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# **UN Sanctions against Individuals – A Challenge To the Architecture of European Union Governance**

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"UN Sanctions against Individuals - A Challenge to the Architecture of European Union Governance"

*For some time now, it has been possible to observe an increase and intensification of supra- and extrastatal legislative and governmental activity. So far, this activity has resulted in relativising the competences of the nation states, historically exclusive and vertically separated from each other. The resulting overlap creates issues regarding the aligning of competences and powers, creates problems of coordination and requires rules of conflict resolution. In the process of establishing all these, asynchronicities and conflicts arise when the evolution of differing public powers do not coincide with the simultaneous evolution of standards regarding the protection of human rights and corresponding mechanisms of legal protection. Such asynchronicities have emerged in the process of the evolution of the European Economic Community; they appeared in the triangular relation between European, Union, European Convention on Human Rights and national constitutional orders. For several years now, they also have posed questions with regard to powers and competences claimed by the UN Security Council under chapter VII of the Charter.*

*In the "Yusuf", "Kadi" and other cases the European Courts are now confronted with one result of such asynchronicity, namely that the UNSC has exerted powers regarding individual persons without, at the same time, being constrained by an equivalent system of human rights protection.*

- I. The paradigm-shift from an intra-national to an individually effective UN sanctions policy

Today the United Nations no longer enact their security policy only within the framework of a "state-centred" paradigm; that is, regarding nations which are hostile to or dangerous for the

maintenance of peace. For about the past decade, the activity of the United Nations has also been directed against endangerments of peace initiated by private individuals and private organizations. A by now long sequence of UN Security Council resolutions enacts sanctions against individuals. This paradigm shift from an exclusive or at least predominant focus on nation states to a policy of sanctions also directed against individuals creates a number of issues and problems with regard to public international law. At stake are in particular issues of due process (transparency; participation; inclusivity) and the possibility of shielding the individuals effectively on the level of the United Nations through a mechanism of judicial protection. At present, individual persons cannot achieve direct judicial protection against resolutions of the Security Council. In principle, they have no standing in international courts.<sup>1</sup> Thus, the individual person has only the possibility to ask its own national government to provide diplomatic protection on the international level. There are, however, no international courts in which a nation state could directly challenge measures of the UN Security Council on behalf of an affected citizen. The ICJ has (if at all<sup>2</sup>) only the competence to control measures of the UN Security Council in an advisory opinion procedure; this, however, can only be initiated by the General Assembly or the Security Council.<sup>3</sup> In this context it is highly improbable, if not impossible, that a nation state seeking to protect its affected citizen will generate the necessary majority in the UN institutions required to initiate such an advisory procedure.<sup>4</sup> These deficits in judicial protection are by now subject to intense scholarly

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<sup>1</sup> Judicial protection is granted to the staff members of the United Nations against their employer (see GA resolution 351A (IV), 9 Dec. 1949, approved by the ICJ: Effect of awards of compensation made by the UN Administrative Tribunal, Advisory Opinion of 13 July 1954, ICJ Reports 1954, p. 47, at 57).

<sup>2</sup> See ICJ, 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 Reports 1971, p. 16, at 53 para 115.

<sup>3</sup> See, e.g., T. Franck, The "Power of Appreciation": Who is the Ultimate Guardian of UN Legality? AJIL 86 (1992), p. 519; I. Brownlie, The Decision of Political Organs of the UN and the Rule of Law, in: R. Macdonald (ed.), Essays in Honor of Wang Tieya, 1994, 95; T. Gill, Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, NYIL 1995, p. 68; D. Akande, The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations, ICLQ 46 (1997), p. 341; Judge Schwebel, Dissenting Opinion in the Lockerbie case (Jurisdiction), ICJ Reports 1998, p. 167; S. Lamb, Legal Limits to the United Nations Security Council Powers, in: G. Goodwin-Gil et. al. (eds.), The Reality of International Law: Essays in Honour of Ian Brownlie, 1999, p. 366; G. Oosthuizen, Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law, LJIL 12 (1999), p. 551; V. Gowlland-Debbas, The Functions of the United Nations Security Council in the International Legal System, in: M. Byers (ed.), The Role of Law in International Politics, Essays in International Relations and International Law, 2000, p. 303; G. Nolte, The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections, M. Byers (ed.), The Role of Law in International Politics, Essays in International Relations and International Law, 2000, p. 316; J.-P. Cot, Politics And Law In International Adjudication, ASIL Proceedings 97 (2003), p. 286; M. Payandeh, Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte, ZaöRV 6 (2006), p. 41.

<sup>4</sup> On several occasions, UN members were convinced that their statutory rights had been encroached upon; see, General Assembly (GA) resolution 3206 (XXIX), 30 Sept, 1974, and decision of the President of the General Assembly, Buteflika, 12 Nov, 1974 (with regard to South Africa); GA resolution 3376 (XXX), 10 Nov, 1975 (with regard to

and political discussion.<sup>5</sup> Many suggestions have been made as to the removal of these deficits. In the meantime, reacting to increasing public pressure,<sup>6</sup> the procedures of the sanction mechanisms have been altered at least to the extent that the most grievous concerns regarding their conformity with the exigencies of the principles of rule of law and human rights protection have been ameliorated.<sup>7</sup>

The effects of this paradigm shift are not limited to the difficulties it revealed in the “constitution” of the United Nations and the concomitant necessity of reform. The same paradigm shift and its associated complexities also question the architecture of *governance* within the EU. After all, it is the function of this architecture to order interaction of the three levels UN, EU and nation state. This architectural dimension has so far not received any attention in the scholarly literature. Of course, cases such as “*Yusuf*”<sup>8</sup>, “*Kadi*”<sup>9</sup> and others have received a great deal of scholarly attention and commentary, but the tenor of the scholarly debate has focused on weighing the conflicting aims of protection of individual rights versus the effectiveness of the fight against international terrorism.<sup>10</sup> This is, however, only one of several possible perspectives. The manner in

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Israel); Security Council resolution 687 (1991), 3 April 1991 (with regard to Iraq). An advisory procedure was never initiated.

<sup>5</sup> I. Cameron, The European Convention on Human Rights, Due Process and UN Security Council Counter-Terrorism Sanctions, Report for the Council of Europe, 2006; Chr. Tietje/S. Hamelmann, Gezielte Finanzsanktionen der Vereinten Nationen im Spannungsfeld zum Gemeinschaftsrecht und zu Menschenrechten, JuS 2006, p. 299; Chr. Schaller, Die Richtigen treffen, Vereinte Nationen 4/2005, 132; P. Wallensten/C. Staibano, International Sanctions. Between Words and Wars in the Global System, 2005; Guthrie, Security Council Sanctions and the Protection of the Individual Rights, NYU Annual Survey of American Law 60 (2004), p. 491; T. Schilling, Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats, ZaöRV 64 (2004), p. 343; S. Albin, Rechtsschutzlücken bei der Terrorbekämpfung im Völkerrecht, ZRP 2004, 71; L. di Brozolo/M. Megliani, Freezing the Assets of International Terrorist Organisations, in: Bianchi (ed.), Enforcing International Law Norms Against Terrorism, 2004, p. 377; O. Dörr, Gewalt und Gewaltverbot im modernen Völkerrecht, APuZ 2004, p. 14.; I. Cameron, UN Targeted Sanctions, Legal Safeguards and the ECHR, NJIL 72 (2003), p. 159; G. Biehler, Individuelle Sanktionen der Vereinten Nationen und Grundrechte, Archiv des Völkerrechts 2003, p. 167; Cramer, Recent Swedish Experiences with Targeted U.N. Sanctions: The Erosion of Trust in the Security Council, in: E. de Wet/A. Nollkaemper (eds.), Review of the Security Council by Member states, 2003, p. 88; M. Krajewski, Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen, Archiv des Völkerrechts 40 (2002), p. 190; M. Ruffert, Terrorismusbekämpfung zwischen Selbstverteidigung und kollektiver Sicherheit, Zeitschrift für Rechtspolitik 2002, p. 247.

<sup>6</sup> See World Summit Outcome document, UN Doc. A/Res/60/1 (2005), para. 109; Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, para. 152.

<sup>7</sup> See UN Security Council Resolution 1617/2005, para. 4.

<sup>8</sup> Court of First Instance, 21 September 2005, Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, not yet reported.

<sup>9</sup> Court of First Instance, 21 September 2005, Case T-315/01, Yassin Abdullah Kadi v. Council and Commission, nyr

<sup>10</sup> See, e.g., Chr. Tomuschat, Case Note, CMLR 43 (2006), 537, at 543 et sub.; S. Hörmann, Völkerrecht bricht Rechtsgemeinschaftsrecht? Zu den rechtlichen Folgen einer Umsetzung von Resolutionen des UN-Sicherheitsrats durch die EG, in: Archiv des Völkerrechts 44 (2006), 267; A. von Arnould, UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz, Archiv des Völkerrechts 44 (2006), p. 201; S. Steinbarth, Individualrechtsschutz gegen Maßnahmen der EG zur Bekämpfung des internationalen Terrorismus, ZEuS 2006, p. 269; K. Schmalenbach, Nor-

which one approaches the challenge to the principles of rule of law and effective protection of human rights also presupposes a fundamental decision regarding the formulation and distribution of competences and responsibilities in the evolving architecture of European governance. In the context of the debate on the so-called “constitutionalization” of the EU this structure is currently subject to much debate, primarily on a rather abstract level.<sup>11</sup> The cases discussed here permit a far more concrete discussion regarding the merits and the value of differing models of governance. It is my thesis in this paper that the European judicial organs have found it rather difficult to recognize the fundamental nature of the challenge of these new UN policies to the very architecture of their own constitutional foundations and therefore to take this into proper consideration in their doctrinal deliberations. It will also be shown that at least some of the solutions the courts developed in response to the challenge transcend the hitherto guiding conception of the EU as an emerging federation. This transcendence of or departure from the traditional model, however, is open to challenge on various grounds. It will be shown that the traditional state-centered model still serves valuable functions and should thus be applied to the described security issues.

## II. The EU Approach to Implementing UN Sanctions Against Individuals

### 1. Overview

For several years now, UN sanctions against individuals have been implemented primarily through EU measures.<sup>12</sup> In part this is the result of external pressures on the EU; in part it is the

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mentheorie vs. Terrorismus: Der Vorrang des UN-Rechts vor EU-Recht, *Juristenzeitung* 2006, p. 349; M. Kotzur, Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft, *Europäische Grundrechtezeitschrift* 2006, p. 19; S. Schmahl, Effektiver Rechtsschutz gegen „targeted sanctions“ des UN-Sicherheitsrats? *Europarecht* 2006, p. 566; Chr. Möllers, Das EuG konstitutionalisiert die Vereinten Nationen, *Europarecht* 2006, p. 426; L. Harings, Die EG als Rechtsgemeinschaft (?) – EuG versagt Individualrechtsschutz, *EuZW* 2005, p. 705; S. Bartelt/H. Zeitler, „Intelligente Sanktionen“ zur Terrorismusbekämpfung in der EU, *EuZW* 2003, 712.

<sup>11</sup> See, e.g. Christoph Möller, *European Governance: Meaning and Value of a Concept*, *CMLR* 2006 (43), 313; Marlene Wind/Joseph H.H. Weiler, *European Constitutionalism Beyond the State*, 1993.

<sup>12</sup> See U. Brandl, Die Umsetzung von Sanktionsresolutionen des Sicherheitsrates in der EU, *Archiv des Völkerrechts* 38 (2000), p. 376; with regard to sanctions in general, see K. Osteneck, Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft, 2004; G. Rss, *Das Handelsembargo*, 2000; G. Garcon, *Handelsembargen der Europäischen Union auf dem Gebiet des Warenverkehrs gegenüber Drittländern*, 1997; S. Bohr, *Sanctions by the United Nations Security Council and the European Community*, *EJIL* 4 (1993), 256; E. Klein, 'Sanctions by International Organizations and Economic Communities', 117 *AVR* (1992) 101; Lauwaars, *The Inter-relationship between United Nations Law and the Law of Other International Organizations*, in *Festschrift Eric Stein* (1987) 466; E. Klein, *Zulässigkeit von Wirtschaftssanktionen der EG gegen ihre Mitgliedstaaten*, *RIW* 31 (1985)

result of its own initiatives. EU law itself has no explicit basis for the implementation of such sanctions against individuals. Since the ratification of the Maastricht treaty, however, EU primary law has provided a basis on which the EU may pursue coercive measures against third states.<sup>13</sup> To this effect, the “second pillar” of the EU structure (Common Foreign and Security Policy -- CFSP) is intertwined with the “first pillar” (EC) in such a manner that a CFSP common position is typically issued together with an EC regulation with direct applicability.<sup>14</sup> This system has been created to permit coercive measures against states within the classical paradigm of transnational politics. The EU is now also utilizing these competences to effect economic sanctions against individuals suspected of terrorism and criminal activities in fulfilment of the duties of its member states in their capacity as members of the UN in implementing UN decisions.

The sanctions that have gained the greatest prominence are those the EU has imposed in the process of implementing UN Security Council resolution 1373/2001. In two regulations (2580/2001/EC and 881/2002/EC) the EU established a prohibition against providing assets and financial services to specifically named (or listed) terrorist organisations and individuals both within the EU and its Member states and outside. It is a characteristic of these sanctions that they too focus on economic aspects and business contacts of the listed individuals and organisations. To assure that no prohibited business contacts occur, the regulations contain extensive control and supervision mechanisms. The prohibitions of the regulations address all persons participating in the economy. In Germany they are criminally sanctioned through Para. 34 of the Foreign Trade Act.

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291; Verhoeven, *Sanctions internationales et Communautés Européennes*, CDE 19 (1984), 259; E.-U. Petersmann, *Internationale Wirtschaftssanktionen als Problem des Völkerrechts und des Europarechts*, ZVglRWiss 80 (1981), p. 1; G. Maier, *Zur Kompetenz der EG-Mitgliedstaaten zur Durchführung von Sanktionsbeschlüssen des Sicherheitsrates der Vereinten Nationen*, RIW 25 (1979), p. 247.

<sup>13</sup> See, e.g., I. Canor, *Can Two Walk Together, Except they be Agreed?" The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia into the European Community Law Through the Perspective of the European Court*, *Common Market Law Review*, 35 (1998), no. 1; P. Koutrakos, N. Neuwahl, *Trade, Foreign Policy & Defence in EU Constitutional Law- the Legal Regulation of Sanctions*, *Common Market Law Review*, 39 (2002), no. 2.

<sup>14</sup> See, e.g., M. Holland, *Common foreign and security policy: the first ten years*, 2<sup>nd</sup> ed. 2004; N. Winn/Chr. Lord, *EU foreign policy beyond the nation-state: joint actions and institutional analysis of the common foreign and security policy*, 2001.

However, by now the coercive measures of the EU are no longer limited to the implementation of UN sanctions. In a number of cases, the EU pursues its own autonomous goals, for example in fighting terrorist organisations in some of its member states.<sup>15</sup> Not all EU coercive measures are thus based on UN sanction decisions.

This policy of sanctions raises at least three questions of “architectural” relevance.<sup>16</sup> First, with regard to the relationship of the EU and its Member states, the EU is after all not itself a member of the UN, yet has taken on the implementation of UN coercive measures. Where are the competences and responsibilities located? Secondly, complications arise within the EU system in implementing the UN sanctions with regard to the mentioned heterogeneous pillars, each organized according to a different principle and hence of fragmentizing effect. Finally, the question of the relationship between three legal entities, namely the UN, the EU and the nation states: Should they follow the model of the (in principle) closed entity and now specifically and consciously open themselves to the intruding law of a different entity? Or should they act as network actors in mutual cooperation without recourse to the concept of hermetic enclosure and the related claim to measure external actions only on the principles and standards of their own legal order? All three challenges have their litmus test in the protection of fundamental rights. To what a degree are the fundamental rights of each specific legal entity applicable to its (externally imposed) implementation measures, thus indirectly subordinating the preceding decisions of the higher entity to the same standard)? How far are national and European courts entitled to apply their own provisions regarding fundamental rights directly to such UN decisions, leading potentially to their overturn? How to proceed in a case in which the UN Security Council and a national or European organ differ in their assessment of the conformity of a measure with regard to fundamental rights?

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<sup>15</sup> Regulation No. 2580/2001 empowers the Council to amend the list of persons to whom sanctions apply. The Council decides unanimously on the basis of “precise information or material which indicates that a decision has been taken by a competent authority”. Affected persons are not notified of the evidence or reasons that led to their inclusion in the list.

<sup>16</sup> Of course, questions about the interpretation of the EU implementation measures also came up (see, e.g. case C-117/06, reference of the Kammergericht Berlin of Febr. 21, 2006, Gerda and Christiane Möllendorf (concerns Salem-Abdul Ghani El-Rafei, Dr. Kamal Rafehi and Ageel A. Al-Ageel), not yet decided; case T-318/01 AJ, order of the President of the Second Chamber of the CFI of October 27<sup>th</sup>, 2006, not yet reported).

## 2. The Cases “Yusuf”, “Kadi” and “Ayadi”

Two proceedings within the European court system deal with these issues. The cases “Yusuf”<sup>17</sup> and “Kadi”<sup>18</sup> deal with the implementation of UN sanctions through EC regulations on the basis of Arts. 60, 301 and 308 of the EC-Treaty.<sup>19</sup> The EU legislator obligated the appropriate organs of the Member states to freeze the accounts and to void any financial transaction of persons specifically and individually listed in the annexes of the regulations. In its decision of September 21<sup>st</sup> 2005, the Court of First Instance (CFI) assumed that persons named in such a regulation have standing under Article 230 para. 4 of the EC-Treaty; there was no doubt that “listed persons” are individually and directly affected.<sup>20</sup> The Court held that the EU is competent to order the freezing of individuals’ funds in connection with the fight against international terrorism. Furthermore, it held that, in so far as they were required by the Security Council of the United Nations, these measures fell for the most part outside the scope of judicial review. It was therefore not willing to apply the fundamental rights of EU law (Article 6 para. 2 of the EU-Treaty) to these regulations, because that would first require questioning the validity and binding character of the UNSC resolutions for the EU according to Article 25 and Article 103 of the Charter. The court based this somewhat surprising conclusion on the claim that the EU is not only obligated to defer to the duties and obligations of the member states in their function as UN members. It assumed further that the EU itself is bound by the resolutions of the UNSC as a result of EU law (in analogy of the ECJ’s decisions assuming a functional succession of the original EEC into the GATT membership of the member states). To avoid deficiencies in the protection of fundamental rights, the CFI then postulated that it is entitled and obligated to evoke the legal constraints that the UN Security Council has to observe. These would in any event include the observation of *ius cogens*

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<sup>17</sup> CFI, December 21<sup>st</sup>, 2005, case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation, nyr.

<sup>18</sup> CFI, December 21<sup>st</sup>, 2005, case T-315/01, Yassin Abdullah Kadi, nyr. The appeal was later removed from the ECJ register.

<sup>19</sup> Other cases are still pending: see case T-253/04 (Zubeyir Aydar on behalf of Kongra-Gel and 10 others), filed on 25 June 2004; cases T-135-138/2006 (Al-Bashir Mohammed Al-Faqih; Sanabel Relief Agency Ltd; Ghunia Abd-rabba; Taher Nasuf ), filed on 5 May 2006.

<sup>20</sup> However, the European Courts had to deal with the question of standing in other cases (see CFI, 15 Februar 2005, case T-229/02, PKK and KNK/Council, Rep. 2005, II-539; ECJ, 18 January 2007, case C-229/05 P, PKK and KNK/Council, nyr.).



norms<sup>21</sup> of public international law.<sup>22</sup> The Court concluded that the sanction decisions do not infringe these universally recognised fundamental human rights. The action thus remained without success.

In its decision of July 12<sup>th</sup>, 2006 in the case “Ayadi”<sup>23</sup> the CFI reiterates that position. It declares again that it is outside the scope of its judicial powers to apply EU fundamental rights to EU measures implementing UN sanctions. At the same time, the Court adds a new facet to its position. It develops an obligation for the Member states to protect their affected individuals through the means of diplomatic protection within the UN system. The CFI thus avails itself of a strategy that had already been used in earlier cases, in which the problem of effective legal protection arose.<sup>24</sup> In those cases the Court asked the courts of the Member states to give standing to affected individuals in situations in which the EU judicial system was not accessible to them. It is new and remarkable, however, that in „Ayadi“ diplomatic protection was introduced as a means of substituting effective judicial protection on the EU level. This approach not only raises questions regarding its effectiveness;<sup>25</sup> the CFI also ventures into territory, which had so far been considered outside of the scope of the court’s powers.

The cases “Yusuf”<sup>26</sup> and “Ayadi”<sup>27</sup> are currently on appeal to the European Court of Justice. At the moment it cannot be foreseen when they will be decided. The applicant in “Kadi” also brought an appeal, which was later removed from the case roll of the ECJ.<sup>28</sup>

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<sup>21</sup> See St. Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules - The Identification of Fundamental Norms*, in Tomuschat and Thouvenin (Eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, 2006, p. 21; Chr. J. Tams, *Enforcing Obligations Erga Omnes in International Law*, 2005.

<sup>22</sup> In public international law doctrine, broad agreement exists as to the binding nature of *ius cogens* for the Security Council; see, e.g. Elihu Lauterpacht to ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 13 September 1993, ICJ Reports 1993, p. 407, at 440 para 100; Bedjaoui, *Nouvel ordre mondial et controle de la legalite des actes du Conseil de Securite* (Brussels, 1994), p. 46; Tomuschat, *Peace Enforcement and Law Enforcement - Two Separate Chapters of International Law?*, in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Naples, 2004), Vol. III, p. 1745, at 1767.

<sup>23</sup> CFI, July 12<sup>th</sup>, 2006, case T-253/02, Chakif Ayadi, nyr. Reiteration of this position in: CFI, 31 January 2007, T-362/04, Leonid Minin, recitals 91-104.

<sup>24</sup> See, e.g. ECJ, case Rs. C-50/00 P, UPA/Council, Rep. 2002, I-6677. In “UPA”, the ECJ overruled the CFI in *Jégo-Quére v. Commission*, expressing its unwillingness to reinterpret the condition of individual concern under Article 230 para. 4 of the EC-Treaty. See M. Nettesheim, *Effektive Rechtsschutzgewährleistung im arbeitsteiligen System europäischen Rechtsschutzes*, *Juristenzeitung* 2002, p. 928

<sup>25</sup> With regard to the role of the member states in the listing procedure: Guidelines of the Committee for the conduct of its work, adopted on 7 November 2002, last amended on 29 November 2006, section 8, available at [http://www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf); see Gutherie (footnote 5 above), p. 491 at 513.

<sup>26</sup> Appeal of 1 December 2005, case C-415/05 P.

It ought to be mentioned that the rationale of the approach of the CFI is limited to cases in which the listing of a person, group or organization is effected by the United Nations Security Council. In “Organisation des Modjahedines du Peuple d’Iran”, the Court was confronted with a case in which the listing decision was based on autonomous considerations of the EU institutions. Here, the Court insisted that the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection apply. In light of the intransparent listing procedure and its uninformative outcome it annulled the relevant parts of the contested Council decision.<sup>29</sup>

### 3. The Cases „*Gestoras Pro Amnistía*“ and “*Segi*”

The second procedure currently within the EU court system, comprising the cases „*Gestoras Pro Amnistía*“<sup>30</sup> and “*Segi*”<sup>31</sup>, has two distinctive features. First, the applicants claim damages for the alleged disadvantages that they suffered due to their being listed in the annex of an EU sanction act. Second, their complaint is not directed at an EC regulation; instead, they indirectly challenge the legality of the provisions of a Common Position that are not implemented by an EC-regulation.

On Dec. 27<sup>th</sup>, 2001, the EC Council declared it necessary to supplement the implementation of UN Security Council resolution 1373/2001 through additional measures. To that effect it adopted the Common Position 2001/931 on the application of specific measures to combat terrorism, later renewed and brought up to date by the Common Positions 2002/340<sup>32</sup> and 2002/462<sup>33</sup>. Based on Article 15 and Article 34 of the EU-Treaty, and thus bridging the Second and the Third Pillar, Common Position 2001/931 declares that “Member states shall, through police and judicial coop-

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<sup>27</sup> Appeal of 27 September 2006, case C-403/06 P.

<sup>28</sup> Appeal of 24 November 2005, case C-402/05 P. It is to be assumed that the applicant was delisted.

<sup>29</sup> CFI, 12 December 2006, case T-228/02, Organisation des Modjahedines du Peuple d’Iran, nyr. According to the Court, the Council enjoyed broad discretion in its decision to amend or update the list. Further it conceded that justifications exist for a limitation of the right to a hearing. However, the lack of information rendered the Court incapable of reviewing the lawfulness of the decision. Consequently, the decision was annulled.

<sup>30</sup> CFI, 7 June 2004, case T-333/02, Gestoras Pro Amnistía association, Juan Mari Olano Olano and Julen Zelarain Errasti.

<sup>31</sup> CFI, 7 June 2004, case T-338/02, SEGI association, Aritz Zubimendi Izaga and Aritza Galarraga; confirmed by: CFI, 17 November 2005, case T-299/04, Selmani, nyr.

<sup>32</sup> Common Position 2002/340/GASP, 2.5.2002, O.J. L 116 of 03.05.2002, p. 75.

<sup>33</sup> Common Position 2002/462/GASP, 17.06.2002, O.J. L 160 of 18.06.2002, p. 32.

eration in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member states” (Article 4).

In its annex the Common Position contained a list of persons, groups and entities deemed to be involved in terrorist acts. Some of the listed names already had appeared in UN sanction decisions; in other cases it must be assumed that the listing decision was based on intelligence information provided by the EU member states.<sup>34</sup> After the adoption of this Common Position, several persons and groups brought legal actions and claimed damages for their inclusion in the list.<sup>35</sup> The Court of First Instances dismissed these actions on June 7<sup>th</sup>, 2004.<sup>36</sup> In its view, it was manifestly outside the judicial powers of the EU courts to adjudicate a claim for damages based on the inclusion in a list of terror suspects in the annex of Common Position 2001/931.<sup>37</sup> The CFI took the position that the Treaty system does not provide such judicial review of EU acts situated within the Second or, as was the case in the situation of the plaintiffs in „*Gestoras Pro Amnistía*“ and “*Segi*”, in the Third Pillar.<sup>38</sup> In the view of the CFI, the power to grant a judicial review cannot derive from the Common Position itself, even taking into account that this act explicitly mentions the right of affected persons to bring claims for damages in case of an erroneous listing.<sup>39</sup> The CFI also took the position that such power cannot be stipulated simply because of the “probability” that the plaintiffs otherwise do not have access to judicial protection.<sup>40</sup> The Court then went on to argue that the EU courts had indeed long accepted the admissibility of actions for damages under Article 235 and 288 of the EC-Treaty in cases in which the adoption of an act had not been covered by norms granting these organs the promulgating authority, or had been based

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<sup>34</sup> AG Mengozzi, 26 October 2006, cases C-354/04 P and C-355/04 P, rec. 57.

<sup>35</sup> Common Position 2001/931 is based both on Article 15 EU (Titel V of the EU-Treaty) and Art. 34 EU (Titel VI of the EU-Treaty).

<sup>36</sup> CFI, case T-333/02, *Gestoras Pro Amnistía et al./Council*, nyr; case T-338/02, *Segi et.al./Rat*, rec. 2004, II-1647.

<sup>37</sup> CFI (supra note 36), rec. 34-37.

<sup>38</sup> CFI (supra note 36), rec. 32 and 33

<sup>39</sup> CFI (supra note 36), rec. 39. According to the Council declaration of 18 December 2001 annexed to the minutes at the time of the adoption of Common Position 2001/931 and Regulation No 2580/2001: “The Council recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress.”

<sup>40</sup> CFI (supra note 36), rec. 38.

on inappropriate ones. However, the court took the position that this argument was manifestly unfounded in the situation of „*Gestoras Pro Amnistía*“ and “*Segi*”.<sup>41</sup> It therefore dismissed the action.<sup>42</sup>

In the appeals procedure, Advocate General *Mengozzi* took a different position. In his view, the CFI’s approach would result in unacceptable lacunae in the EU’s system of judicial protection. According to him, both the principle of the rule of law and the principle of effective protection of EU fundamental rights<sup>43</sup> were of such fundamental importance within the EU legal order that the denial of access to the courts was unacceptable. He argued that „if in a case such as that of the appellants there is genuinely no effective judicial remedy, this would not only be an extremely serious and flagrant inconsistency of the system within the Union, but also a situation which, from an external point of view, exposes the Member States of the Union to censure by the European Court of Human Rights and not only impairs the image and identity of the Union on the international plane but also weakens its negotiating position vis-à-vis third countries, creating a theoretical risk that they will activate clauses on the respect of human rights (so-called ‘conditionality clauses’), clauses which the Union itself ever more frequently requires to be included in the international agreements it signs.”<sup>44</sup> In light of clear and unequivocal treaty provisions, the Advocate General concluded that the power and duty to provide for effective judicial remedies must reside at the level of the Member States. Indeed he even postulated that the latter’s courts should have power to void EU legal acts in case of a violation of fundamental rights. The Advocate General thereby called into question one of the fundamental doctrines of EU law, developed by the ECJ in its “*Foto Frost*”-decision<sup>45</sup> and thus far considered an indispensable element in the EU’s strategy to immunize its law from member state intervention and to ensure the equal and effective application of its laws.

The Advocate General’s view that member state courts should also be charged with adjudicating claims for damages in case of an erroneous listing is even more remarkable. However, at that

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<sup>41</sup> With regard to the relationship of competence and standing: CFI (supra not 35), rec. 42.

<sup>42</sup> This view was confirmed in: CFI, 12 December 2006, T-228/02, *Organisation des Modjahedine du Peuple d’Iran*, rec. 45-60.

<sup>43</sup> AG Mengozzi, 26 October 2006, cases C-354/04 P and C-355/04 P, rec. 75.

<sup>44</sup> AG Mengozzi, 26 October 2006, cases C-354/04 P and C-355/04 P, rec. 85.

<sup>45</sup> ECJ, 22 October 1987, case 314/85, *Foto-Frost*, rep. 1987, 4199 (it has been the constant position of ECJ jurisprudence since this decision that the power to void EC acts is only given to the European Courts; the ECJ and CFI have *exclusive competence* to declare EC acts invalid).

point the Advocate General's deliberations become somewhat vague, if not fuzzy. For example, he does not specify against whom the claims for damages ought to be directed within the court system of the member states. Two possibilities are conceivable. One option would be to accept the EU's capacity to be made a defendant; the alternative would be the assumption of a joint responsibility of the member states acting within the Third Pillar. The uncertainties regarding the nature and character of the EU, which have been a matter of debate in the scholarly literature on the European law for years, find here a practical test case. When choosing the first option, the further question arises whether a claim for damages in a national court against the European Union runs afoul of the principle of immunity of international organisations. The material preconditions which such a claim would have to fulfil have further been largely left open in the deliberations of the Advocate General.

In its decision of 27 February 2007, the European Court of Justice did not follow the approach of the Advocate General.<sup>46</sup> It did, however, share the conclusion of the Advocate General with regard to the claim of damages: The ECJ reiterated that Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever;<sup>47</sup> further it confirmed the finding of the CFI that the declaration made by the Council in its decision 15453/01 of 18 December 2001 could not suffice to confer jurisdiction on the Court to hear and determine an action for damages under Title VI of the EU Treaty.<sup>48</sup> Instead of giving Member State organs the power to void EU acts, however, the ECJ, in an act of judicial law making, then reinterprets Article 35 of the EU-Treaty.. According to the Court, it ought to be admissible to make a Common Position which, because of its content has a scope going beyond that assigned by the EU Treaty to that kind of act, subject to review by the ECJ .<sup>49</sup> It thus ensures that all legal acts based on the Third Pillar can, subject to the conditions laid down in Article 35 of the EU-Treaty, be referred to the Court.

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<sup>46</sup> ECJ, 27. February 2007, case C-354/04 P, *Gestoras Pro Amnistía et. al.*

<sup>47</sup> ECJ (supra note 46), rec. 44-48.

<sup>48</sup> ECJ (supra note 46), rec. 58-62.

<sup>49</sup> ECJ (supra note 46), rec. 49-57.

### III. Between the Model of Principled Enclosure and A New Model of a Network Structure

The analysis of the positions of the EU courts just described reveals the existence of distinctive and conflicting theoretical underpinnings. It is possible to carve out two distinct conceptional models that have made their way into the European Courts' decisions:

#### 1. The Model of the self-contained and, in principle, closed entity

One of these architectural models is based on the idea that entities entrusted with public power conceive of themselves as independent, self-contained and, in principle, closed. They regard themselves as separate entities existing next to each other, and therefore consider the resulting organizational structure as one in which their areas of power are compartmentalized. That does not mean that they cannot open themselves to the influx or impact of legal acts issued by another bearer of public power. Nevertheless the model is founded on the assumption that each entity shields its self-containment by retaining the decision-making power whether or not to accept the internal applicability and internal effectiveness of an act of an outside actor. In case they do accept such externally formulated acts, then they themselves reserve the right to set the conditions under which such acts are applied within their domestic legal order.<sup>50</sup> One important example is the requirement that internal human rights standards are not infringed. Within the German academic discourse, it is assumed that the legal orders of entities adhering to the model here discussed contain a so called "*Rechtsanwendungsbefehl*", or „execution instruction“, which advises administrative bodies and courts which external acts can and must be applied and how this ought to be done. Famously, *Paul Kirchhof*, a former justice of the German Constitutional Court, has used the metaphor of a bridge for this model:<sup>51</sup> He argues that judges operating within the putatively closed entity have the function of guards deciding whether or not a legal act by a foreign

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<sup>50</sup> See Bundesverfassungsgericht, *Neue Juristische Wochenschrift* 2004, S. 3407 (Görgülü); Conseil d'Etat, Rec. Lebon 1989, p. 190 (Nicolo); Ian Brownlie, *Principles of Public International Law*, 6<sup>th</sup> ed. 2003, p. 41 et seq.

<sup>51</sup> Paul Kirchhof, *Der deutsche Staat im Prozeß der europäischen Integration*, in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts Band VII*, 1992, § 183, Rn. 65; P. Kirchhof, *Das Kooperationsverhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof*, in: P.-Chr. Müller-Graff (ed.), *Perspektiven des Rechts der Europäischen Union* (Heidelberger Forum, Bd. 104), 1998, p. 163 at 170 et. seq.

power may pass. It is evident that such a guard at the entrance to the bridge will exclusively apply his own standards. It is equally obvious that such a guard cannot void legal acts from an external source. His sole power rests in declaring such acts inadmissible; that is, inapplicable. In this interpretation, the model of closed entities inevitably results in a “mosaic” of different legal standards. It also inhibits transnational interactions of both governmental bodies and private actors. At the same time, however, it ensures the integrity and guaranteed application of one’s own human rights standards. The model thus is a full expression of the principle of democratic self-determination as well as of subsidiarity. It obviously grew out of structures that enshrined in the form and existence of the classical national state.

The model has received further development and fine-tuning in the context of federal structures. However, even here the system remains in principle closed to the outsider. The federal level decides what legal acts may be accepted from the outside and, at the same time, there is no claim to void laws and acts issued by external powers. Internally, the two levels constituting the federal system are linked in such a manner that higher level organs typically hold the basic “Kompetenz-Kompetenz”. In addition, they have the power to void actions of the lower order based on principles the higher order itself has defined. Organs of the lower order do not have that right.

## 2. The Model of Open Network Structures

The ideal-typical counter-model – it is here suggested - does not know the concept of the principled enclosedness of legal entities. This architectural model is based on the idea that legal entities are open to the acts of other legitimate legal entities. It is defined by the notion of a functional interlacing of discrete entities. That is, it does not require the defining characteristics of sovereignty such as closedness with its resulting defensive mechanisms. In this architectural model, networks of largely open actors emerge, which cooperate with each other in the mutual application and execution of their respective legal acts. It is the mark of such cooperation that the competences of each actor are respected as such and therefore the respective legal acts are considered worthy of note. This for example is the model that the European Union demands of its member states when it obliges them to recognize the acts of another member state in principle in the context of their horizontal interaction (principle of mutual recognition). In general it must be stated

that such open networks are only able to function when the respective standards (for example of human rights, of legal certainty) are so commensurable that submission under the orders and acts of another actor are bearable and acceptable. Any acceptance of a direct influence of another actor can only be expected if there is a reasonable assumption that, for example, the standards for the protection of human rights will be recognized at the point of origin of the legislating, governing or administering power. This model of open network structures is further refined and its impact intensified if organs of one actor claim to control and, in the event, to void measures of a different actor on the basis of this latter actor's own standards.

### 3. The Orientation of the EU on the Model of Closed Federalism – Until Recently

If one surveys the evolution of the European Union and the process of its integration in light of these two architectural models, it becomes abundantly apparent that in the past decades the model of a federal, yet self-contained and principally closed entity has been the defining maxim. The reason for this has been political. There are no logically binding reasons to prefer one of these models over the other. The theoretical assumptions foundational to either approach are not fixed in positive EU law; i.e., they are open to change over time. It is equally apparent that the organs of the European Union must confront the alternative between these two models with a natural ambivalence. In choosing the model of principal closedness, they would orient themselves on a model of nation-state sovereignty the transcendence of which is the basis for their very existence. They would likewise orient themselves on structures which they consider obsolete with regard to the internal affairs of an integrated Europe. On the other hand it would be more than astonishing if, in its process of (institutional, constitutional and ideational) consolidation, the EU were not geared towards the efficient, successful, and legitimizing model of the nation state. The current attempts at formulating and establishing a European “Constitution” perfectly illustrate the viability and continuing currency of such ideas.

Indeed, there is no doubt that the model of a principally closed federation has served as *the* point of orientation in the emergence of the EU as an actor. With regard to its external dimension, the European Union has consistently used the model of principled closedness in determining the status of public international law within its own legal boundaries. It is true that the European Court of Justice has repeatedly used terminology rooted in a monist perception of the relationship



between public international law and European Union law, and it is equally true that the ECJ has repeatedly stressed the openness and friendly attitude of EU law toward public international law. It has even gone so far as to claim that international law forms an “integral part” of EU law.<sup>52</sup> In academic debate, all these claims have been interpreted as the manifestation of a monist approach.

In actuality, however, these semantics hardly manifest themselves in the ECJ’s doctrinal approach. Although Article 300 para. 7 of the EC-Treaty declares international treaties concluded by the EU directly applicable, the ECJ has always examined carefully whether an international treaty or acts of other entities should indeed be applicable and have legal effect within the EU order. The ECJ considers itself to be the guardian of the integrity and functionality of the EU system. It determines whether a treaty provision or an act of an international body may be granted legal status within the EU in light of its aims and tasks. The Court’s filtering mechanism resulted frequently in a positive decision; e.g. led to the acceptance of externally generated decisions. Occasionally, for example in view of certain parts of WTO law, it has resulted in rejection.<sup>53</sup> Regardless of its semantics to the contrary, the ECJ clearly considers the Union as a closed system, which opens itself to legal acts from the outside only after thorough controls.<sup>54</sup>

Its orientation on a federal model of principled autonomy and self-sufficiency also governs the relationship between the EU and its member states. The organs of the EU, in particular the ECJ, in no case consider themselves bound by national law. They further demand that EU law has absolute supremacy over national law. For twenty years, it has been an established fact that the authority to void norms of EU law lies exclusively in the hands of the European Union courts; that is, these norms may not be touched by national institutions. It is true that the EU organs respect the fact that their own constitutional foundation resides within the power of the Member states (Art. 48 of the EU-Treaty). However, within the system the orientation on the federal model not only leads to the EU organ’s claim to the functional “Kompetenz-Kompetenz” (it is they who

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<sup>52</sup> ECJ, case 181/73, Haegemann, rec. 1974, p. 449; see also ECJ, case 104/81, Kupferberg, rec. 1982, p. 3641; ECJ, opinion 1/94, WTO, rec. 1994, p. I-5267.

<sup>53</sup> ECJ, case C-149/96, Portugal/Council, rec. 1999, I-8395; ECJ, case C-94/02 P, Biret et Cie/Council, rec. 2003, p. I-10565.

<sup>54</sup> Interestingly, the CFI, in “Yusuf”, speaks of “the domestic or Community legal order” (para. 181). This seems to imply that vis-d-vis the UN system the EU system constitutes nothing other than a separate (or “domestic”) regime, the relationship of which to the UN system is governed by the rules regulating the relationship between international law and national law.

claim to have the final decision making power regarding measures carried by EU competencies). This orientation likewise also leads them to demand hierarchical subordination from its member states. The fact that the member states subvert this federal claim of subordination by questioning, at least to a degree, the supremacy rule of EU law does not vitiate against this description. It may be worth mentioning as an aside that this federal claim of the EU organs stands in marked contrast to the still rather rudimentary existence of a political community of Europeans. This is one of the roots for the continuing debate regarding legitimacy which has accompanied the process of integration for by now fifteen years.

#### IV. The Competence to Implement EU-Sanctions: Application of the Federal Model

Upon reviewing the deliberations and statements of the European courts just described, their contradictory nature becomes apparent. The orientation on the model of closed federalism on the part of the EU has been called into question. The European Courts have espoused positions ill at ease with the traditional understanding in certain recent decisions regarding the conformity of EU measures to implement UN sanctions against individuals with EU primary law.

However, the decisions of the CFI in the cases “Yusuf”, “Kadi” and “Ayadi” remain firmly anchored on the categories of the first model with regard to the question how the EU will position itself in the future within the architecture of international security. The supposition that the EU has assumed the obligations of its member states and is therefore bound to fulfil their duties of implementation regarding UN resolutions considerably advances the federalization of the EU in the important arena of international security policy. The EU court adjusts the EU’s structure on obligations and duties in light of the altered geopolitical situation and the changed *modus operandi* of the United Nations. It is a noteworthy declaration of an EU organ that it is ready and willing to assume responsibilities in an increasingly important and highly sensitive arena of international politics and to guarantee both politically and legally the implementation of UN measures in its now 27 member states. This declaration is based on the belief that the EU can and ought to become an international actor operating next to or even on behalf of the member states in the area of international security policy. The Court of First Instance has here developed an approach – on the basis of quite dubious doctrinal assumptions, it must be said - that may either be interpreted

as a deliberate and wise step towards an adjustment of the Union's constitutional law to the changed demands of international security policy or as a questionable usurpation of competences – depending on one's perspective.

It is evident that the doctrinal approach leading to the Court's decision in the cases "Yusuf", "Kadi" and "Ayadi" leads to significant questions. The claim of the Court that the EU itself is *obligated* to implement the UN resolutions is itself based on exceedingly problematic arguments. It is certainly true that EU law obliges the EU not to prevent Member states from fulfilling their duties or to make such fulfilment unduly difficult.<sup>55</sup> Such a duty results in general from Art. 10 of the EC-Treaty. For those member states that were already of the UN when they joined the EEC or EU it results further from Article 307 of the EC-Treaty. Contrary to the assumption of the CFI, Article 307 of the EC-Treaty does not support its claim of the duty of the EU to take on the obligations of the member states. Such an interpretation obscures the character of this norm as a "division of powers"-norm separating the powers of the EU and of the member states.. The duty to take on such duties would exist on the basis of international law if the EU itself were a member of the UN (which is self-evidently not the case) or were automatically assuming the duties of its member states<sup>56</sup>; if there was an obligation under customary international law for the EU to assume such obligations (for which both the objective and subjective elements are lacking)<sup>57</sup>; or if the resolutions of the UN Security Council were binding even for non-UN-Members, thus transgressing the paradigm of sovereign and voluntary acceptance of international duties (but this too is arguably not the case<sup>58</sup>).

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<sup>55</sup> There is no doubt that the Member states of the UN are bound to implement UN Security Council regulations: ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p. 3, at 15 para 39; see also: Bemhardt, Comments on Art. 103, in Simma et al, (Eds.), The Charter of the United Nations. A Commentary, vol. II, 2nd ed. (Oxford, 2002), p. 1292, at 1295 para 9; Thouvenin, Comments on Article 103, in Cot, Pellet and Forteau (eds.), La Charte des Nations Unies. Commentaire article par article, 3rd ed. (Paris, 2005), p. 2133, at 2146.

<sup>56</sup> In EU legal doctrine, such an automatic transfer of duties is postulated by the so called "Hypothekendoktrin" (see P. Pescatore, L'Ordre juridique des Communautés Européennes, 2. ed. 1973, p. 147; P. Pescatore, External Relations in the Case-Law of the Court of Justice of the European Communities, CMLR 16 (1979), 615 at 637.

<sup>57</sup> See in general: R. Wolfrum, Means of Ensuring Compliance with and Enforcement of International Environmental Law, RdC 272 (1998), p. 9.

<sup>58</sup> See St. Kadelbach, Zwingendes Völkerrecht, 1992, p. 30; Chr. Tomuschat, Völkerrechtlicher Vertrag und Drittstaaten, in: ders./Neuhold/Kropholler (eds.), Völkerrechtlicher Vertrag und Drittstaaten, 1988, p. 9 at 18; E. Klein, Sanctions by International Organizations and Economic Communities, Archiv des Völkerrechts 1992, p. 101 at 107; for a different opinion: B. Faßbender, UN Security Council Reform and the Right of Veto, A Constitutional Perspective, 1998, 133; H. Kelsen, The Law of the United Nations, 1951, p. 109.

An obligation of the EU can only be derived from EU law itself.<sup>59</sup> The CFI indeed alleges that “the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member states, by virtue of the Treaty establishing it.”<sup>60</sup> The repeated reference of the CFI to the case law of the ECJ in “International Fruit”<sup>61</sup> regarding the position of the EEC within the GATT implies that the court postulates a functional succession of the EU into the UN obligations of the member states. This construction does not convince for a number of different reasons.<sup>62</sup> Contrary to the realm of foreign trade, in which the EC claimed exclusive competences early on, EU and member states act on a parallel level with regard to the UN sanction policy. Member states have to respect the pre-eminence and supremacy of EU law, but they are not deprived of their own competences, as is illustrated by Article 60 Para. 2 of the EC-Treaty. The argument of a functional succession is further weakened by the fact that the EC had the possibility to sit at the table of the GATT institutions, whereas such an option is clearly not given within the UN system, especially with regard to the UN Security Council. One cannot but conclude that an analysis of the CFI’s decision exposes considerable argumentative weakness. Not even mentioned is the problem that both a duty of the EU to fulfil its member states’ obligations under UN law and its duty to adhere to the provision of Article 6 para. 2 of the EU-Treaty would enjoy the same hierarchical rank within the normative structures of the EU legal order. Instead of simply privileging the former duty, the Court would have had to bring both into harmony and concordance.

In light of these considerations, much suggests that the decisions of the EU organs to implement the UN sanctions union-wide and to fulfil the obligations of its member states were politically motivated and justified but not legally obligatory. The efficiency of sanctions and the political coherence of the EU indeed provide good reasons for this step. And from the point of view of EU competences, such an interpretation of the EU’s action is certainly permissible. The provisions of the Second and Third Pillar are not limited to sanction policies directed at third countries. They also support measures against individuals. There can also be little doubt that the instrumental side of the EU sanction policy directed against individuals is supported by Art. 60 and 301 of the EC-

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<sup>59</sup> See Hörmann (see note 10 above), p. 277-280.

<sup>60</sup> CFI, case. T-315/01, Kadi, rec. 193.

<sup>61</sup> ECJ, joined Cases 21/72 to 24/72, International Fruit Company and Others (“International Fruit”), [1972] ECR 1219.

<sup>62</sup> See G. Biehler, Individuelle Sanktionen der Vereinten Nationen und Grundrechte, AVR 41 (2003), p. 169 at 173.

Treaty. Although these provisions only mention sanctions against “third countries”, this deficiency can indeed be overcome by recourse to Art. 308 of the Treaty.

Such an interpretative step is fully consistent with past case law and falls fully into the paradigm of EC law as a legal order transcending the purely inter-statal relationships. However, these considerations do not necessitate or even justify the conclusion that the EU itself is bound to fulfil the UN obligations of its member states. It is therefore submitted that the CFI could have voided the EC regulations implementing UN sanctions without violating or setting aside obligations of the EU. In such a case it would be up to the member states to step in with their own replacement measures. The CFI could have taken precautions against the emergence of loopholes and gaps by deferring the moment in which its decision takes effect, thus giving member states time and opportunity to react. By now, there are numerous precedents for a similar approach in other areas of EC law.

Given that the doctrinal quality of the CFI’s argumentation is weak,<sup>63</sup> there might have been overriding reasons of an integrational nature that might have swayed the court to bring the EU into a position that obligates it to fulfil the duties of its member states resulting from UN law. On the one hand, it is evident that the CFI, by means of these holdings, completes a development in the realm of security policy which the EU courts have already completed with regard to foreign trade in the seventies of the last century. It advances the redistribution of powers along the lines of the federal model through means of judge-made law. While it had been the aim then to achieve congruency on the international parquet between the EC and the member states relative to the powers under Article 113 (today: Article 133) of the EC-Treaty, the legal opinion of the CFI today must be seen as an attempt to create a corresponding congruence in the area of external and security affairs. From the point of view of institutional and power politics, such a surrogation of the states through the EU easily explainable. It is furthermore evident that the court wanted to avoid the negative political fallout of an annulment of the regulations implementing the UN sanctions. This would not only have embarrassed the organs and institutions of the EU politically, but it would in all probability have caused loopholes for the interim period until the replacement measures of all 27 member states would take effect. The desire of the EU to become a

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<sup>63</sup> See, for a different view, Chr. Tomuschat, Case Note, *Common Market Law Review* 43 (2006), 537 at 542 (“Thus, in sum, the inference can be drawn that the EC Treaty yields to the UN Charter, not wishing to abrogate the latter's stipulations. In this regard, too, the exposition of the Court does not show any weaknesses”).

major actor in the international arena of security policy would have been severely dampened for a long time.

On the other hand, the approach of the EU court exacts a high price. As I have pointed out, the opinion of the European court has the potential to create a conflict regarding competences between the EU and its member states in an area of parallel powers. And it provokes a further query: Only because the CFI intended to make the EU a new power player within the architecture of international security politics has it provoked system-immanent tensions regarding the effective protection of human rights, which will be very difficult to resolve, as will be shown in the next section. However, it must be kept in mind that the CFI's approach represents a stringent and consistent application of the federalist model, which has guided EU politics for some time now.

## **I. The provision of effective legal protection: The sudden transition to a network model**

### **1. The decisions in „Yusuf“, „Kadi“ and „Ayadi“**

Even though the approach of the CFI in the cases „Yusuf“, „Kadi“ and „Ayadi“ remains firmly in traditional lines regarding the (vertical) integration of the member states into a federal order, it is nevertheless striking that it pursues an opposing approach with regard to the competences of judicial control. Had it continued to adhere to the model of principally closed federalism, it would have been up to the European courts to decide what legal status to attribute to the acts of the UN Security Council within the EU legal order, and to decide further whether they satisfy the requirements of EU fundamental rights. The court did not do so. In its decision of September 21<sup>st</sup>, 2005, a new paradigm emerges that is diametrically opposed to the construction of a closed entity dealing with acts from the outside as described above. The decision of the European court to subject the EU to the decisions of the UN Security Council but at the same time to test their legitimacy on the principles and norms valid within the UN's own system points towards an interlacing of entities in the process of mutually opening up, whilst at the same time claiming a controlling function in the internal sphere of the respective other. To declare that the respective other has

violated its own norms and legal obligations has an absolute quality and cannot be reduced in its effect to the sphere of the entity making such a declaration – to the function of the bridge guard.

It appears to be the intention of the European court to show openness vis-à-vis the UN organs and to protect their integrity. The realization of this intention leads the court to adopt a network model in which the EU opens itself to the uncontrolled and unlimited influx of external acts. At the same time, however, this requires inevitably that it is EU organs which now act as the arbiters of the legality of UN acts at their source. The court is therefore in the process of establishing a network of open entities cooperating in the framing and application of their respective legal acts. Indeed, this is the model it has superimposed over its member states in forcing them to accept the acts of other member states within the area of the single market (“principle of mutual recognition”). However, it is rather remarkable that the court appears to be unaware of the implications of its seemingly unconscious transfer of an internally functional model to triangular international relationship.

a) Advantages and Disadvantages of such a Paradigm Shift

This shift in paradigm that the European court has undertaken (whether consciously or not) raises doubts from a number of perspectives. There are no precedents. So far, the ECJ has not issued any definitive statement regarding the legal status of UN Security Council resolutions within EU law. Cases exist in which sanctions play a role. None of the resolutions that the court had to deal with so far had been so narrowly construed as to permit the EU no room to manoeuvre in implementing them. The case “Bosphorus”<sup>64</sup> dealt with the implementation of a UN resolution which in fact opened room for manoeuvre.<sup>65</sup> Of course the court is perfectly entitled to question the EU legality of an implementation act in so far as it is situated within the room for manoeuvre established by the UN act.<sup>66</sup> In such a case, the legality of the UN act itself is of

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<sup>64</sup> ECJ, Case C-84/95, *Bosphorus*, [1996] ECR I-3953.

<sup>65</sup> The case was situated within the Common commercial policy of the EU. It dealt with embargo measures against Yugoslavia (Serbia and Montenegro) on the basis of regulation No 990/93. At issue was the impounding of an aircraft owned by an undertaking based in the Federal Republic of Yugoslavia and leased to an undertaking from another non-member country.

<sup>66</sup> For a critique: I. Canor, „Can Two Walk Together, Except They Be Agreed“? The Relationship between International Law and European Law, *CMRL* 35 (1998), p. 137 at 161 et. seq.

course not an issue. The case “Dorsch Consult”<sup>67</sup>, for example, dealt with the liability of the EU resulting from lawful acts, but the court addressed only peripherally the fact that the EC regulation that had caused the damage stood in the context of a UN Security Council resolution.<sup>68</sup> [again, perhaps a sentence in the citation fn about the specific issue?] The decision therefore does not contain clear and unambiguous statements regarding the binding nature of such resolutions.

Likewise there are no compelling reasons on the basis of international law that the EU court could have adduced for its paradigm shift. Resolutions of the Security Council are binding on their addressees in their capacity as subjects of public international law but they do not determine their legal status within the latter’s sphere.<sup>69</sup> This they delegate – like most norms of public international law – to the respective addressee. The UN has never claimed to regulate the status or effect of its laws within the order of its member states.<sup>70</sup> Art. 103 of the Charter also permits no other interpretation.<sup>71</sup> The UN might be a particularly important international organisation; likewise, it may be a particularly important consideration on the part of the EU and its member states that this organisation is supported and its laws adhered to. However, this does not permit [us?] to construe a qualitative difference with regard to the other parts of public international law. Indeed, the legal order of the UN member states supports the view that UN-promulgated acts may not themselves decide their status and effect within the inner sphere of the states. Therefore the European court would have been easily able to grant precedence to the EU’s primary norms, namely those with constitutional quality. Beyond this, , the claims of the UN Charter for respect,

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<sup>67</sup> CFI, Case T-184/95, *Dorsch Consult*, [1998] ECR II-667; ECJ, C-237/98 P, *Dorsch Consult*, [2000] ECR I-4549.

<sup>68</sup> The applicant, *Dorsch Consult Ingenieurgesellschaft mbH*, concluded, in 1975, with the Ministry of Works and Housing of the Republic of Iraq a contract for services relating to the organisation and supervision of works on the construction of an expressway. After the invasion of Kuwait by Iraq, the Council, referring to United Nations Security Council Resolution No 661 (1990), adopted Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1). In response, on 16 September 1990, the Higher Revolutionary Council of the Republic of Iraq adopted with retroactive effect from 6 August 1990 Law No 57 on “protection of Iraqi property, interests and rights in Iraq and elsewhere”, effectively seizing the property of the applicant. The firm then lodged an application claiming damages from the EC.

<sup>69</sup> See S. Schmahl, *Effektiver Rechtsschutz gegen „targeted sanctions“ des UN-Sicherheitsrats?* EuR 2006, p. 566 at 567: „Allerdings sind Organe internationaler Organisationen ... prinzipiell nicht dazu ermächtigt, in den Mitgliedsstaaten unmittelbar wirksames Recht zu setzen.“

<sup>70</sup> Kirgis, *The Security Council’s First Fifty Years*, AJIL 89 (1995), p. 506 at 524; A. Verdross/B. Simma, *Universelles Völkerrecht*, 3<sup>rd</sup> ed. 1994, § 867; Partsch, *International Law in Municipal Law: Law and Decisions of International Organizations and Courts*, in: Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 2, 1995, p. 1228.

<sup>71</sup> See A. Paulus, *Die internationale Gemeinschaft im Völkerrecht*, 2001, p. 309; Hörmann (supra note 10), p. 274-277.



consideration and implementation are in this case mediated via the member states in their dichotomous role.

In addition, it is worthy of note that the CFI has not taken previous jurisprudence of the ECJ regarding the relationship between public international law and EU law into consideration. An argumentative engagement with the fact that the ECJ in its decisions regarding its relationship has never used the model of non-implementation expressed in its decision of Sept. 21<sup>st</sup>, 2005, has not taken place. More specifically, the CFI does not address the reasons that have guided this jurisprudence. At issue is the protection of the various activities of the EU and the capability to control the laws within the EU democratically. In other words, the CFI has developed a construction that forces the EU to implement system-wide acts and measures over which it had no say and in which only a small minority of its member states are involved.

These considerations do not, however, necessarily lead to the conclusion that the approach of the CFI has to be discarded. They merely point out that the burden of proof for the shift away from the traditional paradigm lies with the European courts. In assessing the pros and cons of such a shift, a rather ambivalent situation emerges. In favour of the model applied by the CFI is that a system of open functionally interlinked and mutually constraining entities promises both a higher efficiency and a high degree of compliance. It is nearly implausible in such a model that one entity successfully eludes the impact of the decisions of the others. Another factor in favour of the model of open and functionally integrated entities is the fact that each actor is merely measured and judged on the norms applicable to itself.<sup>72</sup> This may lead to increased cooperation in the evolution of standards. Indeed, such a cooperation could even lead to a constitutionalization of international law; i.e., the member states have a far greater interest in generating norms and controlling institutions on the level of the UN that reflect their own standards and perceptions of legitimacy than they do in a system of decentralized control in which they simply guard their sover-

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<sup>72</sup> In international law discourse, some scholars take the position that each UN member state is free to determine whether the decisions of the Security Council are in compatibility with its obligations (see, e.g., De Wet/Nollkaemper, *Review of Security Council Decisions by National Courts*, *German Yearbook of International Law* 45 (2002), p. 166 at 181; P. Rösgen, *Rechtsetzungsakte der Vereinten Nationen und ihrer Sonderorganisationen*, 1985, p. 157; J. Herbst, *Rechtskontrolle des UN-Sicherheitsrates*, 1999, p. 295 et. seq.; the general consensus, however, assumes that the power of appreciation lays solely with the Security Council itself (see B. Lorinser, *Bindende Resolutionen des Sicherheitsrates*, 1996, p. 34, 99; G. Watson, *Constitutionalism, Judicial Review, and the World Court*, *Harvard ILJ* 34 (1993), p. 1 at 39; M. Herdegen, *The "Constitutionalization" of the UN Security System*, *Vanderbilt Journal of Transnational Law* 27 (1994), p. 135 at 154.

eign sphere. After all, this model is based on mutual trust;<sup>73</sup> the emerging interconnections may represent promising forms of international governance.<sup>74</sup>

From a practical point, it has to be said the freezing of assets of persons allegedly involved in terrorist acts is based on confidential information not available to the European organs and therefore also not to the members of the European courts. In such situations the European courts do not even possess the facts necessary to make appropriate judgements regarding the preservation of fundamental rights.

However, the effectiveness and high rate of compliance promised by the model also have their price. The claim to void potentially the acts of an external entity on the basis of *its* legal principles subjects that entity's legal actors to an ordering principle that they could consider an imperinent imposition. In case of conflicts regarding the interpretation of the respective legal principles, the resulting damage could be as great as in the case in which the addressee simply eludes its obligations. Orientation along the basis of this model should not hide the fact that resulting serious problems of conflict resolution have not been addressed. The CFI does not appear to have clarified how one should act in a situation in which two or more courts examine a UN Security Council resolution on the basis of *ius cogens* and reach differing results. The problems that could arise if several courts claim to be instances of control could only be solved through a system of rules of competence and priority for which there is no model. The claim to control the acts of a foreign legal entity leads furthermore to asymmetries as a consequence of which additional tensions and conflicts could arise. The practical problems in determining the law of the land in a specific situation and time can be formidable. The model applied by the CFI thus creates issues that cannot be easily dismissed or disregarded.<sup>75</sup>

By the same token, however, the characteristics of the traditional paradigm are likewise not without ambivalence. The separation of spheres that lies at its foundation could reveal a position of mistrust, suspicion and distance for which there ought no longer be grounds in an increasingly merging world. But it may also be viewed as a function of democracy which ensures autonomy,

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<sup>73</sup> A. von Arnould (supra note 10), p. 201.

<sup>74</sup> See V. Rittberger/M. Nettesheim (eds.), *Changing Patterns of the Global Political Economy*, forthcoming 2007.

<sup>75</sup> In the case of the European members of the Security Council, the solution of the Court creates yet further dilemmas.

subsidiary and self-determination. The model permits the evolution of different standards of fundamental rights and reflects therefore the structural, cultural and ethical differences among different entities. It avoids the tendency of a “race to the bottom” and establishes regulatory competition. Further it protects the sovereignty of each entity because the decision not to implement a norm in ones owns sphere implies no judgment regarding its legitimacy and legality within the sphere of the other. It treats the other actor with respect.

In my view, the decisive consideration is yet another one: The role of the European courts system as a constitutionally orientated system can best be realized within the purview of the traditional model. It is the characteristic of a constitutionally founded jurisdiction that the framework represents the defining instance which forms the basis upon which all internal acts as well as those being brought to bear from the outside are judged. In contrast. it is not the responsibility of such a constitutionally based jurisdiction to instruct the institutions of other entities whether or not they adhere to their own legal standards. It is certainly not its duty to create a global *ordre public*. In light of such functional considerations doubts of a legal-doctrinal nature arise regarding the competence of the European courts to initiate an examination of the laws binding the UN Security Council. This results in significant arguments against the expansionist intentions of the CFI. On a functional level one is also permitted to ask what specific competences permit the CFI to determine the scope of *ius cogens* norms in public international law. How would the court react if a national court would claim the right to judge EU measures in light of EU constitutional law, or for that in light of *ius cogens* – and to void these measures? Finally, in light of the frequently lamented institutional deficits within the UN system it appears at present unwise to open up the legal order of the EU unconditionally to the intrusion of acts originating from that system: In my view, the UN Security Council does not yet deserve the trust required for a acceptance of a complete submission under its decisions.

These considerations suggest that the self-restraint implicit in EU constitutional jurisprudence must be taken seriously. Given the structural differences between the EU system and the UN system, attempts of the EU courts to become the guardians of the global legal system, or for that of the United Nations, appear at this time to be mistaken. That does not mean that a paradigm shift is not a possibility. One should, however, not forget that the elements of the classical model (principled enclosedness, control of intruding law, democratic self-determination, protection of

fundamental rights etc.) did not evolve arbitrarily and are not freestanding but depend on each other. If one opens the system on one end, this has direct consequences on the functional interaction of other elements. These interactions remain unfortunately without consideration on the part of the CFI. Thus the impression remains of a somewhat breathtaking and not entirely stringent hole (even if certainly defensible from a doctrinal point of view). The complicated and somewhat awkward deduction of an obligation on the part of the EU vis-à-vis the UN Security Council resolutions is linked with a nearly complete submission of the EU under these resolutions,<sup>76</sup> for its part connected with the claim of the CFI to act as a court in the arena of world politics. *Christoph Möllers* formulation (pointing to the “dramatic character of these results”) is certainly apt: „The CFI claims to possess a judicial capacity which in the final analysis every national or regional court in the world to examine decisions of the UN and of other international organisations in view of a violation of *ius cogens*.”<sup>77</sup>

One is hard pressed to avoid the impression that such constructions were not on the mind of the European Court of Human Rights in Strasbourg when recently it attested to the EU a system of fundamental rights protection basically “equivalent” to that of the European Convention on Human Rights.<sup>78</sup> The CFI has developed a fairweather construction chosen merely because it was clear from the outset that no violation would be found. As a conceptual model it is therefore not useful. In fact the CFI itself seems to be somewhat uncomfortable with its one model, since in the case of “Ayadi” it has taken recourse to element of the old federal model by evoking the member states’ obligation to provide diplomatic protection on behalf of their citizens.

## b) Adaptation of a Model of Principled Closedness to the Challenge of UN Sanctions

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<sup>76</sup> See Schmalenbach (supra note 10), p. 352 („Unterordnung“).

<sup>77</sup> Chr. Möllers (supra note 10), p. 428 („Das CFI nimmt eine gerichtliche Zuständigkeit an, die es letztlich jedem nationalen und regionalen Gericht auf der Welt gestatten würde, Entscheidungen der Vereinten Nationen und anderer internationaler Organisationen auf einen Verstoß gegen *jus cogens* zu überprüfen.“).

<sup>78</sup> ECHR, *Bosphorus Hava Yollari v. Ireland*, EHRR 42 (2006), p. 1; see S. Douglas-Scott, *A Tale Of Two Courts: Luxemburg, Strasbourg and the Growing European Human Rights Aquis*, *Common Market Law Review* 43 (2006), p. 629; Schreck, *The Relationship between European Courts and Integration through Human Rights*, *ZaöRV* 65 (2005), p. 837. The European Court of Human Rights has repeatedly noted that notwithstanding the transfer of competences to an international organization, parties to the ECHR remain responsible for ensuring the protection of Convention rights; see, e.g., *Matthews v Great Britain*, Appl. No. 24833/94. A general overview is given by: J. Weiler/P. Alston (eds.) *The EU and Human Rights*, 1999.

The hope that the construction by which the EU submits itself to an international organization while claiming at the same time to be its controlling organ can work in practice has proved to be vain. Were the European Courts to exercise their control seriously, the authority they claim would quickly erode. It would be truly endangered if other courts were not to follow suit in their estimation as to whether or not to void a resolution. If the claim to be a controlling organ were mere façade, the trustworthiness and legitimacy of the EU would be deeply harmed. Therefore it is imperative to resolve the tensions between the political aims of the EU to implement the UN Security Council resolutions within the entire union on the hand and the constitutional imperative demanding the upholding of the EU's fundamental rights within it on the other. The time for a shift to the paradigm of open networks has not yet come.

This means in principle that the law making bodies of the EU are bound by the fundamental rights of the EU (Article 6 para. 2 TEU) even in implementing UN Security Council resolutions. However, the interpreting and concretizing the content of these fundamental rights has made it apparent that these are acts that are not undertaken in a politically autonomous sphere. Therefore, it has to be a desideratum of the European jurisprudence to develop doctrinal principles for the application of fundamental rights to measures implementing UN Security Council resolutions, in which the specific nature of the challenge is reflected and in which the conflicting concerns find adequate attention.<sup>79</sup> With regard to the protection of individual liberties this implies that the particular circumstances of the Security Council when making its decision under Chapter VII of the Charter must be taken into consideration. The protection of individual liberties will be considered differently in the situation of emergency (i.e. an eminent danger of a terrorist attack) than in a routine case of public administration; the standards differ with regard to a politically acting Security Council or an administrative EU body. As far as the procedural guarantees are concerned, control in the situation of emergency can at best be reactive, an anticipatory hearing can not be demanded. The guarantee of effective legal protection of EU law – after all ascertained by Article 6 of the ECHR – leaves room for such deliberations and differentiations in the standard of application of fundamental rights.

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<sup>79</sup> Similar principles are necessary to order the relationship of EU law and national law; see, e.g., M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, *European Law Journal* 11 (2005), p. 262; Th. Schilling, *The Jurisprudence of Constitutional Conflict: Some Supplementations to Matthias Kumm*, *European Law Journal* 12 (2006), p. 173.

The court has achieved an additional shoring up of this guarantee by obliging its member states to grant diplomatic protection as a requirement of granting effectively implementing the legal protection required by EU law. The practical value of this suggestion remains hard to judge. Nobody should expect that a case brought before the CFI claiming that a member states has not provided this diplomatic protection with appropriate intensity within the frame of the UN sanction system will have a positive outcome. The European courts, further, will not be willing to submit the concrete standpoint of its member states in the sanction committees or in the Security Council to any legal requirements or exigencies. The weakness of this element of the CFI's approach lies in the fact that it does not effectively counter the potential indifference of the member states, their resistance or their lack of effectiveness within the UN decision making process. There is no incentive to protect the rights of the individuals.

Therefore it is not only of theoretical interest whether there could be levers within the EU legal system that could be used to intensify the external protection of fundamental rights on the level of the UN system. For example, one could conceive of a system characterized by the fact that the EU implementation act has an expiration date.<sup>80</sup> Fast action would thus be possible. But a renewal would only be permissible if assurances could be given that the conditions for sanctioning a person are still factually and legally valid. An administrative complaint procedure would have to be created; in case that information is too sensitive to be presented to a listed person, one could add an "in camera"-procedure in which the respective information would have to be presented to the Courts.<sup>81</sup> This model too would suffer the weakness of a procedure relying primarily on intelligence information – such a model too would be subject to the political strengths and weaknesses of the member states.<sup>82</sup> But there would be sufficient incentive to strife for a clarification of the facts and the balancing of the interests within the framework of the UN. It would also demand of the EU law making institutions to demand sufficient assurance from the member states regarding the existence and effectiveness of such endeavours. Of course, structural and political givens within the UN systems will not be subverted. But this would send a clear signal that within the

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<sup>80</sup> Currently, the relevant Common Position stipulates that "(t)he names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list." (Article 1 Para. 6 of Common Position 2001/931/CSFP); it "shall be kept under constant review" (Article 6 of the Common Position 2001/931/CFSP). See also Article 2 para. 3 of Regulation 2580/2001/EC.

<sup>81</sup> The question of whether individuals can claim access to documents was decided in: CFI, April 26<sup>th</sup>, 2006, T-405/03, Sison, nyr, appeal dismissed: ECJ, 1 February 2007, case C-266/05 P, Sison.

<sup>82</sup> In its decision of 12 December 2006, case T-228/02, Organisation des Modjahedines du Peuple d'Iran, nyr., the Court has taken a different approach ; it stresses the importance to give reasons.

EU the implementation of UN acts would only be permissible if based on procedures sufficiently in compliance with the rule of law. To demand such standards from the UN would not weaken the institution but would strengthen its legitimacy. This approach would at the same time preserve the state-centred procedural patterns still characteristic for the decision-making processes in New York. If reflexive measures of such a kind were implemented with sufficient urgency, it would also be acceptable that a single individual affected by measure within the Second or Third Pillar cannot himself or herself bring charges. The weakening of the principle of uniform and equal application of EU law, which Advocate General *Mengozzi* has accepted in his conclusion of Oct. 26<sup>th</sup>, 2006, could thus be avoided.

## II. The Conclusions of Advocate General *Mengozzi* in “*Gestoras Pro Amnistía*”

It is more than a mere coincidence that Advocate General *Mengozzi* in his conclusion to the case „*Gestoras Pro Amnistía*“ likewise argues for a departure from the model of federalism that the ECJ has developed for the EU in the last decades. Indeed, the three pillar structure of the EU<sup>83</sup> creates problems in the granting of legal protection against acts affecting individuals within the second and third pillar. It is by now well established that the competence provisions of the second and third pillar, as opposed to the “supranational” first pillar, do not set forth powers which would legitimize legal acts with direct effect. Although the procedural system within these pillars is not strictly “intergovernmental”, as has been frequently argued, the resulting legal acts do (for now) not confer rights or impose duties on individuals. This structural difference is reflected in the provisions on judicial protection. In the first pillar, individuals directly and individually affected by a legal act have standing under Article 230 para. 4 of the EC-Treaty to bring a direct action before the EU courts. With regard to the second pillar, the EU treaty does not establish individual judicial protection at all. In the third pillar, indirect access to the European Courts is provided for under Article 35 of the EU-Treaty by means of references from national courts to the ECJ. The use of this procedure is limited, however, to courts in those member states which have issued a declaration of submission. As of end of 2006, only two thirds of the member states have made use of this option. Although it is beyond doubt that the EU adopts measures of direct

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<sup>83</sup> See, e.g. D. Curtin, The Constitutional Structure of the Union: a Europe of Bits and Pieces, in: Common Market Law Review 30 (1993), p. 17; A. v. Bogdandy/M. Nettesheim, Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung, Europarecht 1996, p. 1.

applicability (as opposed to direct effect) within the third pillar, the treaty-making member states were reluctant to accept a judicialization of the political process in areas such as home affairs or judicial cooperation. In light of the shift of paradigm in international security politics this stance has become more and more questionable.<sup>84</sup>

These deficits should not prompt the Courts to throw out the baby with the bathwater. To react with the dual conclusion that the courts of the member states possess the power to dismiss EU laws and to decide claims for damages against the EU, as the Advocate General has done, calls forth significant doubts. One has to agree with the Advocate General that the effect of a person put on that list is not so minimal that it has to be considered a bagatelle and therefore outside the scope of protection of the fundamental rights. That means that the guarantee of the protection of individual rights through the EU supported by Article 6 para. 2 of the EU-Treaty in connection with Article 6 and Article 13 of the ECHR holds. Further one has to suppose that the plausibility to acquire national legal protection against national measures, with which the Common Positions are implemented, does not promise sufficient protection of the rights of the individual affected. However, there are doubts regarding the conclusion that this permits a direct attack of member state courts against Common Positions.

In favour of the Advocate General's position one may concede that the realm of the third pillar has not yet achieved such a level of juridification as has been achieved in the community law pillar after over half a century. Therefore it could be argued that a concentration (or even monopolization) of the power to void legal acts of the EU at the ECJ is not as necessary as it is claimed in the realm of the first pillar. This argument is, however, not compelling because there is no necessary relationship between the degree of juridification of an area and the functional distribution of the power to void legal acts. The area of the second and third pillar also require the protection of the principle of equal and uniform application of the EU provisions, a recurring and central topos in the jurisdiction of the ECJ. It is not obvious why the interest of the EU in the integrity of the body of its norms should be less in these two pillars than in the EC realm, in particular in light of increasing tendencies at juridification (i.e. the decision of the ECJ in "Pu-

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<sup>84</sup> The Treaty on a Constitution for Europe would close these loopholes; see Article III-365; Article III-370 and Article III-431 para. 2.



pino”<sup>85</sup>). The monopoly to void norms must therefore not be relinquished even in areas where access to European courts is difficult.

The dilemma of this situation may only be resolved by reminding member states of their duty to remove potential lacunae with regard to access to courts.<sup>86</sup> It is therefore possible to develop a solution to the Advocate General’s dilemma within the categories of the federal model; the ECJ has now done so in its decision of February 27<sup>th</sup> 2007. It ought to be remembered that this is not a new approach. The ECJ has already evoked these responsibilities of the member states in its decision in the case “UPA”.<sup>87</sup> From a doctrinal point of view, Article 10 of the EC-Treaty can serve as the basis of such member states duties within the first pillar; an unwritten duty of mutual cooperation and loyalty fulfils the same function in the other two pillars. The member states have to ascertain that they provide for a system of comprehensive and effective judicial guarantees in the area of the third pillar as well, through which the right to effective access to court is actualized. And in this area as well national courts have to interpret national procedural rules in such a fashion that this protection is actually provided. For the national courts this means that they have to ascertain sufficient legal protection already at the stage of the “listing”-procedure. The deficit in judicial protection within the third pillar can therefore largely be counteracted through measures within the member states, even if it cannot be entirely be resolved there, and through a creative interpretation of Article 35 of the EU-Treaty along the lines of the “federal model”, thus ensuring a continuing central role of the European Courts.

### III. Conclusion

The attempts of the European Courts to corral the security measures adopted by EU organs to deal with new forms of terrorism judicially have caused amazement and consternation in the accompanying scholarly literature. Phrases such as “drum roll” appear; a new and hitherto unknown

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<sup>85</sup> ECJ, 16. June 2005, case C-105/03, Maria Pupino, nyr.; in this decision, the ECJ had to determine the effects of Framework Decision 2001/220/JHA within the legal orders of the member states. The Framework Decision aims at the protection of victims of crimes – particularly those most vulnerable – in criminal proceedings. To protect them from the effects of giving evidence in open court, these victims may, by decision taken by the court, be entitled to testify in a different manner. Italian criminal procedural law did not provide for such possibilities. The ECJ sees an obligation vested in the national courts to interpret the national law in accordance with framework decisions. At the same time, member state courts have to ensure that this interpretation does not run afoul of fundamental rights.

<sup>86</sup> See ECJ (supra note 46), rec. 56.

<sup>87</sup> See note 24 above.

evolution and the development of a new order reaching even into international relations is said to appear. This cannot come as a surprise. The European courts are confronted with the task of dealing with an evolution not anticipated by the authors of the treaty and for which therefore the treaty has therefore made no provisions. As a result there are no truly compelling solutions. The European courts certainly cannot master the situation such that the conflicting and contradictory aims and interests can all be optimized. The architecture of international security politics is fragmentary and institutionally underdeveloped, and at the same time the EU level suffers from institutional deficits. These two factors have an immediate effect on the role that the EU plays (or is even able to play) in the implementation of decisions reached on the international level.

It can only be a question of weighing several “second-best” options, each problematic in its own right, and to find a solution that combines in the best possible way the demand for an effective security policy, the aim of close cooperation between the EU and its member states and the UN system, and the necessities of guaranteeing the legal protection of the individual. The difference in reaction elicited by the legal positions of the EU courts in this context make it abundantly clear that different solutions can emerge depending on evaluation, accentuation and emphasis of different aims and issues. The difficulties experienced by the CFI and the Advocate General in finding solutions reveal that the shift in direction required in the protection of individual rights against such measures of implementation cannot be merely deduced from the logic of the process of integration as it has occurred so far, and as found in the “integration teleology” developed by the judges in Luxembourg.

The UN Security Council effects a shift of paradigm in the system that as far as security politics are concerned remains determined by the classic structure of an inter-statal and diplomatic order. The lament that the UN institutions allegedly misinterpret or ignore standards of the rule of law or of fundamental rights does not provide a solution to the problems faced by the European courts, nor, at least not at the present moment, does the demand for the introduction of procedures of judicial protection accessible to individuals within the UN system. As far as the EU courts are concerned, the only issue is the optimal resolution of the resulting tensions between the colliding aims. It is indicative of the current state of constitutionality of the European order that both the CFI and the Advocate General are willing to depart from the classic and tested paradigm and to venture into uncharted territory. It is interesting and probably not coincidental that such a depar-

ture occurs at a time when scholarship is increasingly debating new approaches to European governance. However, these academic debates are not reflected in the discourse discussed above. Indeed, given the fragmentary nature of the current debate it might be doubted how much it could in fact contribute to the solution of the conundrum here analysed. In my opinion the situation demonstrates that the challenges posed can still best be resolved within the traditional paradigm of the principally closed federal model. The shift to a model of open networks is not yet warranted – contrary to the opinion of the CFI. Rather it has to remain a maxim that EU constitutional law must continue to be the bases for deliberation also vis-à-vis acts coming from the outside. In the application of this maxim, the just measure has to remain a central focus. There are, as has been shown, reflexively operating decision-making procures through with member states may be offered effective incentives to pursue the affairs of an individual appropriately within the UN system. However, if the European Courts continue not deem it necessary to ensure a minimal level of “internal” protection, it is already foreseeable that the European Court of Human Rights and domestic courts are not likely to stand aside.

The essential question whether the process of opening the nation states and integrating them in a supranational system (first purely on the European level, then on the UN level) creates network structures in which the theorems of enclosedness (in the current argument still required) will disappear in favour of mechanisms of mutual control and intertwined cooperation has not yet been answered. It may be surprising that I consider such developments from the point of view of prognosis not improbable, and as forward-looking from a normative perspective. Nevertheless the question of the delimitation of competences and conflict resolution thereby generated are of such magnitude that they cannot be resolved en passant – and certainly not through a court forced to make ad hoc decisions. The development of principles capable of addressing these issues must be the purview of constitutional scholarship and political theory. However, the discussion here is still in its very early stages.