanctions are imposed. This is the approach chosen by UN Resolution 1373 (2001) directed against the financing of terrorism in general, which only states the sanctions *in abstracto*, leaving their personal application to the Member States. There are two levels to be distinguished: national and European [49]. Starting point is, pursuant to Article 1(4) Common Position 2001/931/CFSP, a decision with regard to investigations or prosecution due to delinquency referring to terrorism or a condemnation because of such acts, made by a competent national authority, in principle judicial. The decision concerning investigations or prosecution has to be based on serious and credible evidence or clues. Subsequently, the Council decides unanimously if a name is listed [50]. It considers the precise information or material in the pertinent file indicating that the necessary decision has been taken on the domestic level. In this context, the Council does not act under circumscribed powers; it is not obliged to list every person or entity, even if there is a decision according to Article 1(4)

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[44] According to Article 12 UN Resolution 1822 (2008), the decision of the Member States with regard to the question which part of the pertinent information can be released applies also to this context.

[45] Article 2(1) Regulation no. 881/2002; see also Article 8 UN Resolution 1822 (2008).

[46] ECJ, *Kadi*, *supra* note 30.

[47] *Ibid.*, para. 333-371.

[48] See for this thesis *infra*.

[49] CFI, 12 December 2006, case T-228/02, *Organisation des Modjahedines du peuple d'Iran (OMPI)*, *ECR*, p. II-4665, para. 117; 11 July 2007, case T-47/03, *Sison*, *ECR*, p. II-2047, para. 164.

[50] Article 2 (3) *in initio* Regulation no. 2580/2001.

Common Position 2001/931/CFSP [51]. Article 1(5) Common Position 2001/931/CFSP obliges the Council to list the pertinent names in a sufficiently detailed way to ensure their effective identification.

As a reaction to the CFI's *OMPI* judgement [52], the rights of the listed people after their designation were enforced in 2006 [53].

3. Consequence: The listed person's rights

Thus, in neither of the two systems, the listed individual or entity is informed *ex ante* about the current procedure which may lead to a listing. The concerned individuals are not present at the deliberation of the competent authorities leading to the listing either and are, as a result, unable to comment on the facts adducted against them.

If the listed names are fixed by the UN, the listed person is informed after the designation about the listing and given a copy of the *publicly releasable* portion of the statement of case [54], which is also published online [55]. Thus, the insight possible into the reasons adducted by the designated State is, apparently, dependent on the will of the latter. Also the ECJ requires, for the implementation of the UN Resolution on the Community level, a statement of reasons *ex post* [56].

B. De-listing, the procedure

Delisting is determined by the UN- or EU/EC legal framework just as the listing is.

1. First scenario: UN de-listing

The list established by the UN can only be changed according to no. 8 of the Guidelines in combination with UN Resolutions 1822 (2008) and 1730 (2006). No. 8(b) of the Guidelines states the two ways for a listed person to request de-listing: the petitioner can submit the request through either the UN focal point or the State of residence or citizenship [57]. The UN-focal point was established by UN Resolution 1730 (2006); it serves as a *forum* for consultations for the concerned States, which had designated the listed person in the past and the States of residence or citizenship, in order to be able to make a suggestion to the Sanctions Committee [58].

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[51] CFI, *OMPI*, *supra* note 49, para. 145.

[52] *Ibid.*; see in this context *infra*.

[53] Especially information *ex post* about the listing; see also Fight against terrorist financing – Six monthly report, Counter-Terrorism Coordinator, 5 October 2007, n° 11948/2/07 REV 2, http://register.consilium.europa.eu/pdf/en/07/st11/st11948-re02.en07.pdf (checked 29 February 2008).

[54] Articles 10 and 11 UN Resolution 1735 (2006).

[55] Article 13 UN Resolution 1822 (2008).

[56] ECJ, *Kadi*, *supra* note 30; see *in extenso infra*.

[57] See for the second possibility *infra*; see in general with regard to the position of the State in the de-listing procedure S. EYMANN, "Urteilsanmerkung zu BGE 133 II 450", 2, *AJP*, 2008, p. 244 and p. 250-251; see also Article 20 UN Resolution 1822 (2008).

[58] D. FRANK, "UNO-Sanktionen gegen Terrorismus und Europäische Menschenrechtskonvention (EMRK)", *in* S. BREITENMOSER, B. EHRENZELLER, M. SASSÒLI, W. STOFFEL and B. WAGNER PFEIFER (ed.), *Human Rights, Democracy and the Rule of Law,*

In both procedures, the Committee finally decides on the de-listing by consensus. Article 14 UN Resolution 1735 (2006) gives examples of criteria which *may* be considered by the Committee while deciding on a de-listing. UN Resolution 1822 (2008) brings about new approaches with regard to a review of the Consolidated List *without* a request of the listed person [59].

If a consensus is not reached by the Committee, the decision is made by the Security Council [60].

2. Second scenario: European de-listing

In the case of a list established pursuant to UN Resolution 1373, Article 1(6) Common Position 2001/931 requires a review by the Council at least once every six months. It must be ensured that reasons exist for keeping the names listed.

However, again in reaction to the CFI's *OMPI* judgement [61], there has been a certain consolidation of the listed person's rights [62].

3. Consequence: The listed person's rights

The current sanctioning systems infringe upon individual rights – without an existing effective judicial review or respecting the presumption of innocence sufficiently.

The establishment of the focal point in the UN framework does not solve this problem, as long as the same UN committee decides on the listing as well as on the de-listing, *scilicet* the Sanctions Committee [63]. Such an arrangement cannot grant an effective remedy through an independent instance for review. Furthermore, the fact that in practice the listed person has to prove his or her innocence in order to be de-listed puts *the presumption of innocence at risk* [64] – to name in the limited frame of this contribution only two fairly obvious deficiencies.

However, the recent intervention of the ECJ with its *Kadi* judgement [65] obliges the Community authorities to provide the listed people with a statement of reasons as quickly as possible after their names have been added to the European Regulation adopting the UN-Resolution [66]. The existence of such an obligation is crucial for a listed person in order to achieve a de-listing procedure successfully.

Liber amicorum Luzius Wildhaber, 2007, p. 237, p. 245-246, note 36; F. MEYER and J. MACKE, *op. cit.*, p. 453.

[59] Articles 22, 25, 26 UN Resolution 1822 (2008).

[60] No. 8(f) of the Guidelines.

[61] CFI, *OMPI*, *supra* note 49.

[62] See also Fight against terrorist-financing – Six monthly report, *supra* note 53, no. 11, about the possibility to submit a request, together with supporting documentation, that the listing of the pertinent name is reconsidered and also about the competence of the working party.

[63] L. VAN DEN HERIK, *op. cit.*, p. 805, calls "political" the de-listing procedure also after the establishment of the focal point, see also 807 in the same publication.

[64] D. FRANK, *op. cit.*, p. 245-246, note 36.

[65] ECJ, *Kadi*, *supra* note 30.

[66] *Ibid.*, para. 336.

On the European level, even though one cannot detect an individual legal remedy to reach a de-listing in Regulation no. 2580/2001, there exists in theory the possibility of an action for annulment pursuant to Article 230(4) EC [67]. The courts however will have to take the chance and practice jurisdiction in a sufficient way.

Interesting enough, on the whole, it appears that the recent efforts [68] made to improve the situation of listed people and entities refer more to the listing than to the de-listing procedure [69].

3. EU/EC case-law with regard to the judicial review of listing measures

Given the EU/EC human rights *acquis* with regard to the right to a fair hearing and effective judicial review [70] one of the most challenging questions in recent European discussions on jurisdiction has been: what can the courts in Europe do with regard to the UN-sanctions – how can they control them and to what extent? Subsequently, in the main part of this contribution, there is an overview of crucial judgements in the context of listing, de-listing and their judicial review. It focuses on the right to a fair hearing and the procedural rights of listed people and entities, which have been at the heart of – quite different – judgements of CFI (A) and the ECJ (B) on the one hand, and of other *fora* (C) on the other.

A. The Court of First Instance (CFI)

The crucial question regards how the CFI uses the Communities' fundamental rights – which are substantially influenced by the guarantees enshrined in the ECHR and the ECourtHR's pertinent case law – when it has to control a terrorist listing.

1. UN-listings [71]

a. Scope of the jurisdiction: Limitation due to the primacy of the UN-law

In the well-known judgements *Yusuf* and *Kadi* [72] the CFI examined – *inter alia* – an action for annulment according to Article 230(4) EC directed against Regulation no. 881/2002, which contains in its annex the applicants' names adopting the listing of the Sanctions Committee.

The grounds of annulment submitted by the applicants referred to breaches of the right to a fair hearing, the right to respect for property, the principle of proportionality and the right to effective judicial review.

The Court first had to clarify the relationship between the UN legal system and the domestic or Community legal order and commented also on the extent to which the exercise by the Community and its Member States of their powers is bound by UN Resolutions of the Security Council adopted under Chapter VII of the UN-

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[67] F. MEYER and J. MACKE, *op. cit.*, p. 454.

[68] See for the UN level, L. VAN DEN HERIK, *op. cit.*, p. 803-805.

[69] *Ibid.*, p. 805.

[70] As circumscribed *supra*.

[71] See for this scenario *supra*.

[72] CFI, 21 September 2005, case T-315/01, *Kadi, ECR*, p. II-3649; 21 September 2005, case T-306/01, *Yusuf, ECR*, p. II-3533; however, the ECJ set aside the CFI's judgement, see *in extenso infra*.

Charter: The CFI stated a total primacy of the UN-Charter; towards the domestic law of the EC-Member States, the international treaty law and especially also the TEC [73]. *In casu*, when enacting Regulation no. 881/2002, the EC-institutions had acted under circumscribed powers, with the result that they had no autonomous discretion. Subsequently, the CFI defined the scope of its jurisdiction: a review of the internal lawfulness of the contested Regulation would imply that the Court considers, indirectly, the lawfulness of the UN-Resolutions implemented by the Regulation. In the present cases, the origin of the illegality alleged by the applicants would have to be sought not in the adoption of the contested regulation but in the UN Resolutions of the Security Council. Such a review not being compatible with the primacy of the UN-law, the Court recognised a limitation of its own jurisdiction. The only exception had, in its view, to be made in favour of a control whether the contested Regulation adopting the UN-enactments is in accordance with the *jus cogens* "understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible" [74].

b. The accordance of UN-sanctions with jus cogens

Exercising the *jus cogens*-control, the CFI stated that the listing by the Sanctions Committee did not infringe upon guarantees classified as *jus cogens*.

- As to the alleged breach of the *right to respect for property* and of the *principle of proportionality* [75], the CFI emphasised the existence of an express provision of possible exemptions and derogations [76] and the fact that the deprivation of the right to property had not been arbitrary. In addition, the contested measures did not affect the very substance of the right to property, but only its use. Finally, the overall system of sanctions was reviewed periodically and there was a UN-procedure of de-listing.
- The *right to be heard* [77] by the EC institutions according to the Community law could not apply in such circumstances as in the present case, where a hearing could in no way lead the institution to review its position [78]. On the other hand, the lack of a hearing by the Sanctions Committee did not constitute a violation of *jus cogens*-guarantees either. In the Court's view, the fundamental rights do not require the communication of the facts and evidence adducted against the listed person if the contested measure restricts only temporarily the availability of the property [79].

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[73] CFI, *Kadi*, *supra* note 72, para. 176-208; *Yusuf*, *supra* note 72, para. 226-259; the CFI referred especially to Article 307 EC.

[74] CFI, *Kadi*, *supra* note 72, para. 226; *Yusuf*, *supra* note 72, para. 277.

[75] CFI, *Kadi*, *supra* note 72, para. 234-252; only concerning to make use of one's property see CFI, *Yusuf*, *supra* note 72, para. 285-303.

[76] Article 2(a) Regulation 881/2002.

[77] According to the terminology in CFI, *Kadi* judgment, *supra* note 72; slightly different in *Yusuf*, *supra* note 72: "right to a fair hearing".

[78] CFI, *Kadi*, *supra* note 72, para. 258; *Yusuf*, *supra* note 72, para. 328.

[79] CFI, *Kadi*, *supra* note 72, para. 274; CFI, *Yusuf*, *supra* note 72, para. 320.

- Dealing with the alleged breach of the *right to effective judicial review* [80], the CFI stated that it was competent to control the lawfulness of the contested regulation with regard to observance by the EC-institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions. Furthermore, the Court could control the implementation of the UN-Resolution by an EC-Regulation under the aspect of procedural and substantive appropriateness, internal consistency and proportionality [81].
  However, it could not be for the Court to review indirectly whether the Security Council's Resolutions are themselves compatible with the fundamental rights of the Community, whether there is an error of assessment of the facts and evidence relied upon by the Security Council or of the appropriateness and proportionality of the measures. In this area, the applicant has had no judicial remedy. In the Court's view, such a lacuna in the judicial protection is not in itself contrary to *jus cogens*, since the right of access to courts is not absolute and there exists at least the de-listing procedure before the Sanctions Committee [82].
- As to a pertinent reproach, the Court could not detect in the freezing measures an *inhuman or degrading treatment* – neither concerning the purpose, nor the object [83].
  The Court admits, that the freezing of funds is a particularly drastic measure, which is capable of preventing the concerned person from leading a normal social life and forces him/her to be dependent upon public financial assistance. However, the importance of the goals pursued by the UN with its sanctions, *scilicet* the prevention of terrorist attacks, justifies even negative consequences being of a substantial nature for certain operators. As to the applicant's situation in the present case, in the Court's view, a satisfactory personal, family and social life has been possible [84].
- Generally, according to the Court, there is no *jus cogens*-guarantee concerning the *respect for private and family life* violated due to the sanctions in the absence of an arbitrary interference with the exercise of those rights [85].

c. Control of the legal basis of Regulation no. 881/2002

According to the Court's assessment in the cases *Yusuf* and *Kadi* [86], Articles 60, 301 and 308 EC together constitute a sufficient legal basis for the enactment of Regulation no. 881/2002.

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[80] According to the terminology in CFI, *Kadi*, *supra* note 72; slightly different in *Yusuf*, *supra* note 72: "effective judicial remedy".

[81] CFI, *Kadi*, *supra* note 72, para. 279; CFI, *Yusuf*, *supra* note 72, para. 335.

[82] CFI, *Kadi*, *supra* note 72, para. 283-290; more detailed CFI, 12 July 2006, *Hassan*, case T-49/04, *ECR*, p. II-2139, para. 104-125, appeal C-399/06.

[83] CFI, 12 July 2006, case T-253/02, *Ayadi*, *ECR*, p. II-2139, para. 120; appeal C-403/06.

[84] CFI, *Ayadi*, *supra* note 83, para. 121-126; *Hassan*, *supra* note 82, para. 97-102.

[85] CFI, *Hassan*, *supra* note 82, para.126-127.

[86] CFI, *Kadi*, *supra* note 72, para. 87-135; *Yusuf*, *supra* note 72, para.125-171.

In its *Ayadi* judgement [87], the CFI refused to challenge the competence of the Community with respect to the principle of subsidiarity.

d. Exceptions according to Article 2a Regulation 881/2002 [88]

In the recent *Ayadi* judgment [89], the CFI circumscribed its competence concerning Article 2a Regulation 881/2002. Due to its humanitarian objective, Article 2a must not be interpreted strictly. It was for the national authorities having the best overview over the circumstances of each case, to decide whether derogation can be permitted. If the national authority refused an exception without regard to the listed person's needs and without consulting the Sanctions Committee, this would constitute a misinterpretation or misapplication of Regulation no. 881/2002.

e. Obligations of the EU Member States in the de-listing procedure

Regarding the right of the individual, according to Article 8(a)-(c) of the Guidelines, to present a request to the Sanctions Committee for review of his case through the State of residence or citizenship, the Court pointed out in the *Ayadi* judgement [90], that EU Member States are bound to observe the fundamental rights protected by the Community-law when examining such a request.

2. European listings [91]

a. Scope of the jurisdiction: Full jurisdiction

On the other hand, already according to the CFI, the Court's possibilities are more extensive if it is the EU/EC itself that determines which names are listed. When this is the case, the legal review is not limited to the *jus cogens*, but the listed people are protected thoroughly by the fundamental rights guaranteed by Community law.

The CFI has controlled in recent judgements – as e. g. in the matters *OMPI* [92], *Al-Aqsa* [93] and *Sison* [94] – the listing by means of Council Decisions [95] implementing Article 2(3) of Regulation no. 2580/2001.

The pertinent UN Resolution 1373 (2001) does not specify individually the names to be listed. According to the Court, this is a task of the EC, which had to act in accordance with the rules of its own legal order. Subsequently, the CFI analysed the applicants' supranational listing procedure with regard to the respect of the

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[87] CFI, *Ayadi*, *supra* note 83, para. 105-113.

[88] Inserted by Article 1 Regulation 561/2003.

[89] CFI, *Ayadi*, *supra* note 83, para. 130, 132.

[90] *Ibid.*, para. 144-152; see also CFI, *Hassan*, *supra* note 82, para. 114-121 and in the same sense CFI, *Kadi*, *supra* note 72, no. 270; *nota* however No. 8(c) of the Guidelines in the context of the possibility to submit a request for de-listing through the focal point, which has been established after the mentioned judgements.

[91] See for this scenario *supra*.

[92] CFI, *OMPI*, *supra* note 49.

[93] CFI, 11 July 2007, case T-327/03, *Al-Aqsa*, *ECR*, p. II-79.

[94] CFI, *Sison*, *supra* note 49.

[95] Council Decisions 2002/334/EC and 2002/848/EC.

fundamental rights of the Community and stated several violations[96]. The requirements were defined as follows:

– *Rights of the defence* [97] (notification of the evidence adducted and hearing): according to the CFI, the right to a fair hearing has a relatively limited purpose in the present matter [98].
Firstly, as to the initial decision to freeze funds, the evidence adducted against the party concerned [99] has, in the Court's view, to be notified to the listed person as quickly as possible, either together with or as soon as possible after the decision. The only exception to be made from these principles referred to overriding considerations concerning the security of the Community or its Member States or the conduct of their international relations [100]. However, the right to a fair hearing did not require that the evidence be presented to the party or that there is a hearing *before* the first listing. The Court justified this restriction with the necessity of a "surprise effect" and an immediate application of the initial freezing decision. An automatic hearing after the first listing was not required either, since the parties concerned have the possibility of bringing an action before the CFI [101]. As to the scope of the right to a fair hearing, the parties' possibilities to comment on the domestic decision according to Common Position 2001/931 were limited: provided the mentioned decision has been enacted by a competent national authority, the right to a fair hearing pursuant to Community law does not require a repeated opportunity for the parties to express their views on the appropriateness and well-foundedness of the decision. There was no obligation for the Council either, to decide whether the national proceedings leading to the decision comply with the national norms or whether the national procedure respects the fundamental rights. This was an exclusive power of the competent national courts and the ECourtHR. Furthermore, it was not necessary that the listed party expresses his or her views concerning the existence of "serious and credible evidence or clues" pursuant to Article 1(4) Common Position 2001/931. The CFI bases this argument on the principle of sincere cooperation according to Article 10 EC [102].

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[96] However, the applicants in the *OMPI*- and *Sison*-case have been re-listed again after the Council had improved the relevant procedures and especially provided the newly listed people with a statement of reasons, see F. MEYER and J. MACKE, *op. cit.*; critical B. HAYES, "Statewatch Analysis, "Terrorist lists" still above the law", 2007, http://www.statewatch.org/news/2007/aug/proscription.pdf (checked 29 February 2008).

[97] According to the terminology in CFI *Sison* case, *supra* note 49; slightly different in CFI *OMPI*, *supra* note 49: "right to a fair hearing".

[98] CFI, *OMPI*, *supra* note 49, para. 126; CFI, *Sison*, *supra* note 49, para. 173.

[99] Specific information or material in the file which indicates that a decision pursuant to Article 1(4) of Common Position 2001/931 has been taken in respect of it by a competent authority of a Member State and new material communicated to the Council by representatives of the Member States which has not been considered by the competent national authority; CFI, *OMPI*, *supra* note 49, para. 126.

[100] CFI, *OMPI*, *supra* note 49, para. 137; *Sison*, *supra* note 49, para. 184.

[101] CFI, *OMPI*, *supra* note 49, para. 128-130; *Sison*, *supra* note 49, para. 175-177.

[102] CFI, *OMPI*, *supra* note 49, para. 121-122; *Sison*, *supra* note 49, para. 168-169.

Secondly, the subsequent decisions affirming the initial freezing had to be preceded by the possibility of a hearing and the notification of new evidence. Since the funds were already frozen by the initial decision, the argument concerning the surprise effect was not pertinent in this context [103].

- *Obligation to state reasons*: the substantiation had to refer to the statutory conditions of the application of Regulation 2580/2001 and the reasons why the Council considers, in the exercise of its discretion, that the measure *in casu* has to be adopted. The Council had to state the matters of fact and law that constitute the legal basis of its decision [104].
  The only possible exceptions referred to overriding considerations concerning the security of the Community and its Member States or the conduct of their international relations [105].
- *Right to effective judicial protection*: this right grants the listed person the right to bring an action according to Article 230(4) EC before the Court against a decision to freeze his or her funds [106].
- The Court examined whether the legal conditions for the application of Regulation 2580/2001 pursuant to Article 2(3) in combination with 1(4) and 1(6) of Common Position 2001/931 were met. Due to the *broad discretion* enjoyed by the Council when adopting economic and financial sanctions on the basis of Articles 60, 301 and 308 EC, the Court's jurisdiction is limited. It may control compliance with the rules governing procedure and the *statement of reasons*, the material accurateness of the facts and the absence of manifest errors of assessment of the facts or misuse of power [107].

The CFI called this review all the more imperative, because it was the only procedural safeguard in order to strike a fair balance between the need to combat international terrorism and the protection of fundamental rights. An objection based on the allegedly secret nature of the evidence and information must be barred [108].

b. Obligations of the EU Member States in the listing procedure

In its *OMPI* judgement [109], the Court emphasised that in the first place, the right to a fair hearing had to be respected in the national procedure, in which the competent national authority adopts the decision according to Article 1(4) of Common Position 2001/931.

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[103] CFI, *OMPI*, *supra* note 49, para. 131; CFI, *Sison*, *supra* note 49, para. 172.

[104] CFI, *OMPI*, *supra* note 49, para. 146 and 143; *Sison*, *supra* note 49, para. 190-193; *Al-Aqsa*, *supra* note 92, para. 54, slightly different in the structure of the judgement.

[105] CFI, *OMPI*, *supra* note 49, para. 151; *Sison*, *supra* note 49, para. 198.

[106] CFI, *OMPI*, *supra* note 49, para. 152; *Sison*, *supra* note 49, para. 199.

[107] CFI, *OMPI*, *supra* note 49, para. 154 and 159; *Sison*, *supra* note 49, para. 201 and 206.

[108] CFI, *OMPI*, *supra* note 49, para. 156; *Sison*, *supra* note 49, para. 202.

[109] CFI, *OMPI*, *supra* note 49, para. 119.

c. Right to be heard before the enactment of a Regulation

Although the right to be heard could not be extended to the context of a Community legislative process leading to a general application, a Regulation listing names was not thoroughly of a legislative nature. The Court stated in the *OMPI* judgement [110], that apart from the Regulation's general application, it was of direct and individual concern to the listed individuals and entities. Therefore, the right to a fair hearing must be respected in this context.

d. Judicial protection against the listing by Common Positions [111]

According to the case law concerning the CFI's scope of jurisdiction under the EU Treaty, an action for annulment [112] or damages [113] can only be directed against a Common Position if it refers to an alleged violation of the Community's competences.

B. The European Court of Justice (ECJ)

1. UN-listings

In its judicial follow-up with regard to the CFI's *Kadi* judgement [114], the ECJ shed a different light on possible solutions for the problem of exercising control over terrorist listing in interdependent, but still independent legal frameworks.

a. Scope of jurisdiction

The ECJ refused to follow the CFI's concept of a limitation of jurisdiction when it comes to reviewing an EC-Regulation adopting a UN-Resolution already specifying the names to be listed – and reversed, hence, the *Kadi* judgement of the lower instance [115]. With this judgement, the ECJ fell into line with the opinion of his Advocate General who had suggested to abandon the CFI's *jus cogens*-approach, in his view especially, because Article 307 EC could not "render the contested Regulation exempt from judicial review" [116].

The ECJ, on its part, emphasised that international agreements cannot affect the constitutional principles of the TEC, especially the requirement that all Community-acts have to be compatible with the human rights [117]. The EC was based on the rule of law and disposes of an autonomous legal system [118]. The ECJ, in the complete system of legal remedies and procedures and as a crucial constitutional guarantee in the Community, has to review the legality of acts of the institutions. The

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[110] CFI, *OMPI*, *supra* note 49, para. 96-98.

[111] See for the ECJ *infra*.

[112] CFI, *OMPI*, *supra* note 49, para. 56.

[113] CFI, 7 June 2004, case T-338/02 (order), *Segi and others*, *ECR*, p. II-1647, para. 41.

[114] ECJ, *Kadi*, *supra* note 30; CFI, *Kadi*, *supra* note 72.

[115] CFI, *Kadi*, *supra* note 72; see *in extenso supra*.

[116] Opinion of the Advocate General, 16 January 2008, case C-402/05 P, *Kadi*, para. 33; see also the Opinion of the Advocate General, 23 January 2008, case C-415/05 P, *Al Barakaat International Foundation*.

[117] ECJ, *Kadi*, *supra* note 30, para. 316, 281-284.

[118] *Ibid.*, para. 281.

Court's jurisdiction was a matter of the internal and autonomous legal order of the Community [119]. According to the Court, it is only the international agreement itself that is out of reach for a control by the Community judicature but not the EC act adopting the international rule [120].

The primacy of the UN-Resolution in the international dimension would, in the Court's view, not be challenged by the review of the adoption of the Community act with regard to its compatibility with the supranational legal order [121].

The immunity from jurisdiction in favour of Community measures adopting UN-Resolutions stated as a principle by the CFI was neither demanded by UN- nor by EU/EC-law:

- When drawing up supranational measures because of a UN-Resolution, the Community had merely to "take due account" of the terms and objectives of the UN Resolution and the pertinent UN-Charter obligations for the case of such an implementation [122]. "Account" must also be taken of the UN Resolution for the interpretation of the implementing Community act [123].
- Articles 307 and 297 EC cannot be used in order to depart from the principles of liberty, democracy and respect for human rights and fundamental rights pursuant to Article 6(1) EU [124]. A possible primacy of UN-law according to Article 300(7) EC did on no account affect the primary law of the Community [125].

In addition, also the ECourtHR did not follow the CFI's *jus cogens*-approach in its case law [126].

Finally, in the Court's view, the developments on the UN-level to change the position of listed people for the better cannot lead to a generalised immunity as applied by the CFI [127], since especially the de-listing procedure lingered to be diplomatic and intergovernmental and clearly did not offer the guarantees of judicial protection [128].

b. Violation of fundamental rights

After having asserted that, as a matter of fact, it had the competence to fully review the pertinent Regulation no. 881/2002, the ECJ put this enactment to the test of the human rights of the Community.

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[119] *Ibid.*, para. 317.

[120] *Ibid.*, para. 286.

[121] *Ibid.*, para. 288.

[122] *Ibid.*, para. 296.

[123] *Ibid.*, para. 297.

[124] *Ibid.*, para. 303.

[125] *Ibid.*, para. 307-308.

[126] *Ibid.*, para. 313; the ECJ referred explicitly to the ECourtHR's judgement *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, Reports of Judgements and Decisions 2005-VI, see for this judgement *infra*.

[127] ECJ, *Kadi*, *supra* note 30, para. 321.

[128] *Ibid.*, para. 322; *nota*, however, that it remains at least slightly unclear to which stage of development on the UN-level *exactly* the ECJ refers, see also para. 320, 321, 323-325 of the mentioned judgement.

– *Right to be heard*: The ECJ firstly stated a violation of the right to be heard, since the Community authority in question had omitted to communicate the grounds for the listing to the applicant. Admittedly, there was no obligation to inform or hear the person to be listed *ex ante*, *scilicet* before the actual listing, since this might jeopardise the effectiveness of targeted sanction, which is dependent upon a certain surprise effect [129].

However, the relevant information has, according to the Court, to be provided at the latest as quickly as possible after the listing by the EC-Regulation adopting the UN-Resolution [130]. Such a statement of reasons was vital for the listed people in order to defend their rights and be able to decide whether they want to take legal action on the community level. And provided they do so, it is only with such information that the Community judicature can attend its duty to control the lawfulness of the contested Community act [131].

Without relevance for the present case, the ECJ declared that overriding considerations that have to do with safety or the conduct of the international relations of the Community and of its Members can have an influence on the communication of information to the listed person [132].

– *Right to an effective legal remedy*: Secondly, the ECJ answered in the affirmative the alleged violation of the right to an effective legal remedy due to the impossibility to take legal action against the listing when not being informed on its reasons. Under the present circumstances, the Court did not feel able to undertake the review of the contested Regulation [133]. Furthermore, there were no overriding considerations that had to do with safety or the conduct of the international relations of the Community and its Members which could bring about a total exclusion of the review by the Community judicature [134]. However, although *in casu* this aspect was not relevant, the Community judicature must be able to consider legitimate security concerns about the nature and sources of information taken into account before the adoption of the Regulation [135].
– *Right to respect for property*: Finally, according to the Court, there had been a breach of the right to respect for property with regard to a procedural aspect of the guarantee: The pertinent procedures had to provide the person concerned with a reasonable opportunity of putting the own case to the competent authorities [136]. The relevant Regulation lacks such a possibility which constitutes – given also the significance of the restriction of the property rights with regard to the generality

[129] ECJ, *Kadi*, *supra* note 30, para. 338-341.
[130] *Ibid.*, para. 336.
[131] *Ibid.*, para. 337.
[132] *Ibid.*, para. 342 and 344.
[133] *Ibid.*, para. 351.
[134] *Ibid.*, para. 343.
[135] *Ibid.*, para. 344, the judgement talks about accordant "techniques".
[136] *Ibid.*, para. 368.

of its application and the actual continuation – a violation of the applicant's right to property [137].

c. Control of the legal basis of Regulation no. 881/2002

The ECJ accepted Articles 61, 301 and 308 EC as a sufficient legal basis for the enactment of Regulation 881/2002 – but differed with regard to the motivation from the analogue parts of the CFI's judgement [138].

d. The position of third individuals affected by a listing

The origin of the first pertinent case discussed in this context, the *Möllendorf/Mölledorf-Niehuus*-matter [139], was a preliminary ruling pursuant to Article 230 EC concerning a failed sale of land and buildings due to the fact that the buyer was listed in the annex of Regulation no. 881/2002, which forbids in its Article 2(3) the provision of economic resources to listed people. Since the buyer was not able to acquire the ownership, the sellers were – according to German law – obliged to repay the already paid sale price to the buyer.

The Court could not detect a violation of the applicants' – namely the sellers' – right to property. In its view, the reason of the alleged violation was not Regulation 881/2002, but the indirect effects of the German obligation of repayment on non-listed people. This constituted a question concerning the domestic law which cannot be answered in a preliminary ruling [140].

2. European listings

a. Access to documents of the institutions

In an appeal in the *Sison*-matter [141] against a CFI judgement [142], the ECJ had to deal with the claim of an applicant asking for the annulment of three Decisions of the Council. The Council refused access to the documents which had served as the basis for the Council's Decision to add the applicant's name to the list of sanctioned people according to Regulation no. 2580/2001. At the beginning of the matter stood an application for access according to Regulation no. 1049/2001 which had been rejected by the Council.

In the Court's view, the Council enjoys a wide discretion for the decision; it may refuse access to a document according to Article 4(1) (a) of Regulation 1049/2001. Therefore, this decision could only be reviewed by a court in a restricted way, *scilicet* the procedural rules, the duty to state reasons, the accurate statement of facts and manifest errors or misuse of powers [143].

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[137] *Ibid.*, para. 369.

[138] *Ibid.*, para. 163-236.

[139] ECJ, 11 October 2007, case C-117/06, *Möllendorf/Mölledorf-Niehuus*, *ECR*, p. I-8361.

[140] ECJ, *Möllendorf/Mölledorf-Niehuus*, *supra* note 139, para. 76-77.

[141] ECJ, 1 February 2007, case C-266/05 P, *Sison*, p. I-1233.

[142] CFI, 26 April 2005, joined cases T-110/03, T-150/03 and T-405/03, *Sison*, *ECR*, p. II-1429.

[143] ECJ, *Sison*, *supra* note 141, para. 34.

When the applicant's argument uses consideration of his specific interest in the knowledge of the documents, the Court states, that the purpose of Regulation no. 1049/2001 was to provide access to the documents of the institutions and not to protect the particular interest of a specific individual [144].

Even if there was a right to be informed of the nature and cause of the accusation leading to the listing, one would not be able to exercise this right by using the instruments provided by Regulation no. 1049/2001 [145].

The Court also rejected the alleged violation of the right to an effective legal remedy against the violation of the pretended right to be informed in detail of the accusation: if it is impossible to use Regulation no. 1049/2001 to execute such a guarantee, a decision refusing access according to the Regulation cannot be the reason for the breach of that right [146].

The brevity of the Council's refusal to access the relevant documents was in accordance with the duty to state reasons (Article 253 EC). The statement of reasons must be appropriate to the act *in casu*. The sensitive interests justifying exceptions to the right of access must not be undermined by the release of information which should be protected by the exception.

The alleged violation of the presumption of innocence of the listing was rejected by the ECJ as being inadmissible, since it had not been raised before the CFI [147].

On the whole, the appeal was dismissed.

However, it has to be kept in mind that the CFI stated in the appealed judgement in the present matter that it had denied the access only due to a consideration of Regulation 1949/2001. The question, whether the documents were necessary to the defence of the applicant, was a separate matter which could not be decided in the present judgement [148]. We will see if the CFI will answer this question in the cases *OMPI II* (T-256/07), *Sison II* (T-341/07), *Al-Aqsa II* (T- 276/08).

b. The position of third individuals affected by a listing [149]

In its *Osman Ocalan* judgement [150], the ECJ had to decide on the First Court's strict interpretation of Article 230(4) EC, refusing the non-listed Kurdistan National Congress (KNK) to contest the listing of the dissoluted Kurdistan Workers' Party (PKK) by Council's Decision 2002/334 due to a lack of individual concern. The applicants submitted that the interpretation had to be extended when dealing with fundamental rights of the ECHR.

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[144] *Ibid.*, para. 43.

[145] ECJ, *Sison*, *supra* note 49, para. 48.

[146] *Ibid.*, para. 80.

[147] *Ibid.*, para. 80.

[148] CFI, 26 April 2005, joined cases T-110/03, T-150/03, T-405/03, *Sison*, *ECR*, p. II-1429, para. 55, appeal C-266/05.

[149] This issue needs to be distinguished from the position of banks and companies. See in this context F. MEYER and J. MACKE, *op. cit.*, p. 457-465.

[150] ECJ, 28 January 2007, case C-229/05, *Osman Ocalan*, p. I-439.

The Court rejected the appeal and affirmed its well known *Plaumann*-formula [151]: In the Court's view, the KNK does not fall within the scope of this definition, since the risk of having one's funds frozen was rooted in an objectively defined prohibition applying to all people under Community law and not concerning the KNK individually [152]. The ECJ finally rejected the alleged violation of the ECHR by the application of the *Plaumann* formula *in casu*, because, according to the pertinent case law of the ECourtHR, the applicant would not be able to bring an action before that court: In the context of future violations, the latter recognized the status as a victim within the meaning of Article 34 ECHR only in highly exceptional circumstances, which were not realized in the present matter [153].

On the other hand, the CFI has made clear that a listed person is directly and individually concerned in the sense of Article 230(4) EC [154].

c. Judicial protection against the listing by Common Positions [155]

The ECJ already had to deal with claims concerning a violation of the right to effective judicial protection under Article 6(2) EU in the context of Common Positions. In the cases *Gestoras Pro Amnistia* and *Segi* [156], the applicants submitted that there was no possibility of challenging the listing of their names in Common Position 2001/931/CFSP enacted pursuant to Article 34 (2)(a) EU.

The ECJ pointed out that Article 35 EU confers no jurisdiction on the Court to decide on actions for damages under Title VI of the mentioned Treaty [157].

Subsequently, the Court rejected an alleged breach of the right of effective judicial protection. Basically, a Common Position was not supposed to have legal effects on third parties. However, Article 35(1) EU concerning the preliminary rulings needed to be given an extensive interpretation: It referred to all measures adopted by the Council intended to have legal effects on third parties – unaffected by their nature and form. Therefore, provided a Common Position had exceptional effects on third parties, it would be possible to ask the ECJ to give a preliminary ruling. The Court would then examine whether the Common Position should indeed produce legal effects to third parties and classify it correctly. These principles could also be applied to Article 35(6)

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[151] "Natural or legal persons can claim to be concerned individually by a measure of general application only if they are affected by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from any other person" (ECJ, *Ocalan*, *supra* note 150, para. 72); initial of first named after the ECJ judgement, *Plaumann,* case 25/62, *ECR* [1963], p. 211 (238).

[152] ECJ, *Ocalan*, *supra* note 150, para. 73.

[153] *Ibid.*, para. 80, 82.

[154] CFI, *Yusuf*, *supra* note 72, para. 186; *Ayadi*, *supra* note 83, para. 81.

[155] See for the CFI, *supra*.

[156] ECJ, 27 February 2007, case C-354/04 P, *Gestoras Pro Amnistia and others*, *ECR*, p. I-1579; *Segi and others*, *supra* note 113.

[157] ECJ, *Gestoras Pro Amnistia and others*, *supra* note 156, para. 46; *Segi and others*, *supra* note 113, para. 46.

EU [158]. On the whole, due to the existence of these two remedies mentioned, the ECJ could not detect a disregard for the right to effective judicial protection.

C. *Judgements of other* fora

1. *Swiss* Bundesgericht

In its leading case concerning *Youssef Nada* (dated November 2007 [159]) the highest national court of Switzerland found itself confronted for the first time with a listed person's plea to be withdrawn from the Swiss decree implementing the list of the Sanctions Committee according to Resolutions 1267 and 1333.

After having adopted the UN-sanctions regime autonomously, Switzerland became a member of the UN in 2002 and was henceforth bound by its Resolutions like the EC-Member States.

Referring to the pertinent case law of the CFI, *scilicet* the cases *Yusuf* [160] and *Kadi* [161] and the *Bosphorus* judgement of the ECHR [162], the *Bundesgericht* declared itself bound to the list established by the Sanctions Committee.

The Articles 25, 48(2) and 103 of the UN-Charter stated an absolute primacy in favour of the Charter and the obligations imposed on the Member States by the Security Council towards both domestic and international law. The only exception to be made referred to the *jus cogens*, which must not be infringed upon by UN-sanctions; the *jus cogens* was therefore the only standard according to which the *Bundesgericht* is allowed to control the UN-sanctions.

Subsequently, the court could not detect a violation: The procedural guarantees mentioned by the applicant, i. e. the right to be heard and to a fair trial according to Articles 6(1) ECHR and 14(1) ICCPR and the right to an effective remedy pursuant to Articles 13 and 2(3) ICCPR did not belong to the circle of *jus cogens*-guarantees. One could not detect a consensus throughout the States to recognize binding procedural guarantees in favour of the individual set on an anti terror-list.

The *Bundesgericht* pointed out, that the procedure of listing and de-listing has been improved in 2006, a development which could be seen as a crucial progress compared to the situation before.

Although these improvements had not abolished several severe deficiencies related to the fundamental rights, the fact that there is no guarantee in the rank of *jus cogens* being violated leads to the conclusion that the *Bundesgericht* is not allowed to examine the domestic rules which implement the UN-sanctions system without domestic discretion.

Nevertheless, the primacy of the UN-sanctions did not deprive the Swiss authorities of all responsibilities: The exceptions in the Swiss implementation act must – as far as

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[158] ECJ, *Gestoras Pro Amnistia and others*, *supra* note 156, para. 52-55; ECJ, *Segi and others*, *supra* note 113, para. 52-55.

[159] Swiss *Bundesgericht* (judgement), BGE 133 II 450, 14 November 2007: http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm (checked 29 February 2008).

[160] See *supra* note 72.

[161] See *ibid.*

[162] ECourtHR, *Bosphorus*, *supra* note 126.

the supreme UN-law allows it – be interpreted in harmony with the Swiss constitution (*verfassungskonforme Auslegung*).

2. House of Lords

In the current *Al-Jedda*-matter [163], the House of Lords had the opportunity to express its view regarding the relationship between UN-law and the ECHR. The pertinent case referred to a terror suspect being held by UK forces in Iraq without charge or court access and who alleged a violation of Article 5 ECHR.

The House of Lords stated that the UN-Charter (in particular its Articles 103, 25 and 2) and UN Resolutions 1511 (2003), 1546 (2004), 1637 (2005) and 1723 (2006) imposed an obligation on UK to detain the appellant, which displaces the guarantees enshrined by Article 5 ECHR. Thus, the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain according to UN Resolution 1546. However, the detainee's rights must not be infringed upon to any greater extent than is inherent in such detention.

3. ECourtHR

In a decision, the ECourtHR declared inadmissible an application [164] in which two associations alleged violations of the ECHR due to a listing pursuant to Common Position 2001/931 in combination with Regulation 2580/2001. The applicants were named in the annex to the mentioned Common Position; however, only referring to Article 4 of the mentioned Common Position.

In the Court's view, the applicants *in casu* are not victims in the sense of Article 34 ECHR, because they only fall within the scope of Article 4 of the Common Position. This provision stated an obligation for the Member States concerning police and judicial cooperation which was not directed at individuals. The parties were only affected by the improved cooperation between Member States. Therefore, the applicants lacked the status as victims according to the ECHR [165]. The listing may be embarrassing, but in the Court's view, the link is much too tenuous.

In addition, the Court stated in an *obiter dictum* [166] that even if the applicants were affected by a full application of the sanctions, which is not given in the present case, they could still apply to the ECJ.

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[163] House of Lords [opinions of the lords of appeal for judgement in the cause R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)], 12 December 2007, http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf (checked 29 February 2008), para. 26, 39.

[164] ECourtHR, *Segi and Gestoras Pro Amnistia and others v. Germany and others* (judgement), nos. 6422/02 and 9916/02, 16 and 23 May 2002, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=segi&sessionid=5859372&skin=hudoc-fr (checked 29 February 2008).

[165] This part of the judgement is also cited in ECJ, *Ocalan*, *supra* note 150, para. 80.

[166] S. STEINBARTH, "Individualrechtsschutz gegen Massnahmen der EG zur Bekämpfung des internationalen Terrorismus", *ZEuS*, 2, 2006, p. 269, p. 271-272.

4. Caught in a dilemma

The issue of effective judicial control in a multi-layered, interdependent legal framework with independent courts, exercising control according to their respective legal sub-systems is at the heart of the European and national courts deciding in cases of terrorist listings.

A. The ECJ's Kadi *judgement* [167]*: Mission not yet accomplished*

It goes without saying that for the Community level with its *Kadi* judgement [168], the ECJ has solved – or at least tried to solve – one of the currently most pressing problems in the area of conflict between targeted UN-sanctions, their supranational implementation and human rights, *scilicet* the fact that as soon as it was the UN specifying the names to be listed, the national and supranational measures adopting these sanctions were reviewed by the Community courts only with regard to their compliance with *jus cogens*. Even in the CFI's view [169] it was "improbable" that a UN-Resolution may infringe upon the *jus cogens* [170]. Thus, there was a flamboyant antagonism between the scenario that the UN itself lists names directly in the Resolution [171] and the other scenario that the EU/EC decides on the names to be listed [172]. In this second constellation, there suddenly was a far wider protection in favour of the listed individual: Both the listing and the de-listing procedure are reviewed with regard to the full guarantees of the fundamental rights applicable. It is the CFI's *OMPI* judgement [173] which has led to several improvements in favour of the fundamental rights of the people or entities in the listing and de-listing procedure. The distinction between a full protection and one reduced to a little promising absolute minimum was utterly dependent on the rather accidental [174] question of which organisation had specified the names to be listed *in concreto*. With the new *Kadi* judgement [175], this gap seems to have disappeared, since the ECJ claims for the Community courts the competence to review the EU/EC acts implementing UN-Resolutions with regard to their compliance with the primary law, thus especially the Community's fundamental rights.

However, the ECJ did not untie the remaining Gordian knot: The actual relationship between UN-law and the law of the UN-members, including also supranational

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[167] ECJ, *Kadi*, *supra* note 30.

[168] *Ibid.*

[169] CFI, *Kadi*, *supra* note 72, para. 230.

[170] L. Van den Herik, *op. cit.*, p. 798-803, underlines on the other hand that also in the situation that the EC draws up the list, the CFI "shies away from substantively reviewing the listing", considering only the procedural flaws; F. Meyer and J. Macke, *op. cit.*, p. 454, detect the same approach, however, in their view the CFI considers itself as competent to review substantively a list in a given case *pro futuro*.

[171] See for this scenario *supra*.

[172] See for this scenario *supra*.

[173] CFI, *OMPI*, *supra* note 49.

[174] S. Eymann, *op. cit.*, p. 250.

[175] ECJ, *Kadi*, *supra* note 30.

enactments, remains fairly dubious. For the moment, explicitly, the ECJ dares only a purely introverted approach.

Nevertheless, there *is*, indeed, another probable method of resolution hidden in the judgement; due to its radicalness the ECJ seems – at the moment – to consider it Pandora's Box and has decided not to open it yet.

It remains a fact: The UN still cannot be influenced or even controlled "from the outside" – even in the new *Kadi* judgement, the ECJ emphasised that the review of lawfulness now required only refers to the Community acts adopting the UN-law but not to the latter, which can in no way be controlled by the supranational courts [176]. This intrinsic control – control only of the Community measures implementing the UN-requirements with regard to their compliance with the primary law of the Community – does in the Court's view not challenge the primacy of the pertinent UN-Resolution in international law [177]. Then, it is all the more striking that an organisation of such a unique rank does not dispose of sufficient legal protection in favour of those people it affects with its measures [178]. The question how to obtain a satisfying legal control might be seen as one of the currently most virulent issues in international law.

The explicitly declared approach of the ECJ is thoroughly focussed on the Community level: The Community courts can control all Community acts with regard to their compliance with the Community primary law. This approach complies with the well-known standards and is – in this rather autistic dimension – far from being the philosopher's stone. As a result, the reality in the relevant *Kadi*-matter is slightly sobering: The ECJ has decided that the names of the applicants in the *Kadi*-matter shall be maintained for a brief period in the relevant Regulation in order to provide the Community authorities with the possibility to deliver *ex post* a statement and remedy for the violation of the applicants' fundamental rights [179]. The reasons being sufficient, the name will remain on the EU/EC list [180].

At this point, the Court stops – perhaps because a further elaboration of this concept seems to be Pandora's box. The crucial question is: What if the reasons are not sufficient? This question is not far-fetched, since it will be quite a heavy task for the competent authorities to gather sufficient information considering the fact that the relevant information is furnished by the national intelligence apparatus of the UN-members [181]. Furthermore, the influence of the limitation on information which can be publicly released according to the authorisation of the UN-Member States [182] is, at the moment, highly dubious in this context. Or, as an alternative, what if the

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[176] *Ibid.*, para. 286.

[177] *Ibid.*, para. 288.

[178] See e. g. the explicit statements of the ECJ in the *Kadi* judgement, *supra* note 30, para. 322, and of the Swiss *Bundesgericht, supra* note 159, p. 463, also for further discussion. UN Resolution 1822 (2008) – whatever its impact will be *in praxi* – is definitely a change for the better, however, it cannot be considered sufficient.

[179] ECJ, *Kadi*, *supra* note 30, para. 375.

[180] See also *supra* note 96.

[181] Here, the application of Article 4 UN Resolution 1617 (2005) will prove to be crucial, see *supra* for the listing procedure on the UN-level.

[182] Article 12 UN Resolution 1822 (2008); see also *supra*.

applicant can prove the reasons given to be false? Is it, in such cases, possible that the ECJ eliminates the pertinent name from the Regulation? The judgement, carefully following the track of the procedural guarantees, where a *sanatio* is still possible, does not comment explicitly on these scenarios and how to solve them.

Supposing names can be withdrawn: How can one go on pretending that the European legal control did not have an effect on the underlying UN-Resolution? When it comes to names, there is no discretion in favour of the European organs – either they list it or not. However, the listing of the pertinent name in all legal systems of the UN-members is the actual sense of the UN-Resolution. *De facto*, the Community courts would – although they do not admit – control UN-law and if it fails the test, it is not transformed and therefore not applied in the Community.

In our view, despite such concerns, there must be a possibility to be withdrawn from a European list if the authorities cannot provide sufficient reasons *ex post*, since the statement of reasons would be bare of any meaning if this possibility was out of reach.

Accepting this consequence does not imply that it is the best solution possible. Above all dogmatic concerns, the main objection against the solution of such an intervention of the Community Courts is that it is the quick rebirth of a gap in legal protection against targeted sanctions directly after the ECJ had abandoned the CFI's *jus cogens*-limitation. The consequent new approach would not differentiate between UN- and European listings – but it could not avoid that the decision concerning the scope of legal protection against targeted sanctions will be left to the various national and supranational courts. As pointed out, e. g. the Swiss *Bundesgericht* follows the CFI's *jus cogens*-approach [183] – if it does not change its opinion, it will make an enormous difference if one is concerned by an implementing measure of the EU/EC or of Switzerland, again an untenable consequence. Neither national nor supranational courts can abrogate the UN-list *de jure* and therefore globally – no matter if they e. g. extend the notion of *jus cogens*, disobey applying or annul the national or supranational enactment adopting the UN-norm [184]. In its judgement mentioned above [185], the Swiss *Bundesgericht* cannot detect a sense in a withdrawal from the domestic list while the UN-list still contains the pertinent name [186]. One always has a fragmentation of legal protection. This is the basic dilemma always to be kept in mind when one is looking for solutions with regard to a better position of the individual in the context of the UN's targeted sanctions.

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[183] *Supra* note 159.

[184] See in this context e. g. D. FRANK's elaborate doubts with regard to the total primacy of UN sanctioning UN Resolutions, *op. cit.*, p. 253-255; see also the opinion of the Advocate General in the *Kadi* case, *supra* note 116.

[185] *Supra* note 159, p. 464.

[186] There lies the essential difference to the CFI's *OMPI* judgement, *supra* note 49, where there was no UN-list untouched by the judgement.

B. Other possible solutions

1. Intervention by the ECourtHR

Since the ECourtHR sees in the ECHR a "constitutional instrument of the European public order" [187], it is not far-fetched to consider the possibility of a review of the UN-Sanctions regime by the judges in Strasbourg. The Court might control the UN-law or its European adoption or both with regard to the fundamental rights enshrined in the ECHR.

a. Violation of the ECHR?

It is not the aim of this contribution to comment *in extenso* on the question whether a UN-listing is in compliance with the ECHR, but rather to give an impression if and how the sanctions can be reviewed *at all*.

Nevertheless, it can be added that there seems to be a consensus that – provided the ECourtHR came to full control – it would state several violations of the ECHR [188].

b. The Bosphorus *judgement* [189]

In order to be able to speculate on a possible future intervention by the ECourtHR, one has to consider its most recent leading case commenting on the Court's competences to review UN-sanctions adopted by the EU/EC.

The applicants in this case alleged a violation of Article 1 of the First Additional Protocol to the ECHR [190] due to the impoundment of a plane which had been leased by them. The impoundment was based on Article 8 of EC Regulation 820/1993 which adopts Article 24 UN Resolution 820 (1993) [191]. The application was directed

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[187] See e. g. *Loizidou v. Turkey* (judgement, preliminary objections), no. 15318/89, 23 March 1995, Series A 310, p. 27-28, para. 75.

[188] S. EYMANN, *op. cit.*, p. 248; D. FRANK, *op. cit.*, p. 241-246; judgement of the Swiss Bundesgericht, *supra* note 159, p. 464; since Article 6 ECHR applies only in the determination of "civil rights and obligations" or any "criminal charge" (see in that context also *supra* note 22), one firstly would have to classify the UN-sanctions from that point of view. The UN's own view, that the sanctions were administrative (see Analytical Support and Sanctions Monitoring Team, 3rd Report, 30 June 2005, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/1267%20S2005%20572.pdf (checked 29 February), para. 39, 41, and preventive [no. 6(c) of the Guidelines] is challenged by scholars, see e. g. S. EYMANN, *op. cit.*, p. 247-248; D. FRANK, *op. cit.*, p. 243-244; L. VAN DEN HERIK, *op. cit.*, p. 806.

[189] ECourtHR, *Bosphorus*, *supra* note 126.

[190] Entered into force 18 May 1954; henceforth Article 1 Protocol no. 1.

[191] The two texts are identical in the relevant parts, see the UN Resolution: "(...) decides that all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro)" and the Regulation: "All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States. (...)".

against Ireland since it had executed the impoundment according to the mentioned enactments.

The ECourtHR emphasised that the contested impoundment had not been the result of discretion by the Irish authorities but by the legal obligations of Ireland pursuant to community law.

The Court then saw a legitimate general-interest objective for interference with the applicants' possessions in compliance with Community law by a contracting party, *scilicet* Ireland. In the Court's view, it constitutes a legitimate interest of considerable weight; the ECHR needed to be interpreted in the light of any relevant rules and principles of international law. "The Court has also long recognized the growing importance of international cooperation and the consequent need to secure the proper functioning of international organisations" [192].

Reviewing the link of proportionality between the general interest and the impugned interference, the Court summarized its principles in matters like the present:

- It was not contrary to the ECHR to transfer sovereign power to international or supranational organisations.
- The organisation entrusted with such power could not itself be held responsible under the ECHR.
- In contrast, a member of the Council of Europe was responsible according to Article 1 ECHR for all acts and omissions of both its organs. This is the case if they are a consequence of domestic law or if they are necessary to comply with international legal obligations.
- The national actions taken in order to comply with international or supranational obligations were justified "as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides" [193].

The protection was equivalent if it is comparable. Stricter Requirements could run counter to the interest of international cooperation pursued.

According to the Court, if such an equivalent protection exists, there is a presumption that a state has acted in accordance with the ECHR when only implementing [194] legal obligations flowing from its membership of an international or supranational organisation. However, in cases of manifest deficiencies with regard to the protection of the fundamental rights enshrined in ECHR *in concreto*, the presumption could be rebutted in order to enable a review pursuant to the ECHR. The protection being manifestly deficient, the interest of international cooperation would be outweighed by the ECHR's role as a constitutional instrument of the European public order.

The Court then applied these principles to the present matter, first by analysing the protection of fundamental rights offered by the EU/EC law: After having underlined the evolution of fundamental rights on the EU and EC level, also linked to the ECHR

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[192] ECourtHR, *Bosphorus*, *supra* note 126, para. 150.

[193] ECourtHR, *Bosphorus*, *supra* note 126, para. 155.

[194] Without own discretion, see D. FRANK, *op. cit.*, p. 247.

and its case law, the Court classified the system of legal remedies provided by the TEC [195] as equivalent to the protection offered by the Convention system, so that one could presume that Ireland did not infringe upon the ECHR when adapting its obligations flowing from its EC-membership. Finally, the Court stated very briefly that there had been no dysfunction of the mechanisms of control to secure the observance of the ECHR-guarantees so that the presumption could not be rebutted. Therefore, according to the Court, there had been no violation of Article 1 Protocol no. 1.

c. Probable approach with regard to a UN-listing?

The crucial question is obviously how the criteria described above would be applied if a person or entity listed by the Sanctions Committee alleged violations of the ECHR.

Firstly, the ECourtHR would have to decide whether the ECJ's review *in concreto* is manifestly deficient in order to be able to rebut the presumption arisen. It is doubtful that after the ECJ's *Kadi* judgement [196] the ECourtHR might find such a deficiency on the EU/EC-level. Thus, the question is virulent rather with regard to States, in which the courts still are in favour of the *jus cogens*-control abandoned by the ECJ, so e. g. in Switzerland: The fundamental rights of the EU/EC have been classified as equivalent by the ECourtHR in its *Bosphorus* judgement [197]. However, is a *jus cogens*-test also an equivalent mechanism controlling the observance of those equivalent substantive guarantees?

It has to be underlined that the situation in the *Bosphorus* case differs slightly from the UN-listings brought before the *Bundesgericht* [198] (and the CFI) [199]. In the *Bosphorus* case the CFI had expressed itself – before the ECourtHR had passed its judgement – in a preliminary ruling [200] pursuant to Article 234 EC on the compliance of Article 8 Regulation no. 990/93 *without* limiting its arguments to the control of *jus cogens* [201]. This approach is questionable, as – like in the situation that a UN-member has to adopt a UN-listing – neither party [202] in the *Bosphorus* case exercised discretion.

A fortiori, the lack of the possibility to obtain a statement not being limited to *jus cogens* could lead to the conclusion of a manifest deficiency in a case concerning an alleged breach of the ECHR by a UN-listing.

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[195] E. g. Articles 230, 232, 241, 226-228 and 234 TEC; ECourtHR, *Bosphorus*, *supra* note 126, para. 161-164.

[196] ECJ, *Kadi*, *supra* note 30.

[197] ECourtHR, *Bosphorus*, *supra* note 126, para. 159.

[198] *Supra* note 159.

[199] CFI, *Kadi* and *Yusuf*, *supra* note 72.

[200] ECJ, 30 June 1996, case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and others*, *ECR*, p. I-3953.

[201] Opinion of the Advocate General in the appealed *Kadi* case, *supra* note 72, para. 26-27.

[202] Explicitly ECourtHR *Bosphorus*, *supra* note 126, para. 148; D. FRANK, *op. cit.*, p. 248.

Secondly, the ECourtHR could comment on the compliance of the UN listing and de-listing procedures with the ECHR [203]. Obviously, the problems would have to be sought in the Sanctions Committee as a "tribunal" in the sense of Article 6(1) ECHR and the rights of the listed person after his or her listing, especially a de-listing procedure in the context of Articles 6 and 13 ECHR [204].

Finally, it has nevertheless to be emphasized that the ECourtHR, in its *Bosphorus* judgement [205], does *not* examine the UN-system – influencing the EU/EC in a binding way – with regard to an equivalent protection [206]. Such an examination is left out silently.

On the other hand, the ECourtHR never declared itself subordinated to the UN in such an explicit way like e. g. the CFI [207] – therefore, the silence in the *Bosphorus* case could also be a chance to have full control with regard to the ECHR.

d. A better solution?

Above all concerns about the feasibility of such a control, one has to underline that a review by the ECourtHR could not – just like with regard to an intervention of the Community courts – avert a regional fragmentation of legal protection. Nevertheless, a ECourtHR-review could be meaningful in a different context [208] so that the mere *possibility* of such a control is crucial to be stated.

2. Autonomous acceptance of fundamental standards by the UN

The UN has recently improved the listing and de-listing procedure with regard to respect of fundamental rights by creating the possibility for a listed person to submit a request for de-listing directly to the UN through the focal point process and the statement of reasons *ex post* [209]. It could continue in this direction and try to fulfil autonomously the requirements stated by essential human rights conventions such as the ECHR and the ICCPR [210].

At the moment, this seems to be the most promising approach in order to reach a consistent level of protection of the human rights, which is not fragmented due to different approaches by national and supranational courts. Nevertheless, it goes without saying that it is also a heavy task, and an expectation that in the intermediate term future the UN will dispose of a genuine tribunal in compliance with the highest

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[203] Although, obviously, the UN itself cannot be held responsible by the ECourtHR, but only the members of the Council of Europe.

[204] Particularly also Article 6 (2) ECHR.

[205] ECourtHR, *Bosphorus*, *supra* note 126.

[206] D. FRANK, *op. cit.*, p. 248.

[207] *Ibid.*, p. 253.

[208] See *infra*.

[209] See for the proceedings *supra*; the Swiss *Bundesgericht* qualifies these recent developments on p. 463 of the judgement mentioned *supra* note 159 as "improvements", nevertheless, it still states weighty deficiencies with regard to the fundamental rights. According to the ECJ's *Kadi* judgement, *supra* note 30, para. 322, the de-listing procedure of the UN "clearly" does not "offer the guarantees of judicial protection".

[210] See for probable conflicts with the ECHR *supra*.

global standards with regard to human rights is doomed to be nothing more than a beautiful illusion. It is even highly doubtful whether the legal protection we know today especially in the scope of the ECHR can be "globalized" on the UN-level or – as a more obvious approach – if a search for utterly new forms of protection of fundamental rights standards will be necessary.

5. Conclusion

The ECJ's *Kadi* judgement may not be the best solution forever – however, for the moment, it might be a promising approach if one understands the "yes we can" from Luxembourg as a shot across the bow. It is a possibility to show the UN once more that there are clear drawbacks with regard to the legal protection against its measures. Therefore, one especially has to acclaim that the ECJ – different from the CFI's exceedingly careful approach – finds critical words for the existing UN-remedies [211]. In the combination with the impending Pandora's box of names being withdrawn from the Community's list, the ECJ could be able to exert a certain pressure on the UN to change its system of legal protection for listed people for the better. In this context, the deficit of the limited perspective of the ECJ, focussing explicitly only on the Community's legal order, is not relevant and perhaps even necessary from the dogmatic point of view. In the nearer future, it would, however, not be far-fetched to apply a certain kind of "*Solange*"-clause ("as long as") [212], in order to attract more attention.

As a national example, also the Swiss *Bundesgericht* dares to state explicitly that the UN-system of listing and de-listing does not comply with the ECHR [213]. In this context, it is valuable to consider an analogue situation in Swiss national law: Article 190 of the Swiss Constitution states, *inter alia*, that the *Bundesgericht* has to apply the *Bundesgesetze* [214] even if they infringe upon the Constitution. Although the highest Swiss court follows – in the rare cases that this provision becomes relevant – this obligation, it often comments on the fact that the *Bundesgesetz* infringes upon the Constitution in the present matter and urges therefore the Parliament to change the *Bundesgesetz* in accordance with the Constitution [215]. In doing so, it can contact the legislator in a certain form and give an impulse how to change a situation for the better which is in the Court's eyes amendable.

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[211] ECJ, *Kadi*, *supra* note 30, para. 320-325; see also *supra* note 128.

[212] Named after the well-known judgements of the German *Bundesverfassungsgericht* *Solange I*, 29 May 1974, BVerfGE 37, 271, and *Solange II*, 22 October 1986, BVerfGE 73, 339; nota by the way that also the ECourtHR used a similar pattern in its *Bosphorus* judgement, *supra* note 126.

[213] The House of Lords admits that there is a "clash", too, *supra* note 163, para. 39.

[214] Enactments by the Parliament – with the possibility of a veto of the Swiss people – directed at a general circle of individuals and referring to an abstract situation.

[215] See e. g. Swiss *Bundesgericht*, 2 February 1977, BGE 103 Ia 53 (55), http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm (checked 29 February 2008).

In this context, a clear statement by the ECourtHR would be a further strong signal towards the UN to be taken seriously. It has been shown [216] that, in theory, Strasbourg has the possibility to give this signal, at least towards those States which cling to a *jus cogens*-control.

But not only the courts, but also the UN-members themselves should push forward the necessary development [217].

Such contacts or invitations might, in our view, be the most auspicious approach in order to find a way out of the dilemma depicted above: The UN-law does not forbid national or supranational courts to simply *comment* on the compliance of adopted UN-sanctions with the pertinent domestic law. On the contrary, such remarks might be a welcome inspiration for the UN to get involved in an open and prolific dialogue with the courts of the world suggesting improvements, so that the goal of the UN in adapting the human rights standards of its members [218] could be accomplished in a meaningful way. The fact that the Preamble of the UN-Charter refers to the "fundamental human rights" is clearly in accordance with such a dialogue [219]. By concealing possible collisions, the UN-members do not act in favour of the UN's best interest either [220] – or by using Llewellyn's *dictum*: "Covert tools are never reliable tools" [221]. The fact that UN Resolution 1822 (2008) refers now *explicitly* to the problem of legal protection [222] can be seen as an exceedingly welcome affirmation for the efficiency of the new frank approach *in praxi*.

In all, the national and supranational courts of the world cannot solve the problem of the deficient legal protection on the UN-level directly – it is only the UN that is able to draw up a firm and global solution. However, constant vigilance of those courts and, in general all UN-members, and the will to use sometimes interim solutions are indispensable preconditions for a necessary change to happen in the future, since only constant dripping wears away the stone.

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[216] See *supra*.

[217] See e. g. the suggestions in the White Paper prepared by order of Switzerland, Germany and Sweden by the Watson Institute for International Studies, Strengthening Targeted Sanctions Through Fair and Clear Procedures, 2006, http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf (checked 29 February 2008) and also the recommendations prepared by Austria, the UN Security Council and the rule of law, 2008, http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/Vertretungsbehoerden/New_York/Kandidatur_SR/FINAL_Report_-_The_UN_Security_Council_and_the_Rule_of_Law.pdf (checked 10 October 2008).

[218] *Supra*.

[219] L. Van den Herik, *op. cit.*, p. 802-805, considers already the CFI's *jus cogens*-control for itself contributing to such a dialogue influencing the UN.

[220] Also in the context of a system of collective security, there are questions of checks and balances, L. Van den Herik, *op. cit.*, p. 799.

[221] *Harvard Law Review*, 52/700, 1939, p. 703.

[222] E. g. Article 28 UN Resolution 1822 (2008).