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The case of counter-terrorist sanctions

Christina Eckes

Introduction
Sanctions against private individuals suspected to have supported terrorism (individual sanctions) are one of the most illustrative examples of the dangers of decision-taking by multilateral institutions. They combine the two most fundamental power grasps of the executive in recent years: counter-terrorist policies and the ‘externalisation’ of decision-making.1

With regard to counter-terrorist policies, it is true that terrorism has dramatically changed the world we live in. Incrementally but potentially irreversibly counter-terrorist measures have turned exceptional limitations of fundamental rights into normality.2 This has considerably increased public powers over citizens – most prominently the powers of the executive. The externalisation of decision-making refers to the setting-up and conferring powers to multilateral institutions, which then take over functions and tasks that traditionally lie with states. This international (and European) governance is largely exercised by the executive. Indeed, the term ‘fourth branch of governance’ (Petersmann, 2007: 532) raises wrong connotations: it is not a fourth branch but rather a disproportionate strengthening of the second branch. Internal policies have become foreign policies and foreign policy, in principle irrespective of the subject matter, remains a prerogative of the executive. States are represented in these multilateral institutions by their government.

The consequences of counter-terrorist sanctions for the individual are dire: they are publically labeled as terrorists and denied access to their financial assets. In its most recent ruling of 30 September 2010, the General Court left no doubt that individual sanctions are ‘particularly draconian’ and speculated whether they might have to be considered criminal measures irrespective of their administrative disguise.3 The harm that individual sanctions do, not only to the economic situation but also to the reputation of those listed, can only be imagined after reading the factual background of sanctions cases. However, they have done even greater harm to the reputation of the Security Council and to the ‘fight’ against terrorism,4 as well as decision-making by multilateral institutions more broadly. The Security Council should not impose measures as specific as individual sanctions. There is no democratically legitimated framework in which the Security Council could root these measures and they are not subject to independent review mechanisms.
Being confronted with rules of multilateral institutions that apply to the most specific factual situations, the domestic judiciary is given the important task of defining the relationship of these norms with national law. Judges have to take a decision on the applicability of norms from different legal spheres that do not stand in a hierarchical relationship with each other. They will have to find a convincing method of deciding on the applicability of these different norms to the situation before them which combines formal and substantive considerations.

The research in this chapter is firmly rooted in law. It aims to identify and analyse the legal implications of the actions of multilateral institutions in the specific case of counter-terrorist measures against individuals. It is structured as follows. Section One briefly introduces the existing sanctions regime. Section Two sets out the case law on European counter-terrorist sanctions. Section Three explains the dilemmas in which the European institutions and the member states are placed. Section Four specifically addresses the role of the judiciary in these dilemmas. Section Five considers the broader implications of individual sanctions, as an example of multilateral but also multilayered governance.

A concise introduction to individual sanctions

On 15 October 1999 (two years before 9/11), the Security Council adopted Resolution 1267. This resolution was the starting point of the UN practice of sanctioning private individuals as terrorist suspects. It created a Sanctions Committee that directly produces lists of terrorist suspects. Underlying UN Security Council resolutions oblige the UN member states to give effect to these lists by freezing all financial assets of those listed. Since Resolution 1267, a series of resolutions has aimed to improve the procedure but maintained the original sanctioning regime: Resolutions 1333, 1390, 1455, 1526, 1617, 1730, 1735, 1822, and 1904.

The European Union (EU) gives effect to the UN terrorist lists on behalf of its member states. The European sanctioning regime has also been amended several times. On the one hand, the EU has given effect to the amendments at the UN level. On the other hand, steps were taken to comply with the rulings of the European Courts. The most recent instrument, EU Regulation 1286/2009, introduced the changes intended to comply with the ruling of the Court of Justice in the Kadi I appeal. With this regulation, the Union was said to have shifted from ‘automatic compliance’ to ‘controlled compliance.’ After being notified that someone is listed by the UN Sanctions Committee, the Commission continues to immediately freeze that person’s funds. Only now, the Commission issues a ‘statement of reasons’, notifies the person of their listing wherever possible, and gives them the opportunity to express their views.

To avoid confusion, a second sanctions regime should be briefly mentioned. Security Council Resolution 1373 has set up a second sanctions regime that requires UN member states to draw up their own lists of terrorist suspects (autonomous sanctions regime). While under the 1267 regime the UN Sanctions Committee directly lists those suspected to be associated with Al Qaida or the Taliban, under the 1373 regime UN member states – or the EU on behalf of its member states – draw up lists of individuals suspected to support terrorism other than Al Qaida or the Taliban. Hence, under the second regime the multilateral institution only generally calls on its member to take action, while under the first (and here discussed) regime the multilateral institutions adopts lists of terrorist suspects that could not be any more precise and specific. This second sanctions regime has been found in compliance with European law. The CFI ruled at several occasions on the appropriate level of review carried out by the EU Courts. Because the 1373 regime does not reflect the same quality of policy-making by multilateral institutions as the 1267 regime, the former will only be the subject of this chapter for the purpose of comparison.
Both the UN and the EU sanctions systems have been in place for more than a decade. They have both been reformed several times. Very basic procedural safeguards have been introduced. However as the following section will further explore, counter-terrorist sanctions against individuals remain a fundamentally flawed instrument because of the lack of due process, the lack of transparent listing criteria, and by the absence of any convincing evaluation of their effectiveness.

Kadi and other cases concerning European counter-terrorist sanctions

The case of Kadi

The single most important court case concerning individual sanctions is the case of Kadi. Within the EU, Mr Kadi was listed for the first time as a terrorist suspect on 19 October 2001. He brought an application for annulment to the Court of First Instance (CFI) in the same year, which the CFI dismissed on 21 September 2005. The ruling of the CFI has been discussed in detail by many scholars (e.g. Eckes, 2008; Bulterman, 2006; Tomuschad, 2006). In essence, the CFI found that it did not have full jurisdiction to review the Council regulation because of the prevailing force of the underlying Security Council resolutions. It found itself only competent to review the Council regulation in the light of jus cogens and came to the conclusion that the regulation complied with that standard. Mr Kadi appealed to the Court of Justice.

On 3 September 2008, the Court of Justice set aside the CFI’s judgment. A full account of the ruling has been given elsewhere (see Eckes, 2009a and 2009b; Gattini, 2009; Tridimas and Gutierrez-Fons, 2009). In summary, the Court of Justice confirmed that the European legal order is autonomous in that no norm of international law can change the competence division under the European Treaties. In its argument, the Court of Justice stayed firmly within the logic of European law. However, even though the Court’s ruling in Kadi I can be seen ‘an act of civil disobedience to international law’ it ‘is nevertheless loyal to the principles which underpin international law’, namely fundamental rights (Isiksel, 2010: 563). The Court exercised full judicial review and annulled the Council regulation in so far as it concerns Mr Kadi for breaching his right to judicial protection, his rights to be heard and his right to respect for property. One of the main points of criticism was that at no point the Court had been in the position to exercise a meaningful judicial review, because it simply had no access to the relevant information. The Court gave the political institutions three months to reform the sanctioning system before the regulation became void. After certain adaptations such as issuing of a statement of reasons and notifying the applicant, the Council and the Commission relisted Mr Kadi. Mr Kadi brought a second application for annulment before the CFI, which is called General Court since the entering into force of the Lisbon Treaty.

On 30 September 2010, the General Court gave a ruling whose main theme could be described as: ‘We do what you want – under protest!’ The General Court boldly criticised the Court of Justice, an institution that does not allow dissenting opinions in order to preserve consensus and authority. The General Court opined that once the inherent competence of the Security Council was accepted, judicial ‘review would encroach on the Security Council’s prerogatives’ and that indeed ‘a review of the legality of a Community act which merely implements, at Community level, a resolution affording no latitude in that respect necessarily amounts to a review, in the light of the rules and principles of the Community legal order, of the legality of the resolution thereby implemented’. This clearly contradicts the Court of Justice position that judicial review by the EU Courts extends to the European legal instrument only and not to the underlying UN resolution. The General Court further concluded that ‘the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous one’.

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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’. The difference in view is obvious. While the Court of Justice had treated the European legal order as autonomous and denied any hierarchical relationship between European and international law, the General Court insisted on the hierarchical superiority of the UN Charter (‘UNC’) over the European Treaties. Openly contradicting the premise of the Court of Justice’s decision unnecessarily undermines the authority and credibility of the Court of Justice’s reasoning. In the end and after making clear that it was not bound by the points of law, the General Court applied the Court of Justice decision in Kadi I, reviewed the regulation in the light of European standards of procedural and judicial protection and concluded that it had to annul it.

The General Court developed in Kadi II that the applicable standard of review is the same as for the second autonomous sanctions regime. This means that even though the political institutions enjoy broad discretion concerning the assessment of the appropriateness of the listings, it is for the Court to ‘establish whether the evidence is factually accurate, reliable and consistent’, as well as ‘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.’ Most importantly, while exceptions might be conceivable on whether and what evidence is communicated to parties, it is not possible to rely on evidence that is not communicated to the Court.

Other recent cases concerning individual sanctions

Besides in the appeal in Kadi I, the Court of Justice recently dealt with individual sanctions in two preliminary references: the DHKP-C case and the case of M and Others. In DHKP-C, a German regional court asked the Court of Justice whether listings under the autonomous sanctions regime could form the basis for a criminal conviction under national law (for having infringed the European sanctioning regime) even if the adoption procedure at the time of the listing (before 29 June 2007) had been found to infringe basic procedural rights. The legal framework for the adoption of autonomous sanctions was reformed on 29 June 2007 and the legality of the reformed framework has been confirmed by the CFI. In DHKP-C, two persons who were not themselves listed had made funds available to a listed organisation. The question was now whether they could be convicted even though the listing of that organisation had breached basic procedural principles. The Court of Justice held in DHKP-C that the listing adopted prior to the 2007 reform that brought the listing procedure in compliance with European law principles could not have effects in national courts.

The German Court had referred this question ex officio to the Court of Justice. Other national courts could choose the same route to question the validity of the European sanctions giving effect to UN lists; and since it appears impossible to give effect to UN lists of terrorist suspects without infringing European fundamental rights standard, DHKP-C might be the first of a long line of preliminary references challenging the legality of European sanctions against individuals.

The second preliminary reference, M and Others, concerned the question of whether financial support within the meaning of the European sanctions regime included social security benefits of spouses in the event that they live together with the designated person. Despite the limited subject matter, the case illustrates two important points: first, that member states interpret the European sanctions regime in a very rights-restrictive manner and second, that the consequences are devastating, not only for those listed but also for their families. The former is confirmed by another preliminary reference (Germany v B and D) in which the Court of Justice was asked whether membership of an organisation included on the terrorist lists justifies excluding the
person from refugee status (this was the interpretation of the German asylum authority). The Court answered in the negative: any such exclusion must be based on individual responsibility and decided on a case by case basis.

Several national courts have also been confronted with individual sanctions. This adds a further layer to the discussion. In 2007 (the appeal in \textit{Kadi I} was pending), the Swiss Supreme Court sharply criticised the UN sanctions regime but took the same line as the CFI and found Switzerland obliged to give effect to the UN Security Council resolutions (\textit{Nada}). On 4 June 2009 (after the Court of Justice’s ruling in \textit{Kadi I}), the Federal Court of Canada delivered a decision in the case of \textit{Abdelrazik}, concerning a Sudanese-Canadian who was refused entry into Canada because he was placed on the 1267 UN terrorist list. Justice Zinn conceded that Mr Abdelrazik’s rights under the Canadian Charter were breached. He criticised the UN sanctions regime with his much cited comment that: ‘[o]ne cannot prove that fairies and goblins do not exist any more than Mr Abdelrazik or any other person can prove that they are not an al-Qaida associate.’

Finally on 10 January 2010, the UK Supreme Court directly gave a ruling on national measures giving effect to the 1267 regime. In the case of \textit{Ahmed}, the UK Supreme Court did not focus on the fundamental rights implications but on the separation of powers and more specifically on parliamentary sovereignty. This makes this case particularly interesting for the discussion of multilateral institutions, since decision making in multilateral institutions is dominated by the executive. The UK Supreme Court did not focus on whether individual sanctions could be adopted within the UK legal order at all but how and more importantly by whom this could be the case. It came to the conclusion that the legislator (not the executive) is free to adopt individual sanctions as long as it explicitly confirms the necessary derogation from usual fundamental rights standards.

The discussion is not limited to domestic courts. The Swiss case \textit{Nada} is now pending before the European Court for Human Rights. This will allow this regional court to revisit the status of UN Security Council resolutions, which in the past has taken a rather deferential position (Milanovic and Papic, 2008).

By way of conclusion, European sanctions against individuals are subject to full judicial review by EU Courts, irrespective of whether they give effect to Security Council resolutions. The standard of review is the same as for autonomous European sanctions (second sanctions regime). National courts have criticised the UN sanctions regime but so far only the Canadian Federal Court has required public authorities to comply with domestic fundamental rights standards when giving effect to these sanctions.

\section*{The Catch-22 position of the European institutions}

The ‘controlled compliance’ approach in Regulation 1286/2009 was introduced as a consequence of the annulment in the \textit{Kadi I} appeal. It might superficially appear to address the procedural flaws by providing notification, a statement of reasons and by offering those listed the formal opportunity to be heard. However, the Commission can only share information that it possesses. Hence, the crucial question is: what is the amount and detail of the information to which the Commission has access when it gives effect to the decisions of the Sanctions Committee?

On a closer reading, Regulation 1286/2009 displays the limitations with disillusioning clarity. In Article 1(1)(b) it defines ‘statement of reasons’ as the publically releasable portion of the ‘statement of case as provided by the Sanctions Committee’. As becomes clear from the UN website, the publicly available statements of case remain vague and general. No specific evidence is given to support any of the allegations. The fact that the European statement of reasons is identical to publically available sources appears to confirm the existing assumption that the
Commission does not actually receive specific confidential information before listing someone. The General Court considered that even under the new rules the ‘applicant’s rights of defence have only been “observed” in the most formal and superficial sense’, and that the applicant did not have ‘even the most minimal access to the evidence against him’. The main problem continues to exist: the judiciary is unable to carry out any meaningful review due to lack of evidence or even information. Under these circumstances, judicial review can only be a farce (simulacrum). This has been independently confirmed by three courts: the Court of Justice, the UK Supreme Court and the General Court. If courts were to rubber stamp listing and sanctioning decisions of the political institutions without being able to carry out a meaningful review, this would impair rather than improve the situation of individuals. The decisions would appear to be vested with additional authority.

In short, it is impossible for the political institutions to comply with European procedural standards when giving effect to UN sanctions. However, even if the Union does not give effect to the UN sanctions regime, member states remain bound by their obligations under international law to do so. This begs the question whether the member states could lawfully adopt the necessary measures. In principle, the national authorities of the member state are in the same position as their European counterparts: UN sanctions cannot be given effect in compliance with the ECHR or national procedural standards either. However, national courts could take a legal approach different from the Court of Justice. For instance, they could argue, similar to the CFI in Kadi I that the primacy of resolutions under Chapter VII allow derogation from the standard of protection under either the ECHR or national law. The approach of the UK Supreme Court in Ahmed by contrast, which also allows for the implementation of UN terrorist lists, must be seen as something apart. The UK situation is particular (Eckes, 2011). Usually, parliaments are not free to limit human rights as far as they consider necessary and appropriate.

However, the final word on individual sanctions based on UN lists has not yet been spoken at the European level either. The General Court stated in Kadi II that within the ‘hierarchical judicial structure’ it falls to the Court of Justice to ‘reverse precedence’, to acknowledge the serious difficulties that the institutions encounter and to lower the judicial review to a level that would allow the implementation of the UN Security Council resolution. And, even though the General Court might be guilty of wishful thinking, an appeal by the Commission against the Kadi II decision of the General Court is pending before the Court of Justice.

The role of the judiciary in the world of multilateral institutions

One fundamental issue that comes up increasingly in the world of multilateral institutions is: what should be the role of the judiciary in reconciling norms originating in different legal spheres? The present chapter will focus on the role of the judiciary. The role of the executive has been discussed elsewhere (Curtin and Eckes, 2008). More often than in the past, norms of international and national law are relevant to the same legal dispute. Individual sanctions are but one example.

Individual sanctions

The case of Kadi could be seen as one of the traditional situations where the interest of individuals must be balanced against the common interest represented by the state and the existing state-based security system. Only in Kadi, these two interests are protected by different legal regimes. This creates, in addition to the usual balancing act, the need to relate these different regimes that draw their authority and legitimacy from different sources. Kadi required the EU
Courts to take a decision with far-reaching implications on the relationship between the European Treaties and the UN Charter, but also between the UN Charter and domestic law more in general. This leaves domestic courts in the difficult position of having to identify the applicable legal parameters. Most constitutions regulate the hierarchical status of international law. However, many constitutions do not specifically address the status of the ECHR or of obligations under the UN Charter. This is also the case for the European Treaties. At the same time, the ‘variety of non-hierarchical techniques’ developed by the Court of Justice (e.g. indirect effect or consistent interpretation), which have opened the ‘avenues of influence’ between European law and international law, cannot directly be applied to individual sanctions where the different norms regulate the same factual situation to the same level of detail (de Búrca, 2009; Eckes, 2009b).

In practice, the EU Courts annul listings and impose requirements that the political institutions arguably cannot meet. The Commission lists and relists individuals in order to give effect to UN sanctions lists. European sanctions continue to infringe principles of EU law and the EU Courts continue to annul them. Member states remain bound by UN Security Council resolutions under international law. Is it for the Court of Justice to have the last word on whether or not UN Security Council resolutions can be given effect at the European level?

A purely technical perspective

From a purely technical-legalistic perspective, Article 103 UNC offers a fairly easy solution to the conflict between the Charter and other international agreements, including the Convention and, from the perspective of international law, also the European Treaties: the Charter prevails. Dualism offers a similarly simple technical answer to the clash between the Charter and domestic (constitutional) law, including, from the perspective of the Court of Justice, the European Treaties: obligations under the UN Charter are binding under international law only, within the domestic legal order applies domestic law. Additionally, the EU is not a member of the UN and is not itself bound by obligations under the UN Charter. However, these legalistic arguments leave substantive considerations aside. They ignore that both the Charter and the Convention benefit from a particularly high level of authority. Both purport to promote universal and undeniable interests. The UN Charter creates a state-based system with the intention to maintain peace and security at the universal level. The European Convention aims to ensure a minimum standard of fundamental rights protection at the regional level. Whether the UN Charter could be seen as a form of ‘world constitution’ (Fassbender, 1997) is doubtful, but Article 103 UNC certainly gives it an exceptional status under international law. The European Convention is widely considered to be an expression of European constitutional law (Arnold, 1999). It protects values and rights that are equally protected under national constitutional law.

The different norms governing individual sanctions do not stand in a straightforwardly hierarchical relation towards each other but require relating by the force of legal reasoning, either on the basis of a technical legalistic argument or on the basis of substantive considerations. It is certain that the implications of how these norms relate go far beyond the individual case: it determines which of the two legal spheres has the last word. This is also where the role of judges in society goes beyond delivering ‘individual justice’. Judges also have the responsibility to take principled decisions of long-term importance (constitutional justice) (Franck, 2005: 267). Following any of the technical legalistic arguments offers a hierarchical black and white solution to the problem. Increasingly scholars and courts are searching for more nuanced ways of deciding conflicts of norms. Relying on a substantive reasoning (rather than a technical) may prima facie appear to increase the power of courts, since they do not only apply decisions on the
formal status of norms but weigh the importance of the different instruments. Ultimately however, the technical legalistic perspective equally depends on premises chosen by the judge: is EU law domestic law or international law? Is the EU obliged to give effect to obligations under the UN Charter? As to the first question, much had been written on the EU’s Sonderweg or exceptionalism already before the case of Kadi reached the Court of Justice (see before all: Weiler and Haltern, 1995/96; Weiler, 1999; Weiler and Wind, 2003; Ličková, 2008).

A more nuanced approach

A more nuanced approach that combines substantive and technical aspects was suggested to the Court of Justice to decide on the applicability of norms originating in different legal spheres: the so-called Solange approach. Under the Solange approach, judicial review depends on the level of protection in the external legal sphere where the norm originates. ‘So long as’ that legal sphere provides respect for certain principles and values, the domestic court does not exercise judicial review of every individual case but restricts itself to a residual review that this respect continues to exist.

A Solange approach from the perspective of EU law should hinge on whether the ‘very foundations’ of the European legal order are respected (Eckes, 2009b). These are the principles of liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law. These very foundations lie at the heart of the European Union’s identity. In the Kadi appeal, the Court of Justice elevated these ‘foundations’, which were at the time expressed in ex-Article 6(1) EU to a supreme layer of law above the rules expressed in the Treaties. The Court ruled that Article 307 EC even though it allows for a derogation from primary law ‘may in no circumstances permit any challenge to the principles that form part of the very foundations’. The ‘very foundations’ or ‘inalienable essentialia’ of the European legal order and the legal orders of its member states require an independent (judicial) control mechanism as a central element. Or, in Angela Ward’s (2009) words: ‘the rights of “individuals” to effective judicial review to enforce their rights has, from the outset, formed a foundation of the constitutional matrix, justifying the enforcement of EC law over conflicting national member State laws … ’ (Ward, 2009: 332). However, the list of values above illustrates that judicial control alone is not enough. In particular, an active role of the individual through democratic participation is an additional requirement.

This could also be seen as one of the most pertinent reasons why the Court of Justice (even if we assume that it considered a Solange approach) could not restrict itself to a residual level of control only. While the EU offers a political and legal framework which confers on the individual a sufficiently active role to counterbalance direct interferences with the rights of individuals, the UN is set up in an entirely different manner. Also, irrespective of whether it might exercise quasi-judicial powers, the Security Council is not a court. The Court was asked to review the exercise of executive power within a multilateral institution rather than to review the decision of another judicial body. Indeed, the complete absence of judicial review of this particular exercise of executive power is one of the reasons why the Court of Justice exercised jurisdiction.

Much speaks in favour of a nuanced approach. Technical and substantive arguments are closely interlinked. Today, the Union is a Union of law with its own general principles and a Charter of Fundamental Rights. Yet, EU law itself has not grown from values but rather from ‘the central goal of giving effect to the Treaties’ (Williams, 2009: 560). In this respect, it could be seen itself as a technical construction struggling to establish a substantive focus. Urging the UN to create legal safeguards and control mechanisms is urging the UN to constitutionalise. However, the constitutionalisation of any legal sphere, by strengthening the rule of law and
the control over the exercise of (executive) power, also increases the effectiveness of that particular law by improving enforcement. Where constitutionalisation is citizen-driven, as it was largely in the Union,\textsuperscript{71} it directly improves the situation of the individual. At the same time, the increased effectiveness benefits those players who exercise powers under this reinforced legal sphere. The EU is here the best example. The assumption of independent normative authority within the EU required the adoption of constitutional doctrines to constrain and legitimate that authority. At the same time, this European constitutionalism was instrumental to the claim of normative authority, strengthened EU law and extended the powers of the EU institutions.

Implementing the 1267 sanctions regime breaches established fundamental rights of EU law and of national law. Hence, individual sanctions raise questions of whether and to what extent departure from the rule of law can be justified because the relevant norms were agreed in international cooperation within the Security Council. A \textit{Solange} approach combines technical legalistic and substantive considerations. It entails formal respect for norms originating in a different legal sphere; yet at the same time it draws clear substantive limits to how far this respect extends. Individual sanctions are one of the most drastic examples of the unfettered exercise of executive powers. Arguably, even if one is open to \textit{Solange} considerations as a matter of principle full judicial review will have to remain in place.

\textbf{The individual judge}

Finally, \textit{Kadi II} in particular demonstrated the problems arising from the extended powers of the judiciary. Not the outcome but the tone of the \textit{Kadi II} ruling raised questions as to the role and influence of the individual judge in shaping the legal discourse and the actual outcome of the case. The same judge acted as the \textit{juge rapporteur} both when the CFI ruled on \textit{Kadi I} and when the General Court ruled on \textit{Kadi II}. In between, the Court of Justice had set aside the CFI’s ruling in \textit{Kadi I}. In \textit{Kadi II}, the General Court goes far in criticising the Court of Justice. Indeed to my knowledge, the acridity of the General Court’s criticism is unprecedented. This may, on the one hand, be due to deep disagreement on substance; on the other hand, it seems that only a toxic cocktail of hurt personal pride, bitterness in the face of the lower court’s powerless position, and frustration with the impossibility of compliance with the UN resolution could have resulted in such scathing criticism. \textit{Kadi II} stands in clear contrast with the earlier cases of \textit{Othman} and \textit{Al Faqih}.\textsuperscript{72} Both concerned individual sanctions giving effect to UN lists and both were decided after the \textit{Kadi I} appeal decision, but before \textit{Kadi II}. The difference between \textit{Kadi II} on the one hand and \textit{Othman} and \textit{Al Faqih} on the other is that the former case concerned sanctions adopted under the listing procedure reformed after 3 September 2008, the day that the Court of Justice decided the appeal in \textit{Kadi I}. To put it mildly: rulings in which the personality of the judge comes out with such clarity do not contribute to the authority of legal reasoning, which after all is an important source of judicial authority (Dworkin, 2003: 4).

\textbf{Implications and conclusions}

There are limits to multilayered governance and individual sanctions have painfully illustrated them. From the perspective of the EU Courts and national courts the most important questions raised by individual sanctions concern norm reception. The Security Council adopts Security Council resolutions to which states can only give effect by infringing basic fundamental rights. How should courts receive these norms? Should they regard the resolutions as binding and supreme norms? Should they boycott the system by striking down the national implementation measures with all the possible consequences?
On a practical level, the question remains: what could be possible ways out of the impasse created by binding (on the member states) UN Security Council resolutions that can only be given effect by breaching fundamental rights? One conceivable (and desirable) solution would be that the UN completely stopped to list terrorist suspects. If anything, individual sanctions could continue to be adopted under the second autonomous sanctions regime but not the first one (Happold, 2003: 607). Within the European legal order, this would be possible. The second sanctions regime has been accepted by the EU Courts, and the Council should have access to the necessary information since listings are either initiated by members states or by third countries, with the Council itself taking the listing decision. However, this solution is also problematic. Under the second sanctions regime, all UN member states are given the discretion to decide who they will list in order to give effect to a legal obligation under the UN Charter. This will not only lead to disparities between the sanctions regimes of the different UN member states; it also entails the danger that states illegitimately use the obligations under the UN Charter to justify sanctions that purely serve own state interests and that do not serve the objective of containing terrorism. Even though this could to some extent be controlled by judicial review at the national level.

So far no judicial challenges have been brought against entire European legal instruments implementing UN sanctions lists. Individuals have only directly challenged their listing. However, challenges against the entire legal instrument are conceivable either indirectly under Article 277 TFEU or in a preliminary ruling under Article 267 TFEU. However, in the light of the above mentioned cases, particularly the latter is not improbable. The Court of Justice should seize the opportunity to act as the constitutional court of the European legal order.

If the Court of Justice declared void the entire European legal framework giving effect to UN terrorist lists member states would remain under an international law obligation to implement the UN sanctions. The situation would be similar if the political institutions of the EU refrained from listing and re-listing those on the UN lists because they cannot possibly comply with the requirements set out by the Court of Justice. In this situation, member states are likely to give effect to UN lists under national law. First, this is already the case in 16 member states. Secondly, member states will otherwise breach their obligations under international law. However, this will raise many questions. National implementation could be contrary to the competences division under the European Treaties. And more importantly, the annulment of the regulation by the Court of Justice was based on the finding that the sanctioning measures infringed the procedural and judicial rights of the applicant. This, as we have seen, could not be healed by an adoption under national law, since member states are also not in the position to share the relevant information either with those listed or at least with a reviewing court. Therefore, any implementation under national law should breach fundamental rights standards protected under national constitutional law, Union law, the ECHR, and international human rights treaties. It is simply not possible to give effect to the 1267 sanctions system without infringing the most basic fundamental rights.

Notes

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3 General Court, Case T-85/09, Yassin Abdullah Kadi v Commission (Kadi II), judgment of 30 September 2010, para 149. See also: UK Supreme Court, Her Majesty’s Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty’s Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Yousef) (Respondent) v Her Majesty’s Treasury (Appellant), judgment of 27 January 2010, [2010] UKSC 2, paras 60 and 192, speaking of ‘prisoners of the State’.


7 S/RES/1333 (2000), of 19 December 2000; removing the reference to Afghanistan and thereby making the sanctions truly international.


11 S/RES/1617 (2005), of 29 July 2005; introducing the ‘statement of case’ and the (non-mandatory) notice to those listed.

12 S/RES/1730 (2006), of 19 December 2006; establishing the ‘focal point’ where those listed could submit delisting requests.

13 S/RES/1735 (2006), of 22 December 2006; introducing delisting criteria that the 1267 Committee may consider.

14 S/RES/1822 (2008), of 30 June 2008; introduced the ‘narrative summaries’ setting out reasons for listing that are now available on the UN Security Council’s website and required a full review of all names on the 1267 list.

15 S/RES/1904 (2009), of 17 December 2009; creating the position of an Ombudsperson who is responsible for laying out the reasons supporting a delisting request.

16 The first instruments were: Common Position 1999/727/CFSP 15 November 1999; EC Regulation 337/2000 of 14 February 2000. See also current Articles 75 and 215 TFEU.


18 Court of Justice, Case C-402/05 P and C-415/05 P, Kadi v Council (Kadi I), [2008] ECR I-6351.

19 ECCHR Report, supra note 4.

20 EU Regulation 1286/2009, supra n 16, in particular: recital 6, Article 1(1)(b), Article 1(9). See below Section 3 ‘Catch-22 Position’ for a critical analysis.


22 S/RES/1373 (2001), of 28 September 2001; requiring the UN member states to identify terrorist suspects and to freeze their financial resources.

23 Prominent examples of those that have been on autonomous lists are the Kurdistan Workers’ Party (PKK), the People Mujahedin of Iran, and Basque organisations.

24 General Court, Kadi II, paras 185 et seq.


26 CFI, T-315/01, Yassin Abdullah Kadi v Council and Commission [2005] ECR II-3649; Court of Justice, C-402/05 P and C-415/05 P, Kadi I, supra n; General Court, Case T-85/09, Kadi II, supra n 3.

27 Commission Regulation 2662/2001/EC.

28 Jus cogens means ‘compelling law’, it refers to a body of peremptory principles or norms from which no derogation is permitted. See also Article 53 of the Vienna Convention on the Law of Treaties.

29 This was challenged by the Council and by the UK in an appeal against Kadi II: Court of Justice, Case C-593/10 P, Council v Kadi, pending; Court of Justice, Case C-595/10 P, UK v Kadi, pending.

30 Court of Justice, Kadi I, para 351.


32 General Court, Kadi II, para 114 and 116.

33 Court of Justice, Kadi I, paras 286 et seq.

34 General Court, Kadi II, para 119 (emphasis added).

35 General Court, Kadi II, para 112.
General Court, Kadi II, paras 123 et seq. The applicable standard of review in particular was challenged by the Commission: appeal brought on 13 December 2010 by the European Commission against the judgment of the General Court (Seventh Chamber) delivered on 30 September 2010 in Case T-85/09:

Kadi v Commission: Court of Justice, Case C-584/10 P, Commission v Kadi.

37 General Court, Kadi II, para 139.
38 General Court, Kadi II, para 141.
39 General Court, Kadi II, para 142.
40 General Court, Kadi II, para 147.
41 General Court, Kadi II, para 145.
42 Court of Justice, Case C-550/09, E and F [2010] ECR I-0000.
43 Court of Justice, Case C-340/08, M (FC) and Others v Her Majesty’s Treasury [2010] ECR I-0000.
44 General Court, Kadi II, paras 185 et seq.
45 See below section three for more detail.
46 Court of Justice, C-57/09 and C-101/09, Bundesrepublik Deutschland v B and D, judgment of 9 November 2010.
50 UK Supreme Court, Ahmed, supra n 3.

51 Admittedly this is an understanding of fundamental rights that is quite unique to the UK: see A.V. Dicey, Introduction to the Study of the Law of the Constitution 3 (Macmillan, 1915), stating: Parliament has ‘the right to make or unmake any law whatever; and … no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’ This has not changed with the adoption of the Human Rights Act 1998 – see: UK Supreme Court, Ahmed, supra n 3, para 111, per Lord Phillips; 193 per Lord Brown; and 240 per Lord Mance.

52 Pending before the ECtHR: Nada v. Switzerland, application no. 10593/08; see: http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=875909&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.
54 Check the UN website for an impression of the lack of detail of these statements: www.un.org/sc/committees/1267/narrative.shtml
55 General Court, Kadi II, para 171. This was an evaluation of the rules under Commission Regulation 1190/2008.
56 General Court, Kadi II, para 173
57 General Court, Kadi II, para 123.
58 Court of Justice, Kadi I, para 351; General Court, Kadi II, para 183.
59 I will not enter into the discussion whether the adoption of sanctions by the Member States is in compliance with EU law.
60 For a discussion of whether member states can adopt national measures in compliance with European law, see: Christina Eckes, European Journal of Risk Regulation, 2011 forthcoming.
61 General Court, Kadi II, paras 122–23.
62 Court of Justice, Case C-584/10 P, Commission v Kadi. See also the Council’s appeal against the same judgment: Court of Justice, Case C-593/10 P, Council v Kadi and the UK’s appeal against the same judgment: Court of Justice, Case C-595/10 P, UK v Kadi.
63 Article 24 of the German Constitution (Grundgesetz); Article 52–55 of the French Constitution; Article 93 and 94 of the Dutch Constitution (Grondwet).
64 Article 24 of the German Constitution (Grundgesetz); Article 52–55 of the French Constitution; Article 93 and 94 of the Dutch Constitution (Grondwet).
65 This is why they both have ‘constitutional’ characteristics in that they create largely autonomous legal orders which assume effect erga omnes partes (Convention) and supremacy (Charter).
In Kadi I the Court of Justice referred to Article 6(1) TEU in this precise way [paras 303–4].

Court of Justice, Cases C-402/05 P and C-415/05 P, Kadi I, supra, para 304.

Court of Justice, Cases C-402/05 P and C-415/05 P, Kadi I, supra, para 301.

Court of Justice, Cases C-402/05 P and C-415/05 P, Kadi I, supra, para 304.

Two famous moments of citizen-driven constitutionalisation within Union law were: Court of Justice, Case 26/62, van Gend, [1963] ECR 1; Case 6/64, Costa v ENEL, [1964] ECR 585.

CFI, Case T-318/01, Omar Mohammed Othman and CFI, Cases T-135/06 to T-138/06, Al-Bashir Mohammed Al-Faqih, Sanabel Relief Agency Ltd, Ghunia Abdhabbah, Taher Nasuf. Other cases on sanctions giving effect to UN lists (decided between CFI, Kadi I and Court of Justice, Kadi II): CFI, T-49/04, Hassan v Council and Commission; CFI, Case T-253/02, Chafiaq Ayadi v Council.

General Court, Kadi II, paras 185 et seq.

UK Supreme Court, Ahmed, supra n 3.

E.g. the International Covenant on Civil and Political Rights.

References


