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Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists

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1. Introduction

This article will analyse some of the most significant developments in the human rights case-law of the European Court of Justice (ECJ) and the Court of First Instance (CFI) in recent years. It will begin with a brief description of how the ECJ has finally started relying on the Charter of Fundamental Rights of the European Union (EU) in its judgments. The second part of this article will deal with the decision of the ECJ that the highly controversial European Arrest Warrant (EAW) does not breach the principles of legality and equality. Finally, the third part will focus on the litigation arising from the adoption of counter-terrorism measures—in particular, economic sanctions against individuals. The specific cases that this article will deal with in Sections 2 and 3 have arisen from the European Union's measures against crime and terrorism, and have been chosen to be the focus of this article because of the highly sensitive

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nature and the complex institutional framework of this area of activity of the Union,[1] the most rapidly changing one at present.

2. The European Court of Justice Relies on the Charter of Fundamental Rights

The Charter of Fundamental Rights of the EU Charter is a non-binding document, 'solemnly proclaimed' in 2000 by the European Parliament, the Council and the Commission.[2] The Charter was integrated as Part II of the Treaty establishing a Constitution for Europe and would have therefore become legally binding, had the Treaty been ratified.[3]

The CFI has not hesitated to refer to the Charter in its case-law;[4] neither have several Advocates General (AGs).[5] The ECJ, on the other hand, has been reluctant to do so until very recently, when dealing with the European Parliament's challenge to the EC directive on the right to family reunification.[6] The Parliament contended that the measure breached the right to family life (Article 7 of the Charter); the ECJ disagreed, but it nevertheless discussed and admitted the significance of the Charter.[7] Further mentions have ensued, giving the impression that the ECJ is willing to routinely apply the Charter in future case-law.[8]

We can only speculate as to the reasons for the ECJ's change of heart. It is, however, quite telling that it only referred to the Charter once it had become clear that the Constitutional Treaty was not likely to be ratified—at least in its present form. It may be that the ECJ was waiting for the Charter to become binding through the proper constitutional mechanism; once this mechanism came to a halt, the ECJ decided to move the constitutional process forward

1 Activity is undertaken across the different pillars of the European Union, with different patterns of decision-making and judicial control applying in each case.

2 [2000] OJ C 364/01.

3 Although it remains non-binding, the Commission has undertaken to check for compatibility of all legislative proposals with the Charter (internal decision of 13 March 2001). The Charter has also featured in several speeches and reports by the European Ombudsman. See Craig and De Búrca, *EU Law: Text, Cases and Materials*, 3rd edn (Oxford: Oxford University Press, 2002) at 362–3.

4 Famously, if not for the first time, in T-177/01, *Jégo-Quéré v Commission* [2002] ECR II-2365.

5 For instance, AG Tizzano in C-173/99, *BECTU v Secretary of State for Trade and Industry* [2001] ECR-I 4881; AG Jacobs in C-50/00, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; AG Stix-Hackl in C-60/00, *Carpenter* [2002] ECR I-6279; and AG Geelhoed in C-413/99, *Baumbast* [2002] ECR I-7091.

6 C-540/03, *European Parliament v Council* [2006] ECR I-5769, which challenged Council Directive 2003/86/EC on the right to family reunification, [2003] OJ L 251/12.

7 *European Parliament v Council*, ibid. at para. 38. This was made easier by the fact that the Directive itself referred to the Charter in its preamble.

8 See C-411/04 P, *Salzgitter Mannesmann v Commission*, Judgment of 25 January 2007; C-432/05, *Unibet*, Judgment of 13 March 2007; and C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007.

of its own accord.[9] The ECJ has been known for doing this in the past, whenever the legislative process stagnated.[10]

Be that as it may, the reference to the Charter is to be welcomed. Although the ECJ may be criticised for applying a non-binding document *proprio motu*, we should bear in mind that the Charter is a document that merely aims to codify existing standards of protection.[11] In theory, it should not in any way alter the competence balance between the Union and Member States.[12] If this is the case, the judicial application of the Union's bill of rights can only be seen in a positive light.

3. The European Arrest Warrant: Human Rights Concerns

The Framework Decision on the EAW has been a source of human rights litigation in several national constitutional courts across the Union,[13] and recently also before the ECJ.[14] This framework decision was the culmination of a process which started at Tampere in 1999 and was slowly unfolding when the events of 11 September 2001 rapidly catapulted it to completion.[15] It is a measure adopted within the third pillar of the EU, i.e. the area of police and judicial cooperation in criminal matters.[16] This is an area of intergovernmental cooperation, different

9 Although it has recently been agreed by all Member States to draft a new Treaty, in lieu of the failed Constitution, that will proclaim the Charter binding—if with limitations applying to the United Kingdom; see Presidency Conclusions of the Brussels European Council, 23 June 2007, 11177/07 CONCL 2.

10 As it was the case from the entry into force of the EEC Treaty until the breakdown of the Luxembourg Compromise in the early 1980s: see Arnull, *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2006) at 639–42.

11 The Preamble of the Charter states:

> This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.

See also C-540/03, *European Parliament v Council*, supra n. 6 at para. 38.

12 Article 51, Charter.

13 See, *inter alia*, *Bundesverfassungsgericht* (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04); *Trybunal Konstytucyjny* (Polish Constitutional Court), Judgment of 27 April 2005, No. P 1/05; Judgment of the Czech Constitutional Court of 3 May 2006, Pl. ÚS 66/04; Supreme Court of Cyprus, Judgment of 7 November 2005, App No 294/2005; *Minister for Justice & Law Reform v Robert Aaron Anderson* [2006] IEHC 95 and *Office of the King's Prosecutor v Cando Armas* [2005] UKHL 67.

14 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, [2002] OJ L 190/1.

15 An extensive recollection of this process can be found in Spencer, 'The European Arrest Warrant', (2003–04) 6 *Cambridge Yearbook of European Legal Studies* 201.

16 On the EAW, see Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2007) at 468–73; Blekxtoon and van Ballegooij, *Handbook on the European Arrest Warrant* (The Hague: TMC Asser, 2005); and Wouters and Naert, 'Of Arrest Warrants, Terrorist Offences

from the EC or first pillar: democratic and judicial control is limited, and the law adopted in this area does not have the same characteristics as EC law.[17]

The Framework Decision creates a speedy surrender procedure between judicial authorities of EU Member States that replaces traditional methods of extradition based on public international law. The new procedure is based on the principle of mutual recognition of judicial decisions in criminal law and, in a large number of cases, it does away with the traditional requirement of double-criminality—i.e. that the behaviour to be punished constitutes an offence both in the State issuing the warrant and in the State executing it; Article 2(2) lists a series of offences which, if 'punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of the Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant'.

The legal effects of third pillar framework decisions are determined by the TEU (Article 34): they are binding on the Member States as to the result to be achieved, and they are to be implemented through more concrete national measures. The challenges before national constitutional courts have concerned the validity of the national laws implementing the EAW Framework Decision, generally because they conflicted with the prohibition on the extradition of nationals contained in their constitutions.[18] In the German case, the *Bundesverfassungsgericht* was of the opinion that the national legislator could have found a constitutional implementation within the latitude afforded by the framework decision, but failed to do so.[19] In the Polish case, the court found that it was impossible for the legislator to find a way to implement the EU measure in a manner that was compatible

and Extradition Deals: An Appraisal of the Main Criminal Law Measures Against Terrorism After "11 September" ', (2004) 41 *Common Market Law Review* 909.

17 It is traditionally described as 'weaker' because the principles of primacy over national law and direct effect, for example, do not apply here. The Court has, however, extended some of the principles of EC law to the third pillar in recent case-law, causing much discussion as to whether all of them (except direct effect, excluded in the Treaty) can be extended: see C-105/03, *Pupino* [2005] ECR I-5285; and the comments of Fletcher, 'Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino', (2005) 30 *European Law Review* 862; Spencer, 'Child Witnesses and the European Union', (2005) 64 *Cambridge Law Journal* 569; Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in Pupino', (2007) 3 *European Constitutional Law Review* 5 and Spaventa, 'Remembrance of Principles Lost: On Fundamental Rights, the Third Pillar and the Scope of Union Law', (2006) 25 *Yearbook of European Law* 153. For further discussion, see also Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Barnard (ed.), *The Fundamentals of EU Law Revisited* (Oxford: Oxford University Press, 2007) at 35.

18 In the Czech Republic, the challenge also concerned the abolition of the requirement of double criminality.

19 For a comment on this case, see Hinarejos, '*Bundesverfassungsgericht* (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law', (2006) 43 *Common Market Law Review* 583.

with the constitution, forcing the court to find a way to paper over the conflict until the national constitution could be reformed. The Czech Constitutional Court could find a way to reconcile the national implementing legislation and the national constitution through interpretation.[20] Neither of these courts found it necessary to refer the case to the ECJ.

In Belgium, however, the validity of the Framework Decision itself was questioned and the ECJ was asked to give a preliminary ruling under Article 35 of the TEU in the case *Advocaten voor de Wereld*.[21] Among other things,[22] the claimant argued that, because of the suppression of the requirement of double criminality in a set number of instances, the framework decision ran counter to the principles of legality and equality. Legality, because Article 2(2), mentioned above, listed 32 offences—to which the double-criminality requirement no longer applied—without defining their content, or doing so in too vague a fashion;[23] equality, because in choosing these particular offences and not others, the Council had acted without justification. Moreover, the fact that the offences contained in Article 2(2) were not properly defined meant this provision would be interpreted and applied differently by different national authorities.

The ECJ started by highlighting the commitment of the EU to the rule of law and the protection of human rights, 'as guaranteed by the [European Convention on Human Rights (ECHR)] and as they result from the constitutional provisions common to the Member States, as general principles of community law'—a commitment that extends, of course, to the third pillar.[24] This means that the actions of the institutions of the EU, as well as of Member States when implementing Union law, are subject to judicial review.

The ECJ found that the Framework Decision breached neither the principle of legality nor that of equality. As regards the legality of criminal offences, it began by pointing out that this principle, recognised in Article 7(1) of the ECHR, has been interpreted by the European Court of Human Rights to imply that:

> [l]egislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant

20 For comments on the Polish and Czech cases, see Leczykiewicz, '*Trybunal Konstytucyjny* (Polish Constitutional Tribunal), Judgment of 27 April 2005, No. P 1/05' (2006) 43 *Common Market Law Review* 1181; and Komárek 'European Constitutionalism and the European Arrest Warrant: in Search of the Limits of "Contrapunctual Principles"', (2007) 44 *Common Market Law Review* 9.

21 C-303/05, Judgment of 3 May 2007 ('*Advocaten*').

22 The claimant also argued that the subject-matter of the Framework Decision should have been implemented by way of a convention instead.

23 The offences include, for example, 'terrorism' or 'participation in a criminal organisation', without further explanation.

24 *Advocaten*, supra n. 21 at para. 45.

> provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make criminally liable.[25]

The ECJ believed that the Framework Decision did not create any offences; rather, it just referred to offences 'as they are defined by the law of the issuing Member State' [Article 2(2) of the Framework Decision]. If Member States are the ones who legally define the content of these offences and their penalties, it follows that they should be the ones to ensure that the principle of legality is complied with:

> [T]he definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties.[26]

As regards the principle of equality and non-discrimination, the Court turned to earlier case-law, where it interpreted this principle as requiring that comparable situations are treated in the same way and that different situations are treated differently, unless objectively justified.[27] It then examined whether the Council's decision to differentiate the 32 offences detailed in the framework decision from any other (which may therefore be subject to the requirement of double criminality) was objectively justified:

> [T]he Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality.[28]

Thus, the Court found that there was no inequality before the law—but what of possible inequalities in the application of the law, to follow the distinction used by AG Ruiz-Jarabo Colomer in his Opinion?[29] The applicants had also argued that the vague nature of the list of offences contained in Article 2(2)

25 *Advocaten*, supra n. 21 at para. 50. The Court was referring to, *inter alia*, *Coëme and Others v Belgium* 2000-VII 75 at para. 145.
26 *Advocaten*, supra n. 21 at para. 53.
27 Ibid. at para. 56. The ECJ referred to C-248/04, *Koninklijke Coöperatie Cosun* [2006] ECR I-10211 at para. 72 and the case-law cited therein.
28 *Advocaten*, supra n. 21 at para. 57.
29 *Advocaten voor de Wereld*, Opinion of AG Ruiz-Jarabo Colomer, 12 September 2006 at paras 83–99.

of the Framework Decision would lead to different national authorities interpreting this provision in diverse manners. Presumably, inequalities would arise as follows: imagine that a German court issues two European arrest warrants against two different people for the same behaviour ('X'); one of these people happens to be in Spain and the other one in France. The executing national court in, say, Spain, might not regard behaviour X as constituting an offence contained in Article 2(2), and thus only execute the arrest warrant if the behaviour is penalised in Spain, whereas the executing national court in France might regard the same behaviour X as included in Article 2(2)—and therefore execute the arrest warrant without applying the double-criminality requirement. The result is that two individuals, both accused of behaviour X, would receive different treatment and protection depending on whether they were in Spain or France.

It should be borne in mind that arguing that disparities in the application of Article 2(2) of the Framework Decision breach the principle of equality attacks the very principle behind this EU measure, i.e. that of mutual recognition, and amounts to arguing that full harmonisation of the national definition of the offences at stake is a necessary condition for the abolition of the requirement of double criminality within the framework of the EAW mechanism.

The principle of mutual recognition is considered the 'cornerstone' of judicial cooperation in criminal matters in the EU.[30] It entails automatic recognition and execution of judicial decisions among Member States, as opposed to full harmonisation of their criminal laws.[31] The principle of mutual recognition has successfully contributed to the creation of the internal market, but its extension to a very different and delicate area such as criminal law is not without problems. Mutual recognition is based on trust; in theory, a sufficient commonality exists because all Member States are under an obligation to respect fundamental rights as a matter of EU law and are parties to the ECHR. In practice, however, understandable worries surface due to different Member States' conceptions of fundamental rights in the criminal context—beyond the ECHR minimum.[32] These worries have prompted the use of safeguards with a view to limiting the effects of mutual recognition, such as stopping short of making it automatic (in that the executing judge can refuse to execute a decision on the basis

30 See para. 33, Presidency Conclusions, Tampere European Council, 15–16 October 1999, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm; and The Hague Programme, Annex 1 to the Presidency Conclusions of the Brussels European Council, November 2004, at 38.

31 For an overview of the development of this approach, see Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?', (2004) 41 *Common Market Law Review* 5.

32 For a very comprehensive overview of the problems prompted by the application of the principle of mutual recognition to criminal matters, see Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', (2006) 43 *Common Market Law Review* 1277. See also Peers, supra n. 16 at 497–98.

of limited and enumerated grounds),[33] or the harmonisation of some minimum safeguards such as the principle of *ne bis in idem* and the rights of the defendant.[34]

In replying to this question, the ECJ was therefore asked to rule on the legality of a principle that is at the very basis of the third pillar of the EU. Precisely for this reason, no big surprises were expected— but a thorough and convincing analysis was.

In his Opinion submitted to the ECJ, AG Ruiz-Jarabo Colomer did not consider that the situation amounted to a breach of equality in the application of the law, since 'the principle of equality does not require separate courts to reach identical conclusions'.[35] In any event, he argued, it would be necessary to 'wait and see whether the predicted disparities actually arise'; this seemed unlikely to him for two reasons: first, because the Framework Decision creates a mechanism for the accurate exchange of information between courts, and second, because a national court can turn to the ECJ for guidance on the interpretation to be given to the offences listed in Article 2(2).

These two mechanisms do not seem very likely to be effective in avoiding disparities like the one described above; one fails to see how the accurate exchange of information between issuing and executing court is necessarily bound to have an effect on the possible disparate interpretations adopted by two different executing courts. To follow the example above, the exchange of information between Germany and Spain or Germany and France does not seem an absolute guarantee against the adoption of different interpretations by Spain and France. In any case, it is the second mechanism that seems more surprising, since the only way to conclude that the Framework Decision did not breach the principle of legality was by considering the list in Article 2(2) as a collection of 'empty labels'—within some limits, of course—to be legally defined by national legal systems. If that is the case, then it is difficult to see how the ECJ can be in a good position to offer guidance on their content.

The ECJ agreed with the AG on the result, concluding that the Framework Decision did not breach the principle of equality in the application of the law.

33 Mitsilegas, ibid. at 1290–92.

34 Ibid. at 1299–1307. On the problems of the incorporation of the principle of *ne bis in idem* in EU law, see Wasmeier and Thwaites, 'The Development of *ne bis in idem* into a Transnational Fundamental Right in EU Law: Comments on Recent Developments', (2006) 31 *European Law Review* 565; Weyembergh, 'Le principle *ne bis in idem*: Pierre d'achoppement de l'espace penal Européen?', (2004) *Cahiers de Droit Européen* 337; and Fletcher, 'Some Developments to the *Ne Bis In Idem* Principle in the European Union: Criminal Proceedings Against Huseyn Gözutök and Klaus Brügge', (2003) 66 *Modern Law Review* 769. The Commission has recently published a Green Paper on the matter, 'On Conflicts of Jurisdiction and the Principle of *Ne Bis In Idem* in Criminal Proceedings', 23 December 2005, COM(2005) 696 final, SEC(2005) 1767. On rights of defence, see the unsuccessful Commission 'Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union', 28 April 2004, COM(2004)328 final, SEC(2004)491.

35 *Advocanten voor de Wereld*, Opinion of AG Ruiz-Jarabo Colomer, supra n. 29 at para. 97.

Its reasoning was, however, far briefer: the Court disposed of the discussion in one paragraph, where it pointed out that 'it is not the objective of the Framework Decision to harmonise the substantive law of the Member States',[36] and that nothing in the provisions of the TEU which form the legal basis for the Framework Decision makes its application conditional on the harmonisation of the criminal law of the Member States within the area of the offences in question.

The ECJ, it seems, glossed over the question of whether disparate application of the Framework Decision can amount to a breach of the principle of equality, limiting itself to the observation that it was not the objective of the Framework Decision to achieve uniformity. Harmonisation of the different offences and penalties contained in the legal systems of Member States is neither a consequence of, nor a condition for, the creation of an EAW. The ECJ seemed to accept that the Framework Decision will be applied in different ways because it is based on the principle of mutual recognition and not on full harmonisation, but avoided spelling out exactly why this does not result in a breach of the principle of equality—simply assuming it does not. The result of the Court's reasoning is hardly surprising, but it lacks a more convincing analysis of the principal of mutual recognition itself and its conformity with the principle of equality and is, for that reason, disappointing.

Finally, some general observations are in order. This is a brief and, at times, thinly argued judgment. Some would have expected the ECJ to enter a far more extensive dialogue with national constitutional courts by referring to some of the issues encountered by the latter when dealing with implementation of the EAW at the national level: maybe a reminder of the obligation set out in *Pupino*,[37] or even a sign as to the status of the principle of primacy within the third pillar. Realistically, however, it is difficult to see how the ECJ could have done this, since the precise questions asked by the Belgian court had a different focus altogether. Furthermore, a stern stance on any of these issues does not go well with the sort of subtle constitutional dialogue that should ideally take place between the ECJ and national constitutional courts.[38]

As regards the protection of fundamental rights more specifically, both the AG and the ECJ relied on Article 6 of the TEU, the ECHR and the Charter of Fundamental Rights, among other instruments, and sought to emphasise the commitment of the EU, and therefore of the third pillar, to the protection

36 *Advocaten*, supra n. 21 at para. 59.

37 Supra n. 17. The obligation—to interpret all national law in the light of framework decisions—was overlooked by the German Constitutional Court when dealing with the German EAW implementation law: *Bundesverfassungsgericht*, Decision of 18 July 2005 (2 BvR 2236/04).

38 In theory, there is no hierarchical relationship between the ECJ and national courts, but one that is based on cooperation. The ECJ depends on national courts to ensure that EC law is properly applied throughout the Union; a subtle exercise of negotiation and inter-court dialogue has traditionally taken place within this framework, especially in the field of human rights.

of human rights. AG Ruiz-Jarabo Colomer, especially, insisted on the need for this commitment as a way to avoid past misunderstandings with national constitutional courts: it was the lack of protection of fundamental rights within the first pillar that prompted the '*Solange* conflict' between the ECJ and national constitutional courts.[39] The ECJ needs to assure national constitutional courts that fundamental rights are being properly protected within the third pillar in order to ensure their full collaboration. In this spirit, the Court remarked that not only the institutions of the Union, but also the Member States when implementing Union law, 'are subject to review of the conformity of their acts with the Treaties and the general principles of law'.[40] This is a tricky claim: on the one hand, it is clear that the Member States are bound by the TEU when implementing Union law, and thus by Article 6. Further, it is logical for the ECJ to claim that, in theory, Article 6 and the obligation enshrined in it has primacy over national law; after all, the ECJ is an international court and we cannot expect an international court to do anything other than to uphold the principle of *pacta sunt servanda*, or primacy as a theoretical claim of public international law.[41] On the other hand, the ECJ cannot, in practice, use the preliminary reference procedure under Article 35(2) to determine that a concrete national rule has to yield in favour of an Article of the TEU (be it Article 6 or any other) so easily—that would amount to extending the principle of primacy, as understood within the first pillar, to apply in the third one.[42]

4. EU Counter-terrorism Measures: Economic Sanctions Against Individuals

Understandably, the last years have seen a sharp rise in the adoption of EU/EC measures against terrorism. The adoption of economic sanctions against individuals, specifically, has been a focus of litigation and the source of several

39 'Solange' is the name of the saga of German cases: BVerfGE 37, 271, *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel (Solange I)* [1974] 2 CMLR 540; and BVerfGE 73, 339, *re the application of Wünsche Handelsgesellschaft (Solange II)* [1987] 3 CMLR 225. Comparable conflicts occurred in the case of other national constitutional courts: *Frontini v Ministero delle Finanze (Case 183)* [1974] 2 CMLR 372 at 389; *Corte Constituzionale, 21 Aprile 1989 n. 232 - Pres. Conso; red. Ferri - S.p.a. Fragd c. Amministrazione delle finanze dello Stato* (1989) 72 *Rivista di Diritto Internazionale* 104.

40 *Advocaten*, supra n. 21 at para. 45.

41 Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart, 2006) at 167–8.

42 This duty to disapply national law that conflicts with EC law exists in the first pillar but, traditionally, not in the third one. Some authors seem to believe the ECJ is in fact vowing in this judgment to review Member State action in the light of Article 6, TEU, and thus extend a form of first-pillar primacy to the third one, see Spaventa, supra n. 17; Lenaerts and Corthaut 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', (2006) 31 *European Law Review* 287 at 289–91. It should also be noted that the preliminary reference procedure under Article 35(2) TEU is not even available with the same features in all Member States.

benchmark judgments delivered by both the CFI and the ECJ in recent years. These are the *Kadi, Yusuf, OMPI* and *Segi* cases considered below.

First in this thread are the CFI judgments in *Kadi* and *Yusuf*.[43] At stake was an EC regulation adopted on the basis of Articles 60, 301 and 308 EC and which implemented UN Security Council Resolution 1373/2000, a measure that seeks to impose financial sanctions on terrorist organisations and individuals listed in it.[44]

The EU has been implementing UN sanctions against individuals for years, even though there is no specific legal basis for this in the Treaties. The EC Treaty allows for the adoption of economic sanctions against third countries, when the Union adopts a common position or a joint action pursuant to its common foreign and security policy (the second pillar of the EU) that provides for it. Typically, then, this kind of sanction has been possible through cross pillar action: first the Union adopts a second pillar common position, then the Community gives effect to it by adopting a regulation.[45] This mechanism—with slight changes—is now being used to impose economic sanctions on individuals named in 'terror lists'.[46] These lists can be a mere reproduction of UN lists—as was the case in *Kadi* and *Yusuf*—or compiled autonomously within the Union.[47]

Kadi and Yusuf had been named in the 'terror list' annexed to the UN resolution and later to the EC regulation. They sought the annulment of the latter before the CFI under Article 230(4) of the EC Treaty, alleging, among other things,[48] a breach of their fundamental rights—in particular, the right to the use of their property and the right to a fair hearing.

43 T-306/01, *Kadi* [2005] ECR II-3533; T-315/01; and *Yusuf* [2005] ECR II-3649.

44 Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation (EC) No 467/2001, [2002] OJ L 139/9. The list annexed to this regulation is regularly reviewed by the Commission, on the basis of updating by the Sanctions Committee: most recently at the time of the judgment, Commission Regulation (EC) No 1378/2005 of 22 August 2005 amending for the 52nd time Council Regulation (EC) No 881/2002, [2002] OJ L 219/27.

45 Under Articles 60 and 301, CE. See Usher, 'Direct and Individual Concern - An Effective Remedy or a Conventional Solution?', (2003) 28 *European Law Review* 575 at 593; and Nettesheim, 'UN Sanctions Against Individuals—A Challenge to the Architecture of European Union Governance', (2007) 44 *Common Market Law Review* 567 at 571.

46 With the addition of Article 308 EC as a legal basis, which permits the Community to adopt any action necessary to achieve a legitimate aim. It is still debatable, of course, whether fighting terrorism is a legitimate aim of the European Community.

47 On this distinction, see Bartelt and Zeitler "'Intelligente Sanktionen" zur Terrorismusbekämpfung in der EU' (2003) *Europäische Zeitschrift für Wirtschaftsrecht* 712; and Cameron, 'European Union Anti-Terrorist Blacklisting', (2004) 4 *Human Rights Law Review* 225.

48 They also claimed, first, that there was no competence for the adoption of the regulation at stake, since there is no specific legal base in the treaties for the adoption of sanctions against individuals. Article 308 had been used as a supplementary legal base, given that it allows the Community to adopt action necessary to fulfil a legitimate aim. The applicants rejected the idea that fighting terrorism could be such an aim. Secondly, they alleged that the regulation breached Article 249 EC, the provision that describes regulations as instruments

The CFI started by mapping out the relationship between UN and EU law, in order to determine the scope of its competence to review a regulation which merely transposed a UN Security Council resolution. The CFI noted that States can neither rely on their national law nor on other international treaties in order to avoid fulfilling their obligations under the UN Charter.[49] These obligations—which include those derived from Security Council resolutions—prevail over the EU and EC Treaties by virtue of Article 103 of the UN Charter.[50] At the same time, the EC Treaty itself is said to 'yield to the Charter' by virtue of Article 307 of the EC Treaty,[51] according to which the Treaty does not affect the obligations for Member States arising from pre-existing international agreements. Although the Community is not a party to the Charter, the CFI argued at length that the Community is bound by it, given that 'in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community'.[52]

Once the CFI had asserted that the Community was bound by UN law, it followed that it was not in a position to review its validity according to EU law standards. It thus refused to review a Community regulation that merely implemented a UN Security Council resolution—without the exercise of any discretion—according to the general principles of Community law (in particular, those regarding the protection of fundamental rights). In its view, doing so would amount to reviewing the UN Security Council resolution itself.[53] As a result, the CFI believed it has only limited competence in this case.[54] But this did not mean that no review could take place; the Court's limited competence still allowed it to review the validity of this regulation in light of *jus cogens*:

> International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that

of general application. The regulation at stake prescribed individual sanctions and had therefore, according to the applicants, no general application. The CFI rejected both claims.

49 Article 27, Vienna Convention on the Law of Treaties and Article 103, UN Charter, respectively.

50 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

51 Tomuschat, 'Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*; Case T-315/01, *Yassin Abdullah Kadi v Council and Commission*', (2006) 43 *Common Market Law Review* 537 at 542.

52 *Yusuf*, supra n. 43 at para. 253. To this end, the CFI relied extensively on the analogy of 21/72, *International Fruit Company and others/Produktschap voor Groenten en Fruit* [1972] ECR 1219, the case where the ECJ had to rule on whether the Community was bound by the GATT. See *Yusuf*, at paras 245, 246, 250, 251 and 253.

53 *Yusuf*, supra n. 43 at para. 266.

54 Ibid. at para. 269.

> may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.[55]

It is in light of the standard of protection of fundamental rights afforded by *jus cogens* that the CFI set out to examine the applicants' claims.

As regards the alleged breach of the right to property, the CFI argued that the freezing of funds did not have the aim to submit the person affected to inhuman or degrading treatment, since the regulation allowed for derogations in the case of basic and extraordinary expenses.[56] Moreover, according to the Court, only an arbitrary deprivation of property can be considered a breach of the right to property protected by *jus cogens*;[57] the deprivation at issue could not be considered arbitrary, inappropriate or disproportionate.[58]

The Court then moved on to consider the second claim, on the possible breach of the right to be heard: the applicants contended that they had not been informed of the reasons or justification for the sanction, nor were they given the opportunity to be heard during its adoption. On this point the CFI distinguished between the applicants' rights to be heard by the UN organs—prior to their inclusion in the list—and by Community institutions, prior to the adoption of the regulation. In the first case, the Court could not find any rule of *jus cogens* which would oblige the UN Sanctions Committee to hear the applicants prior to their inclusion in the list; furthermore, the purpose of the measure could have been defeated by alerting the persons at an early stage, and, finally, individuals could later rely on their State to request the Sanctions Committee to remove them from the list. In the second case (the right to be heard before the Community institutions), the Court conceded that 'the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law'.[59] This, however, could not apply where the Community institutions exercise absolutely no discretion—exactly the present situation.

Finally, the CFI had to deal with the applicants' right to an effective judicial remedy, and it held that its assessment of the regulation with regard to the UN resolution being implemented from the viewpoint of procedural and substantive appropriateness, internal consistency and proportionality, plus the review of the contents of the regulation that the Court carried out in light of *jus cogens*, was sufficient to uphold this right. There was a *lacuna* in judicial protection in that there was no judicial remedy available to the applicants against the application of the Security Council resolution, but this, in the view of the Court, did not

55 Ibid. at para. 281.
56 Ibid. at paras 290–91.
57 Because of Article 17(2), Universal Declaration of Human Rights, which provides that '[n]o one shall be arbitrarily deprived of his property'.
58 *Yusuf*, supra n. 43 at paras 293–302.
59 Ibid. at para. 325. This applies in principle to a regulation if it is of direct and individual concern to the applicants.

amount to a breach of their fundamental rights: the right of access to courts is not absolute.

> [T]he limitation of the applicants' right of access to a court . . . is inherent in that right as it is guaranteed by *jus cogens*. . . . Such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII of the Charter of the United Nations and by the legitimate objective pursued. In the circumstances of this case, the applicants' interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security.[60]

In the absence of an international court with jurisdiction to review these measures, the CFI went on to say, the fact that individuals can resort to their government to get their case reviewed before the Sanctions Committee was 'another reasonable method of affording adequate protection of the applicants' fundamental rights as recognised by *jus cogens*.'[61]

In a later case, *Ayadi*, the CFI reiterated its position, adding a further twist: Member States have an obligation to protect their affected citizens through the diplomatic mechanism offered by the UN system.[62] This way of attempting to fill a gap in judicial protection by developing and imposing a new obligation on Member States is reminiscent of the approach taken by the ECJ to the problem of standing for individuals who want to challenge general instruments of EC law directly.[63] Needless to say, this 'solution' is not without difficulties.[64]

In general, the way in which the CFI dealt with Community measures that implement UN sanctions leaves a bad taste in one's mouth. We are left with the impression that there is a gap in the system, and that it is therefore not working properly. The European Community operates within a system of multi-level governance: many competences of the nation-state have been 'sourced out' to different levels of supra-national cooperation. This is a long process of adjustment which creates problems of overlap and synchronisation, and requires rules of conflict resolution. According to Nettesheim, conflict arises 'when the evolution of differing public powers does not coincide with the simultaneous

60 Ibid. at paras 343–44.
61 Ibid. at para. 345.
62 T-253/02, *Chakif Ayadi* [2006] ECR II-2139 at para. 144.
63 Under Article 230(4) EC, the ECJ continues to apply a very restrictive test to grant standing to individuals, and this can in turn lead to a gap in judicial protection. The ECJ dealt with this in *UPA* by imposing an obligation on Member States to make it easier for individuals to challenge EC legislation indirectly before national courts: C-50/00P, *UPA v Council* [2002] ECR I-6677. See Nettesheim, supra n. 45 at 574–5.
64 As a matter of principle, it is debatable whether a diplomatic mechanism can substitute judicial protection. It is also not clear whether it can be effective. See Nettesheim, ibid. at 575.

evolution of standards regarding the protection of human rights and corresponding mechanisms of legal protection'.[65] In *Yusuf, Kadi* and *Ayadi* the CFI had to face such a conflict, in that it had to deal with measures produced at a different level of governance—a level without a system of protection of fundamental rights equivalent to that of the EC. The question is, of course, whether there was anything else the CFI could have done to deal with this conflict in a more satisfying manner.

It is contentious whether the EC is bound by UN law in the way the CFI envisaged. The Court followed the case-law of the ECJ in *International Fruit*,[66] a case where it was decided that the EC was bound by the GATT. Yet, the analogy cannot be complete: Member States had totally surrendered the competences covered by the GATT, something that has not happened as regards the competences covered by the UN Charter.[67] Granted, the EC cannot prevent the Member States from implementing a Security Council resolution just as the one at stake here; but it is arguable that this does not necessarily entail that the EC itself has to implement it.

Were we to agree that the EC is bound by the Security Council resolution to the same extent that its Member States are,[68] it is still debatable whether the CFI had to limit its jurisdiction the way it did. The CFI referred to the EC as the 'domestic legal order', as opposed to the international one. Public international law instruments do not have a claim as to how they penetrate a domestic legal system: this depends on the domestic legal system itself.[69] The EC can be described as dualist in this context, because it implements a UN Security Council resolution rather than allowing direct applicability within its domestic legal system. Typically, public international law instruments bind the state. When applying this instrument, however, the national court is not under a national law obligation to ignore the domestic constitution, if there is a conflict between them. Of course, the national court may cause the international responsibility of the State to arise,[70] but it is not under an obligation to apply the international instrument that conflicts with the national constitution (and no-one would expect it to do so).[71] Extrapolating this to the EC, we can see how the CFI could

65 Nettesheim, ibid. at 567.
66 *International Fruit*, supra n. 52.
67 Dashwood, 'Commentary', in Arnull, Schlemmers and Dashwood, *CELS Occasional Paper No. 1: The Human Rights Opinion of the ECJ and its Constitutional Implications* (June 1996) 18 at 25–26, makes this point with regard to the ECHR.
68 On the different underlying assumptions, see Tomuschat, supra n. 51 at 543.
69 For an overview of the relationship between international and domestic law see Cassese, 'Modern Constitutions and International Law', (1985) 192 *Hague Recueil des Cours* 331; Jacobs and Roberts (ed.), *The Effects of Treaties in Domestic Law* (London: Sweet and Maxwell, 1987); and Buergenthal, 'Self-Executing and Non Self-Executing Treaties in National and International Law', (1992) 235 *Hague Recueil des Cours* 303.
70 Claes, supra n. 41 at 167–8.
71 This is the duty imposed upon national courts that deal with a conflict between national and EC law, also called the *Simmenthal* duty.

have put its loyalty to the domestic legal system first, reviewing the implementing instrument according to EC law standards, and annulling it if necessary. The EC may have been in breach of its international obligations, but the CFI itself would not have breached any legal obligation—it would have done what any national constitutional court would have.[72]

Arguably, the CFI wrongly viewed the primacy of public international law in the same way as the primacy of EC law: as an obligation imposed directly on national courts, the so-called '*Simmenthal* duty' or obligation to disapply national law that conflicts with EC law.[73] That was why it referred to *Internationale Handelsgesellschaft*,[74] where the ECJ stressed that Community law cannot be reviewed for accordance with national fundamental rights standards. Two objections can be raised: first, it can be argued that the UN law–EC law relationship should not be compared to the EC law–national law relationship, but to the EU law–national law one. EC law has stronger features which distinguish it from classic public international law. Second, by the time of *Internationale Handelsgesellschaft* the EC legal system had accepted fundamental rights as a general principle of law and was prepared to protect them.[75] It was, therefore, reasonable to ask domestic legal systems to relinquish their control in favour of a system with an equivalent mechanism of protection of fundamental rights—something not present in this case.

In general, one cannot help but think that the CFI should have put its own constitutional obligations above the international law obligations of the EC,[76] and wish that the ECJ takes a different approach in the now pending appeals in *Yusuf*, *Kadi* and *Ayadi*.[77] The contrary may lead to a gap in the protection of individuals and a possible reprimand by the European Court of Human Rights.[78]

72 It is worth remembering how the Polish constitutional court annulled the national law that implemented an EU law measure (the EAW Framework Decision) because it did not accord with its constitution. The latitude given by the Framework Decision to the national legislator did not allow for a constitutional implementation in any case; the case is therefore comparable to the present, where the EC legislator had no discretion to change the content of the UN resolution in any way. See Section 2.

73 See supra n. 71. On the contrary, the ECJ—despite its use of monist terminology—has always made sure that international law acts pass thorough controls before being allowed applicability within the EU legal system. See Nettesheim, supra n. 45 at 582. For a general overview of the legal effects of international law instruments within the EU legal system, see Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004) at 274–344.

74 11/70, *Internationale Handelsgesellschaft* [1970] ECR-1125.

75 Tomuschat, supra n. 51 at 544.

76 Even if in disagreement, it is debatable how the CFI conducted its review of the UN resolution against the standards of *jus cogens* in practice. See Tomuschat, ibid. at 547–51.

77 Pending cases C-415/05, C-402/05 and C-403/06, respectively.

78 This occurrred in the case of *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 EHRR 1. See Hinarejos, 'Bosphorus v Ireland and the Protection of Fundamental Rights in Europe', (2006) 31 *European Law Review* 251; and Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', (2006) 6 *Human Rights Law Review* 87.

It may also lead to an unjustifiable inequality because economic sanctions against individuals adopted by the EC of its own motion (without stemming from UN law) are fully reviewable against EC human rights standards, considerably higher than *jus cogens* standards. Accordingly, in *Organisation des Modjahedines du Peuple d'Iran* (*OMPI*),[79] the CFI exercised its full jurisdiction when reviewing an EC Council decision which contained a list comparable in all respects to that at stake in *Yusuf* and *Kadi*. This was the first case where the CFI annulled a Community measure freezing an individual's assets, and it did so after finding that the right to a fair hearing, the right to a fair trial and the right to effective judicial protection are, as a matter of principle, fully applicable.[80] The measure did not pass the test.[81]

Leaving aside the review of EC measures, there is a further element of interest in *OMPI*. It was mentioned before that the adoption of sanctions of individuals by the EC generally occurs after the adoption of a common position within the second pillar of the EU. In *OMPI*, the claimant urged the CFI to review this common position as well.

The EU courts are not competent to review common positions: neither directly, through an action for annulment, nor indirectly, by giving a preliminary ruling to a national court that is dealing with the common position and seeks guidance. It therefore came as no surprise at the time that the CFI refused to review the common position at issue in *OMPI*. The CFI had already come to a similar conclusion in the earlier case of *Segi*,[82] where another common position with an annexed list of terrorist organisations had been at issue.

It seemed, then, that EU common positions were to remain outside the realm of judicial review. The CFI's decision in *Segi* was, however, appealed before the ECJ.[83] The ECJ took a different approach to the reviewability of EU common positions, substantially extending judicial control in the intergovernmental pillars of the Union.

In *Segi*, there was no EC regulation implementing a common position; just a common position containing a list of terrorist organisations. The claimants had sought damages for the disadvantages they had faced as a consequence of being listed—if their action was rejected, they argued, they would have no access to judicial protection.[84] Following the CFI rejection of their claim, they appealed to the ECJ. They were not successful in their first endeavour: the ECJ agreed

79 T-228/02, judgment of 12 December 2006.
80 Ibid. at paras 91–111. The CFI distinguished this case from *Yusuf* and *Kadi* at paras 99–108.
81 Eckes, 'Case T-228/02, *Organisation des Modjahedines du Peuple d'Iran v Council and UK (OMPI)*', (2007) 44 *Common Market Law Review* 1117–29.
82 T-338/02, *Segi* [2004] II-01647 ('CFI *Segi*').
83 C-355/04 P, judgment of 27 February 2007 ('ECJ *Segi*').
84 This was a common position adopted both under the second and third pillars of the EU, on the basis of Articles 15 and 34, TEU.

with the CFI that there was no jurisdiction to entertain an action for damages in the intergovernmental pillars of the Union.[85] The surprise came when the ECJ had to deal with the applicants' right to judicial protection in the face of a common position: whilst the CFI had stated that the fact that the plaintiffs have no access to judicial protection could not lead to the Court pushing the limits of its competence,[86] the ECJ found a way to do exactly that.

The ECJ argued that the review, either direct or indirect, of common positions is not foreseen in the TEU because these measures are not supposed to produce legal effects in relation to third parties. The intention of the Treaty (Article 35 of the TEU) is to allow for review of all measures that do produce such effects. Consequently, if a common position intends to produce such effects, it may be reviewed according to Article 35 of the TEU.[87] This meant that, on the one hand, common positions may be reviewed indirectly: individuals may challenge their validity through national courts, and the latter may ask for a preliminary ruling from the ECJ. On the other hand, a direct action for annulment may be brought before the ECJ by a Member State or the Commission. It follows that individuals cannot challenge a common position directly—the TEU does not foresee this for any measure adopted under the intergovernmental pillars—but they can at least hope for indirect review. *Segi* was unsuccessful on this count because it was trying to challenge the common position directly.

The fact that individuals can only hope for indirect review of common positions through Article 35 of the TEU is not ideal; the problems of this approach include the need for national implementation in order to have access to a national court and the fact that the individual has no right to a reference to the ECJ and no influence on how the question is framed. More importantly, this preliminary reference procedure is not available with the same features in all Member States. The ECJ was aware of this, and sought to remind Member States of their '*UPA* obligation' to make it as easy as possible for individuals to have access to this indirect action.[88]

In any case, the balance in *Segi* must be a positive one. The ECJ was at pains to extend its jurisdiction so as to allow for more much-needed judicial control in the intergovernmental pillars. A multitude of anti-terrorism measures that are bound to affect the rights of individuals are being adopted in these areas,

85 In the intergovernmental pillars, the Courts only have the jurisdiction conferred upon them by Article 35, TEU—which does not include actions for damages. ECJ *Segi*, supra n. 83 at paras 45–8.

86 CFI *Segi*, supra n. 82 at para. 38. During the appellate proceedings, AG Mengozzi offered a different view: protection had to reside at the level of the Member States—they should therefore be able to review EU law, free of the *Foto-Frost* mandate. Opinion of AG Mengozzi in *Segi*, delivered on 26 October 2006 at paras 121–32.

87 ECJ *Segi*, supra n. 83 at paras 52–6.

88 ECJ *Segi*, supra n. 83 at para. 56. See supra n. 63.

where the pattern of judicial control foreseen by the Treaty is insufficient. The evolution in the type of action that the Union has undertaken in these pillars must be coupled with an evolution in the pattern of judicial control. The ECJ has shown that it is aware of this, and that it is willing to push the boundaries to some extent until the Treaty undergoes these needed reforms.