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**Judicial Review of United Nations Counter-Terrorism Sanctions in
the European Multilevel System of Human Rights Protection**

A Case Study in Ineffectiveness

Federico Fabbrini*

I Introduction

The purpose of this chapter is to assess how effective the protection of fundamental rights is in the European multilevel system of human rights protection: the issue of judicial review of United Nations (UN) counter-terrorism sanctions in the European legal space is taken into account as a case study. My argument will be that the European human rights architecture still has gaps where the protection of fundamental rights is severely undermined. I will claim however that the substantive transformations produced by the jurisprudential dialogue among the highest European courts and the formal transformations that would be generated by the entry into force of the European Union (EU) Reform Treaty adopted in Lisbon show the potential for overcoming these *lacunae* of the European multilevel system, thus enhancing the protection of fundamental rights.

The chapter is structured as follows. In part II I will briefly outline the main traits of the European multilevel system of human rights protection and introduce the problem of ineffectiveness conceptualizing it as one of the major shortcomings of the European human rights architecture. In part III I will argue that the problem of ineffectiveness of human rights protection manifested in the European multilevel system because of the early impossibility for the individuals and the entities targeted by the UN counter-terrorism sanctions of having a court review the lawfulness of such measures. I will maintain, however, that a recent evolution in the jurisprudence of the European Court of Justice (ECJ), especially if coupled with the innovations that might be introduced by the Lisbon Treaty, has provided an answer to this situation. A brief conclusion will follow in part IV.

II Multilevel Protection of Fundamental Rights in Europe and the Problem of Ineffectiveness

The European human rights architecture is characterized by a three-layered structure.¹ Fundamental rights in Europe are protected by

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¹ In this chapter, following Walker (2009) 1, I use the concept of multilevel constitutionalism in a broad sense. Whereas *strictu sensu* multilevel constitutionalism is linked to a particular school of thinking about contemporary constitutional developments centred around the work of Pernice (1999) 703; Pernice (2002), 511; Mayer (2003); *lato sensu*, the label refers to any scholarly position maintaining that constitutional ideas, institutions, norms and practices apply in settings beyond the State (e.g. the theory of compound constitutionalism). See: Barbera (2000) 59; S. Cassese (2002); Della Cananea (2003); Besselink (2007).

national, supranational (EU) and international (European Convention of Human Rights - ECHR) norms and institutions.² The protection of human rights is based on substantive rights backed up by institutional remedies through the method of judicial review.³ The protection of human rights is thus the combination of rights on the books with remedies in action. Rights are proclaimed in national Constitutions and in the ECHR, and are recalled in the EU Treaty, that identifies the constitutional traditions common to the member states and the ECHR as general principles of community law.⁴ National courts, the ECJ (which includes the Court of First Instance – CFI)⁵ and the European Court of Human Rights (ECtHR), then, provide remedies against rights' infringements.⁶

Notwithstanding its apparent comprehensiveness the European system of human rights protection has manifested a number of problems. Several criticisms have been addressed by scholars to *particular* features of the protection of fundamental rights in the (various layers of the) European multilevel structure.⁷ I propose here, however, to identify and define a clearly framed problem of the European human rights architecture *as a whole*. By resorting to the Hartian idea of the 'hard case'⁸ I argue that it is possible to categorize theoretically (some among) the most serious empirical setbacks that have emerged in the European system of human rights protection by using the concept of 'ineffectiveness'.⁹ I consider as falling under this category all the situations arising when the

² The literature on multilevel protection of fundamental rights in Europe is vast, see among many: Zagrebelsky (2003); D'Atena (2004); Douglas-Scott (2006b) 629; Cartabia (2007) 13; Krisch (2008) 183.

³ Weiler (1991) 555, 559.

⁴ See De Witte (1999a) 859; Von Bogdandy (2000) 1307; De Burca (2001); Pizzorusso (2002).

⁵ It shall indeed be remembered that the CFI is part of the ECJ and that according to Article 220 EC Treaty (OJ 2006 C 321/E/46), they both 'shall ensure that in the interpretation and application of this Treaty the law is observed'. Note that the European judicial system is composed by 'the ECJ, with its ancillary body, the CFI, on top, and by national courts': Cartabia & Weiler (2000). See also Craig (2001) 177, 178.

⁶ See Harlow (1999); Lenaerts & De Smijter (2001) 90; Wildhaber (2002) 161; Schimmelfenning (2007) 100.

⁷ See, e.g., A. Cassese, Clapham & Weiler (1991) 1; Besselink (1998) 629; Alston & Weiler (1999) 3, 9; Harlow (cf. *supra*: note 6) 190; Spielmann (1999) 757; De Witte (cf. *supra*: note 4) 883; Scheeck (2005); Gennusa (2007) 91; Harpaz, (2009) 105.

⁸ I borrow the concept of 'hard case' from Hart (1983) who employs it in his celebrated theory of interpretation to distinguish those cases where the meaning of a normative disposition is unclear from those cases where, on the contrary, the situation falls within the core of the normative disposition. For the purpose of this work the Hartian concept of 'hard case' will be utilized to identify those cases laying in the 'penumbra' of the application of the multilevel rules of human rights protection, raising the biggest concerns for the integrity of the European multilevel system. On Hart's legacy see Barberis (2005) 224.

⁹ The identification of the problem of ineffectiveness used in this paper is therefore essentially inductive: it is an attempt to organize (some among) the multiple and contingent criticisms that are addressed to the (various layers of) the European multilevel system of human rights protection (see *supra* note 7) by abstracting them in a more general theoretical category. For an argument that the role of scholars in the

European multilevel system does not provide protection against rights' infringements, given a lack of available rights and remedies at any layer of the structure.

If there are no rights and remedies, the system has a *lacuna*, a legal gap, where human rights are in peril. As such, the problem of ineffectiveness represents one of the major shortcomings of the European multilevel system of human rights protection.¹⁰ When the system is ineffective, the protection of human rights is frustrated since there are cases in which no safeguards are available to protect individuals against the illegitimate activity of public authorities. What distinguishes a constitutional system based on the 'rule of law' from other kind of polities or social compacts founded on other values, however, is exactly the possibility for the individuals illegitimately affected by the exercise of public authority to obtain justice.¹¹ In normative terms, a well-functioning system for the protection of human rights should hence be framed in order to provide the most effective protection against all sorts of violations.¹²

It is submitted that the view that underpins my research is largely rooted in the principles of John Locke's constitutionalism¹³ and based on the idea that fundamental rights are natural and inalienable endowments of every individual that must be protected against the encroachment of the majoritarian political power.¹⁴ In this liberal tradition, the institutions whose purpose is to ensure the protection of individual rights are essentially the courts of law.¹⁵ From this point of view, therefore, the parameter on the basis of which to assess the effectiveness of human rights protection is the possibility for individuals adversely affected by the action of public authorities to obtain judicial redress.¹⁶ I do not need to say, however, that there are other possible ways of looking at the effectiveness of a system of human rights protection, based on different conceptions of constitutionalism and rights.¹⁷

field of constitutional law is precisely to start from empirical evidences to elaborate doctrinal concepts that may help in explaining and rationalizing the complexities of reality see Morrone (2001) 7.

¹⁰ A. Cassese, Clapham & Weiler (cf. *supra*: note 7) 3.

¹¹ See Shapiro (1981); Barak (2006) 51; Zagrebelsky (2008) 116.

¹² A. Cassese, Clapham & Weiler (cf. *supra*: note 7) 7.

¹³ See Locke (1690, reprinted 1980).

¹⁴ See among many: Bobbio (1992); Zagrebelsky (1992); Barbera (1997); Saio (1999); Breyer (2005); Haberle (2006); Cheli (2006).

¹⁵ According to the renowned theory of McIlwain (1947) the development of an independent judiciary guarantor of the fundamental rights and liberties of the individuals historically originated from the distinction between the concepts of *gubernaculum* and *iurisdictio* in Middle-Age England.

¹⁶ For similar statements at the national level see Cheli (1996); Morrone (cf. *supra*: note 9); Bin (2004). With regard to the EU and the international (global) system see Weiler (cf. *supra*: note 3) 565; Poyares Maduro (2005) 332; Von Bogdandy, Dann & Goldmann (2008) 1375, 1376.

¹⁷ In the so called 'Jacobinian' constitutionalist tradition, for example, rights are not considered as pre-political endowment of the individual but rather as the product of activity of the political powers. In this vision the role of courts in ensuring the effectiveness of human rights protection is far more limited since it is believed that the main instrument to attribute rights to individuals is the exercise of legisla-

The constitutional systems of the European countries, nonetheless, confirm the importance of an effective judicial protection of fundamental rights.¹⁸ In the civil law countries, which recognize the principle *ubi ius ibi remedium*, access to justice has progressively emerged as an autonomous individual rights whose purpose is to make all the other substantive rights effective.¹⁹ In the common law countries, because of the tradition of the forms of action, the existence of an effective remedy precede the attribution of an individual rights as only *ibi ius ubi remedium*.²⁰ Both constitutional models acknowledge that human rights shall be effectively protected, be it through a general right of access to court or a specific remedy in front of an independent tribunal. In addition, with the constitutionalization of the European legal space, such principles have moved to the international and supranational systems, increasing the convergence between the two models.²¹

At the international level, Article 6 of the ECHR codifies a right to fair trial and Article 13 states that ‘everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’²² In *Golder*,²³ the ECtHR, drawing from the concept of the ‘rule of law’ in the preamble of the ECHR, interpreted Article 6 as not being ‘limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, [but also as] secur[ing] a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined.’²⁴ On the other hand, it is a fairly established statement of the ECtHR, that the ECHR ‘is intended to guarantee

tive powers expressing the general will. See Barbera (cf. *supra*: note 14) 10; Troper (2007). It may be debated whether this idea of constitutionalism is compatible with the growing pluralism of values that characterize multicultural societies. See Habermas (2005) 63; Facchi (2006).

¹⁸ See Trocker (2007) 421, 435. As affirmed by De Vergottini (1998) 11, this testify the spreading of the principles of liberal constitutionalism Europe-wide in the second half of the XX century.

¹⁹ See, e.g., Article 24(1) of the Italian Constitution recognizing that ‘tutti possono agire in giudizio per la tutela dei propri diritti ed interessi legittimi’ and the similar notion of ‘one’s natural judge’ developed under German constitutional law. For a comparative overview of the concept Europe-wide see Storskrubb & Ziller (2007) 177.

²⁰ See Mattei (1996), who recalls the celebrated statement of Maitland (1948) according to which ‘the forms of action are a part of the structure upon which rests the whole common law of England and, though we may have buried them, they still rule us from their graves.’

²¹ Trocker (cf. *supra*: note 18) 435; Storskrubb & Ziller (cf. *supra*: note 19) 184.

²² According to Wildhaber (2004) 83, ‘the principal and overriding aim of the system set up by the ECHR is to bring about a situation in which in every Contracting State the rights and freedoms are effectively protected.’

²³ *Golder v. United Kingdom* ECHR [1975], Application No. 4451/70.

²⁴ *Id.* at §25. See Harlow (cf. *supra*: note 6), 203.

not rights that are theoretical or illusory but rights that are practical and effective.²⁵

Also the ECJ has recognized in its landmark *Johnston* decision²⁶ that ‘the requirement of judicial control [...] reflects a general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in articles 6 and 13 of the ECHR [...] and as the Court has recognized in its decisions, the principles on which that convention is based must be taken into consideration in Community Law.’²⁷ By virtue of this judgment, therefore, ‘all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to’ their fundamental rights. By enshrining in Article 6 of the EU Treaty²⁸ the principle that the EU ‘is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’ the Masters of the Treaty have furthermore reassessed the need for effective judicial review.²⁹

In addition, Article 47 of the EU Charter of Fundamental Rights (CFR)³⁰ – which is entitled ‘Right to an effective remedy’, just as Article 13 of the ECHR – clearly recognizes that ‘everyone whose rights and freedom guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.’ Although the CFR does not have legal value yet and is not binding over the EU institutions and the Member States when concerned, its formal and solemn proclamation by the EU Parliament, Council and Commission in Nice in 2000 and its subsequent inclusion in the Treaty Establishing a Constitution for Europe³¹ and in the Lisbon Treaty confirm that the Member States and the EU institutions ‘have agreed to the wording of the Charter as being representative of the contents of the rights it endeavours to protect.’³²

De iure, therefore, in every layer of the European multilevel system the availability of effective judicial remedies is considered as essential to guarantee respect and protection of fundamental rights. There is however ‘a number of possible human rights violations [that] may, in fact, never reach’³³ a judge or another officer authorized by law to exercise judicial power. ‘In every legal system there is a gap between the law in the books and the law in action.’³⁴ In

²⁵ *Airey v. Ireland*, ECHR [1979], Application No. 6289/73, at § 24. See also *Artico v. Italy*, ECHR [1980], Application No. 6694/74 at §33; *Goodwin v. United Kingdom*, ECHR [2002], Application No. 28957/95, at §74.

²⁶ Case 222/84, *Johnston v. Chief Constable of the Royal Ulster*, [1986] ECR 1651.

²⁷ *Id.* at §18.

²⁸ OJ 2006 C 321/E/1.

²⁹ Gaja (1999) 780, 794; Shelton (2004) 349.

³⁰ OJ 2000 C 364/1.

³¹ OJ 2004 C 310/1.

³² Stroskrubb & Ziller (cf. *supra*: note 19) 184. See also Ward (2004) 123.

³³ De Witte (cf. *supra*: note 4) 883.

³⁴ Snyder (1993) 19, 26.

the field of human rights protection, nonetheless, the existence of a gap should be a cause for concern.³⁵ It is hence important 'to identify the gaps which exist; to explain why they exist; to identify and distinguish those gaps which are likely to be long-term features of the [...] system; and, if possible, to focus on those [...] gaps which pose real difficulties for the operation and the development of'³⁶ the European multilevel structure of human rights protection.

From this point of view, addressing the developments in the protection of fundamental rights in Europe may prove particularly useful. The European system of human rights protection, indeed, is currently at the heart of several transformations. A substantive transformation is produced by the constant jurisprudential activity of the highest European courts³⁷ dialoguing one with another in the joint effort to overcome the new human rights challenges.³⁸ A formal transformation might derive then by the entry into force (hopefully late in 2009 or at the beginning of 2010) of the Reform Treaty, which was signed in Lisbon in December 2007 – but has not been ratified yet by all 27 EU member states.³⁹ It is hence fruitful to take into account these transformations to evaluate whether they may reasonably solve the problem of ineffectiveness of the European multilevel system of human rights protection.

The issue of judicial review of UN counter-terrorism economic sanctions provides a good example of the problem of ineffectiveness, highlighting the pernicious effects that the lack of adequate human rights protection in any layer of the European multilevel structure may cause. On the other hand, this case

³⁵ A. Cassese, Clapham & Weiler (cf. *supra*: note 7) 75 who argue that 'human rights protection is a question of constant vigilance.' See also Alston & Weiler (cf. *supra*: note 7) 24.

³⁶ Snyder (cf. *supra*: note 34) 26.

³⁷ I follow and generalize here the approach adopted by Shapiro (1999) 321 who argues that any analysis of the 'ECJ must be placed within two evolutionary contexts. One is the evolution of the Union itself. [...] The other is the evolution of the courts engaged in higher law judicial review.' On the dynamic character of human rights jurisprudence see McCrudden (2000) 499, 500. On the recent transformation in the case law of the highest European courts in the field of human rights see Canor (2000) 3; De Burca (2003); Shapiro (2005).

³⁸ On judicial dialogue the literature is now vast. See Slaughter (1994), 99; Slaughter (2003) 191; Lavranos (2008); S. Cassese (2009). With specific reference to judicial dialogue in the European legal space see Jacobs, (2003) 547; Martinico & Fontanelli, (2008) 351; Cartabia (2009) 5.

³⁹ OJ 2007 C 306/1. The Lisbon Treaty has already been ratified by 26 of the 27 EU Member States. However the Treaty has been approved by Parliament but still awaits presidential signature in the Czech Republic. In Germany the constitutionality of the ratification act has been acknowledged by the Constitutional Tribunal – BVerfG judgment of 30 June 2009 – on the condition of the enactment of an additional statute strengthening the responsibility of Parliament in EU affairs. In Ireland a popular referendum held on 12 June 2008 rejected the ratification of the Treaty, but a new referendum held on 2 October 2009 as requested by the Presidency Conclusions of the European Council of 11 and 12 December 2008, Council of the European Union Doc. 17271/08 eventually approved it. For the data concerning the advancement of the ratification procedure in the various EU Member States see: <http://www.euractiv.com/en/future-eu/ratifying-treaty-lisbon/article-170245> (last visited on 14 October 2009).

study has the advantage of illustrating how the current substantive and formal transformations may have a positive outcome in filling the gaps in the European multilevel system of human rights protection. To this end, in the next section, the issue of judicial review will be considered diachronically, from a European constitutional law perspective.⁴⁰ The chronological approach has the advantage of highlighting the gradual transformations in the protection of fundamental rights and the dynamics of the relationship between national, supranational and international courts in the European multilevel system.

III A Case Study: Judicial Review of UN Counter-Terrorism Sanctions

One of the major strategies adopted by the UN to fight against the phenomenon of international terrorism⁴¹ has been, especially in the wake of 9/11/2001,⁴² the adoption of economic sanctions targeting specific individuals or entities suspected of being involved in the financing of terrorism, and freezing their assets.⁴³ The highly political and confidential mechanisms through which such counter-terrorism measures are established, however, has raised concerns as to the respect of the fundamental rights of the natural and legal persons affected⁴⁴ and has raised the question of whether the judiciary should have the authority to step into the thorny field of national security to ensure an effective

⁴⁰ For a thorough assessment of the topic from a public international law perspective see Scheinin (2009).

⁴¹ On the UN global counter-terrorism strategy see: A/RES/60/228 (2006); A/60/825 (2006); A/RES/62/272 (2008). For an overview of UN policies in the field of counter-terrorism see: Bianchi (2006) 881; Frowein (2006) 785. The literature on international terrorism is wide: Sterba (2003); Walter et al. (2004); Ramraj et al. (2005). For the problems raised by the normative definition of the phenomenon see instead A. Cassese (2001) 993 and Saul (2006).

⁴² See Condorelli (2001) 829; Fitzgerald (2002) 957. The employment of counter-terrorism sanctions at the UN level began prior to 9/11/2001 (see, e.g. S/RES/1267 (1999), S/RES/1333 (2000), S/RES/1363 (2001)) but steadily grew after the terrorist attacks in the US (see, e.g. S/RES/1373 (2001), S/RES/1452 (2002), S/RES/1455 (2003), S/RES/1526 (2004), S/RES/1535 (2004), S/RES/1566 (2004), S/RES/1617 (2005), S/RES/1730 (2006), S/RES/1735 (2006), S/RES/1822 (2008)). See Frowein (cf. *supra*: note 41) 787.

⁴³ See Ciampi (2007); Halberstam & Stein (2009) 13. On the UN sanction regime more generally see Cortright & Lopez (2000); Farrall (2007).

⁴⁴ See the report of the UN *Special Rapporteur* on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/61/267 (2006), the conclusions of the UN High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/8/13 (2008) and Resolution 1597 (2008) and Resolution 1824 (2008) of the Parliamentary Assembly of the Council of Europe. The literature on the UN sanctioning system and respect of human rights is now vast, see among many: Mégret & Hoffman (2003) 314; Cannizzaro (2006) 195.

protection of human rights by reviewing the compatibility of the counter-terrorism measures established by the UN with human rights standards.⁴⁵

I will argue that the problem of ineffectiveness of human rights protection manifested in the European multilevel system because of the early impossibility for the natural and legal persons targeted by the UN counter-terrorism sanctions of having a court review the lawfulness of such measures. I will claim, however, that a recent development in the jurisprudence of the ECJ, partly anticipating the reforms about to be introduced by the Lisbon Treaty, has provided an answer to this situation and has enhanced the protection of fundamental rights of the persons targeted by the counter-terrorism measures under suspicion of being involved in the financing of terrorism.

Indeed, although European courts had previously exercised judicial review over the legality of (the domestic implementation acts of) UN authorized sanctions addressing conditions of war or international crisis,⁴⁶ in the first decisions dealing with UN *counter-terrorism* sanctions all European courts either lacked or declined the power to exercise judicial review of the acts under scrutiny. This situation was perhaps generated by the attitude of judicial deference of the European judiciaries *vis à vis* the political branches of government acting under the auspices of the UN in the aftermath of a terrorist emergency.⁴⁷ Nonetheless, it severely jeopardized the effectiveness of the protection of fundamental rights in Europe. The *revirement* of the ECJ in the *Kadi* judgment⁴⁸ however, has filled this *lacuna* in the protection of fundamental rights, by acknowledging that all UN anti-terrorism sanctions transposed into the EU legal space are subject to judicial review.

The structure of the section is as follows. Part A introduces the context, briefly outlining the dynamics of the adoption of counter-terrorism sanctions

⁴⁵ Dugard (2005) 83; Almqvist (2008) 303; Tridimas & Gutierrez-Fons (2008) 660.

⁴⁶ The ECJ had already engaged in human rights review in several cases involving UN sanctions adopted by the Security Council under Chapter VII of the UN Charter in the context of the wars in Yugoslavia and Iraq. See for example: Case C-84/95 *Bosphorus v. Minister of Transport* [1996] ECR I-3953; Case C-177/95 *Ebony Maritime SA v. Prefetto della Provincia di Brindisi* [1997] ECR I-1111; Case C-237/98 P *Dorsch Consult mbH v. Council and Commission* [2000] ECR-4549. For an overview see Kapteyn (2003) 57. Review of national measures implementing UN law had also been customary in many domestic legal systems, especially those adopting a dualist position toward international law: see for example the decisions of the Italian and the German Constitutional Courts relating to the status of international law. C. Cost. s. 73/2001; BVerfG III, 307 (2004) *Görgülü*. For an overview see Herdegen (2003) 77.

⁴⁷ I have tried to argue elsewhere, Fabbrini (2009), that a common trend exists in the behaviour of the European and US judiciaries in times of terrorist emergencies: in the aftermath of a terrorist attack courts tend to be extremely deferent *vis à vis* the political branches of government sanctioning most restriction of individual liberties in the name of national security; only in the long run courts reassert their institutional position and exercise a strict scrutiny over the compatibility with human rights of the acts adopted by the executives and the legislatures.

⁴⁸ Joined Cases C-402/05 P and C-415/05 P *Yassin A. Kadi & Al Barakaat International Foundation v. EU Council and Commission* [2008], nyr.

at the UN level and their implementation in the European legal space. Part B focuses on the specific problem generated by the original absence of effective judicial review of terrorism sanctions in either the law in the books or the law in action of any of the layers of the European multilevel system of human rights protection. Part C discusses several developments that have taken place in the case law of the European courts but that have proven to be unsatisfactory because of their inability to provide an effective protection of human rights. Part D analyzes how the recent change in the jurisprudence of the ECJ – acknowledging the power to exercise judicial review of counter-terrorism measures – has instead provided a solution to the problem of ineffectiveness of human rights protection, in line with the reforms that could be introduced with the Lisbon Treaty. Part E draws some *interim* conclusions.

A. Context

Counter-terrorism sanctions are *ab origine* established by a resolution of the UN Security Council (SC) adopted under Chapter VII of the UN Charter, which grants to the UNSC the power to take on all measures necessary for the maintenance of international peace and security.⁴⁹ In the simplest hypothesis, UNSC resolutions charge the UN Member States of the task of identifying the target of the sanctions.⁵⁰ If this is the case, the listing of suspected terrorist by the national authorities is subject to domestic standards of fundamental rights protection.⁵¹ This chapter focuses however on another hypothesis, which raises bigger concerns for the protection of fundamental rights.⁵² With resolution 1267 (1999),⁵³ in fact, the UNSC has started drawing up directly at the UN level a black list of the persons whose assets are to be frozen by all UN Member States:⁵⁴ Specifically, the UNSC established an auxiliary committee (on

⁴⁹ For an introduction to the dispositions of Chapter VII of the UN Charter and a comment article by article see Frowein & Krish (2002) 701; See also De Wet (2004); Denis (2004). On the expansion of the powers of the UN Security Council in the last years, see Matheson (2006).

⁵⁰ See, e.g., S/RES/1373 (2001) §1c which decides that Member States shall ‘freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such person.’

⁵¹ See in general Kuijper (2003) 39. For the EU legal order this has been confirmed by the CFI in Case T-228/02 *Organisation des Modjahedines du peuple d’Iran (OMPI) v. Council of the EU* [2006] ECR II-4665. See also Della Cananea (2007) 896; Cappuccio (2007) 416; Defeis (2007) 1449; Guild (2008) 173.

⁵² See Miller (2003) 46; Flynn (2007) 371; Van Den Herik (2007) 729 and the literature cited *supra* in note 44.

⁵³ S/RES/1267 (1999).

⁵⁴ See Frowein (cf. *supra*: note 41) 787; Ciampi (cf. *supra*: note 43) 42; Halberstam & Stein (cf. *supra*: note 43) 28.

which all the members of the UNSC are represented) and endowed it with the power to list and delist the persons who are to be targeted by the sanctions.⁵⁵

In this case, for the European countries that are part of the EU, the implementation at the domestic level of the UNSC resolutions follows a three-step procedure.⁵⁶ To begin with, a common position listing the individuals and entities identified by the UNSC is adopted in the framework of the II pillar of the EU, which establishes a cooperation among the EU Member States (EUMS) in the field of Common Foreign and Security Policy (CFSP).⁵⁷ Subsequently, a regulation is enacted under the I pillar of the EU, the European Community (EC), on the joint basis of Articles 60, 301 and 308 of the EC Treaty.⁵⁸ The regulation orders the freezing of the assets of all natural and legal persons reported in the Annex to the regulation, and empowers the Commission of the EC to update the Annex following the changes made at the UN level by the auxiliary committee of the SC.⁵⁹ Finally, EUMS give effect to the regulation at the national level, with administrative acts that materially freeze the financial assets of the blacklisted individuals and entities.⁶⁰

⁵⁵ The Committee was established by S/RES/1267 (1999). Its powers and rules of procedure were then modified by successive resolutions. See, e.g. S/RES/1333 (2000), S/RES/1363 (2001), S/RES/1390 (2002), S/RES/1452 (2002), S/RES/1455 (2003), S/RES/1526 (2004), S/RES/1566 (2004), S/RES/1617 (2005), S/RES/1730 (2006), S/RES/1735 (2006), S/RES/1822 (2008). See: Rosand (2004) 745. In the auxiliary committee, the diplomatic representatives of the members of UNSC directly identify the persons who are to be targeted by the sanctions (so called: smart sanctions). The listing procedure is essentially informal, governed by consensus and based on the (often) limited, confidential and non-shared information gathered by the security services of the member states of the UNSC. For an overview of the administrative procedure that governs the functioning of the Sanctions Committee see Feinaugle (2008) 1513.

⁵⁶ See Nettessheim (2007) 567, 571. For a general overview of the constitutional foundations of the external relations of the EU see: Eeckhout (2004); Cremona (2007) 1173. For an assessment of the increase in importance of the EU as a global actor see: Cremona (2004) 553.

⁵⁷ See, e.g., Council Common Position 1999/727/CFSP OJ 1999 L 294/01; Council Common Position 2001/154/CFSP OJ 2001 L 57/01; Council Common Position 2002/402/CFSP OJ 2002 L 139/04. See also Koutrakos (2007) 257.

⁵⁸ For a discussion concerning the existence of an EC competence to adopt and implement economic sanctions targeting individuals and entities, see Garde (2006) 284; Tzanou (2009) 123, 126. Articles 60, 301 and 308 have been considered as a sufficient legal basis for the adoption of target sanctions by the EC both by the CFI in Case T-351/01 *Yassin A. Kadi v. Council of the EU and Commission of the EC* [2005] ECR II-3649 and by the ECJ in Joined Cases C-402/05 P & C-415/05 P *Yassin A. Kadi & Al Barakaat International Foundation v. EU Council and Commission* [2008], nyr, albeit with different arguments.

⁵⁹ See, e.g., Council Regulation 337/2000/EC OJ 2000 L 43/01; Council Regulation 881/2002/EC OJ 2002 L 139/09; Council Regulation 561/2003/EC OJ 2003 L 082/01.

⁶⁰ According to Article 249(2) EC Treaty 'a regulation shall be binding in its entirety and directly applicable' in all EUMS. The intervention of national administrative agency (e.g., banking authorities, police forces etc.) is however necessary to give full effect to the regulation. See, as far as the Italian discipline of assets freezing is concerned, Savino (2008) 497.

B. Lack of Judicial Review

UN counter-terrorism sanctions have a significant impact over the fundamental rights of the targeted individuals and entities.⁶¹ At the substantive level, both the right to property and the right to privacy are at stake. At the procedural level, the right of due process comes into play and requires, at the very least, that before the adoption of the sanctions or in their immediate aftermath interested persons be informed of the reasons justifying the approval of restrictive measure against them and have the right to defend themselves. Due process rights are well acknowledged in each level of the European system of human rights protection.⁶² Wide consensus exists nonetheless among scholars about the deficiencies of the procedure by which the auxiliary committee of the UNSC identifies the targeted-persons: because of the political and diplomatic mechanism by which the listing takes place, significant violations of fundamental rights have been lamented.⁶³

A *posteriori* judicial review is hence essential to ensure respect for these fundamental rights. Indeed, ‘the key to the notion of rule of law is [...] reviewability of decisions of public authorities by independent courts.’⁶⁴ In the first challenges against the UN counter-terrorism measures, however, no court was available to review the compatibility of targeted sanctions with the fundamental rights of blacklisted persons. No judicial institution has ever been established at the UN level before which individuals can activate legal proceedings.⁶⁵ Even supposing that the International Court of Justice (ICJ) could have been competent to review the acts of the UNSC – a possibility, nonetheless, which is far from certain⁶⁶ – the individuals and entities targeted by the UNSC sanctions ‘lacked *locus standi* before the ICJ, traditionally conceived as a judge between states.’⁶⁷

⁶¹ See Fassbender (2006) 437; Ciampi (cf. *supra*: note 43) 123. See also De Wet (2003) 7.

⁶² Such principles historically originated and were codified in the *corpus* of administrative law of the EUMS and then circulated at the supranational and international level, see: S. Cassese (2006a) 1; Tridimas (2006) 370; S. Cassese (2006b); Harlow (2006) 206. Article 41 of the CFR now recognizes a right to ‘good administration’ defined as the ‘right of every person to be heard, before any individual measure which could affect him or her adversely is taken’. Whereas the CFR is not yet binding, the CFI has acknowledged the importance of such principles in its decisions in Case T-228/02 *Organisation des Modjahedines du peuple d’Iran (OMPI) v. Council of the EU* [2006] ECR II-4665 and Case T-256/07 *People’s Mojahedin Organization of Iran v. Council of the EU* [2008], *nyr*.

⁶³ See Reisman & Stevick (1998) 226; Reinish (2001) 851 and literature quoted *supra* in note 44, 45 and 52.

⁶⁴ Jacobs (2007) 35. See also the literature cited *supra* note 11, 14, 16 and accompanying text.

⁶⁵ Nettesheim (cf. *supra*: note 56) 568. See also Akande (1997) 341.

⁶⁶ The ICJ has not excluded this possibility in its judgment *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep. 1971, p. 45, but so far it has not accepted the authority to judge the validity of acts of the UNSC.

⁶⁷ Della Cananea (2009) 519, 523.

However, also in the European multilevel system, judicial review was mute.⁶⁸ Both legal constraints and self-imposed judicial practices prevented the ECJ, the national courts of the EUMS and the ECtHR to step in and review the counter-terrorism acts of the UNSC. This generated a major problem of ineffectiveness in the protection of fundamental rights in the European multilevel system, since there was no remedy available at any level for the persons who wished to challenge the lawfulness of the UNSC measures adversely affecting them. Paragraph 1 following will consider the limitations of the jurisdiction of the ECJ in the CFSP codified by the EU Treaty and the jurisprudence of the CFI refusing competence to review an EC regulation implementing a UNSC anti-terrorism resolution. Paragraph 2 will take into account the structural limits of the jurisdiction of the national courts and of the ECtHR.

I. The ECJ

The EU Treaty excludes the jurisdiction of the ECJ over the acts adopted by the EU Council in the framework of CFSP: according to Article 46(1)(d) EU Treaty, the jurisdiction of the ECJ in the intergovernmental pillars is limited to what is specified by Article 35, which acknowledges a limited role for the ECJ only in the field of Justice and Home Affairs (JHA). A preliminary reference may be submitted (by the judiciaries of the EUMS that have accepted the jurisdiction of the ECJ)⁶⁹ on the validity and interpretations of decisions and framework decisions and on the interpretation of conventions; action for the annulment of decisions and framework decisions may then be brought by the EUMS or by the Commission.⁷⁰ Common positions instead are not contemplated among the acts that may be subject to review before the ECJ.⁷¹

The jurisdiction of the ECJ over the measures adopted in the EC pillar is formally recognized in the EC Treaty. The validity of EC acts may be challenged ex Article 230 – the action for annulment⁷² – and ex Article 234 – the prelimi-

⁶⁸ See: Cameron (2003) 159; Lavranos (2006) 471; Eeckhout (2007) 183; Adam (2009).

⁶⁹ See *infra* note 140 and accompanying text.

⁷⁰ According to Article 35(1) EU Treaty, the ECJ 'shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them'. According to Article 35(6) then the ECJ 'shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.' See also Spaventa (2008).

⁷¹ Peers (2007) 883, 886. The CFI in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council of the EU* [2006] ECR II-4665 has confirmed the inadmissibility of an action of annulment against a common position.

⁷² According to Article 230(4) EC Treaty 'any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the

nary reference procedure.⁷³ In the *Yusuf*⁷⁴ and *Kadi*⁷⁵ decisions of 2005, however, the CFI denied *proprio motu* the power to review the compatibility with human rights principles of an EC regulation implementing the counter-terrorism sanctions established by the UNSC in the EU legal space. The *Kadi* case originated from an action of annulment: the applicant, a Saudi national with substantial funds in the EU who had been black-listed by the UNSC Sanction Committee, alleged that the EC regulation⁷⁶ implementing the UNSC resolution⁷⁷ violated EU constitutional principles (in particular, the right of due process) and asked the CFI to quash the act insofar as it applied to him.

The CFI found it appropriate, in order to answer the question raised by the petitioner, ‘to consider, in the first place, the relationship between the international legal order under the UN and the domestic or Community legal order.’⁷⁸ In the CFI’s view, the Charter of the UN enjoyed supremacy ‘over every other obligation of domestic law and international treaty law,’⁷⁹ including the EC Treaty and the same primacy extended to the resolutions adopted by the UNSC.⁸⁰ Furthermore, the EC should ‘be considered to be bound by the obligations under the UN Charter in the same way as its Member States’⁸¹ by virtue of the assumption of powers ‘previously exercised by Member States in the area

form of a regulation or a decision addressed to another person, is of direct and individual concern to the former’. See *Cartabia & Weiler* (cf. *supra*: note 5) 55. For a critical assessment of the debate concerning the restrictive interpretation of the *locus standi* provision of Article 230(4) EC Treaty see Lewis (2007) 1469.

⁷³ According to Article 234(t) EC Treaty the ECJ ‘shall have jurisdiction to give preliminary rulings concerning (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community’ upon referral by a national court. See Adinolfi (1997).

⁷⁴ Case T-306/01 *Ahmed A. Yusuf & Al Barakaat International Foundation v. EU Council and Commission* [2005] ECR II-3533.

⁷⁵ Case T-351/01 *Yassin A. Kadi v. Council of the EU and Commission of the EC* [2005] ECR II-3649.

⁷⁶ Council Regulation 881/2002 OJ 2002 L 139/9.

⁷⁷ S/RES/1390 (2002).

⁷⁸ *Kadi* at §178.

⁷⁹ *Id.* at §181.

⁸⁰ The judgment therefore confirms great respect for international law, and is consistent with a constitutional reading of the UN Charter. See Fassbender (1998) 529. With specific regard, however, to the due process concerns posed by the UNSC sanctioning process see also Fassbender (cf. *supra*: note 61) 437 and the text accompanying note 63 *supra*. As such, the internationalism of the CFI decision has been praised by some: see Stangos & Gryllos (2006) 466. Nonetheless a series of questions have been raised about the relationship between the legal orders of the UN, the Community and the EUMS: For an assessment of the debate in light of the subsequent ECJ judgment, distinguishing in particular between constitutionalist versus pluralist approaches to international law see in particular Halberstam & Stein (cf. *supra*: note 43) 43 ff and De Burca (2009) 37 ff as well as the literature cited *infra* note 191.

⁸¹ *Kadi* at §193 According to Nettesheim (cf. *supra*: note 56) 574, this argument is ‘somewhat surprising.’

governed by the UN Charter.⁸² The CFI held that the UN Charter (and the acts adopted under it) prevailed even over EC constitutional rules.⁸³

The CFI therefore took the view that ‘a limitation of [its] jurisdiction [wa]s necessary’⁸⁴ here, since ‘any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of EC law relating to the protection of fundamental rights, would [...] imply that the court is to consider, indirectly, the lawfulness of’⁸⁵ a superior UNSC resolution. However, to avoid a full ‘judicial abdication’⁸⁶ which would have produced a complete ‘deficiency in the protection of fundamental rights’⁸⁷ the CFI found itself ‘empowered to check, indirectly, the lawfulness of the resolution of the SC in question with regard to *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 UN, and from which no derogation is possible.’⁸⁸

Nonetheless, the review on the basis of *jus cogens* of the alleged violations of the fundamental rights of the petitioner turned out to be extremely limited.⁸⁹ The CFI excluded that it had the power to ‘verify that there has been no error of assessment of the facts and evidence relied on by the SC in support of the measure it had taken.’⁹⁰ It instead affirmed, leaving a wide margin of appreciation to the UNSC, that ‘the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted *vis à vis* the person concerned in order to frustrate the threats, entails a political assessment and value judgment which in principle falls within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of peace and security.’⁹¹

⁸² *Kadi* at §203 For a description of the theory of succession, according to which the EC has assumed all the responsibilities of the Member States in the fields now covered by Community law (a theory first developed with relation to the GATT: Joined Cases C-21/72 and C-24/72 *International Fruit Company* [1972] ECR I219) and its defence in the present case see Tomuschat (2006) 537, 542-543.

⁸³ This position seems to contradict the normal understanding of the hierarchy of norms within the EC legal order: see Rosas (2008) 71, 78.

⁸⁴ *Kadi* at §218.

⁸⁵ *Id.* at §215.

⁸⁶ Eeckhout (cf. *supra*: note 68) 205.

⁸⁷ Nettesheim (cf. *supra*: note 56) 574.

⁸⁸ *Kadi* at §227 For a critique of this reasoning see Conforti (2006) 333.

⁸⁹ Lavranos (cf. *supra*: note 68) 475. *Contra* Tomuschat (cf. *supra*: note 82) 551, who claims that ‘the judgment show that the CFI did not confine its assessment to *jus cogens* proper, but resorted to applying to their full extent the standards evolved in the practice of the EC judicial bodies.’

⁹⁰ *Kadi* at §284.

⁹¹ *Id.* According to Adam (cf. *supra*: note 68) 10, the CFI has essentially adopted here ‘the theory of the *actes de gouvernement* or political question.’ The political question doctrine was originally crafted by the US Supreme Court in *Luther v. Borden* 48 U.S. 1 (1849) but is still today contested in legal scholarship. See, e.g., Henkin (1976) 597; Franck (1992).

In conclusion, the CFI decided that none of the applicant's arguments alleging breach of fundamental due process right was well founded and it upheld the EC regulation, an instrument necessary 'as the world now stands'⁹² to fight international terrorism. By limiting the scope of its judicial review,⁹³ however, the first decision of the CFI dealing with the legality of EU counter-terrorism measures 'raised several perplexities, since it ended sacrificing entirely the needs of the protection of fundamental rights,'⁹⁴ giving 'a *carte blanche* to the member states'⁹⁵ to disregard the rule of law in implementing resolutions of the UNSC.⁹⁶ The EU constitutional principles were in fact 'outweigh[ed] by the essential public interest in the maintenance of international peace and security'⁹⁷ pursued by the political branches of the EU.

2. The National Courts and the ECtHR

The rulings of the CFI in *Yusuf* and *Kadi* had also a detrimental spill-over effect on judicial review at the national level.⁹⁸ In most EUMS, (administrative) courts are competent to review the compatibility of a specific national administrative decision (i.e. one freezing the assets of a blacklisted person) with the legislative act that enables it, in this case an EC regulation.⁹⁹ Following the well-established *Foto-Frost*¹⁰⁰ doctrine, however, national courts do not have the power to invalidate an EC measure on their own but must refer the matter to the ECJ via the preliminary reference procedure.¹⁰¹ In the case of doubt as to the effective compatibility between an EC counter-terrorism act implementing a UNSC resolution and fundamental rights as general principles of EC law, national courts could activate the mechanism established by Article 234 EC Treaty.¹⁰²

Once the matter would have reached the EU courts, however, the immunity-shield of the *Yusuf* doctrine would have again prevented the ECJ from reviewing the legality of a regulation implementing a UNSC resolution. Since the CFI in *Yusuf* refused to review the EC regulation challenged ex Article 230 EC Treaty

⁹² *Kadi* at §133.

⁹³ Eckes (2008) 74, 82.

⁹⁴ Cartabia (cf. *supra*: note 2) 49.

⁹⁵ Tridimas & Gutierrez-Fons (cf. *supra*: note 45) 682.

⁹⁶ Eeckhout (cf. *supra*: note 68) 205-206. See also Almqvist (cf. *supra*: note 45), 303. A defensive view of the ruling of the CFI is however taken by Brown (2006) 456, 468, who argues that the CFI 'has a responsibility not to hinder the effective implementation of peaceable measures adopted to combat terrorism.

[Freezing of funds] broadly speaking, therefore, should receive judicial backing.'

⁹⁷ *Kadi* at §289.

⁹⁸ Lavranos (cf. *supra*: note 68), 486.

⁹⁹ See Chiti (2004).

¹⁰⁰ Case 314/85 *Foto-Frost*, [1987] ECR 4199.

¹⁰¹ Tesouro (2005) 299. See also Lenaerts (2006) 211.

¹⁰² Gautron (2006) 175.

– through a direct action for annulment by the interested parties – because the act was simply the implementation of a hierarchically superior norm of international law, perhaps the very same conclusion would also have been reached if the validity of that regulation had been challenged ex Article 234 EC Treaty – through a preliminary reference submitted by a national judge who had doubts about the legality of the regulation.¹⁰³

Finally, no judicial resort against the contested counter-terrorism measures could be found by the interested persons before the ECtHR. To begin with, the ECtHR is not competent *rationae personae* to review the acts of the UNSC. This was recently affirmed in the *Behrami and Saramati* judgment.¹⁰⁴ Here, although the applicants, three Albanian nationals living in Kosovo, brought complaints against France, Germany and Norway for various violations of the ECHR that occurred in the course of and after the Kosovo War,¹⁰⁵ the ECtHR denied jurisdiction *ratione personae*.¹⁰⁶ According to the ECtHR, in fact, the defendants were operating under the aegis of the UN, which had authorized the military intervention with a SC resolution in the fulfilment of its ‘unique’¹⁰⁷ responsibility of maintaining international peace and security.

‘Since operations established by UNSC resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security’,¹⁰⁸ in the ECtHR’s view the ECHR could not ‘be interpreted in a manner which would subject the acts and omissions of the Contracting Parties which are covered by UNSC resolutions and occurred prior to or in the course of such missions, to the scrutiny of the Court.’¹⁰⁹ The decision of the ECtHR, by indirectly attributing the conduct of war operations of several Contracting Parties to the UNSC and at the same time denying any jurisdiction over the former, came close to the ‘non-justiciability argument’¹¹⁰ utilized by the

¹⁰³ This hypothesis is developed *in abstracto* since it assumes that the ECJ would have followed the reasoning of the CFI in a preliminary reference challenging the validity of a EU act operating as a legal basis for a national administrative measure. As a matter of fact this hypothesis never came to being, since the ECJ was already able to review the CFI ruling in the *Kadi* case on appeal. See *infra* note 185 and accompanying text.

¹⁰⁴ Joined Cases *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* ECHR [2007], Application No.71412/01 and 78166/01.

¹⁰⁵ For a comment on the judgments see Sari (2008) 151; Bordeau-Livenc, Buzzini & Villalpando (2008) 323.

¹⁰⁶ According to De Burca (cf. *supra*: note 80) 45 ‘the approach of the ECHR – paradoxically the court from which the strongest human-rights-protective approach might have been expected – seems disappointing as it abdicated any role in monitoring compliance with human rights.’ See also Tridimas & Gutierrez-Fons (cf. *supra*: note 45) 685.

¹⁰⁷ *Behrami and Saramati* at §148.

¹⁰⁸ *Id.* at §149.

¹⁰⁹ *Id.*

¹¹⁰ Barak (cf. *supra*: note 11) 177.

CFI in the *Kadi* case.¹¹¹ Its effect was to deprive individuals and entities of the power to challenge a UNSC resolution adversely affecting them in front of the ECtHR.

Since the *CFDT* decision,¹¹² moreover, the ECtHR has declared inadmissible all challenges *versus* the EC, as neither it nor the EU is (yet) party to the ECHR.¹¹³ The ECtHR can review the compatibility with the ECHR of measures adopted by the Contracting parties after the exhaustion of all the available domestic remedies,¹¹⁴ hence operating as a last instance court for Europe.¹¹⁵ In *Matthews v. UK*¹¹⁶ the ECtHR also acknowledged a power to review domestic acts of the EUMS amending primary EU law. The case was brought by a Gibraltar citizen who contested the compatibility of the UK act regulating election to the European Parliament with the right to democratic election recognized by the ECHR. The ECtHR restated that ‘EC as such cannot be challenged before the Court because the EC is not a Contracting Party’¹¹⁷ but it retained jurisdiction over the case.

The decision to review the application was, however, largely due to the fact that the contested UK act could ‘not be challenged before the European Court of Justice for the very reason that it [was] not a ‘normal’ act of the Community, but [it was] a treaty within the Community legal order’¹¹⁸ and that therefore the UK held responsibility *ratione materiae* for the consequences of that Treaty.¹¹⁹ As will be explained in detail in the next sub-section, on the contrary, since the ECtHR’s ruling in *M. & co. v. Germany*,¹²⁰ if the domestic act implements a EC/EU disposition, a presumption of legality will apply. The ECtHR will hence exercise an

¹¹¹ See De Burca (*supra* note 80) whose paper is a detailed and thorough comparison between the ruling of the ECtHR and the judgment of both the CFI and the ECJ in *Kadi* and the different approaches taken by the various European judicial instances on the question of the relationship between international law (UN law) and European law (both EU law and ECHR law) and thus on the nature and scope of judicial review. As underlined by Tzanou (cf. *supra*: note 58) 145, though, ‘the *Behrami and Saramati* decision is to be distinguished from *Kadi*. The Strasbourg court ruled on the issue of jurisdiction [...]. On the contrary in *Kadi* [...] the ECJ did not have to deal with the question of jurisdiction, as the measure before it were [indisputably] adopted by the Community itself even if they derived from UNSC resolutions.’

¹¹² *Confédération Française Démocratique du Travail v. EEC (CFDT)* ECHR [1978]. Application No. 8030/77.

¹¹³ See *Alkema* (1979) 508. In Opinion 2/94 *In re Accession by the EC to the ECHR* [1996] ECR I-1759 the ECJ furthermore excluded that the EC could accede to the ECHR without a modification of the EC Treaty. From a practical point of view, however, the EC and the ECHR have come closer in the recent years, especially thanks to the jurisprudence of the ECJ and the ECtHR: see on this Gennusa (cf. *supra*: note 7) 91, Scheeck (cf. *supra*: note 7) 40, Douglas-Scott (cf. *supra*: note 2) 629.

¹¹⁴ See Petersmann, (2008) 1.

¹¹⁵ *Tanzarella* (2007) 143, 150.

¹¹⁶ *Matthews v. United Kingdom* ECHR [1999], Application No. 24833/94.

¹¹⁷ *Id.* at §32.

¹¹⁸ *Id.* at §33.

¹¹⁹ See *King* (2000) 86.

¹²⁰ *M & co. V. Germany* ECHR [1990], Application No. 13258/87.

indirect review of the legality of an EC measure through a review of the legality of the national measure only in specific (quasi hypothetical) cases.¹²¹

C. Unsatisfactory Developments

The gap in the protection of fundamental rights generated by the original unavailability, for the individuals and entities adversely affected by the UN counter-terrorism resolutions, of effective judicial review in each layer of the European multilevel structure, prompted the European courts to react by elaborating several possible antidotes in their jurisprudence.¹²² For all practical purposes, however, all these judge-made doctrines, although remarkable, fell short of a truly adequate response to the problem of ineffectiveness that had manifested in the European multilevel system of rights protection. In paragraph 1 I will take into account some innovative judgments of the ECJ both in the I and in the III pillar of the EU. In paragraph 2 I will go on to consider the *Solange* jurisprudence of the national courts and the ECtHR, underlining its possible impact in the case *de qua*.

The mechanisms of review developed by the ECJ to overcome its *Yusuf* and *Kadi* doctrine are new.¹²³ The *Solange* method, instead, is a well-known tool for coordinating overlapping jurisdiction originally elaborated by the constitutional courts of the EUMS and later also adopted by the ECtHR.¹²⁴ Nonetheless, both techniques, while important in themselves, may be regarded as unsatisfactory here. On the one hand, they proved insufficient for the purpose of enhancing the degree of protection ensured to those natural and legal persons whose funds had been frozen without due process. On the other hand, they risked jeopardizing the consistency of the European multilevel structure by calling into question consolidated principles such as the ECJ's monopoly of the power to declare the invalidity of the acts adopted by EU institutions.

I. The ECJ

To begin with, the ECJ adopted a teleological interpretation¹²⁵ of the provisions of the EU Treaty regulating its jurisdiction in the intergovernmental pillars in order to expand its review over common positions – a legal

¹²¹ According to Harris, O'Boyle, & Warbrick (1995) 28, cited in Besselink (cf. *supra*: note 7) 655, the case *M & co. v. Germany* 'involves a disappointing surrender of competence by [...] Strasbourg.'

¹²² Rosenfeld (2004) 633, 635 has underlined how courts in general learn from direct experience and may progressively calibrate the scope of their response by taking into account the effects of their previous decisions.

¹²³ Nettesheim (cf. *supra*: note 56) 579.

¹²⁴ See Lavranos (cf. *supra*: note 38) 217; Petersmann (cf. *supra*: note 114), 13 ff.

¹²⁵ For a discussion on the employment of teleological interpretation in the legal reasoning of the ECJ see: Bengoetxea, MacCormick & Moral Soriano (2001) 43; Poiares Maduro (2007) 1.

act currently employed both in CFSP and JHA.¹²⁶ In the *Segi* case,¹²⁷ the ECJ was confronted with an action brought by a Basque organization: a common position¹²⁸ had listed the entity as a terrorist organization and subjected it to enhanced control by the EUMS, who were authorized to give each other the widest possible assistance through police and judicial cooperation in criminal matters in preventing and combating terrorism. No freezing measures were adopted against the legal person with EC regulations. The petitioner, nonetheless, claimed damages because of its inclusion in the list without having been afforded any due process warrantee.

The ECJ rejected the appeal,¹²⁹ arguing that ‘Article 35 EU Treaty confers no jurisdiction on the ECJ to entertain an action for damages whatsoever.’¹³⁰ However, excluding the claim that the petitioner was ‘deprived of all judicial protection,’¹³¹ the ECJ argued that a common position ‘is not supposed to produce of itself legal effects in relation to third parties. This is why in the system established by Title VI of the EU Treaty, only framework decisions and decisions may be the subject of an action for annulment [or a preliminary reference] before the ECJ.’¹³² If, therefore, the EU institutions adopted a common position that was intended to produce legal effects on third parties, it was necessary not ‘to interpret Article 35 narrowly’¹³³ and ‘it ha[d] to be possible to make subject to review by the ECJ a common position which, because of its content, ha[d] a scope going beyond that assigned by the EU Treaty to that kind of act.’¹³⁴

The result of the evolutionary jurisprudence¹³⁵ of the ECJ in *Segi* was that ‘a national court hearing a dispute which indirectly raise[d] the issue of the validity or interpretation of a common position [...] and which ha[d] serious doubts whether the common position [wa]s intended to produce legal effects in relation to third parties, would be able [...] to ask the ECJ to give a preliminary ruling.’¹³⁶

¹²⁶ See Peers (cf. *supra*: note 71) 888 and the text accompanying note 71 *supra*.

¹²⁷ Case C-355/04 *Segi et al. v. EU Council* [2007] ECR I-1657 See also: Case C-354/04 *Gestoras Pro Aministia v. EU Council* [2007] ECR I-1579.

¹²⁸ Common Position 2001/931/CFSP OJ 2001 L 344/93.

¹²⁹ The CFI in Case T-338/02 *Segi et al. v. EU Council*, [2004] ECR II-1647 had rejected the action of the petitioner. See Nettesheim (*supra* note 56), 576. It is worth noticing that the petitioners, before starting proceedings in front of the EC courts, had already brought a case before the ECtHR. In its judgment *Segi et al. and Gestoras et al. v. the 15 Members of the EU ECHR* [2002], Application No. 6422/02 and No. 9916/02, the ECtHR however declared the application inadmissible for the reasons that the petitioners lacked the victim status required by Article 34 ECHR to begin an action before the ECtHR. See Callewaert (2007) 511, 516.

¹³⁰ *Segi* at §46.

¹³¹ *Id.* at §51.

¹³² *Id.* at §52.

¹³³ *Id.* at §53 See *supra* note 70.

¹³⁴ *Segi* at §54.

¹³⁵ See Sanfutos Cano (2008) 51.

¹³⁶ *Segi* at §54.

Nevertheless, while creating a new cause of action against common positions,¹³⁷ the *Segi* doctrine was unable to resolve the problem of ineffective human rights protection.¹³⁸ *In primis*, the broad language adopted by the CFI in *Yusuf* seemed to exclude that EU courts could review all EU acts which were simply an implementation of a UNSC resolution, including common positions challenged *ex Article 35 EU Treaty*.¹³⁹

Furthermore, the jurisdiction of the ECJ in the intergovernmental pillars is not mandatory. In particular, Article 35 makes the submission of preliminary references by the national courts dependent upon the acceptance by each EUMS of the jurisdiction of the ECJ:¹⁴⁰ the EUMS must accept the jurisdiction of the ECJ and may decide whether all their tribunals or only their final supreme courts may make references to the ECJ. Since only some EUMS have accepted the jurisdiction of the ECJ, with a few of them limiting the referring power to their national jurisdiction of last instance,¹⁴¹ a variable geometry prevails in this field. From this point of view, the possibility for persons affected by a counter-terrorism common position to obtain review by the ECJ was limited and essentially uncertain, because it depended on the contingent fact of being

¹³⁷ Note that the common position that was challenged by *Segi* (*supra* note 128) was adopted on the basis of the provisions of both the II and the III pillar. Since the EU Treaty confers no jurisdiction to the ECJ over purely II pillar measures it is however uncertain whether the reasoning of the ECJ in *Segi* could be expanded also to a common position adopted only on the basis of CFSP.

¹³⁸ Peers (cf. *supra*: note 71) 895.

¹³⁹ As noted above in the accompanying text of note 84 the CFI in *Yusuf* and *Kadi* refused to review a EC regulation because this simply implemented a hierarchically superior UNSC resolution. The supremacy of UN law extends also over a CFSP common position, so it seems likely that no review could have been undertaken on this act, even under a preliminary reference activated *ex Article 35 EU Treaty*.

¹⁴⁰ According, in fact, to Article 35(2) EU Treaty, 'by a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the ECJ to give preliminary rulings as specified in paragraph 1.' Article 35(3) then states that 'a Member State making a declaration pursuant to paragraph 2 shall specify that either: a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the ECJ to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment; or b) any court or tribunal of that State may request the ECJ to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.' See also Arnall (2000) 227.

¹⁴¹ As reported by Peers (cf. *supra*: note 71) 886 fourteen EUMS have accepted the jurisdiction of the ECJ but two of these have limited the possibility to make references for preliminary rulings only to the supreme courts of their legal system.

a national of one EUMS (allowing for preliminary references) rather than of another EUMS.¹⁴²

Attempts were made by the CFI to remedy the *lacuna* in the protection of fundamental rights generated by the *Yusuf* and *Kadi* jurisprudence in the I pillar of the EU too.¹⁴³ In *Ayadi*¹⁴⁴ in particular, the CFI, while confirming the *ratio decidendi* of its previous judgments, recognized that persons affected by a freezing measure imposed by the UNSC have a right to be protected diplomatically by the competent EUMS in front of the UNSC auxiliary committee¹⁴⁵ and that ‘it is open to the persons concerned to bring an action for judicial review based on the domestic law of the state of the petitioned government, indeed even relying directly on the contested regulation and relevant resolutions of the SC which that regulation puts into effect, against any wrongful refusal by the competent national authority to submit their cases’¹⁴⁶ to the UN organs charged with the delisting procedures. ‘It is for the domestic legal system of each EUMS to determine the detailed procedural rules governing actions at law intended to safeguard [these] rights.’¹⁴⁷

Notwithstanding the creation of a new right to action in the national legal orders deriving directly from EC law,¹⁴⁸ the *Ayadi* doctrine certainly missed the target of remedying to the lack of judicial review over EC regulations implementing UN resolutions.¹⁴⁹ Since diplomatic protection is granted on the basis of a political decision, it is not possible to consider it as affording an equivalent degree of protection to that ensured by access to a judicial authority.¹⁵⁰ As highlighted above, the mechanism of listing and delisting of suspected terrorist financiers at the UN level is based on consensus among the members of the auxiliary committee and is essentially confidential. Individuals cannot petition the committee directly and do not participate personally in its deliberation.¹⁵¹ Requiring the EUMS to take their duty of representing the persons falling under their jurisdiction seriously was certainly a step forward but it was not enough to

¹⁴² The perverse effects of this ‘variable geometry’ of the ECJ’s jurisdiction in the III pillar have been largely pointed out, e.g., by Lenaerts & Jadoul (2002).

¹⁴³ Nettesheim (cf. *supra*: note 56) 574.

¹⁴⁴ Case T-253/02 *Chakif Ayadi v. EU Council* [2006] ECR II-2139. See also Case T-49/04 *Faraj Hassan v. EU Council and EC Commission* [2006] ECR II-52.

¹⁴⁵ Ciampi (cf. *supra*: note 43) 282.

¹⁴⁶ *Ayadi* at §150.

¹⁴⁷ *Id.* at §151.

¹⁴⁸ From this point of view, the *Ayadi* judgment expands the concept of domestic acts falling under the scope of Community law. On the ECJ’s review of national measures on the basis of EU human rights principle see in general Tridimas (cf. *supra*: note 62) 319.

¹⁴⁹ Nettesheim (cf. *supra*: note 56) 575.

¹⁵⁰ The ICJ has indeed recognized in its judgment in the case *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, ICJ Rep. 1970, p. 45, §79 that the State is ‘the sole judge to decide whether its [diplomatic] protection will be granted, to what extent its granted and when it will cease.’

¹⁵¹ Frowein (cf. *supra*: note 41) 790, Feinaugle (cf. *supra*: note 55) 1530; See also Bierstaker & Eckert (2006).

ensure to the interested parties a review of their status as fair and equitable as that attainable through judicial scrutiny (if this is a full review on the merits).¹⁵²

2. The National Courts and the ECtHR

One possible answer to the problem of ineffectiveness could perhaps have taken place at the national level. It is well known that a number of constitutional courts in the EUMS have accepted the supremacy of EU law only with the reserve of some ‘counter-checks’.¹⁵³ Most constitutional tribunals claim to retain a power to review EU law on the basis of the domestic constitutional principles of human rights protection but affirm that they will not resort to their safety jurisdiction as long as the EU system ensures a protection of fundamental rights equivalent to the national one.¹⁵⁴ The lack of judicial review at the supra-national level over EU acts implementing a UNSC resolution might thus have prompted national constitutional courts to recur to the *Solange* jurisprudence and to declare void the EC act on their own.¹⁵⁵

AG Mengozzi recognized this possibility in his opinion in the *Segi* case,¹⁵⁶ acknowledging that were the ECJ to uphold the decision of the CFI excluding any power to hear an action brought against a common position adopted in the III pillar, hence ‘endors[ing] the recognition of such a gap in the protection of fundamental rights in the field of police and judicial cooperation in criminal matters, the national courts of various Member States would feel entitled, if actions were brought before them, to verify whether the acts adopted by the Council on the basis of Article 34 EU were compatible with the fundamental rights *guaranteed by their respective national legal systems, but not necessarily in an identical manner*.’¹⁵⁷ This option *de facto* did not materialize, but it is likely that its effect would not have been very satisfactory.

The potential reassertion of the primacy of fundamental rights would indeed have taken place at the very high cost of the consistency and stability of the EU system, which requires that invalidity of EU acts be declared by EU courts.¹⁵⁸

¹⁵² Aust (2008) 51, 64.

¹⁵³ See Cartabia (1995); Lavranos (cf. *supra*: note 38).

¹⁵⁴ The doctrine of ‘supremacy with reserve’ was first elaborated by the Italian and the German Constitutional Courts. See: C. Cost s. 183/1973 *Frontini*; BVerfG 37, 271 (1974) *Solange I*; C. Cost s. 170/1984 *Granital*; BVerfG 73, 339 (1986) *Solange II*; BVerfG 89, 155 (1993) *Maastricht Urteil*. But has successively been adopted by other supreme courts and constitutional tribunals Europe-wide. See, e.g. the decisions on the constitutionality of the European Arrest Warrant of the Polish Constitutional Court P 1/05 (2005) and of the Czech Constitutional Court Pl US 66/04 (2006). The literature on the issue is vast, see among many, Komarek (2007) 9; Baquero Cruz (2008) 389; Sadurski (2008a) 1; Martinico & Pollicino (2008) 97.

¹⁵⁵ Lavranos (cf. *supra*: note 68) 489.

¹⁵⁶ See Nettesheim (cf. *supra*: note 56) 596 and the accompanying text of note 127 *supra*.

¹⁵⁷ *Segi* (Opinion of AG Mengozzi) at §90 (emphasis in the original).

¹⁵⁸ See Besselink (cf. *supra*: note 7) 649; De Witte (1999b) 177; Claes (2006) 666.

There are doubts, furthermore, whether national courts would have been sensitive to the fundamental rights claims of the individuals targeted by UNSC counter-terrorism sanctions.¹⁵⁹ From the few national cases that are available on the issue, it emerges indeed that the jurisprudence of national courts on targeted sanctions has been as weak and deferential as that of the CFI.¹⁶⁰ It suffices here to consider two examples. The French *Conseil d'Etat* (CdE) in its *Association Secours Mondial* decision¹⁶¹ found itself competent to review an administrative act freezing the funds of an entity allegedly involved in the financing of terrorism.¹⁶²

In exercising its review, however, the CdE employed as a standard the manifest error of appreciation scrutiny¹⁶³ and concluded that 'considérant [...] que [...] quelques jours après la parution au Journal officiel de la République française du décret attaqué, l'association requérante a été inscrite sur la liste élaborée et mise à jour périodiquement par le comité du Conseil de sécurité créé par la résolution 1267 du Conseil de sécurité des Nations-Unies et que par le règlement CE n° 1893/2002 du 23 octobre 2002, la Commission des Communautés européennes a également inscrit [l'association] sur la liste des personnes et entités pour lesquelles le Conseil de l'Union européenne a institué des mesures financières restrictives, il ne ressort pas des pièces du dossier que le ministre [...] a, dans ces circonstances, commis une erreur d'appréciation.'¹⁶⁴

¹⁵⁹ For a comparative overview of the role of the judiciaries during times of emergencies see Ackerman (2006); Barak (cf. *supra*: note 11) and, if you want, Fabbrini (cf. *supra*: note 47).

¹⁶⁰ Ciampi (cf. *supra*: note 43) 430. An interesting example of the deference with which the judiciary has reviewed UN counter-terrorism sanction in a non-EUMS is the Swiss case. In *Youssef Nada v. SECO* 1A.45/2007 / daa judgment of 14 November 2007 the Swiss Supreme Court (SSCt) in fact adopted exactly the same stand of the CFI, denying the power to review a national measure implementing a UNSC resolution listing suspected terrorist and freezing their assets, but for its conformity with *jus cogens*. The same reasoning was later employed by the SSCt also in *A v. Département fédéral de l'économie* 2A.783/2008 /svc judgment of 23 January 2008. For an overview of the financial measures adopted by Switzerland to fight international terrorism see Zagaris (2003) 45, 94.

¹⁶¹ C.E. No. 262626, *Association Secours Mondial de France*, judgment 3 November 2004.

¹⁶² Adam, in this book.

¹⁶³ According to Sadurski (2008b) 4 the 'manifest error of appreciation' represents a weak test for judicial review and 'only extremely irrational, arbitrary, unwise legal rules will fall victim of such test of reasonableness.' As a matter of fact, however, since the ruling in the case C.E. *Ministre de l'Équipement et du Logement c. Fédération des Défenses des Personnes Concernées par le Projet Ville Nouvelle Est de Lille*, judgment 28 May 1971, it is customary for the CdE to employ a stronger test to review the legality of administrative acts, which resembles proportionality analysis. See Braibant (1974) 297; Bobek (2008) 5. The decision to recur to the 'manifest error of appreciation' review highlights from this point of view the willingness of the CdE to adopt a deferential scrutiny of the governmental act. See Adam (cf. *supra*: note 162).

¹⁶⁴ *Association Secours Mondial*, 7^{ème} considérant.

In *Al-Jedda*,¹⁶⁵ the UK House of Lords (UKHL) also adopted a similar stand, affirming that an act authorized by a UNSC resolution would escape judicial review of its conformity with the human rights principles recognized by the ECHR.¹⁶⁶ Here, the case did not truly concern the legality of a UNSC counter-terrorism sanction: a British citizen was challenging his detention by the military in Iraq. His detention was authorized by a UNSC resolution, however.¹⁶⁷ The UKHL rejected the claim, ruling that the UN Charter (and the resolutions adopted by the UNSC) enjoyed supremacy even over the ECHR,¹⁶⁸ since this was 'necessary for imperative reasons of security.'¹⁶⁹ As this short overview highlights, both the supreme British and French courts came, in the end, very close to adopting the *act de gouvernement* theory, showing their incapacity to ensure an effective protection of the fundamental rights of persons affected by UNSC acts.

Similar claims hold true with regard to the ECtHR.¹⁷⁰ Even if the EC/EU is not party to the ECHR, the ECtHR has acknowledged a power to review the compatibility with the ECHR of acts of the EUMS which simply implement EC/EU dispositions at the national level.¹⁷¹ The conditions for exercising this review have been recently restated in a comprehensive manner in the *Bosphorus* judgment.¹⁷² *Bosphorus*, a Turkish air carrier, had leased an aircraft from the Yugoslavian national airline, just before the beginning of the Yugoslav civil war. While in Ireland, the aircraft was impounded by the Irish authorities on the basis of an EC regulation¹⁷³ implementing a UNSC resolution¹⁷⁴ imposing sanctions on Yugoslavia. After the exhaustion of the national remedies and a preliminary ruling of the ECJ on the interpretation of the relevant EC regulation,¹⁷⁵ *Bosphorus* started proceedings before the ECtHR lamenting a violation of the right to property.

¹⁶⁵ *R (on the Application of Al-Jedda) v. Secretary of State* [2007] UKHL 58.

¹⁶⁶ See Messineo (2009) 35.

¹⁶⁷ S/RES/1546 (2004). See also S/RES/1637 (2005); S/RES/1723 (2006).

¹⁶⁸ A majority of four Lord Justices of the UKHL concluded that the UN Charter and the obligations stemming from it ought prevail over the other international treaties, including the ECHR. Another Lord Justice, L.J. Rodger, following the reasoning of the ECtHR in *Behrami and Saramati*, even denied the jurisdiction *ratione personae* to decide the dispute arguing that the British military in Iraq was for all effects a *longa manus* of the UNSC. For a comment to the decision see Sari (2009) 181.

¹⁶⁹ *Al-Jedda* (Bingham of Cornhill L.J. at §39).

¹⁷⁰ Lavranos (cf. *supra*: note 68) 484; Douglas-Scott (2006a) 243, 253.

¹⁷¹ See *supra* note 120 and 121 and among the vast literature on the issue: Canor (cf. *supra*: note 37) 3; Scheeck (cf. *supra*: note 7) 40; Harpaz (cf. *supra*: note 7) 105.

¹⁷² *Bosphorus Hava Yolları Turizm v. Ireland* ECHR (Grand Chamber) [2005], Application No. 45036/98

¹⁷³ Council Regulation 990/93/EEC OJ 1993 L 102/14.

¹⁷⁴ S/RES/820 (1993).

¹⁷⁵ Case C-84/95 *Bosphorus v. Minister of Transport* [1996] ECR I-3953. For a criticism of the judgment see Canor (1998) 137.

The ECtHR found itself competent to review the decision of the Irish authorities even if they were simply giving effect to an EC regulation. The ECtHR acknowledged that Ireland was complying ‘with its obligation flowing from EC law.’¹⁷⁶ On the other hand, it reasserted that ‘a Contracting Party is responsible under Article 1 ECHR for all acts of omissions of its organs.’¹⁷⁷ After balancing the EUMS obligations to comply with EC law with their duty to ensure the effectiveness of the ECHR, however, the ECtHR affirmed that it would not undertake any review of a national measure implementing a EC/EU act as long as the EC/EU ensures a level of human rights protection, ‘as regards both the substantive guarantees offered and the mechanism controlling their observance, in a manner which can be considered at least equivalent to’¹⁷⁸ that guaranteed by the ECHR.

According to the *Solange* doctrine of the ECtHR,¹⁷⁹ in other words, review of EC measures through the national implementing acts is to be considered only as an *extrema ratio* to which it is possible to resort if the overall EC/EU system of human rights protection suddenly falls below the ECHR standard¹⁸⁰ and if ‘in the circumstances of a particular case, it is considered that the protection of ECHR rights was [at the EU level] manifestly deficient.’¹⁸¹ From this point of view, the *Bosphorus* judgment was not able to provide the answer to the problem of ineffectiveness generated by the lack of judicial review of UNSC sanctions at the EC level.¹⁸² The response of the ECtHR to the potential violation of human rights by the EU institutions therefore seems as unsatisfactory as that of the other European courts.

D. The Rise of Judicial Review

An important step in the direction of resolving the problem of ineffectiveness in the protection of fundamental rights in the European multi-level system has been taken by the ECJ in the recent *Kadi & Al Barakaat* decision.¹⁸³ By submitting the EU counter-terrorism measures implementing UNSC

¹⁷⁶ *Bosphorus* at §148.

¹⁷⁷ *Id.* at §153.

¹⁷⁸ *Id.* at §155.

¹⁷⁹ See Jacqué (2005) 756; Gaja (2006).

¹⁸⁰ According to Peers (2006) 443, 452 ‘the concept of conditional review as developed by the [ECtHR] is fraught with ambiguities and uncertainties and runs the risk that human rights will not be sufficiently guaranteed in certain cases.’

¹⁸¹ *Bosphorus* at §156.

¹⁸² As acknowledged by Lavranos (cf. *supra*: note 68) 484-485, the effect of the *Bosphorus* judgment is indeed that ‘private parties (like *Bosphorus*) who are affected by UN sanctions or rather European and domestic implementing measures are unable to obtain judicial review from the ECtHR in order to assess their conformity with the ECHR.’ See also Ciampi (2006) 85.

¹⁸³ Joined Cases C-402/05 P and C-415/05 P *Yassin A. Kadi & Al Barakaat International Foundation v. EU Council and Commission* judgment [2008], nyr.

resolutions to a full and strict review, the ECJ has assured a more effective and consistent protection of the fundamental rights enshrined in the European constitutional order and has clearly restated that the rule of law shall survive, and remain in force, even in times of emergency.¹⁸⁴ In paragraph 1, this decision will be analyzed in some detail; in paragraph 2, I will go on to address some of the innovations that might be introduced by the Lisbon Reform Treaty, which will contribute to ensuring a more effective protection of fundamental rights *vis à vis* UNSC counter-terrorism sanctions.

1. The ECJ

The *Kadi* decision of the CFI was later appealed and the ECJ was called on to decide about the legality of an EC regulation implementing a UNSC resolution listing persons suspected of being terrorists and freezing their assets without due process of law. In contrast to the CFI,¹⁸⁵ the Grand Chamber of the ECJ began its reasoning by emphasizing that ‘the EC is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid conformity of their acts with the basic constitutional charter, the EC Treaty.’¹⁸⁶ According to the ECJ, it followed from ‘those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all EC acts must respect fundamental rights.’¹⁸⁷

On this premise, the ECJ left aside the argument of the CFI concerning the relationship between the UN and EU legal orders,¹⁸⁸ and, while not denying the binding nature of the UNSC resolutions and their ‘supremacy in [...] international law’¹⁸⁹ (stemming from the UN Charter), reaffirmed the *primauté* of primary EU constitutional law, ‘in particular the general principles of which fundamental rights form part’¹⁹⁰ within the EU legal system. As a consequence, the ECJ excluded the possibility that an EC regulation implementing a UNSC resolution could be immune from judicial review. By adopting a confident constitutionalist approach¹⁹¹ the ECJ argued instead that ‘the review of the Court

¹⁸⁴ Tridimas (2009) 103.

¹⁸⁵ Halberstam & Stein (cf. *supra*: note 43) 43; De Burca (cf. *supra*: note 80) 43.

¹⁸⁶ *Kadi* at §281 quoting Case 294/83 *Les Verts v. Parliament* [1986] ECR I339.

¹⁸⁷ *Kadi* at §285.

¹⁸⁸ The ECJ deals with the international obligations binding on the EUMS and the EC respectively on the basis of Article 300(7) and Article 307 EC Treaty but reasserts the original hierarchy of norms in the EU legal system stating that the international law displace only ‘acts of secondary EC law’ (*Kadi* at §307). See Rosas (cf. *supra*: note 83).

¹⁸⁹ *Kadi* at §288.

¹⁹⁰ *Id.* at §308.

¹⁹¹ The position of the ECJ is defended by community lawyers such as Lavranos (2009) 157, 174 who argues that with the *Kadi* ruling ‘the normally applicable hierarchy of norms within the Community legal order remains intact also *vis-à-vis* the UN Charter.’ Also according to Tzanou (cf. *supra*: note 58) 142, ‘there

of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.¹⁹²

The ECJ clearly ruled that ‘the EC judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all EC acts in the light of the fundamental rights forming an integral part of the general principles of EC law, including review of EC measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the SC.’¹⁹³ And it engaged directly in a strict and attentive scrutiny of the contested regulation,¹⁹⁴ simply disclaiming the argument put forward by the defendant that ‘when the SC has spoken, the Court must remain silent’.¹⁹⁵ The advice of AG Maduro seems to have been particularly relevant here, as the AG had argued in his opinion that ‘in situations where the Community’s fundamental value are in the balance, the Court may be required to reassess and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the SC.’¹⁹⁶

are two reasons that advocate in favour of the ECJ’s self-oriented approach: first, [...] the serious deficit of the UN system as regard the observance of fundamental rights [...]. Secondly, the ECJ does not seek to establish itself as the guardian of the global legal order, since it does not review the UNSC resolution but the EC implementing measure’. For an international law critique, however, see De Burca, (cf. *supra*: note 80), 2 according to which ‘the judgment is a significant departure from the conventional presentation and widespread understanding of the EU as an actor which maintains a distinctive commitments to international law and institutions.’ According then to Gattini (2009) 213, 224 from this point of view the judgment of the ECJ ‘gives rise to mixed feelings. On the one hand one can not but welcome the unbending commitment of the ECJ to the respect of human rights, but on the other hand the relatively high price, in terms of coherence and unity of the international legal system [...] is worrying’. For an assessment of the various approaches to the relationship between international and EU law – ‘thin internationalism’ and ‘constitutional resistance’ and the identification of a possible third way, ‘a *Solange* type dialogue’ – see Eeckhout (cf. *supra*: note 68) 205; Halberstam & Stein (cf. *supra*: note 43) 49 ff. For a survey of the various critical and favourable position of lawyers on the *Kadi* judgment see Poli & Tzanou, (2009).

¹⁹² *Kadi* at §316 There is much convergence among scholars as to the fact that the ECJ approach is preferable to that of the CFI as far as the protection of fundamental rights is concerned. See Tridimas (cf. *supra*: note 184) 126 who argues that ‘on the issue of fundamental rights protection, the ECJ’s commitment is to be applauded.’

¹⁹³ *Kadi* at §326.

¹⁹⁴ Cappuccio (2008) 903, 904.

¹⁹⁵ *Kadi* (Opinion of Maduro AG) at §1 According to Tridimas & Gutierrez-Fons (cf. *supra*: note 45) 701 ‘a distinct feature of the ECJ’s reasoning, which differentiates its approach from that of the CFI, is [precisely] that it conceded little ground to the source of the security concerns.’ See also *supra* note 91.

¹⁹⁶ *Kadi* (Opinion of Maduro AG) at §43.

On the merit of the fundamental rights claim raised by the appellant, the ECJ displayed ‘distrust toward any invasion of due process’¹⁹⁷ and held that ‘in the light of the actual circumstances surrounding the inclusion of the appellants’ names in the list of persons and entities covered by the restrictive measures [...] the right of defence, in particular the right to be heard, and the right to effective judicial review were patently not respected.’¹⁹⁸ In addition, according to the ECJ, the freezing of assets deriving from inclusion on the list also ‘constituted an unjustified restriction of [the] right to property.’¹⁹⁹ As a result, confirming that ‘in the EU’s flawed system of governance, democracy finds solace in judicial review,’²⁰⁰ the ECJ declared the appeal to be well founded and annulled the contested EC regulation insofar as it concerned the applicants.²⁰¹

In *Kadi*, the ECJ rejected the deferential stand of the CFI and followed the suggestions given by AG Maduro to take seriously the duty to preserve the rule of law as ‘constitutional court of the municipal order that is the EC.’²⁰² The ECJ also reasserted the role of the judiciary in times of emergency by simply excluding that a ‘regulation [could] escape all review by the EC judicature once it ha[d] been claimed that the act [...] concern[ed] national security and terrorism.’²⁰³ As indeed the AG had again correctly pointed out, ‘especially in matters of public security, the political process is liable to become overly responsive to immediate popular concern, leading the authorities to allay the anxiety of the many at the expenses of the rights of the few. This is precisely when courts ought to get involved’,²⁰⁴ with ‘constitutional confidence.’²⁰⁵ Through its decision, the ECJ re-established a judicial remedy at the EC level for the persons listed by UN resolutions in disregard of the due process guarantees.

2. The Lisbon Treaty

The judgment of the ECJ in *Kadi* fills the gap in the protection of fundamental rights in the European multilevel system by recognizing a remedy at the supranational level, and to some extent it anticipates the effects

¹⁹⁷ Tridimas & Gutierrez-Fons (cf. *supra*: note 45) 698.

¹⁹⁸ *Kadi* at §334

¹⁹⁹ *Id.* at §370.

²⁰⁰ Tridimas (cf. *supra*: note 184) 103.

²⁰¹ The ECJ, however, maintained on the basis of Article 231 EC Treaty the effects of the regulation for a period of no more than three months running from the date of delivery of the judgment in order to allow the EU Council to remedy the infringements found and to avoid ‘seriously and irreversibly prejudicing the effectiveness of the restrictive measures.’ (*Kadi* at § 373). See Tzanou (cf. *supra*: note 58) 152.

²⁰² *Kadi* (Opinion of Maduro AG) at §37 According to Gattini (cf. *supra*: note 191), 234-235 ‘the ECJ in its own understanding is not an international supervisory body but a juridical body analogous to a domestic court.’ See also D’Argent (2008) 265.

²⁰³ *Kadi* at §343. See also Della Cananea (cf. *supra*: note 67) 521.

²⁰⁴ *Kadi* (Opinion of Maduro AG) at §45.

²⁰⁵ Tridimas (cf. *supra*: note 184) 114.

that might be produced by the entry into force of the Lisbon Treaty. Even if the destiny of the reform treaty concluded by the EUMS in 2007 is still uncertain, it is worth analyzing its new provisions here.²⁰⁶ While in fact, on the one hand, the EUMS had already shown their agreement on the need to introduce such novelties in the defunct Constitutional Treaty,²⁰⁷ on the other, a discussion of the potentially positive impacts of these modifications may be useful *de jure condendo*. To begin with, if and when the Lisbon Treaty comes into force, it will reassert the importance of the protection of fundamental rights in the EU by granting *valeur juridique* to the EU CFR.²⁰⁸

The Lisbon Treaty, furthermore, will abolish the pillar structure of the EU by extending the *méthode communautaire* (including the full jurisdiction of the ECJ) also to the area of JHA.²⁰⁹ While the CFSP will maintain several *ad hoc* rules,²¹⁰ according to the new Article 275 of the (renamed) Treaty on the Functioning of the EU, 'the ECJ shall have jurisdiction to [...] rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 230 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of [the CFSP]'. Combined with the recent *Kadi* doctrine, this provision of the Lisbon Treaty will allow the ECJ to review a common position listing persons suspected of financing terrorism (as well as its implementing EC regulation) effectively.²¹¹ The reasoning of the ECJ in *Segi* will hence acquire teeth, given that the text of the amended Treaty will exclude *de jure* a jurisdictional immunity for EU acts providing for restrictive measures and render the jurisdiction of the ECJ mandatory.²¹²

Finally, the new Article 6(2) EU Treaty will mandate the formal accession of the EU (which will acquire legal personality and replace the EC²¹³) to the ECHR.²¹⁴ To this end (after the entry into force of the Lisbon Treaty as well as of the 14th additional protocol to the ECHR, which expressly allows for the accession of the EU to the ECHR), a special agreement will have to be negotiated between the EU and the Council of Europe and then ratified by all the 47

²⁰⁶ See *supra* note 39. For a general overview of the Treaty and its impact on the functioning and the policies of the EU see Bilancia et al. (2009).

²⁰⁷ See De Witte (2007) 919.

²⁰⁸ On the impact of the Lisbon Reform Treaty on fundamental rights see Cartabia (2008) 81.

²⁰⁹ Ziller (2007) 70.

²¹⁰ *Id.* 142.

²¹¹ Dougan (2008) 617, 674-675.

²¹² According to Dougan (cf. *supra*: note 211) 675 the decision of the ECJ in *Segi* was of 'little value in the case of [EUMS] which ha[d] refused to accept the [ECJ]'s jurisdiction to deliver preliminary rulings under the Third pillar. Under the revised Treaties, by contrast, the [ECJ] will have jurisdiction over all Union acts imposing restrictive measures on individuals.'

²¹³ Ziller (cf. *supra*: note 209) 142.

²¹⁴ Dougan (cf. *supra*: note 211) 671. On the accession of the EU to the ECHR, see among many Benoit-Rohmer (2000) 57; De Schutter (2002) 205.

Contracting Parties to the ECHR.²¹⁵ One of the major effects of accession will be that the acts of the EU institutions will be subject to judicial review before the ECtHR on their conformity with the ECHR.²¹⁶ The *Bosphorus* doctrine of indirect and limited reviewability will hence be replaced by a full human rights control of EU acts. Should the EU accede to the ECHR, a gap in the protection of fundamental rights such as the one generated by the *Yusuf* jurisprudence of the CFI would hence easily be filled by the review of the ECtHR.

E. 'A Judge in Berlin'

In conclusion, the substantive transformation that has recently taken place in the case law of the ECJ provides the right answer, especially if coupled with the formal transformations that would be produced by the entry into force of the Lisbon Reform Treaty, to the problem of ineffectiveness in the protection of human rights in the European multilevel system. Indeed, structural features of the multilayer structure – aggravated by the decisions of the CFI in *Yusuf* and *Kadi* to withhold scrutiny over domestic acts implementing UNSC resolutions – had made it impossible for the individuals and entities targeted by the UNSC counter-terrorism sanctions to have a court review the lawfulness of such measures.²¹⁷

As chart 1 summarizes, judicial review of UN counter-terrorism measures was initially lacking in both the law in the books and in the law in action of all the layers of the European multilevel system of human rights protection. European courts therein attempted to introduce judge-made responses to overcome the gap in the protection of fundamental rights, but their efforts, although important in themselves, proved unsatisfactory. Finally, in the *Kadi* case, the ECJ took a decisive step in acknowledging the power to review the legality of EC acts implementing UNSC resolutions, anticipating the major reforms that (hopefully) are about to be introduced by the Lisbon Treaty.

««		UN »»	CFSP »»	EC »»	EUMS »»	ECHR
time	Legal acts under scrutiny	SC Resolution	Common Position	Regulation	Domestic act	-
	Lack of judicial review	-	EU Treaty	<i>Yusuf</i>	<i>Foto-Frost</i>	<i>CFDT</i>
	Unsatisfactory developments	-	<i>Segi</i>	<i>Ayadi</i>	<i>Solange</i>	<i>Bosphorus</i>
	Rise of judicial review	-	Lisbon Treaty	<i>Kadi</i>	-	Accession Treaty

Chart 1: Judicial review of UN counter-terrorism sanctions: how effective is the protection of human rights in the European multilevel system?

It is commonplace in constitutional commentaries to recall that already in XVIII century Prussia a miller unlawfully expropriated of his assets by King

²¹⁵ Ziller (cf. *supra*: note 209) 103.

²¹⁶ See Kruger & Polakiewicz (2001) 1; Bribosia (2007) 995.

²¹⁷ Eeckhout (2005) 20; Kunoy & Dawes (2009) 73.

Friedrich II was able to claim that the discretionary powers of his monarch were limited since there was a judge in Berlin to review the legality of that measure.²¹⁸ Three centuries later, the same principle still holds true: counter-terrorism measures adopted by the UN are not above the law: there is *encore* a judge somewhere in Europe willing and able to review their lawfulness.

IV Conclusion

The protection of fundamental rights in Europe is based on a multilevel system where national, supranational and international norms and institutions interlace to provide to the individual greater shield against the illegitimate exercise of public authority. Notwithstanding the existence of three different layers of human rights protection, however, there might be situations in which in the European legal space no rights or remedies are available at any layer of the system against severe infringements of fundamental rights. This situation, which I address as the problem of ineffectiveness, represents one of the major challenge to the European multilevel system of human rights protection and has to be carefully analyzed.

At the same time, several transformations in the law are affecting the scenario of human rights protection in Europe. In substantive terms, the continuous evolution in the jurisprudence of the highest European courts (i.e. the ECJ, the ECtHR and the national constitutional and supreme courts dialoguing together) reshapes the traits of the multilevel system in order to adapt European law to the new human rights challenges. Formal changes in the law are then elaborated through legislative and constitutional reform, especially in the context of EU Treaty amendments. These transformations have (at least potentially) the capacity to overcome some of the *lacunae* of the European multilevel system and resolve the problem of ineffectiveness.

As the case of judicial review of UN counter-terrorism measure in the European multilevel system indeed demonstrates, no review was originally available for the individuals and entities affected by the counter-terrorism sanctions of the UNSC who wished to contest the lawfulness of such measures. Some jurisprudential routes have therein been attempted to resolve the problem of ineffectiveness in the protection of fundamental rights, but most of them have proved to be unsatisfactory. In the end, however, the recent *Kadi* decision of the ECJ has furnished an adequate response to the problem *de qua*, partially anticipating the favourable formal innovations that would be introduced with the entry into force of the Lisbon Reform Treaty.

²¹⁸ The legendary history of the so called 'Miller of Sans Souci' is often considered as the emblematic case of the rise of the rule of law in Europe highlighting symbolically the passage from the *Ancient Régime* where the King and its officers were '*summa legibus soluta potestas*' (supreme power unbound by the law) to the liberal State where the exercise of power by public authorities is subjected to judicial review.

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