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MASTER-THESIS

Titel der Master-Thesis

„Mind the Gaps: The CJEU's decisions in the Kadi cases“

Verfasserin

Teresa Crockett

angestrebter akademischer Grad

Master of Laws (LL.M.)

Wien, 2015

Universitätslehrgang:

International Legal Studies

Studienkennzahl lt. Studienblatt:

A 992 628

Betreuerin:

Assoz.-Prof. MMag Dr. Christina Binder, E.MA

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INTRODUCTION

As a result of decisions made by the Court of Justice of the European Union ("CJEU")¹ in the *Kadi I*² and *Kadi II*³ cases, the European Union ("EU") may no longer automatically implement decisions of the United Nations Security Council ("UNSC") that require States to impose measures freezing the assets of natural and legal persons as designated by the UNSC or its Sanctions Committees. The CJEU determined in *Kadi I* that the EU legislation implementing the decision of the UNSC to list Yassin Abdullah Kadi under its 1267 listing regime⁴ violated Kadi's fundamental rights. The Court now requires that EU authorities first ensure that the fundamental rights of any persons are protected before a UNSC listing can be implemented under EU legislation. In *Kadi II*, the CJEU determined that the level of judicial review to be accorded in respect of such a listing was a full review, and that the EU was required to provide full reasons and give the listed person the opportunity to respond to those reasons.

The decision of the Court of First Instance ("CFI") in *Kadi I (CFI)*⁵ was largely excoriated, perhaps equally for purporting to be able to review UNSC resolutions for compliance with *jus cogens* on the one hand, and for failing to protect Kadi's fundamental human rights by refusing to review the resolution for anything besides compliance with *jus cogens* on the other. Conversely, the CJEU's decision in *Kadi I* was largely lauded as a success for the protection of fundamental human rights, as it determined that the EU's implementation of UNSC sanctions had to comply with the protection of fundamental rights guaranteed by the EU's internal legal order. In the decisions of both the CFI and the CJEU, however, there was a lack of consideration of the actual impact of the 1267 listing on Kadi's

¹ The decision in *Kadi I* was made by the predecessor to the CJEU, the European Court of Justice ("ECJ"). After the coming into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/01 ("Lisbon Treaty"), the ECJ was renamed the CJEU. For ease of reference, I will refer to decisions of both the ECJ and CJEU as decisions of the CJEU, unless citing another source that refers to the ECJ.

² *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008], 3 September 2008, ECR I-6351, Joined Cases C-402/05P and C-415/05P ("*Kadi I*")

³ *European Commission and UK v Yassin Abdullah Kadi*, 18 July 2013, Joined Cases C-584/10 P, C-593-10 P and C-595/10 P ("*Kadi II*")

⁴ I will refer to the list of persons designated under Resolution 1267 (1999), 15 October 1999, S/RES/1267 (1999) ("UNSCR 1267") and its successor resolutions as the "1267 list" and the process for listing and delisting such persons as the "1267 regime" or similar. NB: While the 1267 regime was split into two different listing regimes, one for Al-Qaida, and one for the Taliban, with the adoption of Resolution 1988 (2011), 17 June 2011, S/RES/1988 (2011) and Resolution 1989 (2011), 17 June 2011, S/RES/1989 (2011) ("UNSCR 1989"), I will simply refer to the 1267 list or the 1267 regime or similar, as a distinction between the two lists after June 2011 is not required for the purpose of this paper.

⁵ *Kadi v. Council and Commission* [2005] ECR II-3649, 21 September 2005, Case C-315/01 ("*Kadi I (CFI)*").

property rights, which seemed to affect both the CJEU's overall willingness to review EU measures implementing UN obligations in a manner which seemed to be contrary to international law, as well as the Court's assessment of the breach of other rights.

In *Kadi II (GC)*,⁶ the General Court⁷ ("GC") refused to reconsider the CJEU's findings from *Kadi I*, stating that any reconsideration had to come from the appellate court. However, the CJEU confirmed its position from *Kadi I* in *Kadi II*, after which it proceeded to undertake a full review of the actual reasons underpinning the UNSC's listing of Kadi, finding them to be deficient. While much of the discussion after *Kadi I* had focused on whether the Court had made the *right* decision, the analysis after *Kadi II* thus seemed to focus instead on the *implications* of the Court's decision. Since the Council, Commission and various EU Member States had argued that the CJEU should reconsider its original decision that it had jurisdiction to review legislation that directly transposed binding UNSC decisions and had lost that argument, commentators seemed to largely accept that as the end of the discussion, and focused on what the Court's decision would mean for future listings and challenges. This draw-down in academic discussion did not seem to bode well for governments in other jurisdictions, which were now more likely to receive legal challenges with respect to their implementation of UNSC sanctions regimes, without the benefit of much academic discourse regarding whether the CJEU had gotten it wrong with respect to its ability to review the 1267 listings so directly.

An initial review of the Kadi cases⁸ in the context of analysing Canadian court cases dealing with the same issue had revealed that while the actual impact of the 1267 listing regime was considered in detail in the Canadian court pleadings, decisions, and other documents, this did not seem to play a large role in the Kadi cases.⁹ In addition, this issue did

⁶ *Yassin Abdullah Kadi v European Commission*, 30 September 2010, Case T-85/09 ("*Kadi II (GC)*").

⁷ Following the coming into force of the Lisbon Treaty on 1 December 2009, the Court of First Instance became known as the General Court. I will refer to these courts separately, with respect to their decisions in *Kadi I (CFI)* and *Kadi II (GC)*, respectively.

⁸ I will refer to *Kadi I (CFI)*, *Kadi I*, *Kadi II (GC)*, and *Kadi II* together as "the Kadi cases."

⁹ In *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, Abousfian Abdelrazik, a dual-national of Canada and Sudan who was listed under the 1267 regime, claimed, in a challenge before Canada's Federal Court, that Canada had breached his right to return to Canada when it refused to issue him travel documents to return from Sudan to Canada after he was placed on the 1267 list. Canada claimed that it was prevented from assisting Abdelrazik to return to Canada due to the asset freeze and travel ban imposed under the 1267 regime. Justice Zinn described his due process concerns with respect to the 1267 listing regime, but considered the actual impact on Abdelrazik's right to return to Canada as result of the measures required under the 1267 regime. In the end, Justice Zinn determined that Canada, in refusing to issue an emergency passport to Abdelrazik, had wilfully acted to prevent Abdelrazik's return to Canada in contravention of his right of return. The application of the restrictions in the form of the asset freeze and travel ban had not operated to create the contravention of his rights, as an exemption was provided for under the travel ban for listed individuals to exercise their right to return to their state of nationality. The impact on Abdelrazik's rights thus did not stem from the sanctions, but from Canada's actions. Moreover, Justice Zinn found that Canada was not prevented

not seem to be raised in any of the academic writing analysing the cases. Given that the impact of the sanctions had been referred to throughout the Kadi cases and had affected several elements of the decisions, and yet there seemed to be no evidence given relating to the impact of the sanctions, this seemed like an important area for further consideration. This paper thus investigates the Kadi cases in greater detail, in order to see what influence the failure to assess the impact of the sanctions on property rights may have had, along with whether any other elements of the cases might have been insufficiently considered by the Courts and/or the commentators, and which might therefore be contributing to the strange state of affairs whereby the EU – a traditional proponent of, and adherent to, the international legal order – was being made to question its implementation of decisions of the UNSC. It also considers what the implications of these decisions, and the failure to consider certain elements of them, might be for the EU and for the UN more broadly.

Upon reviewing the arguments presented throughout the Kadi cases and the decisions in those cases, followed by a consideration of the commentary and analysis of these cases, it did indeed seem that a number of practical and legal considerations were either missing from the cases and analysis, or were at least insufficiently considered, and that these "gaps" in the analysis had had an impact on either the outcome of the case itself, or the ramifications of the Court's decision for the EU and other actors.

The first of these gaps is that there is some question as to the extent to which the human rights of listed persons are actually violated as a result of their listing by the UNSC, which was not adequately addressed in the Court's decisions, or in the analysis, nor did it seem to come up in argument. The CJEU has failed to take sufficient notice of how the exemptions built into the sanctions regime were meant to operate, and thus of the actual impacts on the property rights of listed persons. The actual impact of the sanctions on property rights also goes to the question of whether the sanctions are punitive in nature, such as to attract the rights of full defence and effective judicial review, which have been deemed to apply even though the sanctions are preventive in nature, and not imposed in response to criminal behaviour. If the actual impact of the sanctions is less than it is alleged or believed by the Court to be, the argument that those targeted by the 1267 list must be accorded full and effective judicial protection starts to fall apart. However, it is clear that aside from a general

from assisting Abdelrazik financially in returning to Canada, as there was an exemption to the asset freeze and travel ban for the fulfilment of a judicial process, as would be required following his decision. Similarly, the actual impact on Abdelrazik's property rights was considered in a constitutional challenge brought by Abdelrazik, as discussed in greater detail in II:1.i., below.

discussion of the exemptions available to listed persons, the actual impact of targeted sanctions on individual property rights has not been addressed.

Further to the above, the actual *nature* of the sanctions measures has also not been sufficiently considered by the Court. The CJEU has stated that the purpose of the sanctions is to freeze the assets of listed persons. While it has noted the position of the UNSC and the arguments of the EU institutions that the sanctions are preventive in nature, it has concluded that the effects of the sanctions make them punitive in nature, thus attracting full due process rights. The problem is that the Court has referred to "freezing assets of persons connected with Al-Qaida and the Taliban" as being the purpose of the 1267 listing regime, whereas the purpose is much broader, and partly comprises "preventing terrorist financing." *This* is the purpose of the asset freeze; the asset freeze itself is not a purpose. Without taking that underlying concept into account, and without then considering the importance of the listing of individuals on a preventive basis, the Court could not have considered fully how the sanctions truly are preventive in nature, and not punitive. And if the sanctions are not punitive in nature or effect, the need for full due process rights is called into question.

The second gap in the CJEU's analysis is that it treats the EU Treaties as a domestic constitution, and not as the treaties they are. While the CFI referred in *Kadi I* (CFI) to the primacy of the United Nations Charter,¹⁰ ("UN Charter") and decided that it could not review regulations implementing the Charter obligations of its Member States on that basis, the CJEU simply stated that the protection of fundamental rights was guaranteed under the autonomous legal order of the EU, which could not be prejudiced by an international agreement. The Court did not apply the tenets of treaty interpretation - under which it is clear that the primacy of obligations under the UN Charter prevails in the event of a conflict with obligations under other treaties - nor did it consider the wishes of its Member States, as expressed in the EU Treaties, by which primacy is accorded to the UN Charter. The CJEU essentially took the position that it was a domestic court, and examined the regulation at issue for compliance with its "domestic constitution." Article 103 of the UN Charter¹¹ does not apply in the event that there is a conflict with domestic laws, but the Court did not try to explain how Article 103 might not apply due to the fact that the EU was essentially a State in practice, implementing "domestic" laws, rather than an international organization imposing

¹⁰ United Nations Charter, 1 UNTS XVI, 24 October 1945.

¹¹ *ibid* Article 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

treaty obligations on its members. Without undertaking such an examination or providing such an explanation, it remains unclear how the CJEU had authority to examine the lawfulness of the EU regulation implementing the UNSC resolution ("UNSCR") in the first place, as noted in the position taken by the CFI in *Kadi I* (CFI), and the arguments advanced by EU institutions and Member States in the appeal to *Kadi II*. This paper thus assesses the position of EU law within the international legal order, along with the CJEU's powers of review within the EU, with a view to determining (a) whether or not there is an actual basis for the CJEU's statement that it has the authority to review EU legislation implementing mandatory listings of the UNSC for compliance with fundamental rights as guaranteed in EU law, and (b) if not, what implications that might have for the EU and the Court in the first place, and the international legal order in the second.

The third gap in the Court's analysis stems from the CJEU's statement that not only did (a) its review of the EU regulation implementing a UNSC decision not amount to a review of the lawfulness of the UNSC resolution containing the decision, but (b) it did not have the mandate to review the lawfulness of UNSC resolutions. This position of the Court seemed particularly spurious in *Kadi II*, where the Court took the step of expressly reviewing each of the reasons given by the UNSC for listing Kadi, finding each to be deficient. It thus seems clear that the CJEU has at least indirectly assessed the legality of the relevant UNSC resolution, notwithstanding its statements that it has not done so, and that it does not have the mandate to do so.

A part of the reason that the Court seems to have taken the position that it is not reviewing the resolution itself – merely the implementing measures – is that it has conflated the UNSC's targeted sanctions with other measures that the UNSC has required States to take under Article 41 of the UN Charter, such as the requirement under UNSCR 1373 (2001)¹² to freeze the assets of, and criminalize support of terrorists, which are to be listed by States themselves. States have a measure of discretion as to how they implement the requirements of UNSCR1373, and must follow national procedures in order to do so, in line with other international treaty obligations, such as those found in human rights treaties, provided there is no conflict with their UN Charter obligations. In the Kadi cases, the Court has indicated that States have a measure of discretion in implementing the 1267 listing regime as well, whereas

¹² Resolution 1373 (2001), 28 September 2001, S/RES/1373 (2001) ("UNSCR 1373").

the UNSC's requirement that States list the individuals and freeze their assets "without delay" leaves no room for interpretation, and allows for no discretion in the implementation.

With respect to the second statement, that the CJEU does not have the mandate to review the lawfulness of UNSC resolutions, it appears that there may be at least be an exception to this general position, which was raised - admittedly in a somewhat contentious fashion - by the CFI in *Kadi I (CFI)*, when it said that it had the mandate to review UNSC resolutions for compliance with *jus cogens*. The CJEU rejected this position without explaining why (and then proceeded to review the resolution indirectly for compliance with fundamental rights). It is worth investigating that gap in the analysis, however, as an acknowledgement that states can review UNSC resolutions for compliance with *jus cogens* would introduce an element of judicial oversight within domestic court systems, without going too far in the wrong direction in trying to arrive at internal legitimacy for legislation implementing UNSC decisions. Acknowledging that States can take their own action in ensuring compliance with *jus cogens* under customary international law in the absence of an international tribunal that can review UNSC resolutions, may result in fewer judges and commentators striving to find reasons for the European legal order to prevail over that of the international legal order.

Finally, one of the gaps revealed in the academic commentary to the Kadi cases is apparent in the view that there is a *need* for judicial review by courts like the CJEU, given "the change in the UNSC's role since the UN Charter was signed." This position displays a misunderstanding of the origins and purpose of the United Nations and the role of the UNSC. While it is arguable that certain actions taken by the UNSC fall outside the role anticipated for it – such as establishing peacekeeping missions – when it comes to the sanctions being taken under Article 41, the UNSC is finally doing what it was supposed to do. At the time the UN Charter was signed, international terrorism committed by non-State actors had already been deemed by States to be a grave threat to international peace and security. Taking actions against such persons would thus have been an anticipated role for the UNSC, even if the overarching focus at the time the UN Charter was signed was on the prevention of wars on the scale of WWII. A misunderstanding of the origins and purpose of the UNSC leads to a desire to introduce protections that were expressly rejected when the Charter was drafted. This paper thus examines the ability of the UNSC to implement targeted measures against individuals generally and in the event that the human rights of individuals are violated

specifically, in light of the primary purpose of both the UN and the UNSC to maintain international peace and security.

Given the existence of these gaps in the analysis, the third part of this paper addresses the problems created by the CJEU's decisions with respect to the UNSC's targeted sanctions, in the nature of the implications for the EU and the UN system of collective security. The EU's implementation of the CJEU's decision is likely to have a negative impact on the international relations of the EU and its Member States, and could potentially result in liability for both as a result of not just the failure to list a specific individual or entity, but also in the simple delay in the implementation of UNSC resolutions, which has also not been much discussed. It seems that the CJEU's decisions may also result in an erosion of confidence in the CJEU by the EU Member States, given that it has ignored elements of the Treaties in making its decisions, even though it has held them to be of greater importance than the UN Charter. Finally, the section considers the possible precedent-setting nature of the CJEU's decisions, along with the affects that non-compliance of the EU and its Member States might have on the effectiveness of the sanctions specifically, and on the UN system of collective security generally.

The fourth part of this paper then considers alternatives to trying to effect change via domestic and European court decisions, as well as possible remedies to the non-compliance of the EU and its Member States. It reviews previous and recent structural reforms affected through political pressures, and discusses the benefits of effecting change to the UN system via the political organs of the UN, as was intended by the framers of the UN Charter. The paper then briefly considers the feasibility and desirability of (1) amending the UN Charter to either allow for greater review of UNSC decisions, or to add an explicit requirement for the UNSC to respect human rights when imposing Article 41 measures, and (2) referring the situation with the EU to the International Court of Justice ("ICJ").

CHAPTER I: THE KADI CASES

While the CJEU's decisions in the Kadi cases are generally well known, it will be useful to review the decisions made at first instance and on appeal in each case, and then the general analysis of the cases, in order to then consider the issues not fully addressed in both decisions in the second chapter, and the implications for the EU and the UN system of collective security stemming from problems with the CJEU's decisions in the third chapter.

Each Kadi case - *Kadi I* and *Kadi II* - consists of two parts: an initial decision by the CFI in *Kadi I* (CFI) and the GC in *Kadi II* (GC), followed by a decision on appeal in each case by the CJEU. The main thrust of *Kadi I* was a discussion of Kadi's fundamental rights as impacted by the EU regulation implementing his listing by the UNSC, which the CJEU determined had to be protected by the European Courts, notwithstanding the primacy of UNSC resolutions. The main thrust of *Kadi II* was a consideration of what level of review the institutions of the EU were required to take when considering if there were sufficient reasons for the EU to have listed a person who had been designated under the UNSC's targeted sanctions.

1. *Kadi I*

i. Facts and background

In October 1999, in response to growing concern about Al-Qaida, and the Taliban's refusal to hand over Usama bin Laden following his role in the bombing of US embassies, the UNSC adopted UNSCR 1267, which imposed travel and aviation-related restrictions against Afghanistan and the Taliban. The Security Council demanded that the Taliban cease its support of terrorist organizations and ensure that terrorists were not harboured under territory within its control, and gave the Taliban one month to extradite Usama bin Laden, after which a travel ban requiring all states to deny landing rights to aircraft owned by or on behalf of the Taliban, and an asset freeze under which all states were required to freeze funds owned or controlled directly or indirectly by the Taliban, automatically came into effect.¹³

The UNSC decided to strengthen the measures imposed under UNSCR 1267, and adopted UNSCR 1333 (2000)¹⁴ on 19 December 2000, requiring that States "freeze without delay" the assets of Usama bin Laden and individuals and entities associated with him, as

¹³ UNSCR 1267 (n4) para 4(a), (b).

¹⁴ Resolution 1333 (2000), 19 December 2000, S/RES/1333 (2000) ("UNSCR 1333")

designated by the 1267 Sanctions Committee.¹⁵ The Council adopted Common Positions with respect to the actions it considered necessary in order to implement the resolutions, and then adopted Regulations in order to implement the asset freeze required by the UNSC and the 1267 Sanctions Committee,¹⁶ under the conditions set out in the relevant resolutions.¹⁷ Annex I of those regulations contained the list of persons and entities whose funds were frozen, and the Commission was authorized to amend or supplement the Annex on the basis of determinations made by the UNSC or the 1267 Sanctions Committee.

The 1267 Sanctions Committee published its first consolidated list of persons subject to the asset freeze on 8 March 2001.¹⁸ Yassin Abdullah Kadi, a resident of Saudi Arabia, was added to the 1267 list by the UNSC as a possible supporter of Al-Qaida on October 19, 2001. Commission Regulation (EC) No 2062/2001 of the same date amended Annex I to Regulation No 467/2001 to add Kadi's name to the list of persons whose assets were frozen in the EU. On 27 May 2002, the Council adopted Regulation (EC) No 881/2002 to impose the required restrictive measures against Usama bin Laden, Al-Qaida and the Taliban, repealing Council Regulation (EC) No 467/2001, also with an Annex I listing designated persons.¹⁹ These Regulations were subsequently amended on 27 March 2003 in order to adjust the measures imposed by the Community to reflect exceptions to the restrictive measures provided for in UNSCR 1452 (2002)²⁰ (after Common Positions were taken to provide for these exceptions).²¹ These exceptions provided that the asset freeze would not apply to funds determined by competent Member State authorities to be necessary to cover “basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges”; to pay professional fees and legal fees; and

¹⁵ *ibid* para 8(c).

¹⁶ By paragraph 6 of UNSCR 1267, the UNSC established "a Committee of the Security Council consisting of all the Members of the Council" to seek information from States regarding effective implementation of measures; to make periodic reports to the Council on measures; to designate aircraft for the travel ban and to designate funds to be frozen; and to consider exemptions from the sanctions measures. I shall refer to this Committee as "the 1267 Sanctions Committee" or just "the Sanctions Committee," even though its mandate has been renewed and extended in subsequent resolutions, including UNSCR 1989, by which it came to be known as the "Al-Qaida Sanctions Committee."

¹⁷ The Council initially adopted Regulation (EC) No 337/2000 to implement the original flight ban and the freeze on Taliban funds. After UNSCR 1333 was adopted, the Council implemented Regulation (EC) No 467/2001 to strengthen the flight ban and asset freeze, repealing Regulation No 337/2000.

¹⁸ See UN Press Release, 'Security Council Committee, Established by Resolution 1267 (1999) Concerning Afghanistan, Issues Consolidated List,' 8 March 2001, AFG/131-SC/7028.

¹⁹ Whereas the previous two Regulations were adopted on the basis of Articles 60 EC and 201 EC, this regulation was adopted on the basis of Articles 60 EC, 301 EC and 308 EC. However, the arguments based on this distinction in *Kadi I* are not discussed in the context of this paper.

²⁰ Resolution 1452 (2002), 20 December 2002, S/RES/1452 (2002) ("UNSCR 1452").

²¹ See Common Position 2003/140/CFSP regarding exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP, as implemented under Regulation (EC) No 561/2003 amending Regulation (EC) No 881/2002.

to pay fees for the routine holding of frozen funds, provided that the Sanctions Committee was notified and did not object.²² In addition, funds necessary for extraordinary expenses could be unfrozen if the Sanctions Committee approved.²³

Kadi brought an action challenging his listing before the EU Courts on 18 December 2001, claiming that his listing had breached three of his fundamental rights, being (1) the right to a fair hearing, (2) the right to respect for property and of the principle of proportionality, and (3) the right to effective judicial review.²⁴ He stated that he was an international businessman, and that since his funds and assets in the EU were frozen, he was unable to manage his business. He further claimed that he had never been involved in terrorism or the financial support of terrorism, and that his professional reputation had been damaged by his listing in Annex I of the contested regulation.²⁵

In his submissions, Kadi argued that fundamental rights formed an integral part of the Community legal order, which could not be abrogated by the Council and Commission in the implementation of Security Council resolutions, as the EU had to justify its actions by reference to its own legal order.²⁶ With respect to his right to a fair hearing, Kadi acknowledged that prior notice could not be given in light of the purpose of the measures; however, he claimed that fundamental rights required that he be able to make his position known with a view to having his name removed from the list. Since the Council could freeze his funds indefinitely without providing him an opportunity to comment on the evidence against him, he claimed his rights were violated.²⁷

With respect to the alleged violation of his right to respect for property and of the principle of proportionality, Kadi contended that the contested regulation allowed his funds to be frozen solely on the basis of the list provided by the Sanctions Committee, and that without being able to assess the evidence underpinning his listing, the EU institutions could not weigh if the "draconian measures" taken against his property were justified.²⁸

Finally, Kadi alleged that his right to effective judicial review - which is a general principle of Community law - had been breached because the contested regulation did not provide any opportunity for review. In response to the Council's argument that the measures against him were administrative only, and did not amount to a penalty or confiscation of his

²² Regulation (EC) No 561/2003, amending Regulation (EC) No 881/2002.

²³ *ibid*

²⁴ *Kadi I (CFI)* (n5) para 59.

²⁵ *ibid* para 136.

²⁶ *ibid* paras 138, 140.

²⁷ *ibid* paras 141-143.

²⁸ *ibid* paras 144-145.

property, Kadi claimed that he been accused of "the most serious form of criminal wrongdoing, namely, involvement in a terrorist organisation responsible for the attacks of 11 September 2011"; that his reputation was destroyed and assets frozen indefinitely; that the Council had not considered the evidence against him; and that the Council would not and could not provide him with an opportunity to dispute the freezing of his assets.²⁹ Kadi claimed that the Community institutions could not hide behind UNSC decisions, and that he should be entitled to judicial review within the Community.³⁰

For their part, the Council and the Commission submitted principally that they were bound under Articles 24(1), 25, 41, 48(2) and 103 of the UN Charter to give effect to the decisions of the UNSC acting under Chapter VII of the UN Charter, and that the Community institutions had no discretion in implementing the listing measures; they had to be implemented without alteration.³¹ In implementing the contested regulations, "[t]he intention of the institutions was...to give effect to the obligations imposed on [UN] Member States...by means of the automatic transposition into the Community legal order of the lists of individuals or entities drawn up by the Security Council or by the Sanctions Committee."³² Finally, they noted that while the EC was not itself a Member of the UN, it was "required to act, in its spheres of competence, in such a way as to fulfil the obligations imposed on its Member States as a result of their belonging to the United Nations."³³ The Council argued "that when the Community acts to discharge obligations imposed on its Member States as a result of their belonging to the United Nations...the Community must be regarded for all practical purposes as being in the same position as the members of the United Nations, having regard to Article 48(2) of the Charter of the United Nations."³⁴ As such, even if the contested regulation violated Mr. Kadi's fundamental rights, any unlawful conduct under EU law was precluded by Article 48(2) of the UN Charter.³⁵ Thus, any review by the Court should be limited to whether the institutions had committed a manifest error in implementing their obligations under the UNSC resolutions--beyond that, any claim of jurisdiction would amount to indirect judicial review of mandatory measures of the UNSC; would disrupt the international relations of the Community and its Member States; would undermine the foundations of the international order of states; and could affect the uniform application of

²⁹ *ibid* paras 146-149.

³⁰ *ibid* para 150.

³¹ *ibid* para 153.

³² *ibid* para 155.

³³ *ibid* para 158.

³⁴ *ibid* para 159.

³⁵ *ibid* para 161.

UNSC decisions, which is essential to their effectiveness.³⁶ Furthermore, should the Community fail to implement the UNSCRs, the Member States would then be obligated to implement them.³⁷

In the event that the Court decided to proceed with a review, the Council and Commission posited that the contested regulation did not violate Kadi's fundamental rights as alleged. The right to a hearing was not prejudiced, because the Community institutions are obliged to implement UNSC decisions, and have no power to review the measures; the right to property and the principle of proportionality were not infringed, because there is no absolute protection of the right to property, which may be restricted by justified public-interest objectives, such as ensuring that individuals' assets cannot be used to promote terrorism; and the right to effective judicial review was not affected, given that the applicant was able to bring the action at issue.

ii. Decision at first instance

In its decision of 21 September 2005, the CFI refused to review the EU regulation implementing Kadi's listing, because it held that it did not have jurisdiction to review a measure of the Security Council. It noted that the obligation of Member States to respect the principle of UN primacy, as enshrined in Article 103 of the UN Charter, was not affected by the EC Treaty,³⁸ and that the primacy extended to decisions of the UNSC, which Member States are obligated to carry out under Article 25 of the UN Charter.³⁹ The CFI stated that it followed that "pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations."⁴⁰

The CFI further determined that while the Community was not itself bound by the UN Charter, it was bound by the EC Treaty to adopt the measures necessary for its Member States to fulfill their UN obligations.⁴¹ As a result of this reasoning, the Court stated that "the applicant's arguments based on the view that the Community legal order is a legal order

³⁶ *ibid* paras 162-163.

³⁷ *ibid* para 164.

³⁸ *ibid* paras 181, 183, 185-188.

³⁹ *ibid* paras 184, 189.

⁴⁰ *ibid* para 190.

⁴¹ *ibid* paras 192 - 204.

independent of the United Nations, governed by its own rules of law, must be rejected."⁴² That said, the EC institutions could not avoid legal review of their acts for compliance with the Treaty; the applicant had a right under Article 230 EC "to submit the lawfulness of the contested regulation to the [CFI], provided that the act is of direct and individual concern to him."⁴³

The question for the CFI was thus whether general international law or the EC Treaty imposed limits on the judicial review. The CFI noted that the contested regulation was made to implement UNSC decisions, and that "as the institutions have rightly claimed, they acted under circumscribed powers, with the result that they had no autonomous discretion. In particular, they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration."⁴⁴ Any review of the lawfulness of the contested regulations would imply that the Court was considering, indirectly, the lawfulness of UNSC resolutions, and if the CFI were to annul the regulations, that would amount to a declaration by the Court that the UNSC resolution infringed the fundamental rights of individuals.⁴⁵

The Court stated in particular that "determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts."⁴⁶ The suggestion that it had jurisdiction to review the lawfulness of a UNSC decision indirectly, in accordance with the Community's standard of protection of fundamental rights, could not be justified on the basis of international law or Community law.⁴⁷ This would have been contrary to the undertakings of the EU Member States under the UN Charter and the Vienna Convention on the Law of Treaties ("VCLT"),⁴⁸ and would have been contrary to provisions of the EC Treaty.⁴⁹

Notwithstanding those findings, the CFI stated that it was nonetheless "empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from

⁴² *ibid* para 208.

⁴³ *ibid* paras 209-211.

⁴⁴ *ibid* paras 212-214.

⁴⁵ *ibid* paras 215-216.

⁴⁶ *ibid* para 219.

⁴⁷ *ibid* para 221.

⁴⁸ 1155 UNTS 331, entered into force January 27, 1980.

⁴⁹ *Kadi I (CFI)* (n5) paras 222-223.

which no derogation is possible.”⁵⁰ If a UNSC resolution failed to observe peremptory norms, then it would bind neither UN Member States nor the European Community,⁵¹ and the indirect judicial review carried out in the context of an action for annulment of a Community act could, “highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute ‘intransgressible principles of international customary law’.”⁵²

The CFI thus considered whether the applicant's pleas regarding breach of his fundamental rights amounted to a breach of *jus cogens* norms, but determined that they did not. On the basis of these findings, the CFI rejected Kadi's request to have the contested regulations annulled as they applied to him.

iii. Decision on appeal

Kadi lodged an appeal of the CFI's decision on 17 November 2005. His claim was made in five parts, being that: (1) the CFI had erred in law by confusing the question of primacy of States' UN Charter obligations under Article 103 with the question of the binding effect of UNSC decisions in Article 25; (2) the CFI had erred in law by taking the position that UNSC resolutions automatically form part of the law of UN Members; (3) the CFI had erred in law by holding that it had no power to review the lawfulness of resolutions of the UNSC; (4) the CFI's reasoning on *jus cogens* was incoherent, but if UNSC resolutions enjoyed immunity from jurisdiction, this would apply generally, including to considering a breach of *jus cogens* norms; and (5) the fact that the UNSC had not established an independent court to rule on Sanctions Committee decisions did not mean that the Member States could not improve the finding of facts, or that they were “prohibited from creating an appropriate legal remedy by reason of the latitude they enjoy in the performance of their obligations.”⁵³ Kadi further maintained, as an alternative to his international law arguments, that Community law required that all EC measures be subject to judicial review by the Court which also concerned observance of fundamental rights; if the UN offered no protection for those who claimed

⁵⁰ *ibid* para 226.

⁵¹ *ibid* para 230.

⁵² *ibid* para 231.

⁵³ *Kadi I* (n2) paras 250-254.

fundamental rights had been infringed – which was not provided by the re-examination procedure – then the Community must review the measures.⁵⁴

In a cross-appeal, the Council, United Kingdom, France, and the Netherlands argued that the CFI had erred in law in deciding that it was competent to consider whether the UNSC resolutions at issue were compatible with *jus cogens*. The three countries and the Commission further considered that the CFI had erred in determining that the fundamental rights at issue fell within the scope of *jus cogens*. The Commission separately maintained that in instances where the Security Council had made decisions to take measures with no discretion in their implementation, there were only two instances where the resolution could be reviewed: (1) if the resolution concerned was contrary to *jus cogens*; and (2) if the resolution fell outside the purposes and principles of the UN and was therefore *ultra vires*.

The CJEU delivered its judgment in *Kadi I* on 3 September 2008.⁵⁵ The CJEU first assessed the legal basis for the contested regulation, and found that the objective of the contested regulation of immediately preventing persons associated with Usama bin Laden, Al-Qaeda and the Taliban from accessing financial resources could validly be considered as being included as one of the objects of the EC Treaty entrusted to the Community, and was thus valid under Article 308 EC.⁵⁶

The CJEU then determined that it was able to review the lawfulness of the EU regulation implementing the measures against Kadi, because it was clear from the Court's case law that "respect for human rights is a condition of the lawfulness of Community acts...and that measures incompatible with respect for human rights are not acceptable in the Community."⁵⁷ It followed that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty."⁵⁸

⁵⁴ *ibid* paras 255-258.

⁵⁵ The Grand Chamber of the ECJ considered Mr. Kadi's appeal in conjunction with an appeal by the Al Barakaat International Foundation from the CFI's decision in *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, [2005] ECR II-3533; Judgment of the Court of First Instance (Second Chamber, Extended Composition), 21 September 2005, Case T-306/01, which the CFI decided on the same day as *Kadi I* (CFI), with the same outcome (refusing the request to remove the entity's name from the 1267 list), using the same reasoning. While the decision addressed both appeals, this paper will only discuss the case as it relates to Kadi, rather than to both Kadi and Al Barakaat.

⁵⁶ *Kadi I* (n2) paras 222-227.

⁵⁷ *ibid* para 284.

⁵⁸ *ibid* para 285.

The CJEU was careful to note that it was not for the Court to "review the lawfulness" of a UNSC resolution, even with respect to compatibility with *jus cogens*. It then contended that "any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law."⁵⁹

While accepting that the Community was required to take into account the relevant obligations under the UN Charter when implementing measures required under a Security Council resolution, the CJEU stated that:

It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.⁶⁰

The Court also found that there was no basis in the EC Treaty for according immunity from jurisdiction for a Community measure like the contested regulation "as a corollary of the principle of the primacy at the level of international obligations under the Charter of the United Nations," especially those related to UNSC decisions.⁶¹ The CJEU stated that "the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered in the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement."⁶²

With respect to the Commission's argument that as long as listed persons had an acceptable opportunity to be heard within the UN legal system, then the Court should not intervene, the Court noted that an external re-examination procedure could not give rise to general immunity from jurisdiction within the EU's internal legal order. It declared that such

⁵⁹ *ibid* para 287.

⁶⁰ *ibid* paras 298-299.

⁶¹ *ibid* para 300.

⁶² *ibid* para 316.

immunity would constitute "a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty," and would be unjustified given that there was no equivalent protection under the delisting procedure, even after the Focal Point for Delisting had been introduced, and then its procedures amended such that individuals could submit requests directly.⁶³ The Sanctions Committee was not required to communicate reasons or evidence to listed persons or give reasons for not listing, and the delisting process still remained a form of diplomatic protection.⁶⁴ Thus, it followed that "the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations."⁶⁵

Having decided that it had the authority to review the implementation of the UNSC decision for compliance with the fundamental principles upon which the EU was founded, the Court considered Kadi's claims that his right to be heard and right to judicial review, as well as his right to enjoy his property, had been violated by his listing under the UNSC sanctions regime.

The Court stated that "the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR."⁶⁶ The Court held that the effectiveness of judicial review requires "the Community authority in question...to communicate [the] grounds [for listing] to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action."⁶⁷ The CJEU did acknowledge that due to the nature of the listing regime, which freezes the assets of persons, the right to be heard did not mean that the authorities would have to communicate the grounds for listing before a person was actually listed, as "such prior communication would be liable to jeopardise the effectiveness

⁶³ *ibid* paras 321-325.

⁶⁴ *ibid* 323-325.

⁶⁵ *ibid* 326.

⁶⁶ *ibid* para 335.

⁶⁷ *ibid* para 336.

of the freezing of funds and resources imposed by that regulation,"⁶⁸ since they would lose the advantage of a surprise effect. However, the nature of the listing regime did not mean that the regulation escaped all review, and the Court held that the fact that Kadi was never informed of the evidence against him or provided with the opportunity to make his position known meant he could not exercise his right of defence, and in particular the right to be heard.⁶⁹ Given that Kadi had been denied the right to defence, his right to an effective legal remedy had also been breached.⁷⁰

The Court next examined Kadi's claim that the asset freeze imposed against him under the EC regulation constituted a breach of the right to property. According to the Court, the right to property is a general principle of Community law, enshrined in the First Additional Protocol to the European Convention on Human Rights,⁷¹ but it is not an absolute right; it may be restricted, provided that the restrictions do not constitute "a disproportionate and intolerable interference" in relation to the objective of public interest pursued by the restrictions.⁷² The Court stated that the "freezing measure constitute[d] a temporary precautionary measure which [was] not supposed to deprive [listed] persons of their property. It [did], however, undeniably entail a restriction of the exercise of Kadi's right to property that must, moreover, be classified as considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001."⁷³

The Court then considered whether the measures were proportionate to the public interest in imposing the listings. Given the importance to the international community of the fight against terrorism, the measures imposed under the 1267 regime could not "per se be regarded as inappropriate or disproportionate."⁷⁴ The Court next considered the fact that the Sanctions Committee had allowed for national authorities to unfreeze funds for basic expenses on the request of an affected person, as well as for extraordinary measures in instances where the Sanctions Committee approved. In light of the existence of these exemptions, the Court said that "[i]t must therefore be found that the restrictive measures imposed by the contested regulation constitute restrictions of the right to property which

⁶⁸ *ibid* para 339.

⁶⁹ *ibid* paras 343-348.

⁷⁰ *ibid* para 349.

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ("ECHR").

⁷² *Kadi I* (n2) para 355.

⁷³ *ibid* para 358.

⁷⁴ *ibid* para 363.

might, in principle, be justified."⁷⁵ The determination would thus turn on whether Kadi's right to property had been respected "in the circumstances of the case."⁷⁶ According to the Court, as a procedural requirement inherent in Article 1 of Protocol No 1 to the ECHR, these circumstances had to include whether the person concerned had had "a reasonable opportunity of putting his case to the competent authorities."⁷⁷ However, the Court determined that since the regulation was adopted without "furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him"⁷⁸ this meant that the restrictive measures constituted an "unjustified restriction of his right to property,"⁷⁹ which had therefore been violated by the regulation.

On the basis of the above, the regulation was annulled as it concerned Kadi, but the Court gave the EC institutions three months to remedy the infringements, if possible, so as not to irreversibly prejudice the effectiveness of any new restrictive measures against Mr. Kadi that might be validly imposed.

2. *Kadi II*

i. Facts and background

Following the CJEU's decision in *Kadi I*, France sent a letter on behalf of the EU to the Sanctions Committee on 8 September 2008, requesting that it make the summary of reasons for Kadi's listings available on its website, in accordance with the Sanctions Committee's obligation to do so for all listed individuals under UNSCR 1822 (2008).⁸⁰ The Sanctions Committee sent the summary of reasons to France on 23 October 2008. In short, these were that Kadi had acknowledged that he was a founding trustee and had directed the actions of a foundation that operated under the umbrella of the predecessor to Al-Qaida; that he had, on the recommendation of a known Al-Qaida financier, hired an individual who was operating under agreements with Usama bin Laden; that his foundation had been involved in providing logistical and financial support for terrorist activities of mujahidin in Bosnia and

⁷⁵ *ibid* para 366.

⁷⁶ *ibid* para. 367.

⁷⁷ *ibid* para 368, citing as authority the judgment of the ECtHR in *Jokela v. Finland* of 21 May 2002, *Reports of Judgments and Decisions*, 2002-IV, § 45 and case-law cited, and § 55.

⁷⁸ *Kadi I* (n2) para 369.

⁷⁹ *ibid* para 370.

⁸⁰ Resolution 1822 (2008), 30 June 2008, S/RES/1822 (2008) ("UNSCR 1822").

Herzegovina, some of which had also received funding from bin Laden; that he was a major shareholder in a bank where a known bin Laden associate held a position and where planning sessions for an attack against US interests in Saudi Arabia may have taken place; and that he owned several firms in Albania which funnelled money to extremists, and for which some received working capital from bin Laden.⁸¹ These reasons were subsequently published on the website, as required by UNSCR 1822.

France forwarded the summary of reasons to the Commission on 22 October 2008. The Commission sent Kadi a letter containing the reasons supplied in the narrative summary of the Sanctions Committee on the same day. The letter noted that it was the Commission's intention to maintain Kadi's listing on Annex 1 of Regulation No 881/2002 on the basis of those reasons, and that it was the purpose of the letter to give Mr. Kadi the opportunity to address any of the reasons provided by 10 November 2008, before the Commission took its final decision.⁸² Kadi sent a letter to the Commission dated 10 November 2008, requesting that the Commission disclose the evidence supporting the allegations made in the summary of reasons and that he be given an opportunity to respond to it. He also attempted to refute the general allegations in the Commission's letter.⁸³

Eighteen days later, on 28 November 2008, the Commission adopted a regulation that added Kadi's name to Annex I in Regulation No 881/2002.⁸⁴ The preamble to that regulation noted that the Commission had communicated the summary of reasons for listing him, had received and examined comments from Kadi, and that after considering these comments carefully, and in light of the preventive nature of freezing his funds, decided the listing was justified due to his association with Al-Qaida, and added his name to Annex 1, effective as of 30 May 2002.⁸⁵ The contested regulation entered into force on 3 December 2008.

The Commission responded to Kadi's letter on 8 December 2008, stating that in providing Kadi with the summary of reasons and giving him an opportunity to respond, it had complied with the CJEU's decision in *Kadi I*; that that judgment did not require them to disclose the additional information requested by Kadi; that since the measures were "preventative" asset freezing, the evidentiary standard was one of reasonable grounds to believe that the listed person was a terrorist or terrorist organization, or financed terrorism; and that the fact that criminal proceedings against Kadi had been dropped in several countries

⁸¹ See summary of reasons reproduced at para 50 of *Kadi II (GC)* (n6).

⁸² *Kadi II (GC)* (n6) para 53.

⁸³ *ibid* para 55.

⁸⁴ Regulation (EC) No 1190/2008, amending for the 101st time Regulation No 881/2002 (OJ 2008 L 322, p. 25).

⁸⁵ Recitals 3 to 6, 8 and 9 of the preamble to Regulation (EC) No 1190/2008.

was irrelevant, given the different standards of evidence applicable to preventative measures.⁸⁶ The Commission concluded that his listing was justified, and notified him of the possibility of challenging the regulation, and of applying to the Sanctions Committee to have his name removed from the 1267 list.

Kadi challenged the new regulation that placed his name on Annex I of Regulation No 881/2002 via an appeal lodged on 26 February 2009. With respect to the appropriate standard of review, Kadi submitted that the Court should apply an "intensive and anxious" standard of judicial review.⁸⁷ He also submitted that "particularly compelling evidence" was required to justify the asset-freezing measures against him, given that they were "draconian measures, unlimited as to time and quantum...the consequences of which may be devastating"; they were "punitive," as they publicly branded him a terrorist or supporter of terrorism; and they had been in place since 2001.⁸⁸

For their part, the Commission and the intervening governments (the UK and France) submitted that it was necessary to strike a fair balance between fundamental rights and the need to combat international terrorism pursuant to UNSC regulations; that a distinction had to be drawn between standards of judicial review involving measures involving discretionary assessments by the Community, and those implementing measures against persons specifically designated by the Sanctions Committee.⁸⁹ The Commission submitted that while the Committee must examine the comments of an applicant rebutting allegations made in listing reasons, where an applicant wishes to challenge evidence underlying reasons, "it is not for the Community to substitute *ex post facto* its own assessment of that evidence for the Sanctions Committee's assessment," nor could it, given that the evidence is only communicated by UN Members to the Committee itself.⁹⁰ For these reasons, any review should be limited to one for manifest errors of fact or assessment; anything else would undermine the UN sanctions system.⁹¹ The Commission, the UK, France and the Council all argued that an intensive review could lead to a situation where EU Member States were subject to competing obligations under the UN Charter and the EU Treaties.⁹²

With respect to the substance of the judicial review, Kadi submitted that there was a lack of sufficient legal basis for the listing; that his fundamental rights of defence and

⁸⁶ *Kadi II (GC)* (n6) para 60.

⁸⁷ *ibid* para 82.

⁸⁸ *ibid* para 83.

⁸⁹ *ibid* paras 85-89.

⁹⁰ *ibid* para 94.

⁹¹ *ibid* paras 96-97.

⁹² *ibid* paras 99-100, 109.

effective judicial protection had been breached; that there was a manifest error of assessment of the facts; and that there was a breach of the principle of proportionality.⁹³ Specifically, Kadi claimed that simply conveying the summary of reasons to him could not be regarded as satisfying the requirements of a fair hearing and effective judicial protection, as the summary contained "general, unsubstantiated, vague and unparticularised allegations" with no supporting evidence.⁹⁴ The summary of reasons thus could not provide a guarantee of effective judicial protection, either, since a court would not have sufficient information to determine whether the decision to freeze his assets was lawful or not.⁹⁵ He also maintained that the Commission should have taken into account the fact that criminal investigations had been abandoned against him in Switzerland, Turkey and Albania.⁹⁶ The Commission responded that Kadi had had an opportunity to respond to the summary of reasons, and his response was carefully considered, which fulfilled Kadi's right to be heard. Furthermore, the present action was evidence of the fact that he enjoyed the right to effective judicial protection.⁹⁷

Finally, with respect to the claim that the principle of proportionality had been infringed, Kadi maintained that the interference with his property in this second instance was even more serious than his initial listing, due to the duration of the asset freeze, and the fact that it was imposed without the procedural guarantees required by the CJEU. The Commission maintained that this latter element did not apply, as it had reminded Kadi of the possibility of applying to the focal point, and because it gave him the opportunity to put his case to the authorities of the EU.⁹⁸

i. Decision at first instance

The GC annulled the Commission's regulation as it applied to Kadi, since the reasons provided were too vague, and Kadi's rights of defence and to effective judicial protection had been infringed.

To determine the appropriate standard of review, the GC reviewed the various statements of the Court of Justice in *Kadi I*, and concluded that its task was to ensure "in principle the full review" of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the

⁹³ *ibid* para 79.

⁹⁴ *ibid* para 157.

⁹⁵ *ibid* para 160.

⁹⁶ *ibid* para 158.

⁹⁷ *ibid* paras 166-167.

⁹⁸ *ibid* paras 189-191.

ground that it gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations."⁹⁹ This would hold true as long as the Sanctions Committee failed to offer guarantees of effective judicial protection, which seemed to be the case notwithstanding the establishment of the Office of the Ombudsperson, as the Security Council still had not established an independent and impartial body that could review decisions of the Sanctions Committee. Recommendations of the Focal Point and the Ombudsperson could still be overcome by consensus, and there was still no requirement for evidence to be disclosed to listed individuals.¹⁰⁰ The GC concluded that in those circumstances, the review of 1267 measures could only be regarded as effective if it reviewed the Sanctions Committee's assessments, and the evidence underlying them.¹⁰¹

The GC determined that the EU Courts " must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it." In addition to the considerations set out in established case law, the GC stated that it had to take into consideration that the asset-freezing measures were "particularly draconian," and that Kadi's assets had been frozen indefinitely for nearly 10 years, with access to his funds possible only by seeking an exemption from the Sanctions Committee.¹⁰² The Court stated that given the sheer length of time for which the assets were frozen, it might even be time to call into question its finding from *Kadi I* that the measures were precautionary only, and did not affect the very right to the property but just its use.¹⁰³ While it determined that this question was outside the scope of the proceedings, it also stated that, if the premise set down by the CJEU in *Kadi I* that no immunity could be accorded to the measures due to their being required by the UNSC was accepted, then "the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned."¹⁰⁴

In applying this standard of review, the GC stated that the positions and explanations of the Commission and the Council "quite clearly reveal that the applicant's rights of defence have been 'observed' only in the most formal and superficial sense, as the Commission in actual fact considered itself strictly bound by the Sanctions Committee's findings and

⁹⁹ *ibid* para 126.

¹⁰⁰ *ibid* paras 127-128.

¹⁰¹ *ibid* para 129.

¹⁰² *ibid* para 149.

¹⁰³ *ibid* para 150.

¹⁰⁴ *ibid* para 151.

therefore at no time envisaged calling those findings into question in the light of the applicant's observations."¹⁰⁵ Kadi had not been granted even minimal access to the evidence against him, and the few pieces of information and imprecise allegations provided in the summary of reason were "clearly insufficient to enable [him] to launch an effective challenge to the allegations against him."¹⁰⁶ The Court therefore determined that the adoption of the contested regulation had breached Kadi's rights of defence. Since the reason that those rights were breached stemmed from a lack of information and evidence, this also meant his right to effective judicial review had been infringed, since a court could not review the basis of the decision taken.¹⁰⁷

Finally, with respect to the application of the principle of proportionality, the GC, having reference to the judgment of the CJEU in *Kadi I*, noted that "the contested regulation was adopted without furnishing any real safeguard enabling the applicant to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and duration of the freezing measures to which he is subject."¹⁰⁸ It thus had to be held that his listing by the EU constituted an unjustified restriction on his right to property, and the claim that there was a breach of the principle of proportionality was therefore well-founded.¹⁰⁹

The European Commission, the Council and the UK all brought appeals of the General Court's decision on 10 December 2010. The Czech Republic, Denmark, Ireland, Spain and Austria intervened in support of the Council, and Bulgaria, Italy, Luxembourg, Hungary, the Netherlands, Slovakia and Finland intervened in support of the Commission, the Council and the UK. The grounds of appeal put forward were that the GC had erred in law in not recognising that the contested regulation had immunity from jurisdiction; that it had erred in law with regard to the intensity of judicial review; and that it had erred in the examination of Kadi's claim of infringement of his rights of defence, effective judicial protection, and of the principle of proportionality.

ii. Decision on appeal

¹⁰⁵ *ibid* para 171.

¹⁰⁶ *ibid* paras 173-174.

¹⁰⁷ *ibid* paras 177-184.

¹⁰⁸ *ibid* para 192.

¹⁰⁹ *ibid* paras 193-194.

With regard to the first ground of appeal, the CJEU noted that the Council, supported by Ireland, formally requested that the Court reconsider the principles set out in *Kadi I*, claiming that:

...the refusal to grant the contested regulation immunity from jurisdiction is contrary to international law. That refusal wholly ignores the fact that it is the Security Council which has primary responsibility for determining the measures necessary for the maintenance of international peace and security and ignores the primacy of obligations under the United Nations Charter over those arising under any other international agreement. ... That approach leads the European Union's institutions to substitute themselves for the international bodies which have the relevant powers. It amounts to reviewing the legality of Security Council resolutions in the light of European Union law. The uniform, unconditional and immediate application of those resolutions is jeopardised. States which are members both of the United Nations and of the European Union find themselves in an impossible position as regards meeting their international obligations.¹¹⁰

In its findings, the Court did not address any of the arguments with respect to whether or not the EU's institutions were bound to comply with decisions of the UNSC given that it was exercising powers transferred to them by the Member States. It simply referred to its previous decision in *Kadi I*, and noted that there had been no change in the factors justifying a reconsideration. All EU measures were subject to review in light of the constitutional guarantee of the protection of fundamental rights, even if those measures implemented resolutions adopted by the UNSC under Chapter VII of the UN Charter.¹¹¹

The CJEU examined the second and third grounds of appeal together. With respect to the rights of the defence, the Court noted that these rights were affirmed in Article 41(2) of the Charter of Fundamental Rights of the European Union,¹¹² and that these included - on the basis of EU case law - the right to be heard and the right to have access to the file, subject to legitimate confidentiality concerns.¹¹³ The right to effective judicial protection was affirmed in Article 47 of the CFREU, and required that the person be able to ascertain the reasons upon which a decision was based, either from the decision itself, or from obtaining disclosure of the reasons, such as to make it possible from him to defend his rights.¹¹⁴ While Article

¹¹⁰ *Kadi II* (n3) para 61.

¹¹¹ *ibid* paras 65-69.

¹¹² Charter of Fundamental Rights of the European Union (2007) ("CFREU")

¹¹³ *Kadi II* (n3) para 99. Note that while the Court referenced the ECHR in *Kadi I*, it likely referenced the CFREU in *Kadi II* because that Charter had gained the same legal status as the Treaties after the Lisbon Treaty came into force on 1 December 2009 (see Art. 6(1) TEU).

¹¹⁴ *ibid* para 100.

52(1) of the CFREU allows limitations on the rights enshrined therein, this was subject, *inter alia*, to the principle of proportionality.¹¹⁵

The Court stated that when proceedings related to the EU's implementation of UNSC 1267 listings, "respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee."¹¹⁶ The Court also stated that the individual must be provided an opportunity to provide views on those reasons, and the competent EU authority must assess whether the reasons are well founded, in light of any comments made by the individual.¹¹⁷ In that context, the Court stated that the EU authority must assess whether it is necessary to request reasons for the listing of an individual from the UN Member that proposed the listing, via the Sanctions Committee.¹¹⁸ In the event of a judicial review of the reasons for listing, the Courts of the EU were to ensure that a decision affecting a person individually was taken on a sufficiently solid factual basis, which entailed verifying the factual allegations underpinning the reasons for the decision.¹¹⁹ This might require the European Courts to request that the competent EU authority produce confidential information or evidence to establish that the reasons relied upon are well-founded.¹²⁰ In the event that EU authorities cannot provide such information, then the Courts will only rely on the material disclosed. The Court admitted that overriding security concerns might preclude the disclosure of certain information, but stated that it was for the Courts of the EU to determine whether or not that information should be disclosed to the listed person. If the Courts decided disclosure should be made, the competent EU authority would be given the opportunity to make disclosure to the person concerned. If no such disclosure was made, then the Court would not take that information into account on its review. If, however, the Court agreed that disclosure was precluded on the basis of security concerns, that it was for the Courts to strike the appropriate balance with effective judicial protection in considering the reasons.¹²¹ Given the preventive nature of the measures

¹¹⁵ *ibid* para 101.

¹¹⁶ *ibid* para 111.

¹¹⁷ *ibid* paras 112-114.

¹¹⁸ *ibid* para 115.

¹¹⁹ *ibid* para 119.

¹²⁰ *ibid* paras 120-121.

¹²¹ *ibid* paras 125-129.

at issue, the CJEU stated that at least one of the reasons had to be sufficiently detailed and specific so as to support the decision to list a person.¹²²

In applying that standard of review to the facts, the CJEU found that the GC had erred in law in basing its finding that Kadi's rights of the defence and the right to effective judicial protection had been infringed on the fact that the Commission had failed to disclose the information and evidence underlying the reasons for listing, given that the Commission was not in possession of that information and evidence.¹²³ It had also erred in basing its finding on an assessment that the allegations were vague and lacking in detail. While the GC was correct that one of the allegations (pertaining to owning several firms in Albania that funneled money to extremists) was insufficiently detailed and specific, the remainder of the reasons provided in the summary *were* sufficiently detailed and specific to allow the exercise of Kadi's rights of defence and judicial review of the lawfulness of the listing measure.¹²⁴

Notwithstanding its disagreement with the GC in this respect, the CJEU nonetheless found that the contested regulation was unlawful, since no evidence had been adduced to substantiate the allegations - which Kadi had denied - of his being involved in international terrorist activities. The Court undertook a detailed analysis in this respect of each of the reasons provided by the UNSC, and determined that no information or evidence had been produced to support the claims.¹²⁵ Since "none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee [were] such as to justify the adoption, at European Union level, of restrictive measures against him," the CJEU determined that the subsequent regulation maintaining Kadi's listing had to be annulled.¹²⁶

3. Criticism and analysis of the decisions

The CJEU's decision on appeal in *Kadi I*, characterized as "perhaps the most visible and interesting case of the European Court of Justice (CJEU) for external relations in recent years,"¹²⁷ sparked an enormous amount of academic commentary.¹²⁸ This section is not

¹²² *ibid* para 130.

¹²³ *ibid* para 137.

¹²⁴ *ibid* paras 140-150.

¹²⁵ *ibid* paras 151-162.

¹²⁶ *ibid* paras 163-164.

¹²⁷ Juliane Kokott and Christoph Sobotta, 'The Kadi Case - Constitutional Core Values and International Law - Finding the Balance?' (Vol. 23, No. 4, EJIL 2012), 1015.

¹²⁸ As August Reinisch writes at p.3 of *Challenging Acts of International Organizations Before National Courts* (OUP 2010): "scholarly comments on the *Kadi* cases...would already fill a multi-volume publication." For a representative list of articles, see footnote 8.

meant to address specific critiques or articles in detail; it is simply meant to give an overview of the types of issues analysed following each of the Kadi cases.

While the commentary covered issues ranging from judicial review of and legal remedies against UNSC targeted sanctions to the impact of the CJEU's decision on the primacy of the UN system of collective security, many commentators heralded the decision as a triumph for individual human rights. Joris Larik summarised the "two principal sentiments" running through the academic commentary as follows:

Either that compliance with international law is being sacrificed for the, arguably more noble, cause of safeguarding fundamental rights and the rule of law in the EU; or that a regional court is on the brink of casting the EU and its Member States into a state of non-compliance with obligations under the UN Charter, which potentially may undermine the UN and its system of collective security as a whole.¹²⁹

Following the initial criticism of the CFI's decision in *Kadi I (CFI)*, where it limited the ability to review UNSC resolutions to compliance with *jus cogens*, views were polarized between those who thought the decision went too far, and those who thought that it did not go far enough.¹³⁰ A survey conducted following the CFI's judgment indicated that the judgment had been "considered disappointing since the Court has chosen to defend fundamental rights as being protected by *jus cogens* rather than applying the higher standard of protection guaranteed within the EC legal order."¹³¹ The scorn that the CFI's decision received from a human rights perspective "was not compensated by praise from general public international lawyers" with respect to its decision to accord primacy to the UNSC decision, subject only to *jus cogens*.¹³² Larik attributed this to a sense that the "strange manner" in which the CFI had interpreted and applied the concept of *jus cogens* contributed to the view that regional and national courts should not be reviewing UNSCRs for compliance with *jus cogens*, given the potential impact of undermining the system of collective security.¹³³

Those who viewed the Court's decision as not going far enough took the view that a result that held that the UNSC is only bound by *jus cogens* imputes "an enormous abundance of power to the Security Council which [can] hardly be justified."¹³⁴ This specific comment

¹²⁹ Joris Larik, "The Kadi Saga as a Tale of 'Strict Observance' of International Law: Obligations under the UN Charter, Targeted Sanctions and Judicial Review in the European Union" (NILR 2014), p.26.

¹³⁰ Ramses A Wessel, "The Kadi Case: Towards a More Substantive Hierarchy in International Law?" (Vol. 5 *International Organizations Law Review* 2008), 327.

¹³¹ Sara Poli and Maria Tzanou, "The Kadi Rulings: A Survey of the Literature," 28 YEL (2009), p. 548.

¹³² Larik, "The Kadi Saga" (n129) 28.

¹³³ *ibid* 28-29.

¹³⁴ Oxford Reports on International Law, ILDC, the *Nada case*, Analysis, para 3.

arose in the context of the decision in *Nada*,¹³⁵ where the Swiss Federal Tribunal had followed the reasoning of the CFI in *Kadi I (CFI)* very closely. The writer stated that the result that Article 103 trumped all international legal obligations besides *jus cogens* was "even less appropriate as the role of the Security Council at present is not the same as it was when the UN Charter was drafted. The Security Council is no longer merely reacting to certain situations concerning mainly states or regions, but is evolving into a world legislator. This new role necessitates corresponding control mechanisms."¹³⁶

Following the CJEU's decision in *Kadi I*, however, when critics applauded the protection of individual rights, they considered the perceived impact on the human rights of listed individuals without analysing the actual impacts, and lauded the changes to the practice of EU institutions in the implementation of the 1267 regime required by the CJEU. Others simply referred to the Court's findings with respect to the impact on human rights without importing a value judgment, but still without analysing the findings:

Having establish that [the review of lawfulness would apply only to the Union act], the review for compliance with fundamental rights was a relatively simple task. The claimant had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions. Therefore he had not been able to seek judicial review of these grounds, and consequently his right to be heard as well as his right to effective judicial review and the right to property had been infringed.¹³⁷

Critics of the CJEU's decision in *Kadi I* skewered the Court for being unfaithful to its tradition of upholding public international law.¹³⁸ Still others tried to find a middle ground, focusing on the benefit to the protection of fundamental human rights, while observing that future reviews of the EU's implementation of UNSC measures could be limited, so long as the UNSC implemented sufficient protections for human rights in its listing and delisting procedures.¹³⁹ This latter approach construes the Court's reasoning as a variation of the "Solange" concept, as developed by the German Constitutional Court.¹⁴⁰

¹³⁵ *Yousef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment, BGE 133 II 450, 1A 45/2007.

¹³⁶ ILDC, *Nada* analysis (n134) para 3.

¹³⁷ Kokott and Sobotta (n127) 1016-1017.

¹³⁸ See for example Gráinne de Búrca, "The EU, the European Court of Justice and the International Legal Order after *Kadi*," (HILJ Vol. 1, No 51 2009), available at <http://papers.ssrn.com/abstract=1321313>.

¹³⁹ See, for example, Kokotta and Sobotta (n127).

¹⁴⁰ In *Solange I*, BVerfGE 37, 271 [1974], the German Constitutional Court decided that it could review Union actions for conformity with national standards for fundamental rights as long as there was insufficient protection of these rights at the EU level. In its decision in *Solange II*, BVERFFE 73, 339 [1986], the German Court decided that the EU's protection of fundamental rights had developed to the point where it no longer needed to review for their protection domestically.

Finally, with respect to the CJEU's assertion that it was not reviewing the UNSC resolutions themselves, but merely the EU acts implementing the resolutions, commentary noted that "while formally not touching the UN resolutions, the ECJ's annulment of the implementing acts in substance also cast doubt upon the legality of the original acts."¹⁴¹

Perhaps the best summary of the criticisms of the CJEU's decision in *Kadi I* was presented by the General Court in *Kadi II (GC)*. The GC prefaced its decision on the standard of review by noting that doubt had been expressed in legal circles as to whether the CJEU's decision in *Kadi I* was consistent with the provisions of the UN Charter and the EU Treaties; that it been observed that even though the CJEU stated it could not review the legality of a UNSC resolution, it had done so in reviewing the legality of a Community act which implements a resolution affording no latitude; and that while the CJEU had stated that holding a Community measure to be contrary to a "higher rule of law in the Community" would not challenge the primacy of a UNSC resolution, the consequence of such a finding would render that primacy ineffective within the Community.¹⁴² With respect to the protection of fundamental rights, the GC observed, "the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law - in this case the law deriving from the Charter of the United Nations."¹⁴³

After acknowledging that the various criticisms it had reviewed were "not entirely without foundation," the GC noted that it would be for the Court of Justice to provide a response, since it was generally inadvisable for the General Court to revisit points of law decided on by the Court of Justice.¹⁴⁴ Furthermore, it stated, "[i]f the intensity and extent of judicial review were limited in the way advocated by the Commission[,], intervening governments[, and] Council...there would be no effective judicial review of the kind required by the Court of Justice in *Kadi* but rather a simulacrum thereof. That would amount, in fact, to following the same approach as that taken by this Court in its own judgment in *Kadi*, which was held by the Court of Justice on appeal to be vitiated by an error of law. The General Court considers that in principle it falls not to it but to the Court of Justice to reverse precedent in that way, if it were to consider this to be justified in light, in particular, of the serious difficulties to which the institutions and intervening governments have referred."¹⁴⁵

¹⁴¹ Reinisch, 'Challenging Acts' (n128) 7.

¹⁴² *Kadi II (GC)* (n6) paras 115-118.

¹⁴³ *ibid* para 120.

¹⁴⁴ *ibid* para 121.

¹⁴⁵ *ibid* para 123.

The whole tone employed by the GC in setting out the constraints under which it was operating generally seemed to indicate that it agreed with the criticisms of the CJEU's decision.

While academics had speculated on the "correctness" of the CJEU's decision after *Kadi I*, after the CJEU remained unpersuaded by the general summary of the criticisms as presented by the GC in *Kadi II (GC)*, this type of discussion has largely been absent following the Court's decision in *Kadi II*. Maya Lester, for example, a blogger who has been covering the Kadi cases since 2005, simply noted that the CJEU had "laid to rest the argument that European courts cannot review the legality of EU measures implementing UN Security Council asset freezing resolutions" and that such a review did not threaten the primacy of the UNSC.¹⁴⁶ Her review then turned to a consideration of the Court's findings with respect to the extent of the requirement to give reasons. In her analysis of the decision, she notes that the Court may have gone further than the GC in reviewing the basis for the UN's decision; that the approach is consistent with the General Court's review of sanctions against Iran, but less consistent with the "Court's arguably less rigorous review of the evidential basis for other types of sanctions;" that it is clearly important for applicants to submit evidence refuting the reasons for their listing; that the Court did not consider whether the application was moot given Kadi's delisting through the Ombudsperson process; and that the Court's statement that no security concerns would preclude disclosure of sensitive information to the Court (as opposed to the applicant) was not controversial. And indeed, the CJEU's determinations with respect to the reasons and level of review required to be undertaken by the European Courts is indeed troubling. However, analysis of the most recent Kadi decision begs the question of whether such reviews should be taken in the first place, especially given the potential detriment to both the EU and the UN system of collective security.

While this aspect has not been raised frequently post-*Kadi II*, Antonios Tzanakopoulos has discussed the implications for European compliance with UNSC sanctions as a result of decisions in the European Courts, the ECtHR, and domestic courts. He stated that the implications were "far-reaching," and that "[t]here is little doubt that the imposition by domestic and regional international courts of an obligation on domestic executives and courts to provide effective judicial remedies at the national level for those targeted under the [1267 regime] results in a breach of those States' international obligations

¹⁴⁶ Maya Lester, "The ECJ's Judgment in Kadi II," European Sanctions Blog, July 21, 2013, available at <http://europeansanctions.com/2013/07/12/the-ecjs-judgement-in-kadi-ii/>, accessed April 28, 2014.

under Article 25 of the UN Charter."¹⁴⁷ He then noted that this was made possible through a "radical disengagement of the domestic implementing measure from the Security Council that strictly conditions it," and that courts "pretend [this] is legitimate because the Charter does not impose any particular method of implementation of Charter (and Security Council obligations," which allows for review of the measures in conformity with domestic law, "irrespective of the fact that such review may well result...in the violation of the obligation under the Security Council decisions and the Charter." ¹⁴⁸ "Effectively," he states, "domestic and regional international courts are forcing disobedience on their States."¹⁴⁹

4. Summary

After Kadi first challenged his listing on the basis that his fundamental rights had been violated, the Council and Commission submitted that they were bound under the UN Charter to give effect to his listing, as there was no discretion in the UNSC's decision that would allow them to do otherwise. The CFI determined that while the EU was not itself bound by the UN Charter, it was bound by the Treaties to adopt the measures necessary for its Members to fulfill their UN obligations, and that while the EU regulation could be reviewed, it could only be reviewed for compliance with the Treaties. Reviewing the lawfulness of the UNSC's decision for compliance with the EU's standard of protection of fundamental rights could not be justified under international or EU law, as this would be contrary to the provisions of the UN Charter, the VCLT, and the Treaties. It *did* find that it could review UNSC decisions for compliance with *jus cogens*, as this was a body of higher rules of law from which no subject of international law could derogate, including the UN.

The CJEU essentially reversed the reasoning of the CFI in *Kadi I*, holding that the EU Courts had no mandate to review the lawfulness of a UNSC resolution, even for compliance with *jus cogens*, and that while the EU had to take the relevant obligations under the UN Charter into account when implementing measures required under a UNSCR, the UN Charter left States with the choice of how to implement UNSC decisions, meaning that internal review of the measures implementing such a decision was not precluded. Furthermore, such a review was *required* by the Treaties, which comprised an autonomous legal system which could not be prejudiced by an international agreement. The CJEU determined that Kadi's right to be heard had been breached, because he was not informed of the evidence against

¹⁴⁷ Antonios Tzanakopoulos, 'Falling Short: UN Security Council Delisting Procedural Reforms Before European Courts' (Sanctions & Security Research Program 2013) 9.

¹⁴⁸ *ibid* 9.

¹⁴⁹ *ibid* 9.

him, which meant his right to an effective legal remedy had also been breached, since the basis of the decision could not be reviewed. Kadi's property rights were found to be breached, even though were potentially justified and proportionate, because Kadi did not have the opportunity to put his case before the authorities in an instance where the restriction on his property rights had to be regarded as significant.

While the decision of the CFI was roundly criticized – on the one hand for purporting to be able to review the lawfulness of a UNSCR vis-à-vis *jus cogens*, and on the other, for not stating it could review the resolution for compliance with fundamental rights – the CJEU's decision was largely applauded for importing due process rights into the 1267 listing regime. There was also criticism of the Court's decision from the perspective of non-compliance with UNSC decisions and the threat to the UN system, but these voices were comparatively muted.

When Kadi challenged his renewed listing by the EU, these voices were loud on the part of EU institutions and Member States, who in essence asked the GC to make the same decision it had when it was the CFI. The GC said that this sort of reversal of precedent would have to come from the CJEU, however, although the overall tone of its decision indicated that it agreed with the position taken by the EU institutions. In applying the "full judicial review" of Kadi's listing mandated by the CJEU, the GC determined that the reasons for listing supplied by the Sanctions Committee were too vague, and that the regulations listing Kadi should thus be annulled.

In considering the appeal in *Kadi II*, the CJEU refused to reconsider its position that nothing in the Treaty allowed for the immunity from review of regulations implementing UNSC decisions (notwithstanding the fact that the Lisbon Treaty had expressly modified the EU Treaties to provide for the requirement to respect UN obligations, as discussed further below), and instead focused on the nature of the review, and the sufficiency of the evidence for delisting Kadi, before deciding that the regulating listing him never had effect with respect to Kadi. This refusal to reconsider its reasons from *Kadi I* did not spark the kind of commentary seen after the first decision, but rather resulted mostly in a sort of acquiescence as to the settling of the issue within the EU of the primacy of the EU legal order over UN obligations.

CHAPTER II: MISSING ELEMENTS IN THE COURT'S ANALYSIS AND THE COMMENTARY

After reviewing the CJEU's decision in each of *Kadi I* and *Kadi II*, followed by a consideration of the academic commentary, it seems that there are several gaps in the analysis of the CJEU, the analysis of the commentators, or both. This section sets out the various areas where elements failed to be discussed either at all, or sufficiently. Each section discusses a different lacuna and its importance or impact.

1. Actual impact of UNSC targeted sanctions on fundamental rights

The first gap in the analysis is evident in the discussion of the fundamental rights of persons listed under the 1267 regime. There is an insufficient discussion by all parties of whether or not there were *actual* violations of the human rights of listed persons, particularly with respect to the right to property. The finding that there was a severe impact on Kadi's property rights affected both the general willingness of the Court to wade in on the legality of UNSC resolutions – indirectly in *Kadi I*, and then much more directly in *Kadi II* – and the determination that Kadi's due process rights were affected due to the length of time that his property rights had allegedly been affected.

This section will consider the scope of the two types of human rights breaches claimed by Kadi and the actual impact on those rights caused by the sanctions measures, followed by a discussion of how the failure to properly assess property rights may have impacted the Court's findings with respect to other rights.¹⁵⁰

i. Impact of the sanctions on the right to property

While a right to property is not included in the major human rights conventions,¹⁵¹ it is contained in several regional human rights treaties, including the two holding sway over Europe. The right to property in the ECHR is found in the first article of the First Protocol:

¹⁵⁰ This section will *not* address the broader question of whether the UNSC is obligated to respect any of these human rights in taking its measures; the rights are being considered in the context of the EU internal legal order only, to assess the impact on the CJEU's findings.

¹⁵¹ The Universal Declaration of Human Rights ("UDHR") provides in Article 17 that "Everyone has the right to own property alone as well as in association with others." However, while the right to property was included in the UDHR, there is no "right to property" contained in either of the international covenants that were drafted on the basis of the UDHR, and which contain the universal binding treaty obligations on human rights. See p. 159, Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2013): "Ideological disputes between East and West, and disputes between the West and the South over the nationalization of industries and other resources made agreement on a consensus formulation [for the inclusion of a right to property in the International Convention on Civil and Political Rights] impossible." Thus the extent to which there is a "right to property" that would be binding on the UNSC is unclear.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.¹⁵²

Furthermore, the CFREU, which now has the status of primary law in the EU, provides that "[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions," although the "use of property may be regulated by law in so far as is necessary for the general interest."¹⁵³

In making the determination in *Kadi I* that Kadi's right to property as enshrined in the ECHR had been violated, the CJEU was not clear in how it made that connection. It seemed to simply note that the length of time with respect to which the asset freeze continued to apply to him was determinative of the violation of his right, since he was unable to address his listing. This judicial determination, and others like it,¹⁵⁴ fail to truly consider the role played by the exemption process built into the 1267 regime.

By way of UNSCR 1452, the Security Council decided that the asset freeze should not apply to assets that have been determined by the relevant State(s) to be "necessary for basic expenses." The Security Council interpreted "basic expenses" broadly, stating that it included "payments for foodstuffs, rent or mortgage, medicines and medical treatment, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred charges for routine holding or maintenance of frozen funds or other financial assets or economic resources."¹⁵⁵ The only requirement is that the State has to notify the Committee of its intention to authorize access to funds for basic expenses, and wait for three working days to pass without an objection from the Committee. The definition of "basic expenses" certainly seems broad enough for any designated person to be able to meet their basic needs.

The following activities are also allowed under UNSCR 1452 (2002), which stipulates that States may allow for the addition of such payments to accounts subject to the assets freeze:

- a. interest or other earnings due on accounts subject to the assets freeze; and

¹⁵² ECHR (n71) First Protocol (1952), Article 1.

¹⁵³ CFREU (n112) Article 17.

¹⁵⁴ See, for example, *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others* [2010] UKSC 2, where Lord Hope stated at para 60: "The restrictions strike at the very heart of the individual's basic right to live his own life as he chooses ... It is no exaggeration to say ... that designated persons are effectively prisoners of the state. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources and the effect on both them and their families can be devastating." There was no indication in that case that the applicant had even applied for an exemption, however.

¹⁵⁵ UNSCR 1452 (20) para 1(a).

b. payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the assets freeze.¹⁵⁶

In *Kadi I*, the Court noted the existence of most of these exemptions, as incorporated in the contested regulation, but did not consider whether Kadi had even made a request for access to basic expenses, or to have wages deposited to a frozen account, etc. If the sanctions regime is crafted so as to allow for reasonable access to and use of one's property, it would seem to be incumbent on an affected individual to try to access that exemption before claiming that the sanctions regime is in violation of his fundamental rights. In the event that a Member State declined to determine that a particular expense was a "basic expense," and thus did not submit a request to the UNSC for consideration, that decision would then be reviewable under domestic law, as that determination is at the discretion of the State (although the UNSC must also choose not to object).

The "actual" impact of the sanctions on the property rights of listed individuals can also be examined from the circumstances of at least one case presented in a domestic court. Within Canada, Abousfian Abdelrazik – a Canadian citizen listed under the 1267 regime – brought an application before the Federal Court¹⁵⁷ challenging the constitutionality of the *United Nations Al-Qaida and Taliban Regulations*,¹⁵⁸ the Canadian regulations implementing UNSCR 1267 and its successor resolutions. One of his claims was that his property rights were violated by the domestic legislation implementing the UNSC resolutions. While the constitutional challenge was eventually dropped following Abdelrazik's delisting from the 1267 list, it was revealed in the documents submitted to the court that Canada had sought and obtained permission from, or waited for a non-objection from, the UNSC in order to issue exemptions to Abdelrazik from the assets freeze for the following purposes, in the following amounts:

- May 30, 2007: to receive \$100 USD/day to meet basic expenses in Sudan;
- July 29, 2008: for Canada to provide in-kind assistance while Abdelrazik was living in the Canadian embassy in Khartoum;
- April 9, 2009: for Abdelrazik to receive \$3,500 in relation to the settlement of *Privacy Act* litigation;
- June 18, 2009: to cover travel costs for Abdelrazik to return to Canada from Sudan;

¹⁵⁶ *ibid* para 2.

¹⁵⁷ *Abousfian Abdelrazik, BCLA and ICLMG v. Attorney General of Canada*, Court File Number: T-889-10, Ottawa: Federal Court, 2010 (discontinued January 17, 2012) ("*Abdelrazik*").

¹⁵⁸ *United Nations Al-Qaida and Taliban Regulations*, SOR/99-444 ("*UNAQTR*").

- September 24, 2009: to pay \$48,700 in legal costs ordered by the Federal Court of Canada, and legal costs related to the *Privacy Act* litigation;
- September 20, 2010: to allow payment of \$8,200 for legal costs;
- April 15, 2010: to have access to \$2,000/month to satisfy basic living expenses.¹⁵⁹

As noted in Canada's supporting documents: "...if the current Certificate does not allow Mr. Abdelrazik access to sufficient funds to meet his basic living expenses, it is open to him to request access to more funds. To my knowledge, he has not done so."¹⁶⁰

The example provided in the Abdelrazik case goes to show that although the claimant had indicated that the impact on his life was "profound"; that he "must petition the United Nations simply to access a subsistence level of his own money to pay for rent and food"; and that "any potential employer would have to petition the United Nations simply to pay Abdelrazik his wages,"¹⁶¹ the record of actual impact shows that the claimant was not denied any request he submitted to the UNSC (or that was submitted on his behalf) with respect to obtaining access to his property,¹⁶² and in fact, the amount he was allowed access to on a monthly basis was more than twice the amount that his province of residence would have issued to one adult under the province's social assistance program as of January 1, 2015, which can hardly be described as a "subsistence level" of access to funds.¹⁶³

ii. Impact of failure to assess actual effect of sanctions on property rights

In order for a court to determine that any claimant has been affected by measures that affect a right to property, the actual impact of those measures on the individual must be included in the analysis, as must any failure to mitigate the impact that is provided in the measures themselves. This was *not* done in the Kadi cases.

In *Kadi I*, the CJEU stated that procedural protections were a part of the protection of property rights inherent in Article 1 of Protocol No 1 to the ECHR, and that this included a consideration of whether the person had had "a reasonable opportunity of putting his case to the competent authorities. The Court, however, conflated a "reasonable opportunity of putting his case to the competent authorities" in the instance of an individual's initial listing, with a

¹⁵⁹ *Abdelrazik* (n157), affidavit of Michael Walma, paras 40-44.

¹⁶⁰ *ibid* para 46.

¹⁶¹ *Abdelrazik* (n157), Notice of Application, paras 3-5.

¹⁶² *Abdelrazik - Walma* (n159) para 49.

¹⁶³ "New Benefit Amounts: Social Assistance Program and Social Solidarity Program," available at: http://www.emploiuebec.gouv.qc.ca/fileadmin/fichiers/pdf/Publications/SR_dep_montant_prestations_en.pdf, accessed August 12, 2015.

"reasonable opportunity of putting his case to the competent authorities" with respect to the actual restriction on his property. Since he had every opportunity to apply for exemptions under the regulation, and there is no indication on the record that he had done so, the Court failed to sufficiently consider this element. Applying for an exemption is not onerous. Kadi's seeming failure to apply for any such exemption should have been taken into account in considering the procedural fairness issues as they applied to a determination of the impact on his property rights. Since the CJEU's findings with respect to the breach of Kadi's due process rights were affected by its determinations with respect to his property rights, the failure to consider the actual impact on Kadi's property rights affected the Court's determination of the breach of his other human rights as well.

Finally, the perception that Kadi's property rights had been affected by "particularly draconian" measures for 10 years affected the GC's determination that a full and rigorous judicial review of the measures should take place in *Kadi II (GC)*, which was not overturned by the CJEU. The CJEU, as noted, was convinced in *Kadi II* of the need for full and effective judicial review on the basis of its previous findings in *Kadi I* with respect to the impact on fundamental rights, which had been affected by the initial determination with respect to property rights. The CJEU's failure to properly assess the actual impact on Kadi's ability to use and enjoy his property thus impacted the determination that there had been a breach of the fundamental right to property, the rights of the defense, and the right to effective judicial protection. It also affected the standard of review applied to the Court's assessment of the legality of the EU's implementing measures. Had an inquiry as to the actual impacts suffered by Kadi – including whether he had applied for an exemption to alleviate any such suffering – been undertaken, the outcome of the Kadi cases may have been different; the importance of assessing actual impacts of sanctions measures should certainly be emphasized in any future court cases of the same nature.

iii. Nature and purpose of the sanctions measures

The determination that Kadi's property rights were gravely affected also largely impacted the Court's determination that the measures were punitive in nature, rather than preventive, as asserted by the UNSC and its Sanctions Committee.¹⁶⁴ Wrapped up in this mischaracterizing

¹⁶⁴ See, e.g., 'Report of the Analytical Support and Sanctions Monitoring Team on the outcome of the review described in paragraph 25 of resolution 1822 (2008) submitted pursuant to paragraph 30 of resolution 1904 (2009),' S/2010/497, paras. 60-64.

of the purpose of the sanctions is a failure to truly consider the purpose of the measures imposed by the UNSC.

The overarching goal of the sanctions imposed against the Taliban and Al-Qaida, and individuals and entities associated with these organizations is not just to denounce terrorism, but to prevent the loss of life from terrorist attacks. This objective is made up of a series of smaller objectives, which together aim at achieving protection from terrorist attacks. As the United Nations Al-Qaida and Taliban Analytical Support and Sanctions Monitoring Team noted in its tenth report to the Security Council, “the purpose of the List is preventative not punitive; it is not the intention of the Committee to maintain listings as a way to punish past behaviour, but as [a] way to prevent future behavior.”¹⁶⁵ The types of future behaviour targeted by the 1267 listing regime are the movement of funds and persons in order to prevent the financing of terrorism and training and recruitment of potential terrorists.

Dr. Matthew Levitt, an expert in the area of terrorist financing, described the importance of financing to terrorist operations, and the important role that the 1267 listing regime plays in disrupting terrorist financing in order to achieve the UNSC’s goals, in an expert report prepared for Canada’s defense of the constitutional challenge to its UNAQTR.¹⁶⁶ As he describes it, “[w]hile mounting an individual terrorist attack costs relatively little, money remains of critical importance to terrorist organizations. Without it, terrorist groups would be incapable of maintaining the broad infrastructure necessary to run an effective organization. As such, finding means to quickly and securely raise, launder, transfer, store and access funds remains a top priority for all terrorist groups including, al Qaeda and its various globally oriented affiliates.”¹⁶⁷ Terrorist organizations use these funds to train, equip and pay their operatives, as well as to promote their cause, recruit, and pay for travel, bribes, and family support.¹⁶⁸ For this reason, Levitt explains, countering terrorist financing is an important component of any counter-terrorism strategy.

The importance of targeting individuals, and not just the organizations with which they are associated, is evident from the changing nature of the structure and financing of terrorist organizations. We have seen the “franchising of al Qaeda,” for example, whereby

¹⁶⁵ Analytical Support and Sanctions Implementation Monitoring Team, ‘Tenth report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1822 (2008) concerning Al-Qaida and the Taliban and associated individuals and entities,’ S/2009/502, July 31, 2009, p.11.

¹⁶⁶ *Abdelrazik* (n157), Expert Report of Dr. Matthew Levitt, “International Cooperation and the Critical Role of the UNSCR 1267 Consolidated List in Contending with the Evolving Global Terrorist Threat,” 31 January 2011.

¹⁶⁷ *ibid* para 1.

¹⁶⁸ *ibid* para 5.

Al-Qaeda establishes partnerships with other terrorist organizations.¹⁶⁹ Keeping track of the changing involvement of different organizations is done by the 1267 Committee, but it can be more effective to track individuals known to associate with one or more terrorist groups for the purpose of preventing terrorist financing and training activities. Al-Qaida has also shifted how it funds its operations, with “local terrorist cells [being] increasingly self-funded through the proceeds of criminal activity, the use of personal funds, or government welfare benefits.”¹⁷⁰ In addition, Levitt describes how terrorist organisations have begun transferring funds through the personal bank accounts of their members and their families, sometimes through charities.¹⁷¹ Given the increased decentralization and reliance on individual actions and funds in this manner, the importance of targeting individuals on a preventive basis in order to limit terrorist financing becomes apparent.

The importance for countries to monitor individuals within their own borders in accordance with the UNSC’s decisions can be demonstrated by the example of the July 7, 2005 London subway bombing. One of the members of the locally-funded terrorist cell provided the majority of the funding by defaulting on a personal loan and overdrawing his bank accounts. Levitt notes that investigators of the bombing did not find evidence of any external funds being used to finance the operation, and that the investigators had stressed that the cell raised its funds “by methods that would be very difficult to identify as related to terrorism or other serious criminality.”¹⁷² Levitt notes that petty crimes such as welfare fraud can also raise funds for smaller operations.¹⁷³ This again demonstrates the importance of identifying individuals who may be acting on behalf of terrorist organizations in a decentralized fashion, and the importance of restricting the access of such persons to funds in a preventive fashion.

As the US State Department’s Coordinator for Counterterrorism noted in 2002: “any money can be diverted if you don’t pay attention to it.”¹⁷⁴ This quote succinctly demonstrates the importance of imposing “preventive” sanctions. The UNSC does not need to ensure that designated persons can never use their property; it just needs to monitor the use of those funds. This is why the UNSC first requires assets to be frozen, but then allows for exemptions

¹⁶⁹ Dell Dailey, former coordinator for counterterrorism at the US Department of State, at *Abdelrazik* - Levitt (n166), para 13.

¹⁷⁰ *Abdelrazik* - Levitt (n166) para 22.

¹⁷¹ *ibid* para 37.

¹⁷² *ibid* para 23.

¹⁷³ *ibid* para 24.

¹⁷⁴ US Department of State, International Information Programs, 'State's Taylor Summarizes Annual Global Terrorism Report,' *Washington File*, May 21, 2002, available at http://www.usembassy.it/file2002_05/alia/a2052103.htm.

for basic expenses, or for extraordinary expenses, if first reviewed and – for extraordinary measures – approved. The overarching purpose of “paying attention to” the funds can be addressed while still limiting the *actual* impact on designated persons.

Terrorists themselves have stating that following the money will likely frustrate some terrorist activities.¹⁷⁵ And while it may be “difficult ... to deter a suicide bomber, terrorist designations can deter non-designated parties, who might otherwise be willing to finance terrorist activity. Major donors inclined to finance extremist causes—who may be heavily involved in business activity throughout the world—may think twice before putting their personal fortunes and their reputations at risk.”¹⁷⁶ The UN sanctions monitoring team has also observed that several financiers on the 1267 list have changed their behaviour due to their designations, to the extent that some have been removed from the list.¹⁷⁷ It is thus evident that the preventive application of financial sanctions is both necessary and effective.

iv. The right to be heard and the right to judicial review

The extent to which a designation by the UNSC engages the right to be heard or to effective judicial protection is unclear. As already covered by the academic commentary and the General Court, the CJEU in *Kadi I* did not make an explicit link between the UNSC's decision to list, and the resulting right to be heard and to an effective remedy *within the EU* if the right is violated. These rights are covered by the notion of the right to a fair trial, and under the provisions of international law, the right to a fair trial is "primarily aimed at ensuring that an individual is not wrongfully convicted and/or punished by the organs of a State."¹⁷⁸ Under the UNSC listing regime, however, UN Member States are not the ultimate decision-makers with regard to the listing of a designated person. Indeed, most EU Member States have no role in the listing of individuals, and are simply required to comply with the decisions made by the Security Council, while the EU has no role in the 1267 Committee's designations whatsoever. There is thus no judicially-reviewable decision for the EU to review. When the CJEU decided in *Kadi II* that it was incumbent upon the competent EU authority to uncover the reasons for listing individuals; to provide those reasons to the individual and give him or her an opportunity to respond; and to *not* list the individual if the reasons are found wanting, it required the EU to take on a review power that its member States do not have under the UN Charter, and which arguably the EU does not have either.

¹⁷⁵ *Abdelrazik* - Levitt (n166) para 56.

¹⁷⁶ *Ibid* para 56.

¹⁷⁷ Analytical Support and Sanctions Implementation Monitoring Team, 10th report (165).

¹⁷⁸ Louise Doswald-Beck, 'Fair Trial, Right to, International Protection' (MPEPIL 2013) para 1.

The issue is further clouded by the fact that these rights are generally only engaged in response to criminal or quasi-criminal measures. However, it seems clear from the previous section that the measures imposed under the 1267 regime truly are preventive in nature. They have been shown to be effective in meeting their purpose, and people have been delisted on the basis of a change in their behaviour. In addition, the exemptions regime built into the asset freeze is designed so that assets of suspected terrorists are monitored, but can be released for day-to-day use of their funds, and potentially extraordinary uses of those funds. If the measures are not punitive in nature, contrary to the Court's determination, and if they do not substantially affect an individual's fundamental rights, it is not clear that the measures should attract full due process protections in the nature of the right to be heard, and the right to effective judicial protection if not heard.

2. The EU's position in the international legal order

The CFI was quite convinced in *Kadi I (CFI)* that it did not have the ability to review decisions of the UN Security Council, given that EU Member States were required to fulfil their obligations under the UN Charter over their obligations under any other international agreement, including the EU Treaties. As a result, it was not for the European Courts to determine "whether" the EU, exercising the power of its Member States, could – or should – implement a binding decision of the UNSC. The CJEU determined otherwise in *Kadi I*. This finding underpinned its entire decision, but it glossed over any discussion of why the European courts should be unique in being able to overlook the primacy of its Member States' UN Charter obligations under treaty law, instead focusing on the fact that ensuring the compliance of EU acts with fundamental rights was paramount within the EU legal order. The Court did not explain how the "common law" of the EU operated to override the supremacy of UN Charter obligations in the event of conflict for EU Member States as between the treaty that is the UN Charter and the Treaties that form the legal foundation of the EU. The Court in essence treated its decision as being one of a domestic court, rather than the decision of a treaty body. This issue arose again in *Kadi II* when the CJEU was asked to revisit its decision from *Kadi I*. When the Court refused to do so, instead relying on its previous decision, and saying that nothing changed, this of course had great implications for future cases both within and without Europe. Most of the consideration following *Kadi II* turned to a focus of *how* this type of review would be conducted in future, given the standard of review selected by the Court, rather than to a continued discussion of whether such reviews *should* be conducted in future.

This section thus describes briefly the primacy of the UN Charter in order to then address the actual obligations of EU Member States under the UN Charter and under the Treaties, then assesses the CJEU's powers within the EU, to see if there is any basis to support the CJEU's position. While the issue may no longer be pressing, since the CJEU refused to reverse itself, it still warrants continued discussion and consideration, given the underdeveloped discussion of potential liability for the EU and its Member States, and whether any global actors should attempt to remedy the situation, as discussed in later sections of the paper, on that basis and the basis of "correcting the record."

i. Primacy of the UN Charter

Article 103 of the UN Charter provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."¹⁷⁹ Article 103 is "meant to ensure the effectiveness of the Charter system and to remove obstacles in 'ordinary' treaty norms for the implementation of obligations under the Charter."¹⁸⁰

The obligation of UN Member States to implement decisions of the UNSC is found in Article 25,¹⁸¹ which provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." While it is clear from Article 103 of the UN Charter that UN Member States must accord supremacy to their obligations under the UN Charter, there used to be some debate over whether or not Member States' obligation to comply with decisions of the UNSC were captured under Article 103. It is now commonly accepted that secondary Charter norms are covered by Article 103, however. This was addressed by the ICJ in the *Lockerbie* case, for instance, where it stated that both Libya and the United States were obliged to accept and carry out the decisions of the UNSC in accordance with Article 25 of the Charter, and that "prima facie this obligation extends to the decision contained in resolution 748 (1992)...in accordance with Article 103 of the Charter, [as] the obligations of the Parties in that respect prevail[ed] over their obligations under any other international agreement[.]"¹⁸² In his commentary on the UN Charter, Simma also notes that "it seemed clear [to the authors of the Charter] that not only

¹⁷⁹ UN Charter (n10) Article 103.

¹⁸⁰ Bruno Simma et al., ed., *The Charter of the United Nations: A Commentary* (3rd ed., Vol. I OUP 2012) 2123.

¹⁸¹ UN Charter (n10) Article 25.

¹⁸² *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, *ICJ Reports* (1992) para 42.

primary UN law but also secondary UN law, such as SC resolutions, should be covered by the Article."¹⁸³

It is worth noting that Article 103 "does not create direct effect within the domestic legal sphere"¹⁸⁴, however; it is limited to assigning precedence to treaty obligations that are in conflict. Nothing in the UN Charter ascribes primacy of the Charter over domestic legal provisions. Should there be a conflict between a piece of domestic legislation and a State's UN Charter obligations, nothing can "compel" the State to comply with its treaty obligations. Non-compliance will simply attract State responsibility for any internationally wrongful acts, as domestic legal provisions do not constitute a defence to the non-performance of treaty obligations.¹⁸⁵

While Article 103 thus obligates EU Member States to fulfill their Charter obligations over all other treaty obligations, it plays no role when there is a conflict between a domestic law and a UN Charter obligation; resolving such conflicts falls under the domain of State responsibility.

ii. UN and EU obligations of EU Member States

The EU is comprised of 28 Member States, which are also members of the United Nations. These 28 States are members of both international organizations on the basis of treaties. When signing the UN Charter, all members agreed to Article 103, which accords primacy to the UN Charter over all other treaties, even when signed later in time. Notwithstanding the acknowledged primacy of UN Charter obligations, the CJEU has decided that EU Member States may not automatically implement binding decisions of the UNSC targeting individuals. The problem with the CJEU's decisions in the Kadi cases lies in the fact that the CJEU treats the EU as a domestic legal order, which it is not.

The EU has, however, often been described as "special," or even "sui generis."¹⁸⁶ This is because EU Member States accord extensive competencies to the EU, providing for the supranational character of the EU in certain areas; the primacy of EU law in cases of conflict with national rules; and the direct effect of many of its provisions, which allow citizens and companies to invoke EU law before national courts.¹⁸⁷ The unique nature of the EU as an

¹⁸³ Simma (n180) 2116.

¹⁸⁴ *ibid* 2134.

¹⁸⁵ VCLT (n16) Art. 46.

¹⁸⁶ Ramses A. Wessel, 'Immunities of the European Union' (Vol. 10, No. 2, *International Organizations Law Review* 2013) 1.

¹⁸⁷ *ibid* 2.

entity has led some to describe it as being closer to a federation than to an international organization; however, as Wessel has written, "it seems fair to say that as long as the Member States [do] not cease to exist as independent states, there is a clear distinction between them and the organization of which they are a member."¹⁸⁸ So long as the EU remains an organization established by treaty, and not a federation governed by a domestic constitution, the constituent parts of the EU (currently the EU Member *States*) will be bound to comply with UN obligations over EU obligations, due to the application of Article 103 of the UN Charter.

In its decision in *Kadi I (CFI)*, the CFI held that the EU was bound by the UN Charter by dint of the Treaties¹⁸⁹ establishing it. The CJEU, however, held that "obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights."¹⁹⁰ As already alluded to, what is noteworthy in the present instance is that the CJEU did not expressly address the application of Article 103 of the UN Charter in this context; it simply treated the treaty establishing the EU as a constitutional document of a state-like entity.

After *Kadi I*, comparisons were made to the *Solange* decision by the German Constitutional Court.¹⁹¹ Kokott and Sobotta characterized the interplay between the international and Union legal order as follows:

The choice of a somewhat dualist approach in this particular context has to be understood as a reaction to a specific situation that may occur in multilevel systems. In such systems it is possible that the level of protection of fundamental rights guaranteed by a higher level does not attain the level of protection the lower level has developed and considers indispensable. Refusing to accept the primacy of the higher level can be a proper means of responding to this deficiency. The insufficient protection of fundamental rights at UN level therefore required the adoption of a dualist conception of the interplay of EU law and international law.¹⁹²

Part of the reason for the need to continue critically analysing this issue is apparent from the conflation of domestic law and the internal legal order of an international organization displayed by the position, where the commentators simply subsume both under the concept of

¹⁸⁸ *ibid* 3.

¹⁸⁹ Treaty of European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) ("the Treaties"). See Article 1 TEU and Article 1 TFEU which both state that the two Treaties shall together be referred to as "the Treaties," and which shall have the same legal value.

¹⁹⁰ *Kadi I* (n2) para 285.

¹⁹¹ *Solange* (n140).

¹⁹² Kokott and Sobotta (n127) 1018.

a "multilevel system," under which "refusing to accept the primacy of the higher level" can be a "proper means" of responding to perceived deficiencies in rights protection, without addressing the need to find solutions within existing rules of treaty law and customary international law.

If the CJEU had any doubt in *Kadi I* as to the position of EU law vis-à-vis the UN Charter, by the time it decided *Kadi II*, the EU Member States had clarified the situation;¹⁹³ following the implementation of the Lisbon Treaty, the "strict observance and the development of international law, including respect for the principles of the United Nations Charter" became one of the listed objectives of the EU.¹⁹⁴

In addition, Article 351 TFEU states that obligations under agreements concluded by the EU prior to joining the EU "shall not be affected" by the EU Treaties, and for all EU Member States save Germany, the UN Charter is a prior agreement.¹⁹⁵ It is thus abundantly clear in the Treaties themselves that the EU Member States wished to ensure that - when acting within the institutions of the EU - they maintained compliance with their UN Charter obligations.

iii. CJEU's powers within the EU

As the UNSC is bound by the UN Charter, so, too, is the CJEU bound by the Treaties. In assessing EU legislation for lawfulness, the CJEU considers the Treaties and its own case law. The CJEU's powers within the EU are thus considered next in order to examine the extent to which the CJEU is empowered to undertake a "constitutional" review of measures imposing mandatory UNSC decisions.

Turning to the second of these first, the CJEU is understood to be a Court that drives change. While the European Union (EU) was founded with the goal of attaining the economic integration of its Member States, the case law of the CJEU has helped to create a more politically-integrated Union. The case law of the ECJ has established both the "direct effect" of EU law in instances where the law is sufficiently clear to create rights of individuals, and has established that the protection of fundamental human rights falls within the general principles of the EU. And while the economic roots of the EU meant that fundamental human rights were not enumerated in the treaties, the ECJ determined that the content of these rights

¹⁹³ Support for this position is found at Simma (n180) 2132.

¹⁹⁴ TEU (n189) Art. 3(5).

¹⁹⁵ Joris Larik, ' "If the Legal Orders Don't Fit, You Must Acquit": Kadi II and the Supremacy of the UN Charter,' European Law Blog, September 13, 2013, available at <http://europeanlawblog.eu/?p=1909>.

could be found in the mutual constitutional traditions of its Member States, and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁹⁶

One way in which the EU is particularly unique, therefore, is that individuals within the territories of its Member States enjoy "direct effect" of EU law in certain circumstances. "Whereas most international organizations lack a judicial forum for individuals to bring claims," Wessel writes, "the EU's well-developed legal order allows any natural or legal person, whatever his nationality or residence, to institute proceedings against a decision addressed to him or which is of direct and individual concern."¹⁹⁷ The doctrine of direct effect was first expressed by the CJEU in the *Van Gend en Loos* case. In that case, a Dutch appeal court referred two questions to the CJEU, the first of which was whether the relevant article of the Treaty "ha[d] direct application within the territory of a Member State; in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights, which the courts must protect."¹⁹⁸ The CJEU considered the spirit of the Treaty, and determined that since its goal was to establish a Common Market, the Treaty was something "more than an agreement which merely creates mutual obligations between the contracting states," and "the Community constitute[d] a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."¹⁹⁹ It thus followed that since the article at issue contained a clear and unconditional prohibition creating a negative obligation, the article had to be "interpreted as producing direct effects and creating individual rights which national courts must protect."²⁰⁰

Craig and de Búrca explain that "[t]he famous language of a 'new legal order of international law' was designed to legitimate the conclusion that the EEC Treaty was different from other international treaties, in that individuals could derive rights from the EEC Treaty, even, if that was not normally the case."²⁰¹ Where provisions of EU law are sufficiently clear, precise, and unconditional, they can be invoked by individuals before national courts. Individuals may thus hold the EU accountable for its actions within their national courts, provided that the EU's obligations towards individuals are clear, precise, and unconditional.

¹⁹⁶ ECHR (n71).

¹⁹⁷ Wessel (n7) 20.

¹⁹⁸ *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR 1, 12.

¹⁹⁹ *ibid* 12.

²⁰⁰ *ibid* 13.

²⁰¹ Paul Craig and Gráinne De Búrca G, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011), 185.

This emphasis on individual rights is reflected in the powers of review accorded to the CJEU under the common foreign and security policy ("CFSP").²⁰² Under the Treaties, the EU is given competence in matters dealing with the CFSP. However, the CJEU only has limited competence to review acts adopted in the context of the CFSP, namely, in order to monitor compliance with Article 40 TEU, and to assess restrictive measures taken against individuals or legal persons. This limitation is set out in Article 275 TFEU,²⁰³ which provides as follows:

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.²⁰⁴

Chapter 2 of Title V of the TEU covers the "Specific Provisions of the Common Foreign and Security Policy," and, *inter alia*, states that the Union's actions under the CFSP are to be guided by the general principles in Chapter 1 of the TEU; notes that the Union's competence under the CFSP covers all areas of foreign policy and that the CJEU's jurisdiction with respect to the CFSP is limited; and sets out how the Union shall conduct the CFSP.²⁰⁵ Article 215 of the TFEU then provides that where a decision made under the CFSP so provides, "the Council may adopt restrictive measures...against natural or legal persons and groups or non-State entities."²⁰⁶ Finally, Article 263 TFEU provides that: "Any natural or legal person may...institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."²⁰⁷ These measures together comprise a convoluted way of establishing that the CJEU may evaluate sanctions measures that are of direct application or concern to natural or legal persons under the CFSP for compliance with the fundamental principles underpinning EU law. It may not examine any other acts taken under the CFSP.

²⁰² TEU (n189) Article 24(1).

²⁰³ See also Article 24 TEU (n189), making reference to Article 275 TFEU (n189).

²⁰⁴ TFEU (n189) Article 275

²⁰⁵ TEU (n189) Chapter 2, Title V.

²⁰⁶ TFEU (n189) Article 215(2)

²⁰⁷ TFEU (n189) Article 263, paragraph 4.

When reviewing sanctions taken against natural or legal persons, however, the CJEU is still bound by the provisions of the Treaties, which in turn indicate that the EU is bound to comply with the UN Charter. It is clear that the EU Member States wanted to make their compliance with their UN Charter obligations an integral part of the European Union from the repeated reference to the UN Charter in the Treaties. Article 3(5) of the TEU proclaims that: "In its relations with the wider world, the Union shall...contribute to...the strict observance and the development of international law, including respect for the principles of the United Nations Charter."²⁰⁸ In the Preamble to the TFEU, the Member States express their "desir[e] to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations."²⁰⁹ Under Article 351, the EU Member States agreed that:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

And finally, in the Declarations annexed to the act adopting the Treaty of Lisbon, the Conference which adopted that Treaty made two declarations concerning the CFSP. In Declaration 13, the Conference "underline[d] that the provisions in the [TEU] covering the [CFSP]...do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations."²¹⁰ It also "stresse[d] that the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security."²¹¹

Thus, even if the CJEU's position that the EU legal order is akin to a domestic constitutional order, which is not affected by 103 of the Charter, it would still be bound *by its own constitutional document*. Either way you approach this issue, the only reasonable conclusion seems to be that the CJEU has acted in an *ultra vires* manner by failing to take into account the primacy accorded to their UN Charter obligations by the EU Member States, whether under treaty law, or within the bounds of their "constitutional document."

²⁰⁸ TEU (n189) Article 3(5).

²⁰⁹ TFEU (n189) Preamble.

²¹⁰ TEU (n189) Declaration 13, Declaration concerning the common foreign and security policy.

²¹¹ Declarations Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon, signed on 13 December 2007, Declaration 13: Declaration concerning the common foreign and security policy.

In short, the CJEU has failed to recognize EU law as treaty law, and itself as a treaty body. It states that domestic law does not have to give way before international law - which it does not - but treaty obligations are different. The CJEU seems to have interpreted the *sui generis* nature of the EU to mean that it functions more closely to a State than an international organization, but without providing any legal basis for ignoring treaty law. The EU is not a state, however, even though it currently enjoys some supranational competences.

3. Ability to review UNSC decisions

As noted in the General Court's decision in *Kadi II (GC)*, significant doubt was expressed in legal circles with respect to the CJEU's statements that its review of the EU measures implementing Security Council resolutions did not amount to a review of the resolution itself, and that finding that the implementation of the resolution violated fundamental rights had no impact on the primacy of UN Charter obligations. These determinations seemed contrived to fit within the CJEU's own assertion that it did not have the mandate to review the lawfulness of UNSC resolutions. Both of these positions seem flawed, but neither is discussed with great frequency in the commentary. It would seem that discussion in respect of the second statement in particular is warranted, as it lends legitimacy to the UN system if it is accepted that UNSC resolutions can be reviewed by domestic courts for compliance with *jus cogens* norms, as asserted (in perhaps an overly-broad fashion) by the CFI in *Kadi I*.

i. Review of EU measures as a review of the resolution

It seems clear from the arguments advanced by the EU institutions and intervening governments in *Kadi II (GC)* - as recognized by the General Court in that case - that any analysis of whether a State, or an international organisation exercising the powers of its Member States, can implement a UNSC resolution is necessarily a review of the *lawfulness* of the resolution, even if only indirectly. The CJEU's statement that its decisions with respect to the lawfulness of EU implementing legislation has no impact on the primacy of UN law is nonsensical. As with other troubling elements of its decision in the Kadi cases, the CJEU has not given *reasons* for its finding.

It seems apparent from the Court's statements, and references to case law, that that this position may be based on the Court's conflation of the UNSC targeted sanctions with other Article 41 measures. In addition to the list of specific terrorists addressed under the 1267 listing regime, for example, the UNSC also passed UNSCR 1373, under which States

are required to freeze, without delay, the assets of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of such acts, of entities owned in or controlled by such persons and of persons and entities acting on behalf of, or on the direction of, such persons. As the CG noted in *Kadi II (GC)*, "the identification of such persons or entities is left to the entire discretion of the States."²¹² Given the similar effect of these measures to the mandatory listings required under the 1267 regime, they are sometimes referred to as sanctions as well. But as Charron explains, such measures "are not sanctions (because the measures require states to enact extraordinary, national legislation and because the measures do not target any one state or group of individuals with particular deprivations)[;] they are measures pursuant to Article 41."²¹³

As established above, EU Member States are obligated to follow UNSC decisions. And as discussed in the first section of this paper, the CJEU stated in *Kadi I* that it must be noted that the UN Charter "does not impose the choice of a particular model for the implementation of resolutions," and States are free to choose their own mode of transposition.²¹⁴ But while the UN Charter does allow States to choose the method of implementation, this is in terms of deciding whether UNSC decisions will have direct effect within a State, or whether domestic legislation will be required to implement the treaty obligation.²¹⁵ When States are required to take *specific actions*, however, there is no discretion with respect to whether or not to undertake that action.

When the UNSC requires a *type* of action to be undertaken, or authorizes member states to take certain actions, then certainly, all member states must take these actions in accordance with human rights and other treaty obligations, to the extent that they do not conflict with the UN Charter. In deciding that governments subject to its jurisdiction must implement mandatory UNSC listings only after first reviewing these listings, the CJEU is conflating the various types of UNSC decisions, and the different requirements that would apply to different types of sanctions listings.

For example, when the Court stated in *Kadi II* that Community authorities are required to communicate to listed persons and entities the *grounds* for their listings, when it comes to the 1267 listing regime, *the ground for listing is that all EU Member States are*

²¹² *Kadi II (GC)* (n6) para 33.

²¹³ Charron, p. 154.

²¹⁴ *Kadi I* (n2) para 298.

²¹⁵ See Reinisch A, 'Should Judges Second-Guess the UN Security Council?', *International Organizations Law Review*, 6 (2009) 257-291 (Martinus Nijhoff Publishers), at p. 270, where he notes that the UN Charter leaves it up to States as to how they fulfil their obligation to carry out decisions of the UNSC, "whether by regarding binding UN Security Council resolutions as directly applicable or by adopting implementing measures."

obligated under the UN Charter to implement the decisions of the UNSC. That is the only reason that individuals and entities listed under the 1267 listing regime are placed under sanction by the EU. There are no other grounds to convey. The EU is not making a decision to list the various individuals named by the UNSC; rather, it is making a decision to implement a decision made by the UNSC, which requires the individuals to be listed. The distinction may be slight, but it is important.

Of particular concern is the fact that the EU's reasoning in this respect is trickling into the general understanding. When Crawford writes that EU members would be required to implement UNSC resolutions to the letter in instances where the Security Council permitted no flexibility in application, he first reports the findings of the CJEU in *Kadi* as a "useful mechanism" for holding international organizations to account, as he simply accepted the CJEU's position that the Security Council directives: "did not require transposition of these resolutions in a strict and pre-determined fashion. It was open to the Court to order that the resolutions be implemented in such a fashion as to respect human rights."²¹⁶ This statement of affairs failed to nuance that position as one of the CJEU's only, and did not consider the positions of the UNSC, the CFI, and several academic writers, that the actual UNSC resolutions leave no room for discretion. Continued attempts to understand and analyze the Court's decision in this respect is thus important in making sure that flawed assumptions do not become "standard knowledge."

ii. Mandate to review UNSC resolutions for *jus cogens*

Another area where the CJEU did not provide reasons for its findings is with respect to its position that it was not for the EU Courts to review the lawfulness of UNSC resolutions "under the exclusive jurisdiction provided for by Article 220 EC," even if limited to the review of compatibility with *jus cogens*.²¹⁷ Article 220 EC provided that the EU Courts are to "ensure that in the interpretation and application of this Treaty the law is observed."²¹⁸ "The law" would seem to include the general principles of law on which the Union was based, however, including respect for the principles of the UN Charter and international law, as mentioned in the Treaties,²¹⁹ so this reasoning is unclear.

²¹⁶ James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012), 188, 199.

²¹⁷ *Kadi I* (n2) para 287.

²¹⁸ Replaced by TEU (n189) Article 19.

²¹⁹ TEU (n189) Article 21.

It may simply have been that the Court did not want to wade into murky waters. When the CFI made the determination that it had the standing to review the lawfulness of UNSC resolutions with respect to compliance with *jus cogens*, this was judged by commentators as being the worst of both worlds (going too far for some, and not far enough for others). However, it seems clear from the literature that peremptory norms are applicable *erga omnes*, including with respect to the actions of international organizations, of which the UN is one. Where the CFI seems to have gotten it wrong was including universal protection of human rights as a peremptory norm, rather than sticking to accepted *jus cogens* norms.

Reinisch notes that "[w]hile some scholars have suggested that UN Security Council resolutions manifestly *ultra vires* or in open violation of *jus cogens* norms are void or not legally binding, practitioners and politicians tend to stress the UN Security Council's sole responsibility to determine the legality [of] its own acts in order to avoid the perceived threat of fragmentation and disobedience."²²⁰ He further notes that "[f]rom a United Nations legal perspective, the issue is relatively clear. National courts do not have any power to question the legality of binding UN Security Council resolutions. The Council has wide discretion in deciding which measures it considers appropriate to adopt in situations threatening international peace and security. Once it adopts binding decisions, such decisions have to be carried out by all UN member States or at least those which the Security Council determines have to carry them out... [B]inding UN Security Council resolutions have to be implemented by all members. Even conflicting treaty obligations cannot change this."²²¹

However, if states and international organizations are bound not to follow edicts which contradict *jus cogens*, and there is no world court to determine this issue, who else can assess for whether *jus cogens* are violated than those being asked to implement a measure? The only way to resolve the stand-off would seem to be to conclude that domestic courts can indirectly review UNSC resolutions with respect to compliance with *jus cogens* norms only. It thus seems worth examining the limits on the UNSC's powers, in order to assess if it is limited by *jus cogens*, and if so, then who can review for compliance with *jus cogens*.

The UN Charter does not impose explicit limitations on the UNSC's powers when it is acting under Chapter VII.²²² Notwithstanding the broad powers accorded to the UNSC,

²²⁰ Reinisch, 'Should Judges' (n215) 259-260.

²²¹ Reinisch, 'Should Judges' (n215) 268-269.

²²² Crawford (n216) 593.

however, it is generally accepted that the Security Council's powers are not limitless.²²³

Article 24 of the UN Charter sets out the functions and powers of the UNSC, *inter alia*:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.²²⁴

The ICJ in *Tadic* confirmed that the UNSC's powers are limited in that it must act within the principles and purposes of the Charter, pursuant to Article 24(2).²²⁵

Article 1 of the UN Charter sets out the Purposes of the United Nations, which include the following:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace[.]²²⁶

Article 2 sets out the Principles in accordance with which the Organization and its Members are to act, which include the obligation of Members to fulfill their Charter obligations in good faith; the requirement to refrain from the threat or use of force or to act in a manner inconsistent with the Purposes; and the need to give the UN every assistance in accordance with the Charter.²²⁷

In addition to the requirement to act in accordance with the Purposes and Principles of the UN Charter, however, many observers are of the opinion that all international organizations, including the UN, are bound by *jus cogens*.²²⁸ As Klabbers has written:

²²³See, e.g., Bardo Fassbender, 'Targeted Sanctions Imposed by the UN Security Council' (Vol. 3, IOLR 2006); Bedjaoui M, *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff Publishers 1995) 14-16; Dapo 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?' (Vol. 46, No. 2 *The International and Comparative Law Quarterly* 1997) 314-325.

²²⁴ UN Charter (n10), Article 24.

²²⁵ *Prosecutor v. Dushko Tadic*, reproduced in (1996) 35 ILM 32.

²²⁶ UN Charter (n10) Article 1.

²²⁷ UN Charter (n10) Article 2 (2), (4) and (5).

²²⁸ International Law Association, Final Report from the Berlin Conference (2004): Accountability of International Organisations, Part Two, p.18; August Reinisch, 'Securing the Accountability of International

...[such] organizations are said to be bound by *jus cogens* norms. Members would even have an obligation towards the organization not to give effect to any decisions that may violate such *jus cogens* norms: the loyalty that members owe to the organizations they have created or joined does not extend to violations by those organizations of fundamental rules; in the end, states cannot be compelled to violate peremptory norms of international law.²²⁹

With respect to the specific application to decisions of the UNSC, Judge Elihu Lauterpacht confirmed this in his Separate Opinion in the *Genocide* case:

The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot--as a matter of simple hierarchy of norms--extend to a conflict between the Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus--that a Security Council resolution may even require participation in genocide--for its unacceptability to be apparent.²³⁰

Simma notes in his commentary that "[w]hile conflicts between the primary rules of the Charter and *jus cogens* are difficult to imagine...it appears widely accepted in international doctrine that conflicts between Charter law (the Charter itself and secondary Charter law) and *jus cogens* result in the nullity of the Charter law in question."²³¹ Finally, in applying the concept of *jus cogens* to the UNSC's powers under Article 41, Andrea Charron notes that the Council may impose "any measures consistent with international law (i.e. the Council cannot require member states to commit genocide or piracy, which are widely understood as being against international law)" under Article 41, provided that the measures remain short of the use of force.²³²

Part of the problem of assessing lawfulness in terms of compliance with *jus cogens* norms is that while their paramount nature has been codified in Articles 53 and 64 the VCLT, which declare that *jus cogens* are peremptory norms from which no derogation is permitted, *jus cogens* norms have not been enumerated.²³³ For example, while it may certainly seem obvious that the UNSC cannot possibly require UN Member States to participate in genocide,

Organizations" (Vol 7, Global Governance 2001), p. 136; Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011), pp. 70-72; Akande (n223) 322-323.

²²⁹ Jan Klabbbers, *An Introduction to International Organizations Law* (Cambridge University Press 2015) 240.

²³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Provisional Measures, Order of 13 September 1993) (Separate Opinion Judge Lauterpacht) ICJ Reports 1993 p 325, 400.

²³¹ Simma (n180) 2119.

²³² Charron (n213) 3.

²³³ VCLT (n16) Articles 53, 64.

the limit on the UNSC's power becomes less clear the larger the concept of *jus cogens* is expanded. Crawford explains that for the purposes of the VCLT, which put forth a codification of customary law with respect to treaty interpretation, "a peremptory norm of general international law is defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'." ²³⁴

While some few academics would now include the guarantee of a right to a free trial as a norm of *jus cogens* status, ²³⁵ only a limited number of norms are universally accepted as having attained *jus cogens* status, including the prohibition of torture, genocide and slavery, and the principle of non-discrimination. ²³⁶ When the ILC weighed in on the scope of *jus cogens* norms in 2006, it noted that "other rules may [only] have a *jus cogens* character inasmuch as they are accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted." ²³⁷ Given that only a few academics have mentioned the possibility of the right to a fair trial being included amongst the peremptory norms, there does not seem to be sufficient evidence of the universal support required to elevate the right to a fair trial to a the level of *jus cogens*.

While the right to a fair trial was the only potential *jus cogens* norm at issue in the *Kadi* cases, and it does not seem to qualify as such a norm at present, the statement made by the CJEU that it could not review UNSC resolutions for compliance with *jus cogens* did not affect the outcome of the *Kadi* cases. Given that the Court stated that it did not need to consider the issues of peremptory norms to make its determination, making a statement in *obiter* with respect to the ability to review for *jus cogens*, particularly without undertaking any actual analysis, seems unhelpful at best. As arriving at some form of agreement or acceptance that national and regional courts can review UNSCRs in light of their required compliance with *jus cogens* norms would add legitimacy of to States' UN Charter obligations under Chapter VII, it is worth expanding the analysis beyond that made by the Court.

²³⁴ Crawford (n216) 595.

²³⁵ Renowned academic, Antonio Cassese, has gone so far as to say that he would add the "right to a fair trial" among the international rules enjoying the status of "peremptory norm." See Alston and Goodman (n151) 163, reproducing a portion of "A Plea for a Global Community Grounded in the Core of Human Rights, in *Realizing Utopia: The Future of International Law* (2012), 137, at 139.

²³⁶ See, for example, Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press 2014) 201; Akande (n223) 315; Crawford (n216) 595; ILC, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law," A/CN.4/L.702, 18 July 2006, s. 33.

²³⁷ ILC, *ibid*, s. 33.

As noted above, the prohibition on the use of force in the conduct of international relations is a peremptory norm. This norm arose due to the near-universal signing and ratification of the UN Charter. Prior to the coming into force of the Charter, it was not prohibited at international law for States to go to war with one another. And until the norm reached the status of a peremptory norm, it was only prohibited as between parties to the UN Charter. Thus, the prohibition on the use of force as a peremptory norm must be qualified under the grounds contained in the Charter, namely that force is prohibited in instances of self-defence, under Article 51, and is allowed if authorized by the UNSC, as under Article 42. This would explain how the UNSC comes to have the power to authorize an act that – without that authorization – would be contrary to *jus cogens*.

The other norms that are generally accepted as peremptory norms arose organically, however, not via a treaty. The UN Charter did not create them, for example, nor does it mention them. Even if the UN Charter purported to allow the UNSC to take measures contrary to *jus cogens*, these measures would be invalid, as treaty law cannot override peremptory norms.²³⁸ And while the UN Charter is often regarded as a “world constitution,” as Conforti states so pithily: “The constitutional aspect of the UN should not be exaggerated. The Charter is and remains a treaty.”²³⁹

It is noted in *Brownlie's Principles* that “[s]o fundamental a notion as a norm from which states cannot (individually or even multilaterally) derogate was bound to have consequences beyond the law of treaties, and so it has proved.”²⁴⁰ In short, if states are bound to forego their treaty obligations in order to comply with peremptory norms, this supersedes their UN Charter obligations.²⁴¹ In order to determine the existence of a *jus cogens* norm, however, some level of review of UNSC resolutions must fall to the domestic and regional courts that review the lawfulness of legislation implementing UNSC decisions. It would seem that in this sense, the CFI had it right in *Kadi I (CFI)*, although it did not correctly state the scope of norms currently understood to comprise *jus cogens* norms.

²³⁸ VCLT (n16) Articles 53, 64

²³⁹ Benedetto Conforti, *The Law and Practice of the United Nations*, (3rd edn., Marintus Nijhoff Publishers 2005) 10.

²⁴⁰ Crawford (n216) 603.

²⁴¹ See Tzanakopolous, *Disobeying the Security Council* (n228) 70-71, where he notes that because *jus cogens* norms exist not to satisfy the needs of individual States, but the whole international community, States cannot escape the operation of *jus cogens* by contract, and there are accordingly *jus cogens* obligations on the UN and UNSC separate from their obligations under the UN Charter. “[I]f States cannot escape the operation of *jus cogens*, they certainly cannot create an IO which is unbound by it.” See also Akade (n223) at 315, where he states: “The Security Council is not a sovereign authority. It is an organ of limited membership and its powers are conferred on it by the Members of the United Nations through the Charter.”

Acknowledging that domestic courts can and should be able to review for compliance with *jus cogens* would thus seem to accord with international court decisions and commentary, and would lend legitimacy to the current debates with respect to the role of the Security Council. Part of the problem in coming to an agreement as to whether a domestic court should be able to review UNSC resolutions for compliance with *jus cogens* norms seems to be that half of the critics think that no court should be able to review UNSC resolutions for any reason, and the other half think that this does not go far enough in terms of what domestic courts can review. These critics think that UNSCRs should be able to be reviewed for compliance with the principles and purpose of the UN Charter (where it is also not settled if this applies to all acts of the UNSC, or just those under Chapter VI, etc.).

However, what seems to be overlooked in that sense is that it is not necessary to resolve the debate as to exactly what the limits on the UNSC's powers are in order to assess the issue of whether domestic courts should be able to review for *jus cogens*. As set out above, peremptory norms are the one thing that States cannot contract out of. Since the UN Charter is a treaty, States have not agreed to incur any obligations with respect to the UNSC as regards *jus cogens*. This is the one area where domestic courts certainly retain control with respect to assessing the legality of any of the domestic government's actions, as it could never contract to contravene any of them (and if it did, that contract would be void under the VCLT). Thus, any domestic court can assess if an act contravenes *jus cogens*. The declaration by a State, or by a domestic court reviewing the domestic implementation of a UNSC decision that implementing that decision would be contrary to *jus cogens* would indirectly be a review of the lawfulness of the UNSCR in that respect. But given that States cannot contract out of the obligation to comply with *jus cogens*, they (and their courts) must necessarily retain the right to review any action they take for compliance with *jus cogens*. Establishing this as a position does not require the international community to come to a common understanding as to "what limits apply to the UNSC's powers when it is acting under Chapter VII." It simply requires an acknowledgement that there is no other way for domestic courts to ensure that domestic governments are complying with their obligations not to contravene *jus cogens* norms.

As States cannot agree to have the UNSC tell them to contravene a peremptory norm, they equally cannot leave it to the UNSC to decide if its decision involve the contravention of a peremptory norm, as that would be tantamount to requiring a State to contravene a peremptory norm in the event of an error or mistake made by the UNSC (or even an intentional direction). And while not complying with a decision requiring a State to commit

genocide or enslave a people is a relatively easy call without involving the domestic courts, there could be a grey area with respect to the interpretation of the application of the principle of non-discrimination, which is an accepted peremptory norm. It would thus have been beneficial for the CJEU to have seriously considered the CFI's position in *Kadi I (CFI)*. Barring that, it would have been better had it dismissed it out of hand as it had so many other arguments, rather than making a statement in *obiter* that it could not review the lawfulness of UNSC decisions, even for compliance with *jus cogens*.

4. The role of the UNSC

The fourth gap in the analysis surrounding the Kadi cases comes not from the Court, but from the commentary. It relates to the view welcoming external review of the legality of UNSC resolutions on the basis that it is necessary now that the UNSC is taking actions that go beyond the role originally anticipated for it under the UN Charter. And while there may grounds for arguing this in terms of some decisions taken by the UNSC, such as with respect to peacekeeping missions,²⁴² its actions with respect to imposing sanctions against individuals, and imposing sanctions that interfere with human rights, would have been anticipated, based on the historical record. Removing this external reason to support unwarranted review of the legality of UNSC resolutions will entail a consideration of the primary purposes of both the UN and the UNSC, as well as of the purpose of sanctions generally, and of targeted sanctions in particular.

i. Primary purpose of the UN and the UNSC

While the principles and purposes of the UN are numerous, the primary purpose of the United Nations organization is the maintenance of international peace and security.²⁴³ With the failure of the League of Nations, and the onset of WWII, the need for a new international organization for the maintenance of peace and security, endowed with the necessary power and authority to enforce the peace, was envisaged and discussed by the major Allied powers.²⁴⁴

The UNSC was established to provide the means by which the UN determined the existence of threats to or breaches of the peace, or acts of aggression, and took measures to

²⁴² Note that a discussion of peacekeeping missions or other actions taken by the UNSC beyond targeted sanctions is beyond the scope of this paper.

²⁴³ See statements to this effect in Shaw (n236) 897-898; Conforti (n239) 2, 8; Bedjaoui (n223) 6.

²⁴⁴ See, e.g., Simma (n180) first chapter; Paul Kennedy, *The Parliament of Man: The Past, Present and Future of the United Nations* (HarperCollins Publishers Ltd. 2006), first chapter.

address them. Shaw describes the Security Council's powers as being "concentrated in two particular categories, the peaceful settlement of disputes and the adoption of enforcement measures. By these means, the Council conducts its primary task, the maintenance of international peace and security."²⁴⁵

The Security Council exercises its enforcement powers by taking actions under Chapter VII of the UN Charter. Chapter VII consists of 14 articles covering "Action with respect to threats to the peace, breaches of the peace, and acts of aggression." Article 41 provides that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.²⁴⁶

Applying elements of treaty interpretation to Chapter VII confirms that Article 41 provides the UNSC with the power to sanction individuals.

The "general rule of interpretation" of treaties is set out in Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"), which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁴⁷ In examining the "ordinary meaning" of the terms in Article 41 of the UN Charter, it is clear that Article 41 anticipates the ability to take actions beyond the blanket sanctioning of states or state actors. First, Article 41 refers to actions comprising "complete or partial interruption of economic relations." While "economic relations" might be read broadly to mean "economic relations with a state," it does not say that the economic relations have to be with the state as a whole, and it also anticipates that only a portion of any economic relations might be disrupted, which would impact one or more segments of a state to a greater extent than the others. Second, the article explicitly anticipates interrupting "rail, sea, air, postal, telegraphic, radio and other means of communication." In many states, such enterprises are (and were at the time the UN Charter was signed) owned or controlled, in whole or in part, by private entities and individuals. Most importantly, Article 41 does not state that the disruption of economic

²⁴⁵ Shaw (n236) 878.

²⁴⁶ UN Charter (n10) Art. 41.

²⁴⁷ VCLT (n16) Art. 31.

relations or other services can only be required in response to actions taken by a state. It thus cannot be said that Article 41 anticipates that actions will only be taken against states.

In addition to the ordinary meaning of Article 41, the context of Article 41 must be considered in its interpretation.²⁴⁸ The impetus for decisions taken under Article 41 is found in Article 39, the wording of which makes it clear that actions taken under Article 41 need not be limited to curtailing actions taken by states. Article 39 provides as follows:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.²⁴⁹

Article 39 allows the Security Council to determine the existence of any threat to the peace or breach of the peace, and to decide what measures shall be taken to maintain or restore international peace and security. If a threat to international peace does not stem from a nation state, but from non-state actors, it makes sense that recommendations and decisions would be made to deter or stop the actions of the relevant non-state actors.

It is also clear that the potential for individuals – as opposed to States – to be the source of a threat to the peace was understood when the UN Charter was signed. International terrorism involving non-State actors had already been on the rise in the 1920's and 1930's, decades before the UN Charter had been signed, and it had been identified as having the potential to start an international conflict. The existence of terrorism as a threat was of course overshadowed by World War II and the gross human rights violations that occurred under the direction of States, such that “[t]oday it is largely forgotten that the issue of international terrorism - its definition, prevention, and punishment - was debated and codified in Europe in the 1930s.”²⁵⁰

Mark Alan Lewis notes that prior to World War I, terrorism was primarily domestic, involving revolutionists and anarchists,²⁵¹ but that after WWI, certain types of "ultranationalist" and revolutionary terrorism continued, and there was a rise of "extra-judicial paramilitaries" frequently connected to the military and police.²⁵² He writes that:

²⁴⁸ VCLT (n16) Article 31. For a discussion of the importance of considering the context of the UN Charter in interpreting its provisions, see Simma (n180) 84.

²⁴⁹ UN Charter (n10) Art. 39.

²⁵⁰ Mark Lewis, *International Legal Movements against War Crimes, Terrorism, and Genocide, 1919-1949: A dissertation submitted in partial satisfaction of the requirements for the degree Doctor of Philosophy in History, University of California, Los Angeles* (ProQuest LLC, 2008) 190.

²⁵¹ *ibid* 208.

²⁵² *ibid* 209-210.

...by the late '20s, the international criminal jurists, followed by certain diplomats in the '30s, believed a new international system was required. They contended that terrorism was becoming increasingly international in the post-Versailles environment of border disputes, armed groups clandestinely supported by states, and the expansion of modern communications and transportation. Throughout the interwar period, certain states pursued political goals by supporting foreign terrorists and granting asylum to them.²⁵³

As a result of several terrorist incidents in the interwar period, there were international efforts to create a convention ensuring international co-operation against terrorism. Lewis explains that "[i]n the late '20s and early '30s, a select group of continental European jurists, interested in developing an international system of criminal law, began to theorize on the problem of terrorism. Like the diplomats on the League Council a few years later, their major concern was that an act of international terrorism - in which the perpetrators were supported by a foreign state, committed the act in a state other than their own, or sought refuge in a third state - could explode into an international crisis leading to another world war."²⁵⁴

Due to renewed concern about state support for armed groups following specific terrorist activities, the issue was escalated to a "grave threat to international peace and security."²⁵⁵ A Committee for the Repression of Terrorism was established, which resulted in a convention to repress and punish international terrorism. While the international system envisaged by this convention was never implemented, it is clear that State actors were alert to the possibility that international terrorist acts carried out by individuals could lead to a breach of international peace and security. Given that the UNSC was given primary responsibility for international peace and security, it would have been reasonable to expect that it might need to take action against individuals.

ii. Primary purpose of sanctions

At their core, sanctions measures are imposed by the UNSC for the purpose of maintaining or restoring international peace and security, in response to a threat to or breach of the peace or act of aggression.²⁵⁶ Once the UNSC has determined that a threat to the peace exists pursuant to Article 39, it may require measures to be taken under Article 41 and/or 42. However, it is also open for the Council to call for provisional measures to resolve the matter under Article 40, which provides, *inter alia*, that "to prevent an aggravation of the situation, the Security

²⁵³ *ibid* 211.

²⁵⁴ *ibid* 219-220.

²⁵⁵ *ibid* 222.

²⁵⁶ UN Charter (n10) Articles 41, 39.

Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."²⁵⁷

Provisional measures called for under Article 40 are intended to stabilise crisis situations, and, according to Shaw, "often [have] an effect ranging far beyond the confines of a purely temporary action. They may induce a calmer atmosphere leading to negotiations to resolve the difficulties and they may set in train moves to settle the dispute upon the basis laid down in the Security Council resolution which called for the provisional measures."²⁵⁸ It is unlikely that calls to action under article 40 would have much effect if the possibility of sanctions measures were not waiting in the wings, and the only "next step" that the Security Council could take was the authorisation of armed force. There is thus also value to sanctions measures in terms of a general deterrence factor, and an impetus to resolve disputes before such measures are imposed.

The UNSC's options under Article 41 should also be compared with the options available under Article 42 of the UN Charter, which permits the UNSC to take "such action by land, sea or air forces as may be necessary to maintain or restore international peace and security." It is thus understood that the UNSC has the authority to authorise the use of force to protect international peace and security. It may make decisions that result in the ultimate violation of human rights - the taking of life. It was thus understood that the UNSC had the authority to violate human rights if necessary in pursuit of the overarching goal of maintaining world peace.

iii. Primary purpose of targeted sanctions

Following the end of the Cold War, the UNSC became more active as the five permanent members of the Security Council experienced a thaw in their relations.²⁵⁹ One of the areas of increased activity was the imposition of economic measures against states in response to threats to international peace and security.²⁶⁰ Initially, most sanctions imposed by the UNSC were comprehensive in nature, comprising a complete embargo on trade, and a prohibition on all financial transactions with the country. The thought process behind imposing

²⁵⁷ UN Charter (n10) Article 39.

²⁵⁸ Shaw (n236) 902.

²⁵⁹ David Cortright D & George A Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (International Peace Academy, Inc. 2000) 1, 37-51. See also Arne Tostensen and Beate Bull, 'Are Smart Sanctions Feasible?' 54 *World Politics* (2002) 373; Nigel d. White, *Keeping the peace: The United Nations and the maintenance of international peace and security* (Manchester University Press 1993) 9-21; Kennedy (n244) 52; Simma (n180) 2113; Conforti (n239) 149; Bedjaoui (n223) 2.

²⁶⁰ Tostensen and Bull (n259) 373.

comprehensive sanctions was based on what has been referred to as the "pain-gain" formula, namely that "the greater the pain inflicted on the target state, the greater and quicker the gain by the sanctioning states."²⁶¹

In practice, the imposition of comprehensive sanctions did not generally achieve the desired outcomes. This may have been because the targeted regimes did not place the same value on human life that the sanctioning states do. In such instances, humanitarian problems arising as a result of the sanctions measures against a state may not have served to change that state's behaviour. The deterioration of the humanitarian situation in Iraq as a result of the imposition of sanctions against the country in 1990 is commonly cited as the impetus for moving away from comprehensive sanctions towards targeted sanctions.²⁶² While humanitarian aid was permitted under the sanctions regime, it was not available in sufficient quantities, and the health situation in Iraq quickly became troubling. The UNSC responded by allowing the export of oil in order for Iran to acquire food and medicine, but Iraq refused to implement this program until 1996, claiming that it was contrary to its sovereign rights.²⁶³ Inflation and food shortages led to disease and malnutrition, and a five-fold increase in child mortality.²⁶⁴

The cost in human lives as a result of the Iraq sanctions led the Security Council to begin imposing targeted sanctions against specific sectors or industries of concern in a country, as well as individuals responsible for either making the decisions that led to a country's policies or human rights abuses,²⁶⁵ or to individuals who posed a threat due to potential or actual terrorist actions (as opposed to measures against countries who may be harbouring or supporting them), as under the 1267 regime.

While different human rights concerns have arisen with respect to individuals targeted by UNSC sanctions, the move to targeted sanctions stemmed from a desire to avoid the massive abrogation of human rights that could be caused by imposing blanket sanctions against a country. Targeted sanctions have not proven to be a panacea, but it is clear that the actions taken by the UNSC in the nature of targeted sanctions conform with the role

²⁶¹ Tostensen and Bull (n259) 375.

²⁶² Tostensen and Bull (n250); Charron (n213); White (n250) 98-99.

²⁶³ Manfred Kulesa and Dorothee Starck, 'Peace Through Sanctions?' <https://globalpolicy.org/global-taxes/42325.html?tmpl=component&print=1&page=>, accessed May 14, 2015, s. VI.

²⁶⁴ *ibid* s. VI.

²⁶⁵ See for example the Angola sanctions imposed under Resolution 864 (1992), 15 September 1993, S/RES/864 (1992), which were the first sanctions containing targeted measures, and the measures imposed against individuals and sectors of concern relating to Iran's nuclear program under resolution 1737 (2006).

originally anticipated for it as the UN organ having primary responsibility for the maintenance of international peace and security.

5. Summary

After reviewing the various sources of commentary and analysis of the CJEU's decisions in *Kadi I* and *Kadi II* in Chapter I, it was evident that there were a number of holes in these decisions that had ramifications for the outcome of the cases and for the actors involved.

The first of these was that the Court failed to take into account the actual impact of the sanctions on Kadi's fundamental rights. The determination of *all* of the breaches seemed to stem from the fact that Kadi's right to property had been grossly violated by the 1267 sanctions measures. This determination was made on the basis that all of Kadi's assets had been frozen for 10 years, and he had not had a chance to go before an independent tribunal to have his name removed from the asset freeze list. Given the purportedly grave impact on the use of his property, the sanctions measures had to be deemed punitive in nature, and so Kadi was owed the rights of defence, and the right to effective judicial protection of this rights. In declaring the measures against Kadi to be punitive in nature, so as to attract full due process rights, the Court also failed to properly consider the nature of the sanctions measures. The 1267 Sanctions Committee had described them as "preventive" in nature, and the EU institutions argued this as well. However, the Court - again relying on the incomplete assessment of the impact of the measures on Kadi's property rights - determined that the serious impact on those rights amounted to the measures being punitive in nature.

In this sense, the CJEU's reasoning was somewhat circular; Kadi's rights to property had been breached because he did not have the opportunity to be heard before an independent tribunal, but he only had the right to full rights of defence and judicial protection because his property rights had been contravened to such a degree that they had to be considered punitive. A potential method of breaking the circle would have been for either the EU institutions to lead evidence with respect to the actual impact on Kadi's property rights - there was no indication that Kadi had every applied to take advantage of the exemptions to the asset freeze - or for the Court to consider that the proper application of the sanctions regime in full could have accorded Kadi the right to use his property to be paid for gainful employment (into a frozen account), and to have access to his own funds to pay for all of his basic expenses. This was not done, however, and greatly affected the determination of a breach of Kadi's rights as a result.

The second gap in the Court's decisions was an actual absence of an explanation, in this case as to why the CJEU had determined that the "autonomous EU legal order" stood above the international legal order. The EU institutions had argued before the Court that the EU was bound by the UN Charter, both in the course of exercising the powers of its Member States, which are bound to fulfill obligations under the UN Charter before all other international obligations in the event of a conflict, and under the terms of the Treaties themselves, which require the EU to accord primacy to the Charter. Rather than address the parties' arguments, however, the CJEU simply declared that these obligations could not take precedence over protecting the fundamental rights guaranteed within the EU. As seems clear from a review of the UN Charter, the VCLT, and the Treaties, the EU - as stated by the CFI in *Kadi I (CFI)* - is indeed bound by the Charter. In failing to respect the actual constraints placed upon it by its Member States, the CJEU seems to have set itself up for a crisis of confidence, as discussed further in Chapter 3.

The third element that seemed under-analyzed by the Court related to its statements about its lack of ability to review UNSC resolutions for lawfulness, along with its position that reviewing an implementing measure for compliance with fundamental rights would not affect the primacy of the resolution within the EU. As with the previous element discussed, the CJEU again failed to provide reasoning for its statements. It seemed, however, that it was basing its position that a review of the EU implementing regulation did not amount to a review of the UNSC resolution on the notion that States are free to choose the method of implementing UNSC resolutions. But while States are free to choose *how* UNSC resolutions should be made binding within their domestic spheres, they are not free to choose *whether* they will become binding in their domestic spheres. The Court seemed to have conflated the domestic implementation of non-sanction Article 41 measures such as the obligation for States to maintain their own counter-terrorism listings and legislation with the mandatory listings on the 1267 regime. This type of conflation and resulting stated position of the top court of a very influential regional actor will have an impact on how other States may view their UNSC compliance options, as discussed in Chapter III. In addition, the CJEU disagreed with the CFI that it had the mandate to review UNSC resolutions for *jus cogens*. It appears, however, that this may be the one certain area where any state can review a resolution of the UNSC, at least for compliance by their local government. And while any one State's determination would not be binding on any other State in that sense, and so would not comprise a *true* review of the lawfulness of a UNSC resolution, compliance with *jus cogens* is not an action States could have conceded to the UNSC at international law, and so remains

reviewable by them, which lends at least a base level of legitimacy that can be reviewed for. Dismissing this notion out-of-hand, with no reasoning, was perhaps irresponsible, and at least presented a lost opportunity for discussion of the issue with a wide audience.

Finally, the fourth area where analysis was somewhat lacking stemmed from the commentary, where writers espoused the notion that it was not only admirable but necessary that courts such as the CJEU step up to review the activities of the Security Council, given that the UNSC had taken on a "new role" in sanctioning individuals. As discussed in this chapter, however, it was anticipated that individuals would cause a threat to international peace and security, and that the UNSC would have to take measures under Article 41 to deal with them. Thus, while others may have cause to discuss the "new roles" of the Security Council in other arenas, this cannot apply with respect to its role in imposing targeted sanctions, and should not form the basis of attracting unwarranted review by bodies that are extending beyond their mandate.

CHAPTER III: IMPLICATIONS FOR THE EU AND THE UN

On the basis of the analysis above, it seems as though the CJEU has acted beyond the mandate given to it by its Member States under the constituent Treaties. The CJEU has failed to take account of the fact that it is a treaty body, not a domestic court. The obligations of the EU Member States to fulfill the obligations imposed on them while acting in the context of the EU is an obligation required under treaty. In instances where those obligations conflict with their international legal obligations under the UN Charter, they are obligated by Article 103 of the UN Charter to give precedence to their UN Charter obligations. EU Member States are thus obligated to ignore the edicts of the CJEU directing them not to automatically implement non-discretionary UNSC decisions, in favour of continuing to do so immediately (when so required by the resolution, as in the case of the 1267 listing regime).

Matters are complicated, however, since while the EU Member States might be obligated to comply with UNSC resolutions over decisions by the CJEU, they have granted competence under the CFSP to the Union, complicating the means by which they might do so. Matters are further complicated by the fact that individuals enjoy direct effect within EU Member States, so if the EU itself does not act in accordance with CJEU's decisions, individuals can bring challenges before domestic courts. All of which raises the questions: what are the implications for the EU and other actors as a result of the CJEU's decisions, and what can be done about it? Chapter III will address the first of these questions, and Chapter IV, the second.

1. Implications for the EU and its Member States

i. Liability for internationally wrongful acts

Two initial questions arise in the context of whether or not the EU (or its Member States) could be liable for an internationally wrongful act as a result of following the edicts of the CJEU in the Kadi cases: (1) is there an internationally wrongful act? and (2) if so, who is liable for any such acts: the EU, or its Member States?

With respect to whether there is an internationally wrongful act, there are two possible means by which the EU's compliance with the CJEU's "Kadi requirements" might result in such an act. The first is through the failure to list someone mandated by the UNSC; the second is through simple *delay* in listing someone. The latter failure has not generally been considered in the academic writing reviewing the Kadi cases, however.

In the first instance, the failure to list someone on the 1267 list because the UNSC had not provided "sufficient reasons" for listing - and by extension the EU, in the eyes of the CJEU - would clearly be a violation of all of the EU Member States' international legal obligations, for the reasons discussed above. However, the larger issue of non-compliance that was automatically created by the CJEU's decisions in *Kadi I* and *Kadi II* which has largely been overlooked by the academic commentary, is that all EU Member States cannot comply with the requirement to freeze the assets of persons listed by the UNSC and its Sanctions Committees "without delay." The phrase is not defined in the resolutions, nor are timelines for freezing included in the guidelines. It is perhaps safe to say, however, that for States to wait to freeze the assets of designated persons until after the State has verified the listing reasons with the Sanctions Committee, and then comparing that to national or regional notions of fundamental principles likely does not comply with the requirement. There is thus an automatic "non-compliance" with UNSCR 1267 and its successor resolutions every time the EU takes the time to decide whether or not it will comply with each decision to add a name to the 1267 list.

One could envisage a situation where an EU Member State has not frozen the assets of a person designated by the UNSC "without delay," as required by the UNSC resolution, due to the requirement of the EU to substantiate the reasons for listing. In the meantime, the designated person - who is aware of his listing as soon as the UNSC sanctions or the Committee decision is published - decides to move his money out of the EU state. Those funds are then used to finance a terrorist attack, which claims the lives of hundreds, and causes millions of dollars worth of property damage. In such a situation there is some risk that the EU State would be liable under the doctrine of state responsibility for failing to comply with its UN obligations, as might the EU itself. This potential for liability would be even more prominent were the review system implemented by the EU to result in the non-listing of an individual or entity designated by the UNSC.

As regards the question of *who* is liable for the failure of the EU to implement sanctions against an individual - either at all, or "without delay" - it seems likely that the EU and its Member States would both be liable for any damage resulting due to their failure to comply with the obligations under international law to list the individual. Generally under international law, "[a] breach of an international obligation gives rise to a requirement for reparation."²⁶⁶ Thus, whenever a state or an international organisation breaches an

²⁶⁶ Shaw (n236) 566.

international obligation, the doctrine of state responsibility or that of international organisations comes into play.

With respect to the potential for liability of the EU Member States themselves, while they have accorded competence in the area of foreign policy to the EU, "EU law cannot relieve its Member States from their obligations under the Charter."²⁶⁷ Article 2 of the *Articles on State Responsibility* ("ASR") provides that there is an internationally wrongful act of a State where an action or omission is attributable to a State, and constitutes a breach of the State's international obligations.²⁶⁸ As demonstrated above, the failure of the EU Member States to comply with the listings of the UNSC would be a breach of their international obligations. Under Article 1 of the ASR, "[e]very internationally wrongful act of a State entails the international responsibility of that State."²⁶⁹ Finally, Article 42 of the *Articles on State Responsibility* makes it clear that responsibility applies when an obligation is owed as between several states, as under the UN Charter.²⁷⁰

With respect to the potential for liability of the EU itself, while the EU enjoys "observer" status with "special participation rights" within the UN, it is not a party to the UN Charter. But as Simma has explained, "[i]nternational organizations whose statutes lay down explicitly or implicitly the supremacy of the Charter are already bound by their own law to recognize the prevalence of the Charter."²⁷¹ It would seem that contrary to the CJEU's assertions with respect to the EU's obligations under international law, the EU itself is also bound by the UN Charter, as a result of its Member States' obligations under the UN Charter, the observance of which is also included as a requirement of the EU in its constituent treaties. That intent of the EU Member States to bind the EU was clarified in the Lisbon Treaty, which makes "the strict observance and the development of international law, including respect for the principles of the United Nations Charter" one of the objectives of the European Union.²⁷²

Even had the EU Member States not included the obligation to respect its UN obligations in the EU treaties, as Brownlie has pointed out, "a State cannot by delegation...avoid responsibility for breaches of its duties under international law."²⁷³ This position was codified in the ILC Draft articles on the responsibility of international

²⁶⁷ Simma (n180) 2132.

²⁶⁸ Articles on State Responsibility for Internationally Wrongful Acts (2001) ("ASR"), Article 42.

²⁶⁹ *ibid* Article 1.

²⁷⁰ *ibid* Article 42.

²⁷¹ Simma (n180) 2131.

²⁷² TEU (n 189) Article 3(5).

²⁷³ Ian Brownlie, 'State responsibility: the problem of delegation' (*Völkerrecht zwischen normativen Anspruch und politischer Realität*, Ginther K et al eds, 1994), pp. 300-301.

organisations ("DARIO"), which provide that a State member of an international organisation cannot take advantage of the international organisation's competence in the area of a State's international obligations to cause the organization to commit an act that - if committed by the State - would have constituted a breach of the obligation.²⁷⁴ In addition, Article 48 of the UN Charter requires Members of the UN to carry out the decisions of the UNSC directly, and through their actions in international agencies of which they are members, importing responsibility of this nature within the Charter itself.²⁷⁵

The DARIO provide that there is an internationally wrongful act of an international organization where an action or omission attributable to that organization under international law constitutes a breach of an international obligation of that organization.²⁷⁶ The conduct of an organ of an IO is considered to be an act of that organization under international law,²⁷⁷ even if the conduct exceeds the authority of that organ, or contravenes its instructions.²⁷⁸ Article 10 notes that an IO breaches its international obligations when it commits an act that "is not in conformity with what is required of it by that obligation, *regardless of the origin or character of the obligation concerned*."²⁷⁹ It further clarifies that this "includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization."²⁸⁰ Article 17 then directly addresses the issue of the circumvention of international obligations through decisions and authorizations addressed to members:

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding on member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.
[...]
3. Paragraph [1 applies] whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision...is addressed.²⁸¹

Article 19 notes that the effect of (*inter alia*) Article 17 "is without prejudice to the international responsibility of the State...which commits the act in question."²⁸² This is

²⁷⁴ Draft articles on the responsibility of international organizations (2011) ("DARIO"), Article 62.

²⁷⁵ UN Charter (n10) Article 48(2).

²⁷⁶ DARIO (n274) Article 4.

²⁷⁷ *ibid* Article 6.

²⁷⁸ *ibid* Article 8.

²⁷⁹ *ibid* Article 10(1).

²⁸⁰ *ibid* Article 10(2).

²⁸¹ *ibid* Article 17.

confirmed in Article 48, where it is noted that where an international organisation and one or more States are all responsible for the same internationally wrongful act, the responsibility of each may be invoked.²⁸³ Thus, whether or not the EU has committed an internationally wrongful act in this instance does not affect the determination of whether the individual EU Member States have also committed internationally wrongful acts. In addition, the rules of the IO cannot justify a failure to comply with its international legal obligations.²⁸⁴

Finally, there is the question of what the consequences are of a State or an IO committing an internationally wrongful act. Firstly, the duty to perform the international obligation continues.²⁸⁵ At the same time, the State or international organisation is under an obligation to cease any continuing internationally wrongful act, and to offer assurances and guarantees that it will not happen again, if required.²⁸⁶ While the breach of a treaty is actionable in international law without proof of damage,²⁸⁷ a State or an international organisation is responsible to make full reparation for any damage - whether material or moral - that is caused by any internationally wrongful act that it commits.²⁸⁸ Reparation can take the form of restitution, compensation, and/or satisfaction.²⁸⁹ Thus, in the event that the failure of the EU to implement the freezing of assets of a listed person without delay resulted in funds that should have been frozen by an EU Member State being used in a manner that caused damage to a State (or international organisation), the EU would be liable to compensate for the losses, either as itself, or as its Member States, depending on the circumstances. Even if no material damage were committed, the existence of moral damage in the simple form of non-compliance with treaty obligations could still be established,²⁹⁰ with a resulting obligation to give satisfaction for the injury, which can "consistent in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."²⁹¹

Finally, with respect to procedure, it would appear that either the UN or any of its Member States would be entitled to invoke a breach of the international responsibility of the EU and/or its Member states. Article 43 of the draft ILC articles provides that:

²⁸² *ibid* Article 19.

²⁸³ *ibid* Article 48.

²⁸⁴ *ibid* Article 32.

²⁸⁵ ASR (n268) Article 29; DARIO (n274) Article 29.

²⁸⁶ *ibid* Article 30; *ibid* Article 30.

²⁸⁷ Crawford (n216) 590.

²⁸⁸ ASR (n268) Article 30; DARIO (n274) Article 31.

²⁸⁹ *ibid* Articles 34-37; *ibid* Articles 34 - 37.

²⁹⁰ As Crawford (n216) notes at 590-591, "in international law a breach of treaty is actionable without proof of special damage, unless the treaty otherwise provides."

²⁹¹ ASR (n268) Article 37; DARIO (n274) Article 37.

A state or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

- (a) that State or the former international organization individually;
- (b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:
 - (i) specially affects that State or that international organization; or
 - (ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.²⁹²

The injured State or international organisation must give notice of its claim to the State or international organisation,²⁹³ and must not be considered, by reason of its conduct, to have validly acquiesced in the lapse of the claim.²⁹⁴

It is additionally possible for a State or an international organisation *other than an injured State or international organisation* to invoke the responsibility of an international organisation for an internationally wrongful act if the obligation breached is owed to a group of States or international organisations, and is "established for the protection of a collective interest of the group,"²⁹⁵ or if it is owed to the international community as a whole,²⁹⁶ provided that for an international organisation, safeguarding such an interest of the international community as a whole lies within its functions.²⁹⁷ Given that State and international organisation inaction can result in acquiescence, it may behoove interested UN States or the Organization itself to take action on this front before it is too late. In this context, it is worth noting that the possibility of an individual who suffers damage as a result of the EU's failure to immediately comply with UNSC listings is not precluded under the codification of international organisation responsibility, and likely would not suffer from any State acquiescence; Article 50 provides that the invocation of responsibility by a State or an international organisation "is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization."²⁹⁸

²⁹² DARIO (n274) Article 43. The ASR (n268) provides substantially the same entitlement, although with respect to states only, under Article 42.

²⁹³ ASR (n268) Article 43; DARIO (n274) Article 44.

²⁹⁴ *ibid* Article 45; *ibid* Article 46.

²⁹⁵ *ibid* Article 48(1); *ibid* Article 49(1).

²⁹⁶ *ibid* Article 48; *ibid* Article 49.

²⁹⁷ DARIO (n274) Article 49(2), (3).

²⁹⁸ DARIO (n274) Article 50.

ii. Erosion of confidence in the CJEU

While the previous section demonstrates that the EU and its Member States may both be on the hook for non-compliance with international obligations under the UN Charter, it is clear from the actions of both that they do not *wish* to be offside their UN obligations, and have taken the steps possible in complying with the CJEU's edicts to minimise their level of non-compliance. These steps - taken continuously, over a number of years - demonstrate what may amount to an erosion of confidence in the CJEU. This section discusses the CJEU's obligations to the EU, the steps taken by the EU to counteract CJEU decisions, and the implications of these actions.

As noted by Crawford, "[a] central aspect of any international organization is the relationship between the institution and its membership," which is normally composed of States.²⁹⁹ The existence of an organ with a "distinct will" is necessary in order to justify the special status of international organizations at international law. But at the same time, this is somewhat of a legal fiction, given that "the international organization is little more than a tool in the hands of the member states."³⁰⁰ The level to which the EU is a "tool" of the Member States is less in the case of the EU, as its Member States have endowed the EU with supranational powers, and have created a judiciary for the purpose of ensuring that EU decisions and acts comport with the Treaties.³⁰¹ However, the authority of the EU still stems from its Member States, who should be "Master of the Treaties." This is a title that the CJEU is more and more claiming for itself however, as seen in the wake of its *Kadi* decisions, where the CJEU showed itself willing to ignore its Member States' express desire to uphold their obligations under the UN Charter, in favour of reviewing EU acts implementing Charter obligations for compliance with the fundamental rights of individuals.

In this sense, one prominent commentator described the CJEU's decision in *Kadi I* as "a hardly veiled threat to use quasi-constitutional principles of the law of the European Union to disregard the obligations of EU Member States under the UN Charter."³⁰² This brief statement illustrates the view that the implementation of the CJEU's decision would indeed require the EU's Member States to disregard their UN Charter obligations.

As summarized above, with respect to instances where the UNSC directs its Member to permit no flexibility in application, "Article 103 requires the resolution to be implemented

²⁹⁹ Crawford (n216) 188.

³⁰⁰ Klabbbers (n229)13.

³⁰¹ TEU (n189) Article 19.

³⁰² Simma (n180) 2113.

by Members to the letter, irrespective of how the EU and ECHR view the subject, and irrespective of the absence of equivalent protection on the level of the Security Council."³⁰³ The EU Treaties result in treaty obligations for EU Member States, which must give way to treaty obligations under the UN Charter. The CJEU, however, has made it clear that the EU Treaties are not just "other" agreements entered into by the EU's Member States. As it stated in *Opinion 1/91*, regarding the Agreement creating the European Economic Area:

...the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields.... The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.³⁰⁴

With respect to the *Kadi* cases, the Court has been described as "perfecting" this theme, as it dismissed Article 103 of the UN Charter and Article 351 of the TFEU in one fell swoop, requiring - as discussed above - that all Community measures be subject to full review for compliance with fundamental rights, even those giving effect to UNSC resolutions.³⁰⁵

But as some few commentators have noted, the CJEU's edicts did not result in *actual* non-compliance by the EU,³⁰⁶ as Kadi remained listed under EU regulations until such time as the Sanctions Committee removed him from the list.³⁰⁷ The EU thus managed to maintain "strict observance" with the UNSC resolutions, as Kadi was listed by the EU two days after the UNSC added his name to the 1267 list, and his listing was maintained by the EU until a week after the 1267 Committee delisted him.³⁰⁸ As the same commentator notes in a different article, while *Kadi II* removed the restrictive measures against Kadi, such that they are deemed never to have existed, this decision was made after Kadi was de-listed by the UNSC, and so in fact, Kadi was "at no moment in time, not for the blink of an eye," removed from the EU list while he was on the 1267 list.³⁰⁹

³⁰³ Crawford (n216) 199.

³⁰⁴ *Opinion 1/91 of 14.12.1991*, European Court Reports 1991 I-6079, para 21.

³⁰⁵ Larik, 'Legal Orders Don't Fit' (n195).

³⁰⁶ Although as noted above, whether the EU maintained compliance with Kadi's listing does not bear on whether it maintained compliance with the obligation to freeze the assets of new designated persons "without delay."

³⁰⁷ See Larik, 'The *Kadi* Saga' (n129), and Larik, 'If the Legal Orders Don't Fit'.

³⁰⁸ Larik, 'The *Kadi* Sage' (n129).

³⁰⁹ Joris Larik, 'Kadi De-listed - A Cause for Celebration?' European Law Blog, October 30, 2012, available at <http://europeanlawblog.eu/?p=1192>

Larik attributes the ability of the EU Member States to comply with the UNSC measures against Kadi to the EU institutions, including the CJEU, which extended the contested measures for three months, to give the Commission time to address the situation in light of the Court's requirements. It is standard practice for Courts that annul regulation to allow the government time to "correct" the regulation at issue, however, in order to avoid a situation where no law at all applies in a particular instance; it can hardly be said that this was an action of the CJEU to allow the EU to remain in compliance with the UNSC sanctions regime. Furthermore, the only reason the annulment of the regulation in 2010 did not take immediate effect is because the Council, Commission and UK lodged appeals; the Court certainly was not acting in a manner so as to ensure there was no gap in compliance with the 1267 regime. Compliance with UN obligations was solely due to the manoeuvring of EU Member States, who were paying lip service to the CJEU's decision in their roles as members of the Council, while trying to ensure that they could comply with their UN obligation to maintain Kadi's listing.

The Commission and the intervening governments registered their initial displeasure with the CJEU's decision in *Kadi I*, and its refusal to allow them to fully implement their legal obligations under the UN Charter when it argued in *Kadi II (GC)* that "the Community as a whole cannot substitute its own assessment for that of the Sanctions Committee. The margin of discretion which the Sanctions Committee enjoys must be respected *not only by the political institutions of the Community but also by the Community judicature*. In the present case, the Court must therefore respect the Commission's decision not to substitute its own assessment for that of the Sanctions Committee, unless the Commission's decision appears to be manifestly erroneous"³¹⁰ (emphasis added). "Otherwise," the Commission claimed, "the Court would be able to impose on the Member States of the European Union obligations which would be directly contradictory under the Charter of the United Nations and under Community law"; even if the Court substituted its own assessment, the EU Member States would still be obligated to implement the listing under Article 103 of the Charter.³¹¹ The Council also emphasized that "if all the Members of the United Nations adopted such an approach, the United Nations based system could no longer function."³¹²

The dissatisfaction of the EU's Member States with the Court's position was thus made apparent in the appeal from the General Court's decision in *Kadi II*. In appealing that

³¹⁰ *Kadi II (GC)* (n6) para 99.

³¹¹ *ibid* para 100.

³¹² *ibid* para 110.

decision, the Council, the Commission and a number of Member States argued that the Court's position "wholly ignores the fact that it is the Security Council which has primary responsibility for determining the measures necessary for the maintenance of international peace and security and ignores the primacy of obligations under the United Nations Charter over those arising under any other international agreement."³¹³

The CJEU ignored the obligations of EU Member States under the UN Charter; long-standing provisions in the EU Treaties according precedence to existing agreements; the clarifications added to the EU Treaties with the Lisbon reform noting that observance of the UN Charter is an objective of the Treaties; *and* ignored pleas from the EU bodies and Member States for the CJEU not to place States which are members of both the UN and the EU into an "impossible position as regards meeting their international obligations."³¹⁴ This repeated position by the CJEU to ignore its Member States' express wishes, as stated both in the Treaties and to the Court directly cannot but have reduced confidence in the CJEU by the EU's Member States. With the CJEU seemingly ignoring the restrictions placed on its operation by EU Member States - namely to accord precedence to their UN Charter obligations over their obligations to the European Union - it is possibly that the only way to square this circle will be via further amendment of the EU Treaties.

iii. Global reputation of the EU and its Member States

While much has been written about the human rights implications of sanctions, not much has been written about the implications for international relations when states - especially those that are traditionally strong supporters of the UN system of collective security - elect not to comply with UNSC resolutions. This is perhaps largely because communications between States and with the UNSC are usually considered privileged communications, to which the public is not privy, and so obtaining confirmation of States' views can be difficult.

The potential implications for non-compliance with the 1267 listing regime were discussed in detail in material filed by the Attorney General of Canada in response to the application submitted by Abdelrazik challenging the constitutional validity of the UNAQTR in Canada, however. In those documents, Canada noted that the UN's "effectiveness as an international organization depends upon Member States' adherence to the UN *Charter*, including the requirement to abide by decisions taken by the UNSC."³¹⁵ Canada was bound to

³¹³ *Kadi II* (n3) para 61.

³¹⁴ *ibid* para 61.

³¹⁵ *Abdelrazik - Walma* (n 159) para 15.

give effect to UNSC measures taken under Article 41, given its status as a UN Member State, with implications for non-compliance with UNSC resolutions as follows:

Non-compliance with UNSC resolutions undermines the legitimacy of the Security Council and erodes its ability to coordinate an effective international response to threats to global peace and security. Non-compliance is a matter of grave concern and is condemned in very strong terms by the international community. Iran and North Korea are two States that have been subject to UNSC condemnation for their repeated non-compliance with Security Council resolutions.

[...] If committed members of the UN disregard binding UNSC resolutions, it is to be expected that other countries will begin to see these resolutions as optional. This may well lead to an environment in which Member States choose to ignore Security Council resolutions. If countries do not abide by the UN *Charter*, the authority of the UN and the ability of the UNSC to safeguard global peace and security will be seriously undermined. There is no other global body that can perform this function.

Canada's non-compliance could embolden other states to disregard UNSC resolutions. States like Iran or North Korea that contravene Security Council resolutions could use Canada's non-compliance to justify their own non-compliance.³¹⁶

It is clear that Canada intended to defend its automatic listing of Mr. Abdelrazik under the UNAQTR on several grounds, including the straightforward international legal obligation to do so; its desire not to provide grounds for "rogue" states to justify disobeying Security Council resolutions; and its worry that if UN Member States begin to act as though they can choose which UNSC resolutions to apply, this will weaken the authority of the UNSC, which is the only global body that can safeguard global peace and security. These same arguments can be applied to the decisions of the CJEU requiring that EU Member States not automatically list individuals in accordance with UNSC resolutions.

2. Implications for the UN system of collective security

i. Precedent for "acceptable" non-compliance with UNSC decisions

As referred to in the Canadian Court documents just described, one of the potential problems with not implementing UNSC decisions as delivered is that this could result in a precedent for non-compliance with UNSC decisions by other States. While this is not a focus of most scholarly writings considering the impact of the UNSC sanctions regimes, Klabbers addresses the issue briefly in his consideration of the law of international organisations. He notes that an order by a domestic court for a local government not to apply the acts of an

³¹⁶ *ibid* paras. 19, 21-23.

international organisation of which it is a member "would undermine the binding force of such organizational acts."³¹⁷ With respect to the larger political issue, he writes:

...those who accept that, say, the CJEU or the US Supreme Court might be reliable courts when it comes to reviewing the acts of organizations, might be highly reluctant to recognize the authority of the highest courts of, say, North Korea or Iran to do the same.³¹⁸

The CJEU states in *Kadi I* that the measures in the EC Treaty allowing for its Member States to carry out its international obligations for the purpose of maintaining international peace and security "cannot...be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union."³¹⁹ However, that Treaty provision was a reflection of Article 103 of the UN Charter, which accords primacy to the UN Charter above all other international treaty obligations. And that primacy exists for the exact purpose of forestalling this kind of review. Were the courts of a UN Member State to review a UNSC decision and determine that it could not implement the decision because it ran contrary to a facet of sharia law, for example, and because the right to freedom of religion was paramount according to its highest court, the same Member States purporting to review UNSC decisions within the EU would likely object to the non-compliance.

Already, the decisions of European courts have been seen as legitimising legislation from national governments that results in their non-compliance with UNSC decisions. The Swiss Parliament adopted a motion in May 2010 which allows Switzerland to ignore its obligations under the 1267 regime once a certain period of time has passed, and in the absence of evidence supporting a listing. By way of a letter dated March 22, 2010, the Swiss ambassador to the UN informed the Sanctions Committee of the motion, under which the Swiss Federal Council notified the UNSC that it would no longer be applying sanctions under the 1267 regime against individuals, because they had been blacklisted for over three years without being allowed to challenge their listings before a court or independent authority, and they had not had charges or any new evidence brought against them.³²⁰ The Chairman of the 1267 Committee wrote to the Swiss representative to the UN to express concerns about Switzerland's ability to fulfill its obligation under the UN Charter, and remind it that it was

³¹⁷ Klabbers (n229) 236-237.

³¹⁸ Klabbers (n229) 237.

³¹⁹ *Kadi I* (n2) para 303.

³²⁰ Swiss Federal Council, March 22, 2010 letter, COE Parliamentary Assembly document AS/Jur/Inf (2010) (05), available at <http://assumblly.coe.int>.

obligated to carry out decisions of the UNSC under Articles 25, 48 and 103 of the UN Charter.³²¹ However, the introduction of legislation denotes the level of acceptability within one government, at least, with respect to domestic laws requiring non-compliance with UN obligations.

ii. Impact of non-compliance on effectiveness of sanctions

One of the major impacts of non-compliance with targeted sanctions is that sanctions are not as effective when they are not universally applied. Even when the world's largest superpower decides to take unilateral measures against a state, if it acts alone, the chances of such action resulting in a change of behaviour of the targeted state are slim. Ensuring universal application of targeted sanctions imposed on terrorist organizations and other actors is particularly important. As Levitt explains, “[g]iven that terrorism knows no borders, that al Qaeda, its franchises and affiliates operate transnationally, and that they raise, transfer and access funds in a globalized financial system that spans national borders, actively contesting terrorist financing demands an international and multilateral approach.”³²² Individuals are much more nimble than governments, and can move themselves and their funds under governments' radar. Contending with the global terrorist threat as it has changed since 9/11 thus "demands a coordinated international effort. Indeed, counterterrorism structures and policies will only be as successful as their weakest parts.”³²³

Levitt cautions that “[t]here are real limits to what any given country can accomplish on its own against al-Qaeda and other transnational terrorist organizations, particularly in combating terrorist financing.”³²⁴ He explains that as the events of 9/11 grow distant, the tendency to increase multilateral cooperation against terrorism has been waning. It is thus important to be able to rely on the UN in this capacity. In addition, given the “diffusion of the terrorist threat in general, and of the means of financing terrorism in particular, means that it is even more important today for governments to be able to react quickly to stem the flow of funds to terrorist or other transnational threats. The ability of governments...to quickly act on UN Security Council terrorism listings is more important than ever before.”³²⁵ When any one State - especially one with a regulated and safe financial system - fails to act in concert with other States, it provides a gap for terrorist financing to slip through.

³²¹ *Abdelrazik* - Walma (n159) para 27 and Exhibit "L"

³²² *Abdelrazik* - Levitt (n166) para 4.

³²³ *ibid* para 42.

³²⁴ *ibid* para 75.

³²⁵ *ibid* para 78.

As many observers have noted, many states lack the financial resources, administrative capabilities and judicial capacity to implement the sanctions regimes mandated by the UNSC.³²⁶ But by removing the immediate implementation of UNSC decisions by 28 UN Member States, the CJEU's actions affect the effective implementation of sanctions by states that would otherwise be uniquely positioned to ensure immediate and effective implementation.

Another problem presented by the non-compliance with UN targeted sanctions is that the UNSC is limited in the actions it can take short of authorizing the use of force in order to fulfill its mandate of maintaining international peace and security. It can, and does, issue resolutions requesting that parties threatening the peace cease their actions. And if the request is not observed, it will issue resolutions requiring parties to change their behaviour. But once the UNSC has exhausted the options of requesting that parties change their behaviour, and then requiring that they do so, the UNSC has to take enforcement measures. "Sanctions," Kulesa and Starck observe, "constitute a means of exerting international influence that is more powerful than diplomatic mediation, but lies below the threshold of military intervention."³²⁷

While the UNSC has been working to make Article 41 measures more "nimble and responsive," they are still sanctions in name and purpose, and will remain that way. As Secretary-General Kofi Annan wrote following the Iraq sanctions experience: "It cannot be too strongly emphasized that sanctions are a tool of enforcement and, like other methods of enforcement, they will do harm."³²⁸ Charron notes that observers are "right in that there are many problems associated with the listing and delisting of individuals. The full weight of the Council, once reserved for states, is now directed against individuals and entities – but this is not unique to the terrorism context. It has always been the case that there is no recourse to a trial, no judicial oversight, no appeal process or a fair and transparent process on which the 'listing' is made."³²⁹ She then asks the question which is at the heart of the matter: "Why is the concern more acute in the case of the 1267 list than for other lists? The Council has not mandated the creation of an Office of the Ombudsperson for any of the other sanctions regimes. Still, principles such as the right to a fair trial, the right to remedy, and the right to property have all been curtailed or damaged as a result of the Council's sanctions measures to

³²⁶ See, for example, Tostensen and Bull (n259) 394; Daniel W Drezner, "How Smart are Smart Sanctions?" (Vol 5, International Studies Review 2003)

³²⁷ Kulesa and Starck (n263)1.

³²⁸ A/53/1: para 64

³²⁹ Charron (n213) 178.

combat terrorism according to human rights groups.”³³⁰ To the extent that there is an impact on the human rights of listed persons, this impact is the same whether the measures are targeted against individuals first, due to the nature of extra-national activity, or whether targeted against a country, with individuals affected in a secondary manner.

Given the limited enforcement options short of the use of force, it would behoove the international community to exert political pressure to ensure that the sanctions process functions in as "human rights friendly" a manner as possible, as discussed further in the next section, rather than to undermine the domestic implementation of these processes, and thus the processes themselves.

iii. Risk to UN system as a whole

In their submissions to the General Court in *Kadi II (GC)*, the Commission and intervening governments "submit[ted] that, if each of the 192 Members of the United Nations had to satisfy itself individually as to the available evidence before an implementing measure was taken, the centralised system of United Nations sanctions in the context of the fight against international terrorism would immediately 'collapse' and it would be impossible to strike a fair balance between respect for fundamental rights and the need to combat international terrorism.”³³¹

The troubling precedent created by the CJEU in the Kadi decisions does not just have a potential impact on the global community's ability to combat terrorism, however; it presents risk to the functioning of the system as a whole. In the documents filed in response to the constitutional challenge of its domestic legislation implementing the 1267 regime, Canada addressed this danger, noting that "[b]eyond terrorism, Canada looks to the UNSC to provide global leadership on a wide range of complex geographic and thematic issues. The effectiveness of this leadership is dependant (*sic*) on the willingness of Member States to implement the decisions of the UNSC.”³³² In the event that Member States decide to stop implementing UNSC decisions - or even treat them as optional, and dependent on compliance with national norms and procedures, as the CJEU has required the EU to do - then there is a risk that the system of collective security crafter under the UN Charter will begin to break down.

³³⁰ *ibid* 178.

³³¹ *Kadi II (GC)* (n6) para 97.

³³² *Abdelrazik - Walma* (n159) para 17.

Simma notes that "the lack of direct effect and supremacy of UN law within the domestic legal order, and, according to the *Kadi* judgment of the ECJ, arguably even within regional supranational systems of law, constitute a far greater threat to the authority of the UN than challenges to the bindingness of a particular Security Council resolution as in the *Lockerbie* Cases."³³³ Noted EU scholar de Burca has also weighed in on this issue, noting that the approach adopted by the CJEU in its ruling in *Kadi* provides not just "a striking example for other states and legal systems which may be inclined to assert their local constitutional norms as a barrier to the enforcement of international law, but more importantly it suggests a significant paradox at the heart of the EU's relationship with the international legal order, the implications of which have not begun to be addressed."³³⁴ If EU Member States accept the CJEU's position that the legal order of the EU is of paramount importance, such that EU legal norms and traditions should override those of the United Nations, this would drastically undercut the legitimacy of the UN, and the means in which other states feel obligated to follow through on their legal obligations under the UN Charter.

The problem with undercutting the legitimacy of the UN, of course, is that there are limited options for policing the global community beyond the existing UN Charter system. What is more, the global community has largely recognized the continued value and importance of the UN system, notwithstanding the flaws in the Charter. As discussed above, the UN system was largely ineffective during the Cold War, due to the fact that the UNSC was paralyzed. As relations between the world's superpowers thawed, UN Secretary-General Boutros Boutros-Ghali noted in 1993 that "[a] growing number of member states are concluding that some problems can be addressed most effectively by U.N. efforts. Thus, collective security is finally beginning to work as it was conceived."³³⁵

In describing the benefits of the approach taken by the Security Council after the Cold War, Ferencz considers the alternatives under international law, none of which are viable means of safeguarding world peace. He notes that binding customary international law usually takes generations to form, and even then, the exact parameters of the customary law are unclear; treaties and conventions take years to negotiate, years to be ratified, and are often subject to reservations; and traditional diplomacy requires years to come to a consensus on

³³³ Simma (n180) 2136.

³³⁴ De Búrca (n138) 52.

³³⁵ Boutros Boutros-Ghali, "Don't Make the U.N.'s Hard Job Harder," Op-Ed. N.Y. Times, Aug. 20, 1993 at A29, cited in Benjamin B. Ferencz, *New Legal Foundations for Global Survival: Security Through the Security Council* (Oceana Publications, Inc. 1994), at p. 243.

issues such as defining terms such as aggression (which took fifty years) and terrorism (which still does not have a broadly accepted definition).³³⁶

Given the alternative of relying on "worn-out, plodding, confusing, inefficient and ineffective methods of protecting international security - which has been the rule,"³³⁷ we are left with the UN Charter system. It is possible that some global crisis could catapult the world forward into a new system, as happened when the League of Nations died in WWII, and the United Nations arose from its ashes; it is more likely, however, that a quiet descent into irrelevance would follow on from widespread defiance of the UNSC than that a global federation of equal states would form. If States are unhappy with the UNSC as it currently exists, they must then strive to change the system from within.

3. Summary

It seems clear that the CJEU's decisions under *Kadi I* and *Kadi II* have required the EU to be non-compliant with the 1267 listing regime. While some commentators have latched on to the fact that the EU managed to maintain strict compliance with its obligations as regards the listing of Kadi himself, the outcome of the case is that the EU is now required to separately assess the names listed by the Sanctions Committee, and make a separate decision with respect to whether or not to list the individual or entity. This does not allow the EU to comply with its requirement to implement listings without delay, opening the EU and its Member States, both, up to potential liability under the doctrines of state and IO responsibility. While the international community may be content to politely ignore the non-compliance for the moment, that might change should the wrong person remain unlisted in the EU for too long, such that actual, material damage is caused due to EU inaction.

In addition to causing potential difficulties between the EU and its Member States on the one hand, and the international community on the other, it seems likely that the CJEU's decisions in the Kadi cases could result in an erosion of the EU's confidence in the CJEU, if it has not already. The EU Member States all signed the UN Charter before the Treaties (save for Germany); accepted the primacy of the UN Charter under Article 103 of that document; operated under the understanding that UN obligations superseded EU obligations; and then clarified that desire to ensure that UN obligations remained paramount under the Treaties during the Lisbon reform. Finally, when Kadi challenged the supremacy of the UN obligations, the EU institutions and several Member States made known their express desire

³³⁶ Ferencz (n335) 243-244.

³³⁷ *ibid* 244.

for the primacy of the UN Charter to prevail. In the face of all of this, the CJEU decided that the autonomous legal order of the EU would prevail in order to preserve the protection of fundamental rights, without providing the EU institutions or the Member States with reasons for its decision. While there may not be much the EU feels it can do in response at the moment, this issue could rear its head the next time the Treaties are amended, which could actually result in a decrease in the CJEU's power, with a potential impact on its ability to protect fundamental rights more broadly.

More troubling, however, is the potential impact that the CJEU's decision may have on the practice of other States in the future who do not wish to comply with a UNSC resolution. A well-respected regional Court has chosen to make implementation of UNSC decisions optional, and tied compliance with decisions to accordance with internal notions of fundamental rights. When States that are not known for compliance with international norms choose to use the same lines of arguments, this will not bode well for the UN system of collective security. In the short term, it has the potential of decreasing the effectiveness of sanctions overall, while in the long term, it risks undermining the authority of the Security Council. And while many observers have remarked on the many flaws of the UN Charter, that is the document that the global community has to work with, and it is unlikely to change any time soon. This then leads to the question of what can be done to address these concerns, both with respect to addressing the protection of fundamental rights, *and* the issue of EU non-compliance at the behest of the CJEU.

CHAPTER IV: ALTERNATIVE APPROACHES & POSSIBLE REMEDIES

It is admittedly very difficult for an individual or entity to challenge a listing decision of the UNSC. However, accepting that domestic or regional courts have the ability to review UNSC decisions for compliance with domestic norms is not the answer. It certainly need not fall to individual states to provide elements of procedural fairness. It is Canada's stated position, for example, that a listed individual has other avenues for pursuing delisting than via domestic courts, such as through the Ombudsperson process, which has proven to be quite effective.³³⁸ Change to address the situation should come from the UN Member States themselves. This section briefly addresses a few of the available options for affecting such change, being procedural reform through political pressure; the possibility of amending the UN Charter, and referring the issue to the ICJ. This latter measure may also be useful with respect to correcting non-compliance of the EU, if the ICJ were to find that the UNSC resolution is valid (even if that determination is only binding as between States in contentious proceedings).

1. Procedural change through political pressure

The UN Special Rapporteur addressed the deficiencies of the 1267 listing regime, even following substantive reforms, in his forward to a critique of the 1267 regime:

Despite all reforms and dialogue, the fundamental problems with the UN terrorist listing regime persist. All decisions, including those on listing and delisting, are made by the 1267 Sanctions Committee, a political body composed of the diplomatic representatives of the 15 member states of the Security Council. Once a person is listed, this is with indefinite duration and subject only to the delisting power of the same Committee. Perhaps most alarmingly, that decision requires full consensus, i.e., one state with a seat on the Security Council can block it, even without expressing its reasons. The Ombudsperson can independently collect and provide information but can neither decide nor even recommend delisting. Although a summary of the 'reasons' for terrorist listing nowadays need to be given to the person concerned, this is something quite different from actual evidence of links to terrorism. In fact, it appears that listing decisions can be made on the basis of assertions by some states that they possess intelligence information, rather than sharing the evidence with others. Just one look at the composition of the Security Council at any given time will be enough for the observer to realize that the 15 states running the show are not willing to share their intelligence with each other.³³⁹

³³⁸ Abdelrazik - Walma (n159).

³³⁹ Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted sanctions, preemptive security and fundamental rights*, European Centre for Constitutional and Human Rights, December 10, 2010, 42.

The UN Special Rapporteur castigates the decision-making process of the UNSC, as it requires agreement between 15 UNSC members. There were valid reasons for constructing the system in this way, however.³⁴⁰ While the Rapporteur's quote does not take into account the subsequent reforms to the Office of the Ombudsperson, it does highlight that political pressure has already achieved several reforms within the listing regime, even though it can be difficult to do so. The value of this process should not be overlooked, particularly since it was via the Ombudsperson process that Kadi was delisted, and not through his legal challenges in the EU Court.

i. Sanctions reforms achieved before *Kadi I*

There is precedent for the eventual success of political pressure with respect to sanctions reform. After the Cold War, the number of mandatory UN sanctions regimes jumped from 2 to 14. As a result of this increase in number, and as the effects of the comprehensive sanctions imposed began to be understood, “[t]hink tanks, government and academics made sanctions a popular topic of research – much of it focused on making sanctions more effective by standardizing the wording of resolutions, working with member states to enforce the sanctions and ‘targeting’ the sanctions to impact only those responsible for the conflict as opposed to the general population.”³⁴¹ The move from blanket or “dumb” sanctions to targeted or “smart” sanctions was thus made as a result of academic discussion and debate and political pressure.

Change has resulted from political pressure within the system of “smart” sanctions as well, which started prior to the CJEU's decision in *Kadi I*. Indeed, improvements to the 1267 listing regime have been taking place almost since its inception. However, “the efforts of the Council to improve its decision-making processes to allow for more transparency vis-à-vis listing and delisting decisions are not reported often.”³⁴²

In 2002, measures were first added to allow exemptions to the asset freeze for basic expenses.³⁴³ Even before that, though UNSCR 1333 allowed for affected persons to request exemptions from the 1267 Committee. In 2006, the UN Office of Legal Affairs examined the issue of due process with respect to the 1267 regime. As a result of its report, UNSCR 1730

³⁴⁰ See White (n259) 10, where he notes: “The power of veto had its genesis in the desire to prevent the permanent members from being the potential objects of collective measures.” Without the assurance of the veto, it is likely that there would have been no UN, or that it would have had an ineffective, toothless enforcement body.

³⁴¹ Charron (n213) 6.

³⁴² *ibid* 185.

³⁴³ UNSCR 1452 (n20).

(2006)³⁴⁴ was passed, laying out a delisting process for the first time. A focal point was established to receive delisting requests from natural or legal persons, as submitted through their State of nationality or residence. Listed individuals and entities could now appeal their status. Following the CFI's decision in *Kadi I* - which did not require the EU to delist Kadi, and essentially maintained EU compliance with the resolutions - but before the CJEU's decision, the UNSC also UNSCR 1822, which required States to identify in listing proposals those reasons that could be publicly released, to form part of the "summary of reasons for listing" to be provided on the Sanctions Committee's website; required States to take all possible measures to notify persons in their territory of having been listed, the effects of listing, and the processes for requesting delisting or exemptions; and allowed for individuals to make applications for delisting directly to the Focal Point for Delisting, rather than having to rely on their State of residence or nationality to make an application on their behalf.

All of these measures were made to improve the procedural fairness of the 1267 regime, and all were made before the CJEU could be said to have "forced" these changes through the threat of external review of the sanctions measures. Rather, they were made through discussion between and pressure from UN Member States.

ii. Benefits of implementing change through political pressure

Change adopted by the institution itself is much more likely to be welcomed and implemented. As Larik notes with respect to the Kadi situation, "what finished the seemingly never-ending story of Mr Kadi's listing was not judicial intervention by the EU, but the UN Security Council responding to its own Ombudsperson."³⁴⁵ While Larik and Reinisch both argue that the EU courts played an indirect role in the long process of de-listing Mr. Kadi, that role could have been played by political actors equally as well, without the greater threat to the UN system.³⁴⁶

We can also see the benefits in using political pressure in the changes implemented after *Kadi I* and *Kadi II*. While it is true that some of the pressure likely stemmed from the UNSC not wanting the threats to the UN system outlined above to continue due to the CJEU's decisions, part of the pressure was simply due to continued attempts by UN Member States to have the system approved, in part through the Informal Group of Like-Minded States on Targeted Sanctions. Since *Kadi I* was decided, resolutions continued to be passed that

³⁴⁴ Resolution 1730 (2006), 19 December 2006, S/RES/1730 (2006) ("UNSCR 1730").

³⁴⁵ Larik, 'Kadi Delisted: A Cause for Celebration?' (n309).

³⁴⁶ Larik, 'Kadi Delisted: A Cause for Celebration?' (n309); Reinisch, 'Should Judges' (n215).

improved various procedural elements of the sanctions exemptions and listing and delisting processes.

The delisting process was strengthened with the adoption of UNSCR 1904 (2009),³⁴⁷ which created the UN Office of the Ombudsperson, which has the mandate to receive delisting requests directly from individuals and entities listed under the 1267 regime. The Ombudsperson serves as an independent and impartial intermediary. After gathering information from the petitioner and relevant states, the Ombudsperson drafts a report on his/her findings, including a recommendation to the 1267 Committee for or against delisting. The Sanctions Committee then considers the delisting request with the assistance of the Ombudsperson. Also under UNSCR 1904, the UNSC decided that the statement of case for designation was to be releasable, upon request, save the parts which were deemed by the Member State to be confidential. The mandate of the Ombudsperson was extended and improved in UNSCR 1989. Now, if the Ombudsperson recommends that the 1267 Committee consider delisting, the individual or entity is delisted unless the Committee decides by consensus to maintain the listing within 60 days. If no consensus is reached, a Committee member can refer the decision to the UNSC.

Another example of how political pressure has been effective in changing the targeted sanctions regime can be found in the split in the 1267 Consolidated List that took place in June 2011. The UNSC adopted two new resolutions, UNSCR 1988 and UNSCR 1989, which had the effect of splitting the 1267 Consolidated List into an Al-Qaida List and a Taliban List. Each list now has its own listing and delisting process and a separate sanctions committee to oversee the management of the list and its associated sanctions. The division was motivated by efforts at reconciliation with the Taliban in Afghanistan. The 1267 Sanctions Committee now deals solely with an "Al-Qaida Sanctions List" which contains the individuals and entities associated with Al-Qaida, while the "1988 List," maintained by the new 1988 Sanctions Committee, focuses on those individuals and entities associated with the Taliban. These changes had nothing to do with the decisions of domestic or regional courts, but the changes were made to address concerns and criticisms with the listing regime, and to make sure that the sanctions were structured so as to best meet the objectives of the measures.

³⁴⁷ Resolution 1904 (2009), 17 December 2009, S/RES/1904 (2009) ("UNSCR 1904").

2. Amendment of the UN Charter

As noted above, there is currently no method for judicial review of decisions made by the UNSC. The Security Council and other UN organs are the sole arbiters of whether they are complying with the UN Charter. The UN system was created this way on purpose, but the ever-increasing focus on individual rights has demonstrated that at least some members of the international community would appreciate the opportunity for judicial review of UNSC decisions, at least for compliance with the UN Charter. Obtaining formal access to judicial review as a matter of course would require an amendment of the UN Charter.

i. Possible amendments to the Charter

Not only does the UN Charter establish the *procedure* for amending the document, it also establishes a *responsibility* to do so if required for the UN to meet its objectives:

The duty to ensure that the UN is provided with the structural means to discharge its mandate effectively is a continuous obligation. In the light of ever-changing factual circumstances the organs of the UN and the member States are charged with the responsibility of permanently monitoring and reviewing the effectiveness of the Organization and, if necessary, of making adjustments to ensure its proper functioning. In this sense the Charter may be said to establish a 'responsibility to reform'.³⁴⁸

The "substantive yardstick" by which effectiveness is to be assessed is provided by the "purposes and principles" set out in Articles 1 and 2, but the "ways and means" of reform rest with the political actors themselves.³⁴⁹

One type of amendment that could be made to the Charter would be to introduce some form of judicial review of UNSC decisions. As Lord Hope observed in *Ahmed*:

The ECJ is not alone in regarding the way the decisions under the listing system administered by the 1267 Committee are dealt with as incompatible with the fundamental right that there should be an opportunity for a review by an independent tribunal of their lawfulness.³⁵⁰

The establishment of an independent tribunal specifically established to review the lawfulness of UNSC decisions could perhaps serve to add "legitimacy" to the decision-making process of the UNSC.

Another type of amendment that could be made to the Charter would be to add the explicit requirement that the UNSC respect human rights - generally, or perhaps limited to

³⁴⁸ Simma (n180) 29.

³⁴⁹ *ibid* 29.

³⁵⁰ *Ahmed* (n154) para 61.

due process rights - when taking measures under Article 41. While this would be difficult to frame, and the same issues of determining *who* is allowed to review the legality of UNSC resolutions would still exist, this would at least make clear that this particular limit applied to actions of the UNSC in imposing targeted measures.

ii. Difficulties of amending the Charter

The problem is that the process for amending the UN Charter is complex. Reform can only occur if there is a change in the political reality to spur that reform, and political agreement among the Member states.³⁵¹ Any reform must then take place within the framework of the Charter. The process for amending the Charter itself is found in Article 108, which provides that:

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.³⁵²

This obviously prevents a very high bar for reforming the Charter. To the extent that individual human rights are regarded as more important than the primary objective of the UN, reform *could* be made in this respect, but there would need to be the political will and agreement to do so. This must be such as to overcome the constraints to reform that are built into the system. It would also seem that such an extreme amendment as to create an independent tribunal to review UNSC decisions is unlikely, as - beyond requiring agreement of two-thirds of the GA - it would require the P5 to agree that they should no longer have the ultimate say on (a) what constitutes a threat to or breach of the peace or act of aggression, and (b) what measures should be taken to address the threat, breach, or act. And "the truth is that...the powerful nations that now control the Security Council are not prepared to weaken their present position."³⁵³

Thankfully, however, the Charter "reserves considerable space for reform below the threshold of constitutional amendment"; Simma describes the Charter as setting up a framework to be fleshed out by the principal organs and the Member States in the future.³⁵⁴

³⁵¹ Simma (n180) writes at 28 that reform of the UN Charter "is a process in which political and legal elements are inextricably intertwined."

³⁵² UN Charter (n10) Article 108

³⁵³ Ferencz (n335) 232.

³⁵⁴ Simma (n180) 28.

This includes the task of creating subsidiary organs, as set out in Article 7(2), and rules of procedure, as set out in Articles 21, 30, 72, and 90. While this reform would not place as an amendment of the Charter itself, it would comprise an amendment of practice under the Charter.

Again, however, the same requirement for political agreement would arise. As just noted, for example, the UNSC already has the jurisdiction to establish "such subsidiary organs as it deems necessary for the performance of its functions."³⁵⁵ It could thus establish a tribunal to review its decisions on targeted sanctions. The most that it could muster, however, was the establishment of the Office of the Ombudsperson. Allowing for anything further would grant a tribunal ultimate power over the UNSC's decisions, and it is unlikely that the five permanent members will cede this power.

3. Referral to the ICJ

The final option that might have a role to play in clarifying the situation is referring the matter to the ICJ. From the discussion above, it is evident that the UNSC does not agree with the decisions taken by the CJEU, and the Charter authorizes the Security Council to "request the International Court of Justice to give an advisory opinion on any legal question."³⁵⁶ Given that the 1267 Sanctions Committee has already registered its objections directly with non-compliant Member States, it is possible that the Security Council might consider referring the question of compliance with UNSC decisions to the ICJ. Such a referral would be highly politicized, however. Ferencz has stated with respect to such referrals that:

The Council should, as a matter of prudent practice and the exercise of wise discretion, in all cases of reasonable doubt, seek an advisory opinion regarding any significant Security Council interpretation of prevailing international law. The interplay between Court and Council is a desirable method to disperse power and provide a check against misinterpretations or arbitrary action. By turning for guidance to recognized legal authorities, the Council will demonstrate that it is not a dictatorial regime but one that is prepared to cooperate with others in maintaining peace through law as part of an invigorated global management process.³⁵⁷

It is also possible that a sufficiently interested State could bring contentious proceedings against one or more Member States. It is possible that the UK or France, for example, who have argued against the position taken by the EU, might be willing to have a dispute with respect to their non-compliance be heard before the ICJ. While any such decision would not

³⁵⁵ UN Charter (n10) Article 29.

³⁵⁶ UN Charter (n10) Article 96(2).

³⁵⁷ Ferencz (n335) 251.

be binding on the UN or the EU - whichever way it went - it would provide an indication of the ICJ's understanding of the state of the law. That said, unnecessary "legality testing" may be looked on unfavourably, lest the ICJ deliver a judgment that hinder the UNSC's ability to take action.³⁵⁸

There is also a question as to what the legal consequences might be if the ICJ determined that EU Member States were not fulfilling their treaty obligations under the UN Charter in favour of those under the Treaties establishing the EU. Simma writes that:

... In the event of a conflict between a treaty--that is not *per se* incompatible with the substance of primary Charter law--and a SC resolution under Chapter VII the colliding norm is only temporarily suspended as long as the resolution is not force.

The predominant view is that Art. 103 does not render void the norm that is incompatible with the Charter but merely sets it aside under the circumstances of the case. ... It is in the general interest that established norms stay in force to the greatest extent possible. They are only inapplicable insofar as they contradict Charter law in the 'event of a conflict', thus, abstract incompatibilities between international agreements and Charter law are not covered. Moreover, Art. 103 does not set aside the whole agreement but only the specific provision that contravenes the obligation under the Charter.³⁵⁹

Applying the reasoning above to the EU Treaties would be a complicated exercise. The first question that would need to be addressed would be what element of the EU Treaties was causing the conflict. As already noted, the EU Member States have accorded primacy to the UN Charter; it is the CJEU that has ignored that element of the treaties. Would it be the element of the treaty dealing with the CJEU? And would the suspension of any part of the EU Treaties be temporary, since the decisions of the CJEU pertain to temporary UNSC sanctions measures? Or would it be permanent, given that the CJEU has seemed to indicate that it will overrule the implementation of EU Member States of any UNSC decision that does not conform to the fundamental principles upon which the EU was based? It is perhaps due to the nature of such questions that Simma writes that in many instances where a conflict exists, "the best application of Art. 103 may be no application at all."³⁶⁰

Notwithstanding these potential difficulties, however, there is a good reason for the UNSC to request an advisory opinion from the ICJ, or for a non-EU state to request contentious proceedings against a "willing" EU Member State for breaching its international responsibility. Put simply, the understanding of the state of international law is at stake. It is

³⁵⁸ Bedjaoui (n223) 17-31.

³⁵⁹ Simma (n180) 2135.

³⁶⁰ *ibid* 2114.

therefore incumbent on concerned States and international bodies to endeavour to keep the discussion alive, and to find ways to register their opinions and disapproval, lest they be found to have acquiesced to the EU's continued non-compliance, or potentially to a new understanding of the interaction between regional bodies and the UN.

4. Summary

Many of the commentators to the Kadi cases were gratified to see that the protection of fundamental human rights was receiving serious consideration and actual precedence by an international court, albeit a regional one. While others criticized the fact that the CJEU took power for itself in this manner, they recognized the value in having an independent tribunal to review the legality of UNSC decisions. Taking power away from the UNSC and placing it in the hand of independent judges would require an amendment to the UN Charter, however, which is unlikely in the absence of some galvanizing event, as it would require the agreement of the five permanent Security Council powers to give up that power. It thus seems that achieving resolution or progress will have to be done through existing structures.

In the legal arena, this might be performed if the General Assembly or the UNSC wishes to request an Advisory Opinion from the ICJ on the matter. While an Advisory Opinion would certainly be persuasive, whichever decision the ICJ came to, it would be binding on neither the UNSC, if it found that the resolutions were invalid for contravening due process rights, nor on the EU if it determined that the resolutions were valid, and that all UN Member States had the obligation to comply with the resolutions. While there would be the option of obtaining standing through contentious proceedings between States, this would require the establishment of a dispute between States willing to proceed before the ICJ, and any decision of the ICJ would be binding between those States only, and not either IO.

It thus seems that the best way forward for concerned parties is to continue keeping pressure on the UNSC to improve procedural safeguards in the listing and delisting processes of targeted sanctions. It is in this manner that all procedural safeguards have come to date, and has been the proven method of directing sanctions reform generally, since the UNSC finally took up its mantle of guardian of international peace and security.

CONCLUSION

In requiring EU Member States to review the listings delivered by the UNSC under targeted sanctions before the Member States could list specific individuals, the CJEU has ignored its Member States' desire to give supremacy to the UN Charter, which would entail automatic, unquestioning designations of individuals listed under the 1267 regime. While the CJEU did so in the name of ensuring the protection of fundamental rights within the EU, and in furtherance of its accountability to individuals, the CJEU's actions demonstrates a startling lack of accountability of the EU to its Member States, since its decisions do not adequately address the limits on its powers set out in the EU Treaties.

It is certainly true that any given country is free not to follow UNSC resolutions. It is a different thing entirely, however, for the CJEU - as the judicial organ of an international organization - to presume to make the same sorts of determinations on behalf of all EU Member States, when (a) the EU Member States explicitly gave precedence to the UN Charter under the Treaties; (b) even without this explicit precedence, the UN Charter supersedes the EU treaties; and (c) the EU Member States expressly limited the CJEU's power of review under the CFSP, and in the case of targeted UNSC sanctions, the decision is *not that of the EU*, so as to be reviewable. Moreover, the CJEU has incorrectly conflated the "discretion in implementation" that operates with respect to whether or not to give UNSCRs direct effect, or whether to require domestic incorporation of the measures, with a more "general discretion" that amounts to whether or not to implement measures.

The CJEU has thus taken powers for itself not given to it by its Member States. However, even were the same decisions being made by domestic courts within the EU Member States, the actual findings would still be flawed, because (a) the actual impact on human rights is not as great as assumed, and (b) this has largely determined the Court's finding that the sanctions also violate due process rights, given the (incorrectly assess) severity of the impact of the measures. Contrary to the CJEU's statements otherwise, States have no discretion with respect to the implementation of the 1267 regime. The UNSC could not have been clearer. It gave Member States a list of names, as updated from time-to-time, and told them to freeze the assets of, and prevent the transit through their territories of, each of these individuals. There can be no clearer direction. As the actions were taken under Chapter VII of the UN Charter, all Member States were obligation to take these actions, included each of the EU Member States. When the CJEU requires that the EU review the reasons for listing individuals under both the 1267 listing regime, and the 1373 counter-

terrorism regime, it is conflating these two types of Article 41 measures, and causing confusion in compliance for countries the world over.

Any potential remedy for EU states to address the decisions of the CJEU is unclear; while most States who are members of international organizations can choose to ignore the edicts of an IO that asks its members to contravene the UN Charter, this is more difficult for EU member states, given the *sui generis* nature of the EU, and the fact that individuals within the EU enjoy direct effect. In the meantime, EU Member States continue to be offside their international legal obligations when they delay the implementation of UNSC listings (and would remain in violation if they choose not to list an individual), creating potential liability for any injury caused by that violation, and a potential valve for the flow of funds for terrorist financing.

The failure to implement UNSC decisions could potentially have a negative impact on the international system of collective security as well, by encouraging states who are not supporters of the Security Council-led system to begin viewing UNSC resolutions as "optional," and reviewable by domestic courts. Some commentators have stated that the decisions of the CJEU were a step in the right direction, as they prompted the UNSC to implement measures improving due process of listed individuals. Reform measures had already begun within the UNSC prior to the Court's decision in *Kadi I*, however. While the Kadi decision may have accelerated the process slightly, leaving the process to the political machinery would likely have resulted in the same outcome, without the risk to the UN system of collective security. Given that amendments to the UN Charter to allow for the judicial review of UNSC decisions are unlikely any time in the near future, additional changes should continue to come from the Member States themselves.

It would thus seem that the CJEU's decisions have unnecessarily jeopardized the interests of the EU and the stability of the UN system in order to achieve protection for individual human rights that may not be required, given existing exemptions in and procedural reforms of the targeted sanctions regime, and that would in any case be best achieved via political processes, as envisaged by the UN system of collective security.

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Abstract

This thesis analyzes the decisions of the Court of Justice of the European Union (CJEU) in Kadi I and Kadi II, along with academic commentary pertaining to those decisions, in order to assess whether there were significant gaps in the Court's decision and the analysis thereof, along with the implications of any such gaps.

The first of these gaps is that the actual impact of targeted sanctions on listed persons is not fully considered by the Court in assessing the human rights implications of targeted sanctions. The paper outlines how this has an impact on the determination of the breach of property rights, which in turn affects the determination of due process rights. The second gap discussed is that the Court treats the EU treaties as a constitution, instead of the treaties they are, without explaining the reasons for doing so. The paper thus considers the position of the EU in the international legal order to determine whether the Court has the ability to review legislation implementing UN Security Council resolutions.

The third gap stems from the CJEU's statements that its decisions do not have the effect of reviewing the legality of UNSC sanctions, and that it does not have the mandate to do so. The paper addresses the veracity of these statements, and examines their implications. The final gap discussed involves a misunderstanding of the UNSC's anticipated role, and so the paper considers the purpose of the UN and the UNSC from a historical perspective in order to address the misplaced concern.

The paper then assesses the implications for the EU, including potential liability for internationally wrongful acts and a negative impact on its reputation and that of its Member States; the implications for the UN system of collective security when States treat compliance with UNSC decisions as "optional"; and the impact on international peace and security when sanctions are not universally applied.

In the fourth part, the thesis assesses possible means of addressing both the legitimate human rights concerns raised when sanctions are imposed against individuals and the non-compliance with UNSC sanctions that the CJEU has required of the EU and its Member States.

The thesis concludes that the CJEU's decisions have unnecessarily jeopardized the interests of the EU and the stability of the UN system in order to achieve protection for individual human rights that may not be required, given existing exemptions in and procedural reforms of the targeted sanctions regime, and that would in any case be best achieved via political processes, as envisaged by the UN system of collective security.

Abstract (German)

Diese Master These untersucht die Entscheidungen des Gerichtshofes der Europäischen Union (EuGH) in Kadi I und Kadi II, einhergehend mit diesbezüglichen wissenschaftlichen Kommentaren, um zu beurteilen ob erhebliche Lücken in der Entscheidung des Gerichtshofs und der dementsprechenden Analyse vorliegen, und die Auswirkungen allfälliger Lücken.

Die erste solcher Lücken behandelt die tatsächliche Auswirkung zielgerichteter Sanktionen gegen Personen, die in der Liste angeführt sind, wobei der Gerichtshof allerdings die Prüfung der Begleiterscheinungen zielgerichteter Sanktionen nicht unter den Aspekten der menschenrechtlichen Sachlage völlig berücksichtigt hat. Die These legt dar wie dies eine Auswirkung auf die Ermittlung von Verletzungen von Eigentumsrechten hat, welches wiederum die Feststellung von Rechtsschutz beeinträchtigt. Die zweite Lücke besteht darin, dass der Gerichtshof die EU Verträge als Verfassung handhabt, statt als jene internationale Verträge, die sie sind, ohne diesbezüglich eine Erklärung abzugeben. Vor diesem Hintergrund bedenkt die These die Position der EU in der internationalen Rechtsordnung um festzustellen ob der Gerichtshof die Kompetenz besitzt Rechtsvorschriften, die Resolutionen des UN Sicherheitsrats umsetzen, zu überprüfen.

Darauffolgend prüft die Arbeit die Auswirkungen auf die EU, inklusive einer eventuellen Haftbarkeit für internationale Vergehen, sowie die negativen Auswirkungen auf ihren Ruf und jenen seiner Mitgliedsstaaten; sowie die daraus resultierenden Folgen für das kollektive Sicherheitssystem der UN sobald Staaten anfangen, die Einhaltung der Entscheidungen des UN Sicherheitsrates nur mehr als „fakultativ“ anzusehen; auch die Auswirkungen auf den internationalen Frieden und Sicherheit, wenn Sanktionen nicht mehr überall umgesetzt werden, werden untersucht.

Der vierte Teil der Masterthese zieht mögliche Mittel in Betracht, um sowohl die berechtigten menschenrechtlichen Bedenken einbeziehen zu können, sobald Sanktionen gegen Einzelpersonen verhängt worden sind, als auch wie der EuGH die Nichterfüllung der UN Sicherheitssanktionen durch die EU Mitgliedsstaaten sicherstellen kann.

Die Arbeit kommt zum Schluss, dass die Entscheidungen des EuGH die Interessen der EU und die Stabilität des UN Systems unnötigerweise gefährdet haben, um eine Sicherheit der Menschenrechte für den einzelnen erreichen zu können, die in Anbetracht existierender Ausnahmeregelungen und verfahrenstechnischer Vorgehensweisen des zielgerichteten Sanktionsregimes gar nicht erforderlich waren, weil dies sowieso durch politische Verfahren am besten erreicht worden wäre, so wie es das UN System für kollektive Sicherheit von Anfang an geplant hatte.