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EUROPEAN 'TERROR LISTS' AND THE RULE OF LAW

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The 2001 terror attacks in the United States spurred the development of an almost entirely new body of law – the law on terror. Among the many disturbing features of this new area of law, so-called 'terror lists' have attracted little doctrinal interest, despite the fact that they raise perhaps some of the greatest problems for the rule of law and individual rights in decades.

Terror lists were initially devised by the United States and later imported into both the United Nations Security Council and the European Union (EU). Their purpose is to freeze the assets of suspected terrorists and their supporters, and to thereby prevent them from financing and ultimately committing acts of terrorism.

The practical effects of these lists are far-reaching. De facto, the lists prevent all designated persons from conducting any business. In some cases, these lists may even represent a *de facto* economic death penalty for the companies and individuals listed in them, particularly if they conduct business in the United States or Europe.

The establishment of terror lists is legitimate and lies at the core of the fight against the financing of terrorism. Nobody puts seriously into doubt their existence. To some extent, the lists are even more respectful of the principle of predictability than *a posteriori* crackdowns on persons suspected of having dealt with others who are themselves suspect of being terrorists.

Unfortunately, however, the aim of fighting terrorism too often provided – and still provides – cover for serious violations of due process and frequently results in the arbitrary deprivation of the rights of entire groups and individuals. Besides, it is not out of question that, in some cases, the inclusion or maintaining of persons in such lists is more closely tied to political considerations, or even to specific bargains with third countries, than it is to security issues.

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In order to explore these issues, we take the examples of recent cases dealt with by the European Court of First Instance, such as the cases of Yassin Abdullah Kadi and of the People's Mujahedin Organization of Iran (PMOI). In the two cases, the suspects were effectively dispossessed of all their assets with the stated purpose of bringing all their business and other activities to an end. Faced with some of the harshest sanctions in international and European law, they were, *de facto*, denied any right to judicial review and the protection of even the most basic principles of due process, including their right to know the reasons or legal bases for their dispossession. Seized of dozens of complaints by the affected persons,² the European Court of Justice (hereinafter referred to as 'the Court') severely criticized the Council of Ministers (acting either independently or under orders of the United Nations Security Council), for listing or, moreover, maintaining on its lists such individuals and groups. Unfortunately the Court's efforts have proven, until now, largely useless to most, if not all, alleged terrorists.

This paper will focus on recent developments in the case law of the Court and their aftermaths, showing that the current process for designating and, more importantly, for reviewing the designation of alleged terrorists fails the most basic standards of due process, despite repeated decisions by the Court.

Section 1 summarizes the standards of review designed and applied by the Court to the designation of alleged terrorists, while Section 2 addresses the peculiar and, until recently, unenviable fate of individuals and groups designated as terrorists by the United Nations Security Council. Despite the significant jurisprudential advances described in Sections 1 and 2, Section 3 shows that, in practice, the European Council of Ministers has consistently failed to implement the Court's decisions and effectively deprived listed individuals and groups of their fundamental right to judicial review.

1. The Standards of Review of "Terror Listing" by the European Court of Justice

Much of the confusion surrounding the establishment of European terror lists can be traced back to their absence of any obvious legal basis in the European constitutional treaties.³ The original drafters of

² See the impressive list of complaints established by D. SIMON & A. RIGAUX, in *Le jugement des pourvois dans les affaires Kadi and Al Barakaat: smart sanctions pour le Tribunal de première instance ?*, Europe, 2009, p.5, at para. 30.

³ If, however, the Treaty of Lisbon had entered into force, the new Treaty on the Functioning of the European Union would have contained a clear basis for terror lists in Article 75, which would have specifically provided for the safeguard of the rights of alleged terrorists: 'Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European

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the treaties did not foresee the establishment of such lists and failed to include any provision to that effect. A consequence of the absence of any clear basis was that the Council had to stretch the terms of the treaty chapter on Common Foreign and Security Policy to enact Common Positions establishing the terror lists. However, Common Positions lack the strength of European Community (EC) Regulations, and the Council had to explore new, almost experimental interpretations of the Treaty to enact EC Regulations and effectively freeze the assets of entities in the list in all Member States.⁴ While already illustrative of a clear deficiency in terms of the respect of the principles of legality, legal certainty and predictability, relevant Common Positions and Regulations have also become so inextricably enmeshed that it is now virtually impossible to know with any degree of certainty which ones are currently in force.⁵

The constitutional validity of the mechanism designed by the Council to establish terror lists gave rise to much debate before the Court, a debate which falls outside the scope of this article.⁶ In a nutshell, the most striking feature of relevant Common Positions and Regulations is that they fail to provide for any kind of safeguard of the procedural rights of alleged terrorist individuals and organisations.

Relevant Common Positions and Regulations provide that individuals and groups can be included on the list wherever a 'decision' taken at the national level shows that they are involved in terrorism.⁷ However,

Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph. The acts referred to in this Article shall include necessary provisions on legal safeguards⁸.

⁴ See Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344, 28.12.2001, pp. 93–96, to be read in conjunction with Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344, 28.12.2001, pp. 70–75. The list of designated entities attached to Common Position 2001/931 is periodically updated by the Council. See e.g. the latest update (discussed below at Section 3) in Council Common Position 2008/586/CFSP of 15 July 2008 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2007/871/CFSP, OJ L 188, 16.7.2008, pp. 71–76.

⁵ See the list by D. SIMON & A RIGAUX, in *Le jugement des pourvois dans les affaires Kadi et Al Barakaat...*, *op. cit.*, at p. 11.

⁶ See Court of First Instance, *Kadi v Council and Commission*, Case T-315/01, Judgement of 21 September 2005, at paras 64 to 135, European Court of Justice, *Kadi v Council and Commission*, Cases C-402/05P and C-415/05P, Judgement of 3 September 2008, at paras 121 to 236 and Court of First Instance, *Sison v Council*, Case No T-47/03, Judgement of 11 July 2007, at paras 83 to 103. See also D. SIMON & A RIGAUX, in *Le jugement des pourvois dans les affaires Kadi et Al Barakaat...*, *op. cit.*, at pp. 6–7.

⁷ The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in

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they do not describe the procedure to be followed and, in particular, do not afford alleged terrorists the right to a hearing or even to be informed of the identity and/or nature of the national decision relied upon by the Council when putting them on the list. Several of those alleged terrorists seized the Court and argued that the absence of such provisions violated their fundamental human rights and essential principles of due process.

In a series of important decisions, the Court agreed with the views of the applicants and imposed on the Council and Commission: (1) an obligation to state their reasons for initiating or maintaining terrorist designations, (2) an obligation to respect the plaintiffs' right to a fair hearing and (3) an obligation to respect their right to effective judicial protection, although it failed to exercise its review over perhaps the most important question of all – whether listed individuals and groups actually qualify as 'terrorists'.

a. The Obligation to State Reasons

As has already been noted, inclusion on a terror list has real and dire consequences for the individuals or groups concerned and it would seem but natural that such individuals or groups be informed of the reasons for their inclusion in such a list. The reasons for being listed as a terrorist constitute essential information which allows alleged terrorists to make their case and is thus directly linked to those persons' or entities' right to a fair hearing. In addition, a statement of reasons provided by the Council is also crucial for the Court's review of the decision complained of by the applicant, as there can be no effective assessment of the legality of the decision concerned if the Court is not aware of the reasons why such individuals and organizations were put on the list. Thus the obligation to state reasons also acts as an essential safeguard of the alleged terrorists' right to *effective* judicial protection.

It was in the first PMOI case in 2006 that the Court of First Instance affirmed the obligation of the Council to state the reasons for the initial listing of individuals and groups, save in exceptional circumstances.⁸ This finding was confirmed in several subsequent decisions.⁹ Where the

respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds' – Article 4 of Common Position 2001/931, *op. cit.*

⁸ *Ibid.*, at paras 138 to 151.

⁹ See e.g. Court of First Instance, *PKK v Council*, Judgement of 3 April 2008, at para 63 and the confirmation by Court itself in the *Kadi* case: European Court of Justice, *Kadi v Council and Commission*, Judgement of 3 September 2008, *op. cit.*, at paras 336-337. Exceptional circumstances can be found where 'overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations' are at stake. In practice, however, the Court never found that the standard of 'overriding considerations' could be met. See e.g. Court of First Instance, *Sison v Council*, Judgement of

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Council extends the designation of individuals or groups beyond the initial time period, it must also explain 'the actual and specific reasons why the freezing of the funds remains justified', together with all new evidence used, if any.¹⁰

The scope of the obligation to state reasons is not restricted to the mere identification of the national decision that was relied upon by the Council. Since the Council exerts a discretionary power to list or not list individuals and groups targeted by national decisions, it is under an obligation to state the *actual policy considerations* for such decision. In the words of the Court of First Instance in the 2006 PMOI case:

'in principle, the statement of reasons for a measure to freeze funds under Regulation No 2580/2001 must refer not only to the statutory conditions of application of that regulation, but also to the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned'.¹¹

The Court of First Instance found in all the cases brought before it that the Council had failed to comply with its basic obligation to state the reasons of its decisions. Such an outcome is not surprising given the lack of any provision to that effect in relevant common positions and regulations,¹² but the absolute lack of any reasons whatsoever in most Council decisions remains startling.

In practice, the Council had in most cases only stated that the designation of given individuals or groups was 'desirable'.¹³ The Council had not provided any information regarding which national decision was relied upon when including such individuals or groups on the terror list. Some individuals actually did not even know which country proposed their names for inclusion in the first place or, technically speaking, in which country the national decision concerned had been taken.¹⁴ Under such circumstances, the persons could not even consider challenging the

11 July 2007, *op. cit.*, at para 209 and Court of First Instance, *Stichting Al-Aqsa v Council*, *op. cit.*, at para 54.

¹⁰ *Ibid.*, at paras 137 and 151.

¹¹ *Ibid.*, at para 146. See also Court of First Instance, *Stichting Al-Aqsa v Council*, Case No T-327/03, Judgement of 11 July 2007, at para 54.

¹² D. Simon and A. Rigaux mention the 'defeating silence' ('*silence assourdissant*') of relevant common positions and regulations on this point, in *Le jugement des pourvois dans les affaires Kadi et Al Barakaat...*, *op. cit.*, at p. 9.

¹³ See e.g. Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Case No T-228/02, Judgement of 12 December 2006, at para 164 and Court of First Instance, *Stichting Al-Aqsa v Council*, Judgement of 11 July 2007, *op. cit.*, at para 55.

¹⁴ See e.g. Court of First Instance, *Sison v Council*, Case No T-47/03, Judgement of 11 July 2007, at para 209.

relevant decision at the national level. Some affected persons would see their assets frozen and thus be advised for the first time of the existence of national proceedings or investigations against them on terrorism charges, without being afforded the right to know in which country (let alone before which jurisdiction) such proceedings or investigations were taking place. This situation was clearly unacceptable.

The imposition by the Court of an obligation to state the reasons for the Council's decisions was therefore logical and clearly intended to cure future decisions from similar defects and to allow the alleged terrorist concerned to engage in a fair and enlightened dialogue with the Council. Compliance with such an obligation would have the additional advantage of allowing the Court to more thoroughly review the listing of alleged terrorists.

b. The Right to a Hearing

The Council had been equally consistent in its refusal to provide alleged terrorists with an opportunity to make their case and present observations on their listing. Faced with claims in which affected individuals and groups sought the exercise of this right, the Court indeed recognized their right to a hearing by the Council, but subject to qualifications much more stringent (and indeed more troubling) than those applied to their right to know the reasons for their designation.¹⁵ In short, while the Court did in fact recognize the rights of alleged terrorists to a hearing in respect of decisions through which they were kept on the list, it denied them both the right to a hearing for the decision through which they were initially designated as a terrorist, and the right to challenge the policy considerations for their listing and the reality of their alleged terrorist-related activities.

First, the Court agreed with the Council and several Member States that the Council had no obligation to, and indeed should not, grant a hearing to alleged terrorists *before* the first decision freezing their funds is taken. If this were required, alleged terrorists would be advised of freezing orders beforehand and thereby given the opportunity to withdraw their assets from the European Union, which would of course

¹⁵ For general support for the applicability of rules regarding the right to be heard to alleged terrorists, see Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgement of 12 December 2006, *op. cit.*, at para. 91: '... observance of the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the evidence adduced against him on which the penalty is based...' and the cases cited therein. The same has been reiterated by the Court in e.g. Court of First Instance, *Sison v Council*, Judgement of 11 July 2007, *op. cit.*, at paras 139 and 141.

defeat the whole purpose of the list. As a result, the Court concluded that the right to a hearing only applies *after* initial designation as a terrorist. The Court of First Instance even considered that the right to a hearing did not apply *immediately after* such designation either, since alleged terrorists are then at liberty to challenge their designation before the Court.¹⁶ Thus, the right to a hearing with the Council only applies before decisions *maintaining* alleged 'terrorists' on the list, save for the 'overriding considerations' exception already applicable to the Council's obligation to state reasons, mentioned above in part 1.1.¹⁷

The finding of the Court of First Instance may be surprising given that it effectively discourages alleged terrorists from engaging the Council and initiating a discussion with European institutions immediately after their designation. Individuals affected by freezing decisions are thus deprived of the right to simply make their case to the Council and must either resort to the costly and lengthy method of litigation before the Court, wait for months until there is a decision extending the time their designation or remain in the shadows.

However, the second qualification to the right of alleged terrorists to a hearing is even more troubling. We mentioned earlier that the Court understands the Council's right to designate individuals and groups as 'terrorists' as a discretionary power. The only pre-requisite for such a determination is the existence of 'precise information or material in the relevant file which indicates that a decision has been taken by a competent authority' in relation to allegations of engaging in terrorism or of otherwise supporting terrorism.¹⁸ Accordingly, alleged terrorists should at least be allowed to call into question national decisions concerning them and hinting at their involvement in terrorism or the support of the terrorism.¹⁹ On the other hand, the Court denied alleged terrorists the right to present their observations at the Council level (or indeed, as will be shown below, at the Court) as to the *reality* of their involvement in terrorist-related activities. In other words alleged terrorists are not allowed to challenge whether they in fact engage in or support terrorist activities, but only whether there is sufficient evidence supporting the existence of a relevant national decision.²⁰

¹⁶ See Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgement of 12 December 2006, *op. cit.*, at para. 130.

¹⁷ *Ibid.*, at para. 131.

¹⁸ See e.g. the text of Article 3 of Common Position 2001/931 at footnote 3 above.

¹⁹ See Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgement of 12 December 2006, *op. cit.*, at paras 115 to 126.

²⁰ See Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgement of 12 December 2006, *op. cit.*, at para 120 ('the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question, namely, where it is an initial decision to freeze funds, whether there is specific information or material in the file which shows

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The rationale for this *prima facie* bizarre finding is that the designated terrorists' right to a fair hearing has supposedly been sufficiently preserved by virtue of initial domestic proceedings in which they are in theory given the opportunity to present their views.²¹ This interpretation is actually faithful to the logic of relevant Common Positions and Regulations which contemplate the designation mechanism as a two-tier process, the European process being the mechanical consequence of the national process. The system is based on the premise that national procedures in the European Union respect the parties' right to a fair hearing. It is incumbent on alleged terrorists to make their case before national courts, based on the identification of the national decision concerned by the Council under its obligation to state reasons as the case may be.

The legal reasoning of the Court sounds fine in theory but its implications often prove hardly acceptable in practice. Indeed, it presupposes that the national decision has reached a certain degree of maturity: if the national procedure is at an earlier stage of development, it is hard to see how the right to be heard could have (yet) been fully respected in terrorism cases. In some cases, such national procedures may not have allowed alleged terrorists to present their observations at the domestic level at all, because, for example, the national listings do not have any adverse domestic effects but only effects in a foreign country. This may be the case when the coercion was triggered by a request of mutual legal assistance in criminal matters, bearing in mind that such decisions are sometimes not open to challenge in the requested and/or requesting State of the assistance, or may be challenged only at a very late stage of the procedure.

The Court of First Instance explicitly mentioned such a possibility but nevertheless declined to review whether alleged terrorists could in effect exercise their right to be heard in the context of national procedures, for fear of violating the duty of Community institutions and Member States to 'cooperate in good faith'.²² Such a lethal combination of national and EU law leaves alleged terrorists with no right to make their claims before any judicial or other authority, at least not until years after the measure has been taken, either to the national authority (because there is no need or urgency given the nature of the procedure domestically), or to the Council or the ECJ (because the merits are supposed to be discussed at the domestic level and because the Court will not review whether the national procedure effectively guaranteed the alleged terrorist's fundamental rights).

that a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931 was taken in respect of him by a competent national authority).

²¹ *Ibid.*, at para. 119.

²² See Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgement of 12 December 2006, *op. cit.*, at paras 121 to 123.

c. The Right to Effective Judicial Protection

The same applies *mutatis mutandis* to the right of alleged terrorists to effective judicial protection. The above-mentioned finding that the Council has a discretionary power to designate any entity on the basis of a relevant national decision designating that entity as a 'terrorist' has direct implications on the Court's scope of review and hence the scope of designated entities' right to judicial review.

Although individuals and organizations may challenge their designation before the ECJ, the Court will normally not review the merits of the decision (*i.e.* whether the individuals or organizations concerned were effectively engaged in terrorist-related activities), but simply verify whether a relevant national decision existed at all. The Court will not review the Council's reasons for including entities on the list either, save for severe or gross mistakes of law or fact. This leaves designated terrorists with very few not purely procedural grounds to challenge their listing at the European level.²³

Although the Court of First Instance did not mention it explicitly, the rationale of such an awkward finding can be traced back to the two-tier process contemplated by relevant common positions and regulations. It is apparent that the Court of First Instance considered that alleged terrorists should not be allowed to challenge before the Court the reality of their involvement in terrorism or the support of terrorism to a greater extent than they had been allowed to before the Council. The appropriate forum for challenging one's alleged links with terrorism remains the national level, since European designations can only be adopted following a relevant national decision.

The shortcomings of such an approach have already been described above in relation to the right to a hearing before the Council.²⁴ Even where the national procedure concerned does afford judicial review to alleged terrorists, national courts will not always review the merits of their activities. As a result, the national procedure may not provide for such review, or at least not at that stage, while the European Court of Justice will also refrain from exercising merits review on the basis that such review should happen at the domestic level.

²³ Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgement of 12 December 2006, *op. cit.*, at para 159: 'Because the Community Courts may not ... substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power' See also Court of First Instance, *People's Mojahedin Organization of Iran v Council*, Case T-256/07, Judgment of 23 October 2008, at paras 138-139.

²⁴ See above at I.2.

Alleged terrorists should arguably not be faced too often with such a circular, almost Orwellian, argument. Unfortunately, listing practice by the Council shows that the concern is all too real. In many cases the national 'decisions' are but decisions to launch criminal investigations, decisions which may not result in proceedings on the merits for months or years. In the meantime, the assets of the alleged terrorists remain frozen, potentially leading to severe economic consequences for those affected persons, including bankruptcy.

The underlying problem will often be a difference between the emergency character of the European freezing order and the non-urgent character of the national procedures concerned. Most national procedures will ultimately lead to some form of judicial review, but freezing orders produce stringent and immediate effects, which should not be allowed to persist for months or years without judicial review. Unfortunately, the terms of relevant Common Positions and Regulations, as interpreted by the Court, do not allow for such emergency judicial review, and emergency freezing measures are thereby allowed to remain in force for years without any judicial review.

In addition, if the Court decides that the hinge of the decision-making process of a terrorism listing is at the national level, then the logical consequence would be that if a so-called terrorist is successful in a delisting procedure at a national level, then this decision should be taken into consideration by the Council and that only serious considerations which were not within the knowledge of the national authority could justify the Council's review. If the position of the European institutions is that the best system for the fight against terrorism is based on the freedom of national decision-makers to list, then it should also rely on the principle of the freedom of national decision-makers to delist. However, it will be seen that, in practice, the Council barely subscribes to this view to such an extent. In fact, that it can even be seen to be disregarding the Court's findings.²⁵

In conclusion, the Court's approach to the legality and review of terrorist designations under European Law has serious shortcomings. The Court has imposed basic standards of review, but provided little leeway to afford alleged terrorists a more thorough protection than the texts intended to afford them. All in all, despite their numerous shortcomings, the standards of review developed by the Court over the last few years at least created minimal safeguards of fundamental individual rights in the context of the establishment of the European terror list. Section 3 will show that, in practice, such minimal safeguards are often either not implemented or, alternatively, circumvented by the Council. However,

²⁵ See e.g. the removal of the FMOI from the British list of proscribed organizations and its aftermaths at the European level, described below at 3.1.

a word needs first to be said, in Section 2, on the application of such minimal safeguards to individuals and groups designated as 'terrorists' by the United Nations Security Council, for it was unclear until recently whether even the basic standards discussed here were applicable to these entities.

2. The Relationship between the Security Council Designation of 'Terrorists' and EC Law

a. The Problem

The United Nations Security Council started maintaining lists of 'terrorist' individuals and groups in early 2000.²⁶ Unlike national and European lists, they consist exclusively of individuals, organizations and other groups allegedly linked to the Taliban and/or Al-Qaeda. The lists are constantly updated by the Security Council itself and managed by a dedicated 'Sanctions Committee'.²⁷

Relevant Security Council resolutions are not dissimilar to the relevant common positions and regulations issued by the European Council of Ministers. Both provide for harsh measures, freezing the assets of target individuals and groups while providing little, if any, in terms of judicial review and other protections of their right to a fair hearing.²⁸ The Security Council recently set up a *sui generis* (and still quite questionable) review mechanism in order to defuse the outcry of human rights and other activists which followed its original resolutions. Yet current UN resolutions still barely provide any kind of review of the UN listing procedure, while quite effectively freezing the assets of listed individuals and groups the world over.

The already mentioned case of Yassin Abdullah Kadi, which ultimately reached the European Court of Justice, is the most edifying. A prominent Saudi businessman with interests and assets all over Europe, Mr Kadi was included in the amended list issued by the Sanctions Committee of the United Nations Security Council in the autumn of 2001.²⁹ In turn, the European Commission implemented the amended list by amending its own list, established pursuant to EC Regulation No 467/2001, thereby freezing all of Mr Kadi's assets in Europe.³⁰

²⁶ See United Nations Security Council Resolution 1333 (2000), United Nations document S/RES/1333 (2000), at paras 8(c) and 23.

²⁷ *Ibid.* The Sanctions Committee was established by United Nations Security Council Resolution 1267 (1999), United Nations document S/RES/1267 (1999), at para. 6.

²⁸ See United Nations Security Council Resolution 1333 (2000), *op. cit.*, at paras 8(c) and 23 and relevant provisions of relevant common positions and EC regulations mentioned above *inter alia* at note 5.

²⁹ See European Court of Justice, *Kadi v Council and Commission*, Judgement of 3 September 2008, *op. cit.*, at para 30.

³⁰ *Ibid.*, at para 31.

Faced with the freezing of his assets and the effective end of his business ventures around the world, Mr Kadi tried to contact and make his case before the Security Council Sanctions Committee, but was rebuked on the grounds that individuals did not have standing to bring comments before the Committee. He also tried to trigger consular or diplomatic protection from his country of citizenship, Saudi Arabia, but to no avail.

Mr Kadi was therefore left with only one option: indirectly challenging the Security Council's measures before domestic courts. He first turned to the Swiss Federal Criminal Court, successfully at the judicial level, because he was cleared of any wrongdoing and allowed to regain control of his Switzerland-based assets.³¹ And of course he also turned to the European Court of Justice, requesting the annulment of various EC regulations which included and maintained him on the EU list of 'terrorists'.

The Court was thus faced with a thorny if not intractable problem involving both the fundamental human rights of Mr Kadi (and other Security Council-designated 'terrorists') and the unclear rules governing the relationship between international law and the law of the European Union. In short, the question was whether the standards developed by the Court for the establishment and review of the European terror list were effectively trumped by the higher authority of Security Council resolutions. If they were, certain individuals and groups would, quite arbitrarily, be denied the protection of the fundamental principles of due process described above at Section 1. If they were not, the European Council of Ministers would in effect be ordered by the Court to violate Security Council resolutions binding on all Member States, if not on the European Union itself, by virtue of Article 103 of the United Nations Charter.

The Court recently brought a definitive and welcome answer to that question in favour of the procedural rights of alleged 'terrorists'. However, it is worthwhile briefly revisiting the findings of the Court of First Instance in the case of Mr Kadi, which gave rise to intriguing constructions on the relationship between international law and EU law, while offering a glimpse of what the global, fundamental procedural rights of alleged terrorists could be under international law.

³¹ However, we were told that the SECO, *i.e.* the organ in charge of economic policy in Switzerland, maintained the freezing even after the decision of the Swiss Supreme Court, precisely because it considered itself not to be allowed to review a decision of the Security Council.

b. The Position of the Court of First Instance: A *jus cogens* Procedural Right?

The Court of First Instance quickly disposed of the issue of whether the European Union was bound by relevant Security Council resolutions. The Court of First Instance declared that, although the European Union itself is not a party to the United Nations Charter, all Member States are parties to the Charter and bound under articles 24 and 103 of the Charter to implement and give priority to Security Council resolutions. The EU is therefore bound *de facto* by relevant provisions of the Charter and Security Council resolutions, because its Member States could not have transferred to the Union and/or Community more rights than they already had under international law.³²

The immediate conclusion drawn by the Court of First Instance was that the European Council of Ministers does not enjoy the slightest discretion in the implementation of relevant Security Council resolutions.³³ The Council's position is thus entirely different depending on whether it places someone on the list on the basis of a national decision or of a Security Council resolution. In the former case the Council is acting on the basis of the powers and the discretion vested in it by relevant common positions and regulations, while in the latter case the Council is merely implementing the obligation of its Member States under international law to implement Security Council resolutions.

The Court of First Instance further reasoned that, since the Council does not enjoy any discretion as to whether it is fit to designate the individuals and groups concerned as terrorists, there would be no point in compelling it to state the reasons for its decision. In such cases, the reasons for listing are readily apparent: the alleged terrorists have been designated as such by the United Nations Security Council and the Council has to defer to the Security Council's judgment and decisions. The same applies to the alleged terrorists' right to a hearing or to effective judicial protection or indeed to the whole body of European human rights law. The Court of First Instance considered that such principles were not applicable due to the immediate primacy to be accorded to Security Council resolutions.³⁴

³² See Court of First Instance, *Kadi v Council and Commission*, Judgement of 21 September 2005, *op. cit.*, at paras 192 to 200.

³³ *Ibid.*, at paras 213-214.

³⁴ *Ibid.*, at paras 215-225.

However, the Court of First Instance seems to have realized that the outcome of its position was unacceptable. It therefore devised an interesting, though doomed, device to assess the consistency of Security Council listings with the fundamental procedural rights of alleged terrorists. The Court of First Instance found that it could assess the 'legality' of relevant European instruments (and thus *de facto* of Security Council resolutions) on the basis of '*jus cogens*', most notably general principles of human rights qualifying as '*jus cogens*'.³⁵

The argument was imaginative and clever, but risky and was indeed rejected by the European Court of Justice itself.³⁶ It remains interesting though to bear in mind that certain substantial and procedural rights are of such importance that they could perhaps qualify as *jus cogens* in the view of the Court of First Instance, and thus disqualify the designation of 'terrorists' by the Security Council and other authorities. The Court of First Instance also reviewed whether the designation of Mr Kadi and his fellow Security Council-designated 'terrorists' and the freezing of their assets was consistent with, *inter alia*, their right to property,³⁷ their right to judicial review,³⁸ their right to be heard³⁹ and their other fundamental human rights including (tacitly) their right to life.⁴⁰

Unfortunately, *jus cogens* does not easily lend itself to the implementation of individual procedural rights and the Court of First Instance concluded that none of the applicants' '*jus cogens* fundamental rights' had been infringed. Their right to property had been preserved since the freeze was not permanent,⁴¹ their right to judicial review had been preserved by the possibility afforded to them to request diplomatic protection from their home country;⁴² their right to be heard had been preserved by actual hearings and communications;⁴³ and their right to life and other fundamental rights had not been infringed since the Security Council resolutions provided for the de-freezing of funds necessary to cover basic and extraordinary expenses.⁴⁴

³⁵ *Ibid.*, at paras 231. This finding by the Court of First Instance was widely commented upon – see e.g. generally R.A. Wessel, *The UN, the EU and Jus Cogens*, *International Organizations Law Review*, 2006, p. 1-6 and C. Eckes, *Judicial Reviews of Anti-Terrorism Measures – The Yusuf and Kadi Judgements of the Court of First Instance*, *European Law Journal*, 2008, pp. 74-92.

³⁶ See below at Section 2.3.

³⁷ *Ibid.*, at para 248.

³⁸ *Ibid.*, at paras 267-269.

³⁹ *Ibid.*, at paras 262-265.

⁴⁰ *Ibid.*, at paras 239-240.

⁴¹ *Ibid.*, at para 248.

⁴² *Ibid.*, at paras 267-269.

⁴³ *Ibid.*, at paras 262-265.

⁴⁴ *Ibid.*, at paras 239-240.

In effect, the reference to *jus cogens*, as imaginative as it was, thus left Security Council 'terrorists' with no more protection than they would have been afforded without this path being followed by the Court.

c. The Position of the European Court of Justice: The Primacy of Fundamental Human Rights

In a landmark decision of September 2008, the European Court of Justice overturned the ruling of the Court of First Instance in the *Kadi* case. The Court basically affirmed that no international norm could override fundamental human rights as they are understood in the European Union, rights which form part and parcel of the constitutional general principles which the Court is entrusted to protect. The Court thus understood it as its duty to annul any instrument infringing the fundamental rights, including fundamental procedural rights of individuals and groups, even if such an instrument was in reality implementing international obligations of the Member States. In the words of the Court:

'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'.⁴⁵

It is hard to understate the importance of this ruling in the history of the relationship between international law and the law of the European Union. The Court has seldom had the opportunity to affirm the superiority of 'constitutional' principles of the European Union over conflicting international norms.⁴⁶ The effects of the Court's decision will be far-reaching and it may take us some time to fully grasp the importance and meaning of its findings.

The importance of the *Kadi* decision in terms of the relationship between international and European law is, however, beyond the scope of this article. With respect to terror lists, suffice to say that the decision of the European Court of Justice on the fate of Mr Kadi signifies the end of a legal 'black hole' whereby individuals and groups could be arbitrarily dispossessed of their goods and possessions by European institutions. The designation of alleged terrorists by the Security Council can no

⁴⁵See European Court of Justice, *Kadi v Council and Commission*, Judgment of 3 September 2008, *op. cit.*, at para 285.

⁴⁶See however the case cited by the court itself at para 289, namely European Court of Justice, *Germany v Council*, Case C-122/95, Judgment of 10 March 1998.

longer be blindly implemented by the European Union, but must rather satisfy the still very basic requirements of due process established by the Court with respect to designations made pursuant to a national decision under relevant common positions and regulations, as described above at Section 1.

This major advance for human rights resulted in the Court annulling the EU designation of Mr Kadi and other defendants as 'terrorists'.⁴⁷ The *Kadi* decision represents perhaps the greatest leap forward in terms of subjecting the European terror lists to the rule of law. Unfortunately, however admirable the Court's efforts have been in subjecting the designation of 'terrorists' in Europe to basic standards of justice and due process, they suffer from one serious and maybe fatal shortcoming: the Council's blatant, continuous disregard of the Court's rulings on these issues.

3. The Ineffectiveness of Judicial Review of "Terror Listing"

a. How the Council Resists ECJ (and National) Decisions: The Case of the PMOI and Others

In practice, the Court's findings on the procedural rights of designated 'terrorists' resulted in a series of annulments of European listings. It is however startling to see that some of the individuals or organizations concerned are still designated as terrorists, years after the Court ordered that they be removed from the list.

Such individuals include *e.g.* Jose Maria Sison, a well-known Filipino activist who was meant to be removed from the EC list pursuant to an order of the Court of First Instance made on 11 July 2007 on procedural grounds. The latter order was deprived of any effect though, since Mr Sison had been put back on the list on 28 June 2007 on the basis of 'new' evidence.⁴⁸ A challenge of the relevant Council decision is pending before the Court.⁴⁹

⁴⁷ See the operative part of the judgment in European Court of Justice, *Kadi v Council and Commission*, Judgment of 3 September 2008, *op. cit.*

⁴⁸ See Council Common Position 2007/448/CFSP of 28 June 2007 updating Common Position 2001/931/CFSP, on the application of specific measures to combat terrorism and repealing Common Positions 2006/380/CFSP and 2006/1011/CFSP, with its annex, OJ L169, 29/06/2007, p. 69-74 and Council Decision 2007/445/EC of 28 June 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC, OJ L169, 29.6.2007, p. 58-62.

⁴⁹ Court of First Instance, *Sison v Council*, Case T-341/7, Application of 10 September 2007.

But the most edifying case is the case of the PMOI. As mentioned above at Section 1, the organization was included in the European list in 2002 at the request of the UK Government, i.e. one year after the Organization had abandoned its armed struggle against the Islamic Regime of Iran, apparently on the basis of an understanding or secret agreement between the UK Government and Iran.⁵⁰ The inclusion of the PMOI had dire consequences for the organization and its supporters. The Iranian government made extensive use of the label to justify abuses committed against PMOI supporters in the Western media. European governments revoked the political asylum status of, or denied visas to, many Iranian exiles on the charge that they were PMOI supporters. The government of Iraq even used the European 'terror' label as justification for putting pressure PMOI members residing in Iraq and pledging to expel them to Iran because its constitution does not permit the presence of 'terrorists' on Iraqi soil.

Yet, the reasons, official or non-official, for such inclusion were not communicated to the organization. The Council did not explicitly identify the national decision on the basis of which the PMOI had been listed. Indeed the British government and the Council later even appeared to disagree during the course of proceedings before the Court on the question of which national decision formed the basis of the European listing, although it seems that their inclusion on the British list of 'Proscribed Organizations' in 2002 played a key role.⁵¹ The PMOI's listing was maintained and extended several times.⁵² The organization's leaders were never heard, let alone invited to make their case by the Council or the Commission until after the first decisions of the Court of First Instance in 2006.

Faced with such blatant violations of fundamental human rights, the Court of First Instance delivered a first judgment annulling the original decision of the Council to list the PMOI and to freeze its funds, and striking down the subsequent decisions with retroactive effect on 12 December 2005.⁵³ Incidentally, this decision of 12 December 2006 is the one in which the Court set out most of the basic standards discussed above at Section 1.⁵⁴

⁵⁰ See C. Booker, "Iranians Freed from Ban", *The Daily Telegraph*, 12 March 2008.

⁵¹ See Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgement of 12 December 2006, *op. cit.*, at para. 171.

⁵² Relevant Council decisions are too numerous to be listed here. All in all, the PMOI has been included on the list nineteen times since 2002; all nineteen decisions were annulled by the Court, as will be shown below.

⁵³ See Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgement of 12 December 2006, *op. cit.*.

⁵⁴ See above at Section 1.

Unfortunately, the Council largely ignored the Court of First Instance's findings. The PMOI was maintained on the terrorist list throughout 2007 and 2008, on repeated (and still largely unsubstantiated) allegations by the Council that 'new evidence' had arisen.

The Council's position became increasingly difficult to maintain in late 2007 and early 2008, because the PMOI was ordered out of the UK list of 'terrorist groups' by British courts. In June 2006, Members of the British Parliament made an application to the Home Secretary seeking the removal of the PMOI from the UK list. Their application was denied on the grounds that the PMOI was 'concerned in terrorism', as set out in the British Terrorism Act 2000. The Home Secretary acknowledged that the PMOI had ceased its military activity some years earlier, but nevertheless contended that he was 'entitled to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future'.⁵⁵

Absolutely no evidence was cited in support of this 'entitlement'. The Members of Parliament appealed to the British Proscribed Organisations Appeals Commission (POAC). After an extensive review of both open and classified evidence, the submission of affidavits, and oral argument, POAC delivered a 144-page judgment on 30 November 2007.⁵⁶ In that judgment, POAC concluded that the PMOI is not 'concerned in terrorism' and that it has neither the capability nor the intent to engage in terrorist activity. Indeed, so strong were the arguments and evidence for the PMOI, and so weak were those of the Government, that the Commission wrote that to maintain the terrorist designation of the PMOI in light of that evidence and those arguments would be 'perverse'.⁵⁷

On 7 May 2008, the Court of Appeal denied the Government permission to appeal, citing the lack of 'any reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future' and going so far as declaring that:

'It is a matter for comment and for regret that the decision-making process in this case has signally fallen short of the standards which our public law sets and which those affected by public decisions have come to expect'.⁵⁸

⁵⁵ See extracts of the decision cited in *Secretary of State for the Home Department v Lord Alton of Liverpool & Ors* [2008] EWCA Civ 443 (7 May 2008), at para 19.

⁵⁶ Proscribed Organisations Appeal Commission, *Lord Alton & Ors others (in the Matter of the People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department*, Open Determination of 30 November 2007, available at www.siac.tribunals.gov.uk/poac.

⁵⁷ *Ibid*, at para 360.

⁵⁸ See *Secretary of State for the Home Department v Lord Alton of Liverpool & Ors* [2008] EWCA Civ 443 (7 May 2008), at para 57.

As a result, the PMOI was delisted by the British Parliament on 23 June 2008 upon request of the British Government and the Court of First Instance annulled once again their European designation on 23 October 2008, finding that there was no remaining relevant national decision to justify keeping this organization on the European list.⁵⁹

However, in the meantime, the British government had unofficially requested other EU Member States to step in for them and provide any other national decision to justify maintaining the PMOI on the European list. Apparently, the Dutch government was first approached but declined the offer after a review by its own intelligence services which concluded that the PMOI were not involved in terrorism in any ascertainable way. The British government then turned to the French government which agreed to support the continued listing of the PMOI on the European list.

The designation was thus further extended on 15 July 2008 by the Council upon request of the French government, on the basis of the opening of a French judicial inquiry in 2001 and of new charges brought against 'alleged members of the PMOI' – not even against the organization itself – in 2007.⁶⁰ This latest designation (the nineteenth designation of the PMOI to date) was again annulled by the Court of First Instance in its latest judgment dated 4 December 2008.⁶¹

b. What Further Remedies for Designated 'Terrorists'?

The case of the PMOI and, to a lesser extent, of José María Sison, shows a clear pattern in how the Council manages its terror list. Upon receiving an order to remove an individual or group from the terror list, the Council simply acknowledges the order and issues a new decision on the basis of 'new' 'decisions' by national authorities which often only consist of decisions to investigate, or to continue to investigate, made by prosecuting authorities acting on orders of their respective governments.

The ball game between the Court and the Council may very well continue forever. Individuals and groups keep being removed from the list by the Court and the Council keeps re-including them on the list on the basis of 'new' relevant national decisions.

⁵⁹ See Court of First Instance, *People's Mojahedin Organization of Iran v Council*, Judgment of 23 October 2008, *op. cit.*, at paras 167 to 186.

⁶⁰ See Court of First Instance, *People's Mojahedin Organization of Iran v Council*, Case T-284/08, Judgment of 4 December 2008, at para 10.

⁶¹ *Ibid.*

Thus, the predicament of alleged terrorists, and indeed of the entire idea of a European rule of law, looks like a dead-end. Indeed it is unclear what further remedy listed individuals and groups may have. Apart from a change of attitude from the Council (which seems unlikely given the heavily political interests at stake in certain listings), the only available redress would be for the individuals and groups concerned to obtain compensation from European Union institutions.

Some designated 'terrorists' have tried that avenue, attempting to obtain redress by suing the Council for damages at the Court. The Court however rejected such claims in the *Segi* and *Gestoras Pro Amnistia* cases.⁶² It considered that Title VI TEU (on CFSP) did not provide for any action for damages and that the claimants could not seek damages in connection with the Council's position.⁶³ It remains unclear whether individuals or organizations wrongly designated as 'terrorists' could seek damages in connection with relevant EC regulations rather than in connection with relevant CFSP common positions.

4. Conclusion

All in all, the European Court of Justice imposed certain standards of due process and other fundamental rights on Member States and compelled the Council to issue statements of reasons and to hear the observations of alleged terrorists, even where such 'terrorists' have already been designated as such by the United Nations Security Council. The Court's jurisprudence thus resulted in more procedural fairness for the designation of terrorist individuals and organizations and for the maintaining of persons on the terror blacklist in the European Union.

However, the Court has failed to properly enforce fundamental human rights in connection with so-called terror lists, if only because the Council keeps issuing new listings based on 'new' national decisions after its initial listings are annulled by the Court. The attitude of the Council shows a certain disrespect of the rule of law and, certainly, an attitude which could hardly be qualified as "sporting". Yet unfortunately, the Court is not expected to embark any time soon upon any real, substantial review of the designation of 'terrorists', because the Court leaves it largely to the Council's arbitrary discretion to assess the accuracy of alleged links between suspected entities and terrorist activities, save for allegations of gross or severe mistakes in law or fact.

⁶² See European Court of Justice, *Segi and Others v Council*, Case C-355/04P, Judgment of 27 February 2007 and European Court of Justice, *Gestoras Pro Amnistia and Others v Council*, Case C-354/04P, Judgment of 27 February 2007, both at para 62.

⁶³ *Ibid*, both at paras 44 and? 48.

Responsibility for the always difficult task of deciding whether a person is truly involved in terrorism remains with national authorities and within the discretionary power of the Council. In cases where national procedures do not afford alleged 'terrorists' the opportunity to challenge before a Court – at least within a reasonable period of time – the decision relied upon by the Council, such alleged terrorists may be left with their assets frozen and no possibility whatsoever of a judicial review of their situation. The situation is even more disconcerting if the Council only considers the principle of 'freedom of movement' of decisions to list, but not of decisions to *delist*.

Given the Court's refusal to enter this admittedly shifting territory, one can but hope that future European legislation will expressly provide for some sort of judicial review of the Council's reasons for labeling an organization or an individual 'terrorist'. Until then the European Union terrorist list will, most regrettably, remain a fortress of unlawfulness amidst the Union's ever growing '*Communauté de droit*'.

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