

# **Bachelor Thesis**

**Is there a development in the case law of the  
EC Courts in relation to the legal protection of  
individuals on the EU terrorist lists?**

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# Abstract

Terrorism always has been a topic that causes quite a stir. In the aftermath of the terrorist attacks in September 2001, many states realised that the terrorism can only be dealt with in a global, preventive way. Therefore they introduced the so called “terrorist lists” at the UN and the EU level. A terrorist list is a listed where suspected persons are listed and, as a consequence of being listed, have their funds frozen. Many scholars criticised the lists for breaching fundamental Human Rights, such as the right to be heard and the right to have property. Additionally many affected people brought law suits before the European Courts in order to challenge their listing. Building on these suits, the research question of this assignment is whether *Is there a development in the case law of the EC Courts in relation to the legal protection of individuals on the EU terrorist lists?* or not. The research question is addressed through the discussion of several sub-questions which are “*What was the reason to establish the terrorist list at the level of the UN and the EU?*”, “*How are the lists decided on and what are the consequences of being listed?*” and “*How did the EU Courts judge in cases related to the EU terrorist lists?*”.

The case law analysis conducted as the basis for answering the above described question indeed showed that the European Courts during the course of time became more willing to support the claims of the plaintiffs if Human Rights and Fundamental Freedoms have been infringed or if procedural rights have been disrespected. Regarding the terrorist list under UN regulation, the Courts changed from a minimalist approach to a more extensive one. For example, they are now allowing the review of de-listing matters. When it comes to the autonomous list, the starting point was already from a higher level of protection. Nevertheless, also here, the Courts introduced some significant enhancements such as the introduction of a necessity to provide the reasons for inclusion to the affected individual.

# List of Abbreviation

CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
EC	European Community
ECJ	European Court of Justice
EU	European Union
TEU	Treaty of the European Union
UN	United Nations

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# 1. Introduction

*There is no trade-off to be made between human rights and terrorism. Upholding human rights is not at odds with battling terrorism: on the contrary, the moral vision of human rights—the deep respect for the dignity of each person—is among our most powerful weapons against it. ... The promotion and protection of human rights . . . should, therefore, be at the center of anti-terrorism strategies.*

Kofi Annan<sup>1</sup>

## 1.1 Background

The “Detroit-terrorist-attack” from the 26<sup>th</sup> of December 2009 which threatened a peaceful Christmas celebration reminded the world that terrorism is still a serious danger nowadays. Moreover, it strengthened the view that combating terrorism is not an easy task. Terrorism indeed has always existed and states as well as their citizens had to deal with it as a long standing phenomenon since decades. The ETA is a good example of a long-standing terrorist group.

Nevertheless, the nature of terrorism has changed during the last decades. As the examples just mentioned shows, terrorism was more an act of individuals against their nation state or against a national authority of another state located in their nation-state, e.g. violence directed against embassies.

The attacks of New York, Madrid and London, on the contrary, belong to the new kind of terrorism. The reason for this is that these terrorist acts were conducted by groups which came from another culture. These individuals believe that the way of living of the victims is reason enough to combat them.

One feature of this modern terrorism is its unpredictability. States are not longer able to predict to a high percentage the likeliness of a terror act in their territory. Moreover, terrorist groups, such as Al-Qaeda, do not restrict themselves to one particular country but see the ‘enemy’ in a whole culture (in the case of Al-Qaeda, it is the Western Hemisphere).

To sum up, while in earlier days the terrorist were mostly radicals from the same culture and same country of origin as their country of attack, today the danger comes out of a different cultural setting and is more transnational or even global in nature.

The unpredictability and the transnational character of terrorism raise the vulnerability of individual states. That holds true also for the member states of the European Union. As a result of this development states more and more bound together in the “war against terrorism” because none of the states can any longer guarantee security for its citizens by its own.

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<sup>1</sup> Annan, K. (2003). Conference Report, keynote address, Conference on “Fighting Terrorism for Humanity”, International Peace Academy, New York, 22 September 2003

Cooperation is also needed because attacks might cause ripple effects as today's societies are so interdependent on each other<sup>2</sup>.

The states recognised soon that terrorism is not a problem that can be dealt with alone within the borders of the territory. Therefore the United Nations as well as the European Union adopted several action plans and regulations (or resolutions) dealing with the fight against terrorism. However, at both governance levels, the implementation was not that good. This changed radically after the aftermath of 9/11. Impressed by the dimension of the terrorist act many states adopted new regulations in order to strengthen their security and safety policy.

As a consequence of the nation-states' re-thinking of and emphasize on terrorism as well as their awareness that terrorism is global in nature, the states, acting through the United Nations, agreed upon special sanctions for terrorist suspects. A first list of suspects existed already before 9/11, but its scope is limited to associates of the Taliban and Al-Qaeda. The European Union implemented this list as a part of their regulations. Additionally, the EU annexed a terrorist list to the Common Position which implements Security Council Resolution 1373. This list is independent from the first one and the decision-making capacity regarding listing-and de-listing request are decided upon by the European Union itself.

Both lists, however, raise several Human Right concerns and it is questioned whether a listed individual, group or entity has sufficient opportunities to challenge his/her listing. The conflict mirrored in these worries is that Civil and Human Rights are disrespected and even violated for the purpose of strengthening internal security. Many affected individuals try to force the European Union to de-list them in proceedings before one of the EU Courts. These cases are interesting insofar as the Courts can be seen as the guardian of individuals as becomes obvious when examining the establishment of Fundamental Rights by the Courts. The underlying interest is then whether one can make such a claim also in regard of the legal protection of listed individuals. The purpose of this research is therefore to shed light on the question whether the EU Courts judge differently over the years in order to develop a case law which improves the situation of listed people regarding their legal protection.

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<sup>2</sup> Lugna, L. (2006). Institutional Framework of the European Union Counter-Terrorism Policy Setting, Baltic Security & Defence Review Volume, Vol. 8



## 1.2 Research questions and structure of the thesis

As a result, the research question examined and finally answered in this bachelor thesis is *“Is there a development in the case law of the EC Courts in relation to the legal protection of individuals on the EU terrorist lists?”*

In order to be able to answer the research question several sub-questions will be addressed in separate chapters. Chapter two of this thesis provides general background information about the two terrorist lists shedding light on the question *“What was the reason to establish the terrorist list at the level of the UN and the EU?”* Thus, the chapter first gives the reasons for establishing the lists, before their legal basis are determined.

The third chapter leaves the surface and goes a bit further into the material and the problematic of the terrorist lists. Judging possible Human Rights breaches is strongly connected to the procedure of listing and subsequent consequences of being listed. Additionally, also the basis for access to justice may depend significantly on the kind of procedure used. Therefore the second sub-question is *“How are the lists decided on and what are the consequences of being listed?”* Chapter three discusses this sub-question before the actual analysis is conducted in chapter four. Based on the question *“How did the EU Courts judge in cases related to the EU terrorist lists?”* the case law concerned with the lists of the EU Courts is elaborated regarding the respect for legal protection. Here, two distinctive analyses are done: first for the EU/ UN list and then for the autonomous EU list. The aim of this inquiry is to make an inquiry about the reasoning about the EU Courts in order to trace any change in the protection of the individuals who bring their matter before the Court.

The last chapter provides a conclusion about the analysis conducted in the foregoing chapter and in doing so answers the overall research question.

## 1.3 Significance of the study

The research that will be conducted within the framework of this thesis is admirable for manifold reasons. First of all, it combines important outcomes of the single judgments. Hence, one does not have to look up all the different cases. This helps to create a good overview of the existing laws. More important however is that the research examines the Court’s ability to protect and enforce Human Rights within the European Union. This is significant on the basis of some essential changes that came with the Lisbon Treaty, such as the inclusion of the Charter of Fundamental Rights, and the possibility to become a party to the European

Convention of Human Rights. As these developments give the EU more rights but also more duties, it is the responsibility of the EU Courts to ensure the respect of Human Rights. Hence, the significance of the research of this thesis lies in its investigation of the ability and willingness of the Courts to establish a legal framework which secures Human Rights for listed individuals through their case law.

## **1.4 Methodology**

As the aim of the bachelor thesis is to provide insides into the EU Courts judgments in cases brought forward by individuals listed on the EU terrorist list, the data used is case law as well as secondary literature by other scholars about the certain cases. Hence, the analysis is descriptive and qualitative in nature. As a result of this, the appropriate research design is a desk research. The unit of analysis is hereby the EU Courts where the unit of observation is the case law, i.e. the judgements of the Courts.

The judgments of the EU Courts will be reviewed under the point of legal protection. The aim of the analysis is to show whether or not there has been a development regarding the legal protection of listed individuals during the years.

### **1.4.1 Case selection and time span**

The unit of analysis of this thesis are as already mentioned the cases brought before the EU Courts. Due to the fact that there are much more cases concerned with the EU terrorist list than I can deal with, I selected the cases that will be discussed on the basis of the literature. The criterion for selection was the importance of a case that was assigned to it by various scholars in their examinations of legal and Human Right issues related to the EU terrorist list. Next to this the time the judgement was delivered has been used also as a criterion for the selection. I will only consider cases that have been brought before the Court and decided upon between October 2001 and December 2009.

### **1.4.2 Definition of the concept “legal protection“**

The main concept of this thesis is the term “legal protection”. Within the framework of this thesis the term labels to the protection of listed individuals via the EU Courts through the latter’s case law.

Legal protection thereby is given if the suspicious person has access to judicial review, if the Regulation can be reviewed and if any Human- and Fundamental Rights breaches are examined.

In order to analyse the selected case law against the grant of legal protection over the time, I will summarise the case law regarding the following criteria:

a) are Human Rights granted and reviewed

=> Human Rights: right to fair hearing and right to fair trial

right to property and information

presumption of innocence and right to state reason

=> Is the Court able and willing to review the legislation under contestation on the basis of possible Human Rights breaches?

b) access to judicial review

=> Is the Court willing to permit access to judicial review for listed individuals?

## **2. What was the reason to establish the terrorist list at the level of the UN and the EU?**

In this chapter basic information about the two terrorist lists will be presented. First I will review the reasons for setting up such lists before I will focus more on the legal foundations of them. These steps are necessary because one cannot place the lists into a discussable context without such information.

### **2.1 The EU terrorist list under UN regulation**

As already mentioned in the introductory part of this thesis, two different lists exist. The first one is often called EU/UN list or EU terrorist list under UN regulation while the second is known as “autonomous” list.<sup>3</sup> Before turning to the autonomous list, I will deal with the former one. The reason for this is that the autonomous list is build upon the UN list and will be discussed in more detail in a later part of this chapter.

#### **2.1.1 The reasons for establishing a terrorist list at the UN level**

The attacks of September 11 revealed a basic phenomenon: the fight against Al-Qaeda and other similar minded terror groups falls within international criminal prosecution. Hence a war, in the classical sense of the meaning, against an identified enemy is not possible.<sup>4</sup> The reason for this can be found foremost in the organisational structure of these groups. They are network-organisations with many, widely dispersed members and countless passive sympathiser. Therefore any effective measure against terrorism needs a global approach, i.e. a high level of cooperation between the nation-states.<sup>5</sup>

The members of the UN recognised this development fast. Their willingness to pool together their power and to establish common measures against terrorism is also founded in the wish to create a global basis and approach for the local response to terrorism. Support and cooperation are the main motives here.

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<sup>3</sup> Van den Henrik, L. (2007). The Security Council’s Target Sanctions Regime: In need of better protection of Individuals, *Leiden Journal of International law*, Vol. 20, Issue 4, pp 797-807, 798

<sup>4</sup> Cortright, D. (2004). An Action Agenda For Enhancing the United Nations Program on Counter-Terrorism, article presented at Fourth Freedom Forum, Goshen: India, October 2004

<sup>5</sup> Cortright, D. (2005). Kann die UN den Terrorismus effektiv bekämpfen?, *Wissenschaft & Frieden*, No. 4/2005

### 2.1.2 The content of the resolutions

There are several resolutions that stand in connection to the EU/UN list, i.e. not the autonomous EU terrorist list. The most important ones, at least for our purpose, are Resolution 1267 and Resolution 1333. Together these resolutions are often called the Taliban Sanctioning Regime.

#### 2.1.2.1 Resolution 1267

The beginning of the international listing of terror suspects is made in Resolution 1267 from 1999. The resolution, also known as the Taliban Resolution, orders to “*freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban*”.<sup>6</sup>

These sanctions can be seen as a reaction on the on-going support for terrorist groups by the Taliban. The behaviour of the Taliban was seen as serious threat to international order, peace and security by the international community.

Beside the introduction of sanction for the Taliban, a new Committee, namely the Al-Qaeda and Taliban Sanctions Committee, was established. Its task is to safeguard and monitor the implementation of the resolution under consideration.<sup>7</sup>

Moreover, the committee is also responsible for the drawing up of an actual list of “*the persons and entities attached to the Taliban and Al-Qaida whose financial assets should be frozen*”.<sup>8</sup> Inclusion, reviewing, delisting and other features connected to the maintenance of the list is in the hands of the committee which can decide about such guidelines by itself.<sup>9</sup>

#### 2.1.2.2 Resolution 1333 and Resolution 1390

Resolution 1333, adopted in 2000, builds up on the content of Resolution 1267. The Resolution 1333 calls for the freezing of all existing financial assets of Osama bin Laden and

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<sup>6</sup> UN Security Council Resolution 1267 (1999) retrieved 01.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement> p 2

<sup>7</sup> Tappeiner, I. (2005). The Fight Against Terrorism: The lists and the gaps, *Utrecht Law Review*, Vol.1, No.1, pp 87-125, p 100

<sup>8</sup> Tappeiner, I. (2005). The Fight Against Terrorism: The lists and the gaps, *Utrecht Law Review*, Vol.1, No.1, pp 87-125, p 101

<sup>9</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work” retrieved 01.03.2010 from [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf) pp 2-5

associated entities or persons. Here the emphasis lays on Bin Laden's terrorist organisation Al-Qaeda.<sup>10</sup>

In 2002, Resolution 1390 continued the phase of validity of the sanctions imposed to Bin Laden in the aforementioned resolution.

### **2.1.3 What is the legal foundation of the list?**

The research conducted in this assignment will focus mainly on the working of the lists at the European level. Therefore, this section will only introduce the legal background of the reproduction of the above mentioned UN resolution leaving aside their legal base at the UN level. Within the legal base discussion, the emphasis will be how the resolutions are implemented at the EU level in order to become EU /EC law.

The way the resolutions from the UN level are transformed and implemented at the EU level is significant for the answering of the overall research question insofar as the implementation is a determining factor regarding the Courts' ability to be able to make a judgement at all. The reason for this is that, as a consequence of the implementation process, that the Courts do not have any jurisdiction to consider cases dealing with the terrorist lists.

#### **2.1.3.1 The implementation of UN resolutions in the EU**

In this sub-section I will describe the general procedure by which UN resolutions dealing with sanctions for individuals are transferred into the EU's legal framework. Regardless of the fact that the Treaties do not provide any legal base for the implementation of UN measures against individuals, the EU has done so for years.<sup>11</sup>

Although the Lisbon Treaty abolished the pillar structure, it is important to refer to the pillar structure as it determines the implementation procedure. Before the abolishment of the pillar structure, the EU used a cross-pillar action for the conversion of UN resolutions.<sup>12</sup>

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<sup>10</sup> UN Security Council Resolution 1333 (2000) retrieved 01.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement>

<sup>11</sup> Hinarejos, A. (2007). Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists, Human Rights Law Review, Vol. 7, No. 4, pp 793-811, p 803

<sup>12</sup> Hinarejos, A. (2007). Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists, Human Rights Law Review, Vol. 7, No. 4, pp 793-811, p 803

The first action is to adopt a Common Position under the Common Foreign and Security Policy (CFSP) framework, i.e. the former second pillar. The established Common Positions has the purpose to “*implement peace policies at the European intergovernmental level*”.<sup>13</sup> These Common Positions are then implemented by EC regulations.<sup>14</sup> The effect of this second action is that the enactment through EC law gives “*direct applicability to the UN*”<sup>15</sup> resolutions which in turn, as a result of the transformation into EC regulations, have direct effect.<sup>16</sup> Due to the fact that Common Positions are instruments that fall within the scope of the EU, the Council of the European Union is responsible.

#### 2.1.3.2 The reproduction of the Resolutions 1267, 1333 and 1390

Even though the UN requires its member states to implement the resolution under consideration at the national level, the member states of the EU were willing to follow a more supranational way. The reason for this was not only the belief that an EU-wide response would be more effective and efficient, but also the consideration that the UN resolution could be the beginning of a European approach of combating terrorism.<sup>17</sup>

Also the UN resolutions under consideration have been implemented in the way just described in sub-section 2.1.3.1.

Resolution 1267 was first adopted via the Common Position 1999/727/CFSP concerning restrictive measures against the Taliban on the 15<sup>th</sup> of November 1999.<sup>18</sup> In order to become EC law, the Council adopted EC Regulation 337/2000 which is also called the Taliban Regulation.<sup>19</sup>

In 2001, the Council established the Common Position 2001/154/CFSP which aims at implementing Resolution 1333 from the year 2000.<sup>20</sup> The corresponding EC regulation is regulation 467/2001. This regulation includes the list with suspects associated with the Taliban and who are subject to sanctions.<sup>21</sup>

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<sup>13</sup> Simoncini, M. (2009). Risk Regulation Approach to EU Policy against Terrorism in the light of the ECJ/CFI jurisprudence, *German Law Journal*, Vol.10, No.9, pp 1526-1549, p 1533

<sup>14</sup> Tappeiner, I. (2005). The Fight Against Terrorism: The lists and the gaps, *Utrecht Law Review*, Vol.1, No.1, pp 87-125, p 104

<sup>15</sup> Simoncini, M. (2009). Risk Regulation Approach to EU Policy against Terrorism in the light of the ECJ/CFI jurisprudence, *German Law Journal*, Vol.10, No.9, pp 1526-1549, p 1533

<sup>16</sup> Tappeiner, I. (2005). The Fight Against Terrorism: The lists and the gaps, *Utrecht Law Review*, Vol.1, No.1, pp 87-125, p 104

<sup>17</sup> Cameron, I. (2003). European Union Anti-Terrorist Blacklisting, *Human Rights Law Review*, Vol.3, No.2, pp 225-256, p 229

<sup>18</sup> Council Common Position 1999/727/CFSP, *OJ* 1999, L 294/1

<sup>19</sup> Council Regulation (EC) 337/2000, *OJ* 2000, L 43/1

<sup>20</sup> Council Common Position 2001/154/CFSP, *OJ* 2001, L 57/1

<sup>21</sup> Tappeiner, I. (2005) The Fight Against Terrorism: The lists and the gaps, *Utrecht Law Review*, Vol.1, No.1, pp

This regulation was replaced by EC Regulation 881/2002 in 2002 because UN Resolution 1333 was updated and replaced by UN Resolution 1390.<sup>22</sup>

Thus, the UN terrorist list which is taken over by the EU without changes is annexed to EC Regulation 881/2002.

## **2.2 The autonomous EU terrorist list**

The first section of this chapter (2.1) dealt exclusively with the EU terrorist list under UN regulation while the following part will discuss the autonomous list.

It must be noted that even if this terrorist list is called ‘autonomous’ it is still based on a UN resolution. This resolution is then also enacted through an EC regulation as will be elaborated on in a later part of this chapter. The difference between the two lists lays only in a small, but essential detail: while the UN list exists already in the UN resolution, the autonomous list came into being only at the EU level.

### **2.2.1 The reasons for establishing an autonomous list**

The autonomous list was established after the nightmare of September 2001. The member states of the EU acknowledged that the measurements taken by the UN are necessary but also that a more local response is needed. The reason for this is that a global approach is time consuming and not all agreed means for combating terrorism are equally effective for a certain region.<sup>23</sup> A list only for the EU provides the opportunity to list other people than mentioned on the UN list, here one can think about the ETA as an example who acts more local. Beside this, an own list can be reviewed quicker if necessary. Additionally, it enhances the opportunity for EU institutions as well as member states to detect, investigate and prevent terrorism acts which is an aim that can only be reached with a high level of cooperation within the Union.<sup>24</sup> Therefore, as a side effect, the list also helps to improve cross-border cooperation and integration in criminal matters.<sup>25</sup>

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87-125, p 105

<sup>22</sup> Tappeiner, I. (2005). The Fight Against Terrorism: The lists and the gaps, *Utrecht Law Review*, Vol.1, No.1, pp 87-125, p 105

<sup>23</sup> Simoncini, M. (2009). Risk Regulation Approach to EU Policy against Terrorism in the light of the ECJ/CFI jurisprudence, *German Law Journal*, Vol.10, No.9, pp 1526-1549, p 1538

<sup>24</sup> Kirkwood, L.T. (2006). The European Union Counter-Terrorism Strategy: Origins, Problems and Prospects, retrieved 3.3.2010 from <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA462613&Location=U2&doc=GetTRDoc.pdf>, pp 1-99, p 8

<sup>25</sup> Simoncini, M. (2009). Risk Regulation Approach to EU Policy against Terrorism in the light of the ECJ/CFI jurisprudence, *German Law Journal*, Vol.10, No.9, pp 1526-1549, p 1539



Furthermore, independently from the UN, the EU has adopted a multitude of measures in the fight against terrorism, such as the European Arrest Warrant or Europol. Hence, having an own list is a logical consequence and step within these efforts.

Due to all these reasons and consideration did the EU decide to annex an own list at the EC Regulation implementing a new UN Resolution.

### 2.2.2 The content of the resolution

Resolution 1373, as the newly adopted resolution is called, is a far reaching political instrument. While earlier resolution concerned with terrorism, terrorist or terrorist groups focused mainly on the Taliban, and more specific on Al-Qaeda, Resolution 1373 do not contain this restriction any longer. Moreover, now not only individuals from specific countries fall under the UN Security Council Regulations. From the point of time at which the resolution becomes effective, states are forced to “*ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts*” should be subject to the means adopted by the resolution.<sup>26</sup> Beside this, the resolution has also no pre-determined date of expiring. Following the resolution, all member states of the UN are required to freeze financial asset of terrorists and their (possible supporters), to deny the journey through the territory of the state and to collaborate with other states in fields of information sharing and criminal prosecution. Thus, Resolution 1373 stimulates a non-militarily cooperation.<sup>27</sup>

Moreover, does the resolution force states to anticipate the recruitment of terrorists and to actively erode the supplies of weapons to them.<sup>28</sup>

According to Dhanapala, the “*operative paragraph*” 6 is one of the most significant ones because this paragraph “*set up a committee—later to be called the Counter Terrorism Committee (CTC)—which was to ensure and monitor the implementation of Resolution 1373*”.<sup>29</sup>

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<sup>26</sup> UN Security Council Resolution 1373 (2001) retrieved 20.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement> p 2

<sup>27</sup> Luck, E.C. (2004). Tackling Terrorism, in David M. Malone (ed) (2004) ‘*The United Nations Security Council*’, Boulder, Colo., Lynne Rienner Publishers , pp 85-100, p 93

<sup>28</sup> Rostow, N. (2002). Before and After: The Changed UN Response to Terrorism Since September 11, *CORNELL I.L.J.*, Vol. 35, No. 3, pp 475-490, p 482

<sup>29</sup> Dhanapala, J. (2005). The United Nations' Response to 9/11, *Terrorism and Political Violence*, Vol. 17, issue 1, February 2005, pp 17-23, p 18

### 2.2.3 What is the legal foundation of the list?

The procedure used for the implementation of UN resolution 1267, 1333 and 1390 applies also for resolution 1373. The General Affairs Council of the EU initiated an action for this idea. It based its action on several articles, namely on Article 60, 301 and 308 EC and on Articles 11, 15 and 29 of the Treaty of the European Union (TEU).<sup>30</sup> Common Position 2001/931/CFSP on combating terrorism and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism are the outcomes of the first stage of the implementation process.

To be effective also in the EC, the Council adopted Regulation 2580/2001. The terrorist list, however, is not annexed to the end legislation, i.e. the Council Regulation 2580/2001 but to the Common Position.<sup>31</sup>

## 2.3 Sub-conclusion

In this chapter the question “What was the reason to establish the terrorist list at the level of the UN and the EU?” was answered by providing background information about the two distinctive lists regarding their reason for establishment, their content as well as their legal basis. The reasons for establishing a terrorist list at the UN level are clearly founded in the recognition that a global phenomenon as terrorism needs a global answer. Cooperation of course had a lot of influence on the decision-making at the EU level as well. However, another important point is the wish of the EU politicians to have more discretion in the decision who to add and who not to add. Moreover an own list creates the opportunity to strengthen the inner-EU collaboration in issues related to terrorism.

As a result of the slightly different reasoned backgrounds there is an important distinction between the two lists: The UN list is determined by the Al-Qaeda and Taliban Sanctions Committee, while the list annexed to Common Position 2001/931/CFSP is decided on by the EU itself.

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<sup>30</sup>Cameron, I. (2003). European Union Anti-Terrorist Blacklisting, *Human Rights Law Review*, Vol.3, No.2, pp 225-256, p 229

<sup>31</sup>Cameron, I. (2003). European Union Anti-Terrorist Blacklisting, *Human Rights Law Review*, Vol.3, No.2, pp 225-256, p 230

### **3. How are the lists decided on and what are the consequences of being listed?**

While the foregoing chapter functioned as a general introduction to the topic and the background of which the problem examined in this thesis is arises, this chapter will deliver more specific insights into the functioning of the terrorist lists.

The analysis of, first, the EU terrorist listing procedure and, secondly, of the various consequences of being listed for an individual is significant insofar as only such an analysis can be used for the examination of legal protection inherent in the EU list but also in the subsequent case law. Additionally, the listing-and de-listing procedure already indicates the possible level of influence the EU Courts can have on the listening-and-de-listening process. Any discussion of breaches of Human Rights and Fundamental Freedoms before one of the European Courts requires that the Court knows the listing-and-de-listing procedure and that they are able to retrace the process.

#### **3.1 The EU terrorist list under UN regulation**

Also in this chapter, a differentiation between the two lists is conducted. The reason for this is that the EU has no, at least no direct<sup>32</sup>, influence at the decision-making procedure regarding the listing of individuals because the EU is not a party to the UN. The case is of course the opposite when it comes to the autonomous list. Thus, first the listing procedure of the reproduced UN list is described before the focus is turned to the autonomous one.

##### **3.1.1 The listing procedure**

At the beginning of their work the 1267 Committee had no criteria and guidelines which could be used when debating about the inclusion of an individual on the list. Decisions were, and still are, made on grounds of secret intelligence material handed to the Committee by the member states of the UN.<sup>33</sup>

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<sup>32</sup> Of course they can influence the decision-making process at the UN level via their observer status and their member states. The situation is improved since the Lisbon Treaty. Now it is the High Representative for Foreign Affairs which speaks in the name of the EU. However, do to the fact that the EU cannot vote, it still must act through the member states, see also Article 17 and 19 of the Treaty of Lisbon

<sup>33</sup> Cameron, I. (2006). *Terrorist Financing in International Law*, in Ilias Bantekas (general ed.) (2006) *International and European Financial Criminal*, London: LexisNexis Butterworths, pp 65-95, p 80

As a result of the secretiveness of the material, the Committee has hardly ever reviewed the claim that the person is involved in acts of terrorism.<sup>34</sup> Therefore also the suspected persons receive few information why they are listed, if they got informed at all.<sup>35</sup> Moreover, the listing proposals keep the amount of personal information to a minimum.<sup>36</sup>

Critics about the lack of clearness and the weak and irreproducible linking of the person to Al-Qaeda or bin Laden arose soon.

The Security Council took these concerns serious and adopted several resolutions. Beside this the Committee itself defined a catalogue with guidelines for the listing procedure as a response to the critics.

An important improvement is Resolution 1617 from 2005 because this resolution introduced the so called “associated with” standard.<sup>37</sup> This standard demands that there is a strong relationship, so to say an association, between the suspect and the Taliban, Al-Qaeda or bin Laden.<sup>38</sup>

According to the new procedure a person is listed in the following way: Every member state of the UN can submit a proposal for adding a new persons or entity to the list. In order to respect the “associated with” standard, the member states have to “*provide a detailed statement of case in support of the proposed listing that forms the basis or justification for the listing in accordance with the relevant resolutions*”.<sup>39</sup> In the Committee guidelines it is stated that this declaration “*should provide as much detail as possible on the basis(es) for listing...*”.<sup>40</sup>

The statement must made detailed explanation about:

(1) specific findings demonstrating the association or activities alleged;

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<sup>34</sup> Cameron, I. (2006). Terrorist Financing in International Law, in Ilias Bantekas (general ed.) (2006) *International and European Financial Criminal*, London: LexisNexis Butterworths, pp 65-95, p 80

<sup>35</sup> Fromuth, P. (2009). The European Court of Justice: *Kadi* Decision and the Future of UN Counterterrorism Sanctions, *The American Society of International Law*, Vol. 13, Issue 20, electronic publication, retrieved 05.03.2010 from <http://www.asil.org/insights091030.cfm>, p 29

<sup>36</sup> Hudson, A. (2007). Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights, *Berkeley Journal of International Law*, Vol. 25, Issue 2, pp 101-125, p 105

<sup>37</sup> UN Security Council Resolution 1617 (2005), retrieved 18.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/446/60/PDF/N0544660.pdf?OpenElement>, par. 2 and 3

<sup>38</sup> Feinäugle, C.A. (2008). The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?, *German Law Journal*, Vol. 09, No 11, pp 1513-1539, p 1521

<sup>39</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work” retrieved 01.03.2010 from [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 6d

<sup>40</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work” retrieved 01.03.2010 from [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 6d

(2) the nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.)

(3) supporting evidence or documents that can be supplied. States should include details of any connection with a currently listed individual or entity.<sup>41</sup>

New changes come along with Resolution 1904 which was adopted in December 2009. Even though the Committee guidelines have not been yet re-written, it is clear from the content of the resolution that some important improvements have been made in order to enhance the due process. The listing procedure was changed only slightly. The most significant change here is that the Member states can now decide whether to inform the Committee about the fact that there are the (or one of the) designating state(s). Moreover, the members of the Sanctions Committee are now allowed to extend the time frame for making a decision about a listing request if it is not uncontested that the suspect might be wrongfully proposed for listing.<sup>42</sup>

When the requirements for the submission of a proposal are fulfilled, the Committee will decide about it by consensus. If no consensus is reached, it is the task of the Chairman to have bi-or multilateral negotiations with the aim to enhance the possibility of and to alleviate a consensus decision. For the case that these efforts do not lead to an agreement the Committee may lose its responsibility if the Committee members agree to that. In situations like that the decision-making is passed upwards to the Security Council.<sup>43</sup>

After a decision is made the outcome of this is passed to the member states. In authorized cases can ‘the statement of information’ be submitted to the member states as well. At this point the new list is valid.

Then, it is the task of the member states to spread the new list, e.g. to “*banks and other financial institutions, border points, airports, seaports, consulates and intelligence agencies*”<sup>44</sup> while the secretary of the Committee informs the national authorities of the state

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<sup>41</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work” retrieved 01.03.2010 from

[http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 6d

<sup>42</sup> UN Security Council Resolution 1904 (2009), retrieved 25.03.2010 from

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>, paras. 12 and 17

<sup>43</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work” retrieved 01.03.2010 from

[http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 3a

<sup>44</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work” retrieved 01.03.2010 from

[http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 5c

of residence of the listed entity. Coming along with Resolution 1904 it is also a task of the Committee to provide a narrative summary of reasons for the inclusion which has to be made public on the Committee's website.<sup>45</sup>

### 3.1.2 The de-listing procedure

The starting point of the de-listing procedure is a petition to request review of the case, i.e. their inclusion, by a listed person. The affected individual who wants to be excluded from the list is in the 'position of proof'. That is, he/she has to show the authorities that he/she is innocent.<sup>46</sup>

There are two main possibilities for an individual or entity to contest its listing.

The first approach a petitioner can use to pass forward such a request "*through his/her State of residence or nationality*".<sup>47</sup> When a suspected individual, group or entity chooses this way, the state of residence or nationality is obliged to examine the information on which the initial decision, i.e. the decision to list the petitioner, is based. Additionally, it is recommended in the Committee guidelines that the authorities of the petitioner's state get in contact with the "*designating State(s) to seek additional information and to hold consultations on the de-listing request*"<sup>48</sup> whereby also the 'designated state' may ask for information.

If, after reviewing the material, the petitioned state is willing to set in motion a de-listing proceeding it shall "*seek to persuade the designating State(s) to submit jointly or separately a request for de-listing to the Committee*".<sup>49</sup>

However, in cases where a designated state is not in favour of the opening of a proceeding, the other state can hand in an enquiry anyway. Before turning to the second opportunity available for affected individuals, one last confinement has to be mentioned: states are not required by any law or international standard to represent a suspected person or entity.

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<sup>45</sup> UN Security Council Resolution 1904 (2009), retrieved 25.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>, par. 14

<sup>46</sup> Lopez, G.A., Cortright, D., Millar, A., and Gerber-Stellingwerf, L. (2009). *Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists, A report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame*, retrieved 03.03.2010 from [http://www.fourthfreedom.org/pdf/Overdue\\_process.pdf](http://www.fourthfreedom.org/pdf/Overdue_process.pdf), p 5

<sup>47</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work" retrieved 01.03.2010 from [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 7b

<sup>48</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work" retrieved 01.03.2010 from [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 7 h ii.

<sup>49</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work" retrieved 01.03.2010 from [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 7 h iii.

The second possibility for a listed suspect is to submit a request independently so that no national authority is taken responsible for his/her matter.<sup>50</sup> It is important to note that, even if the affected person acts now in his/her own responsibility, she or he is not actively involved in the decision-making process.<sup>51</sup> Since 2009 listed suspects can directly send their application of de-listing to the UN because the UN established the position of an Ombudsman. He is appointed by the Secretary-General and has to be “*an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions*”.<sup>52</sup> The Ombudsman has many responsibilities such assisting the Committee in de-listing negotiations. The most important one however is that he is the contact person for the individual that will bring forward a de-listing request.<sup>53</sup> In the begin of this procedure the Ombudsperson has to inform the applicant that his request have been receipt and if the petition is not in good order to advise the petitioner in its reformulation.<sup>54</sup>

Secondly, the Ombudsman has to pass the petition to the relevant UN bodies and affected member states asking them for more information at the same time. Beside this, the Ombudsman is responsible for drawing up a document with lays down the main arguments for and against de-listing the applicant.<sup>55</sup>

During the decision-making process, the Ombudsperson acts as the connect person between the listed person and the UN bodies. Hence, his task is it to pass information from one actor to the other as well as to facilitate communication between the applicant and the bodies.

The final de-listing decision-making procedure resembles to a large part the one of the listing procedure. First, the involved states, i.e. the designated and the petitioner state, are asked to exchange information and to indicate whether they are in favour or opposed a de-listing. This can be stimulated by the Ombudsman as just described. After three month passed and none of the states mentioned above is acting on the de-listing application, the request is handed to all

<sup>50</sup> Keller, H. and Fischer, A. (2009). The UN Anti-terror Sanctions Regime under Pressure, *Human Rights Law Review*, Vol. 9, Issue 2, pp 257-266, p 258

<sup>51</sup> Lopez, G.A., Cortright, D., Millar, A., and Gerber-Stellingwerf, L. (2009). Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists, *A report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame*, retrieved 03.03.2010 from [http://www.fourthfreedom.org/pdf/Overdue\\_process.pdf](http://www.fourthfreedom.org/pdf/Overdue_process.pdf) , p 5

<sup>52</sup> UN Security Council Resolution 1904 (2009), retrieved 25.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>, par. 20

<sup>53</sup> UN Security Council Resolution 1904 (2009), retrieved 25.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>, par.

<sup>54</sup> UN Security Council Resolution 1904 (2009), retrieved 25.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>, Annex II, par. 1

<sup>55</sup> UN Security Council Resolution 1904 (2009), retrieved 25.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>, Annex II, par. 2

member states which can now initiate a de-listing proceeding. However, if after one month none of the members of the Committee recommended the de-listing, the case is considered as rejected. In a final step the petitioner is informed about the decision by the Ombudsman. In the case that a person is successfully taken off the list the secretary will inform the member states and publish the new consolidated list on the Committee's website.<sup>56</sup>

## 3.2 The autonomous EU terrorist list

I now turn to the independent EU terrorist list. In this section the same question will be addressed as it was the case in relation to the UN list. More specific, I will shed light on the question how the EU defines who is added to and who is excluded from the list annexed to Common Position 2001/931/CFSP and its manifold consolidated versions.<sup>57</sup>

### 3.2.1 The listing procedure

Contrary to the regulations regarding the UN list, the autonomous list's regulations do not provide specific guidelines and standards. Hence, the Common Position and the Regulation are the only means left through which one is able to deduce the listing procedure from.<sup>58</sup>

Article 1 paragraph 4 of Common Position 931 states in Article 1(4) that "*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 respect of which the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigation or prosecution for a terrorist act, an attempt to penetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation (sic) for such deeds*" a decision can and have to be made. In this paragraph it becomes clear that the EU autonomous list has a different scope than the reproduced UN list. While the latter lists only suspects who have a connection to the Taliban or Al-Qaeda, the former includes every suspicious person.

In order to find out how the decisions about the inclusion of people are made at the EU level, one has to look into the provisions of Council Regulation 2580/2001. This regulation defines

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<sup>56</sup> Security Council Committee established pursuant to Resolution 1267 (2008): Guidelines of the Committee for the conduct of its work" retrieved 01.03.2010 from [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), par. 9 a iv.

<sup>57</sup> The newest list is annexed to Common Position 2009/468/CFSP

<sup>58</sup> Hoffmann, J. (2008). Terrorism Blacklisting: putting European Human Rights Guarantees to the Test, *Constellations*, Vol. 14, No. 4, pp 543-560



under Article 2 paragraph 3 that the Council is the responsible institution for the listing of terrorist suspects. Thus, the Council adopts, reviews and changes the list.<sup>59</sup>

Even if the Council is the responsible organ at the EU level, it is the duty of the member states' national authorities to decide to include a suspect on the EU list. The member state which wishes to include somebody must submit information on which the Council then made its decision.<sup>60</sup> In the on-going process started by the initiative of a member state, the matter is passed to the members of the working group on cooperation on terrorism. This working group is part of the Home Affairs Council and consists of state officials responsible for internal security. These officials get in contact with their national authorities, most likely high interior and foreign ministry officials as well as anti-terrorist experts working for the government, the police and the various intelligence services, in order to inform them about the listing request. All listing decisions are made unanimously in the Council.

The listing procedure is completed when a new Common Position has been adopted which includes an updated annex. In a last step, the European Community orders the freezing of the assets of the newly included person or entity.<sup>61</sup>

### 3.2.2 The de-listing procedure

As it is the case with the listing procedure, there are only weak guidelines for the de-listing procedure. At the EU level applications for de-listing can come from any member state, the third state that had started the listing procedure under consideration as well as from all affected persons and entities. These incoming requests are executed by the CP 931 Working Party on the basis of material that endorses the petitioner's claim.<sup>62</sup>

In general individuals have two possibilities to challenge their inclusion. They first can request their de-listing at the national level. In that case, they bring a suit against the national authorities before a national court. Secondly, a suspect can use EU procedures and bring the matter before the Court of First Instance of the European Communities. The legal basis and the procedure that must be followed in the accusation are manifested in Article 230(4) and (5)

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<sup>59</sup> Cameron, I. (2003). European Union Anti-Terrorist Blacklisting, *Human Rights Law Review*, Vol.3, No.2, pp 225-256, p 232

<sup>60</sup> Porretto, G. (2008). The European Union: Counter-Terrorism Sanctions Against Individuals and Human Rights Protection, Transitional Justice Institute Research Paper No. 09-08, in Penelope Mathew and Miriam Gani (eds.) (2008) *Fresh Perspectives on the 'War on Terror'*, Canberra: ANU E Press, pp 235-268, p 243

<sup>61</sup> Common Position 2001/931/CFSP, Article 2

<sup>62</sup> European Union (2008). Factsheet: The EU list of persons, groups and entities subject to specific measures to combat terrorism, retrieved 03.03.2010 from [http://www.consilium.europa.eu/uedocs/cmsUpload/080206\\_combatterrorism\\_EN.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/080206_combatterrorism_EN.pdf), p 3

of the TEC.<sup>63</sup> Article 230 (4) states that “*any natural or legal person may, ..., institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*”. Thus, as soon as an individual or organisation is directly affected it can bring a case before the EU Courts. This requirement is fulfilled in the case of the terrorist list because any listed individual is definitely directly subject to an EU measure.

### 3.3 The consequences of being listed

The conditions and measurements which the member states of the UN have to implement at the national level or, and for our purpose of more significance, at the European level determine which consequences an individual will face after having been listed.

Regarding the list based on the UN Resolution 1267, the consequences are abundantly clear. Any person, organisation or entity that is subject to the UN list established and maintained by the 1267 Sanctions Committee must anticipate that his/her/their financial assets are frozen and that it is prohibit to support terrorist groups financially. This actually means that affected persons do no longer have access to their bank accounts and that they cannot use their property to make money out of it, e.g. when selling a car. Suspects listed can also be subject to travel restriction. Persons on the list added to Common Position 2001/931/CFSP face also sanctions which are connected to police and judicial collaboration in criminal matters.<sup>64</sup>

For example they can be subject to Europol measures and their location can be passed to the secret services of the member states.

An individual listed at the autonomous list however cannot simply derive its sanctions from looking into the appropriate UN Resolution. The EU itself has the say which sanctions it will impose and which sanctions should be accomplished. Here, Regulation 2580/2001 defines what is meant by the term ‘freezing of assets’. The freezing of funds is considered as “*means the prevention of any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession,*

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<sup>63</sup> European Union (2008). Factsheet: The EU list of persons, groups and entities subject to specific measures to combat terrorism, retrieved 03.03.2010 from [http://www.consilium.europa.eu/uedocs/cmsUpload/080206\\_combatterrorism\\_EN.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/080206_combatterrorism_EN.pdf), p 5

<sup>64</sup> European Union (2008). Factsheet: The EU list of persons, groups and entities subject to specific measures to combat terrorism, retrieved 03.03.2010 from [http://www.consilium.europa.eu/uedocs/cmsUpload/080206\\_combatterrorism\\_EN.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/080206_combatterrorism_EN.pdf), p 1

*character, destination or other change that would enable the funds to be used, including portfolio management”.*<sup>65</sup>

The Regulation then calls that

a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen

and that

(b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list.<sup>66</sup>

It must be noted that these provisions are only applicable for groups and individuals that are located outside the EU but which also have supporters within the territory of the EU. Internal terrorism organisations are not subject to these provisions because the leaders thought that it would be wrong to restrict internal capital movements on the EU level. This is the task of the member states.<sup>67</sup>

### **3.4 Sub-conclusion**

In this chapter the procedure, i.e. regulations, for the listing and de-listing were mentioned whereby also the procedure's legal backup was explained shortly. During this examination it became clear that the rules governing the listing or de-listing process are not clearly defined but arrived by practice. This is true more for the UN than for the EU, even though the latter also has no rules how to conduct the decision. Both lists are decided on by bodies, i.e. the Committee and the Council, in non-transparent acts on basis of highly sensitive and contested secret service information. In this procedure lays the main problem of the listing-and de-listing procedure: The listing and de-listing can easily become a “back-door”-issue preventing that the affected individuals have only limited possibilities to fight against their inclusion. The

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<sup>65</sup> Council regulation 2580/2001, Article 1(2)

<sup>66</sup> Council regulation 2580/2001, Article 1(2)

<sup>67</sup> Council regulation 2580/2001, Article 1(2)

reason for this is that the secret services' information are too sensitive to make public so that no grounds for inclusion are passed to the suspects.

Regarding the consequences of being listed provide both lists the same sanctions. The only difference is that suspects of the UN list can also be subject to travel restrictions. The consequences of being listed have profound impacts on an individual's life: not only their reputation is damaged but also their quality of life is constrained massively. Due to these far-reaching consequences the listing-de-listing procedure has to be understandable and easily to change in order to react fast to unjustified inclusions.

## **4. How did the EU Courts judge in cases related to the EU terrorist lists?**

The de-listing procedures just described are often executed before a court. In the case of terrorist list individuals have brought several suits before the European Court of First Instance (hereafter CFI) as well as before the European Court of Justice (hereafter ECJ). Most of them filed a suit against their inclusion at one or both of the EU terrorist lists. In this chapter it is investigated how the EU Courts judged in these cases. A special emphasis of the examination lies on the legal protection of the compliant. Due to the fact that the two lists have different legal bases, as described in chapter 2, and due to the fact that individuals are listed in different procedures, the separation between the reproduced and the autonomous list will be maintained.

### **4.1 Case law related to the EU list under UN regulation**

European Union citizens who are listed on the terrorist list which was established within the framework of the UN Security Council 1267 Resolution can bring an action against their listing before the Community Courts.

As described in chapter three, the first court at the European level which is responsible is the CFI. Over the years of existence of the terror list many individuals have chosen this way in order to challenge their inclusion.

#### **4.1.1 Analysis of case law related to the EU list under UN regulation**

One of the first lawsuits concerned with the reproduced list was the so called “Kadi case”. Mr. Kadi, a Saudi Arabian businessman whose business is established in Sweden but who lives in Saudi Arabia, brought an action against the Council of the European Union and the European Commission before the CFI in 2001.<sup>68</sup> The reason for this was that he was included into the UN Sanctions Committee list of terrorist and so in turn also subject to the list annexed to EC Regulation 881/2002. At the same time another case concerned with the list was brought before the Court. The claimants here were Mr Aden, Mr Ali, Mr Yusuf, and the Al Barakaat

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<sup>68</sup> Case T-315/01 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities

International Foundation.<sup>69</sup> The suspects live in Sweden but hold a Somali passport. Al Barakaat is a company which is involved in money transfers from Sweden to Somalia. However, during the course of time, Mr Aden and Mr Ali were de-listed as a result of Sweden's efforts within the framework of the UN, i.e. their action in the 1267 Committee.

The parties in both cases sought annulment of the respective EC Regulations which reproduces the UN terrorist list at the EU level.<sup>70</sup> They both build their suit on Article 230(4) and claimed that the regulation would violate and breach their Fundamental Rights. In particular, Kadi claims that there is a "*breach of the right to a fair hearing, ..., breach of the right to respect for property and of the principle of proportionality, ..., breach of the right to effective judicial review*"<sup>71</sup>, while Yusuf, using the Fundamental Right argument only as a second one, stresses that they not have "*been heard or given the opportunity to defend themselves, nor had that act been subjected to any judicial review*".<sup>72</sup>

In September 2005, four years after the lawsuits were brought before Court, the CFI judged in both matters.

While not being asked to review the power of the European Community (hereafter EC) to establish economic sanctions on individuals as none of the parties claimed that the EC would not have such power, the CFI nevertheless dealt with this question.

This question, however, is not relevant for the purpose of the examination conducted in this thesis. Hence, it is enough to mention shortly that it held that the EC has the power to impose sanction on individuals because the Articles 60 EC, 301 EC and 308 EC, seen as a joint basis, provide sufficient legal backup.<sup>73</sup>

Afterwards, and much more important for this analysis, the CFI turned to the relation between the UN and the EU, or more clearly between the international legal order and the European one. This question is significant insofar as it addresses the consideration whether the EC (EU) can simply implement international law, i.e. take over international rules in a monistic manner. In these cases, this would lead to the question whether the EC can take over the terrorist list.

The CFI first of all hold that "*the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of*

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<sup>69</sup> Case T-306/01 Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities

<sup>70</sup> Case T-315/01, Kadi, par. 37; Yusuf, par. 42

<sup>71</sup> Case T-315/01, Kadi, par. 59

<sup>72</sup> Case T-306/01, Yusuf, par. 190

<sup>73</sup> Case T-315/01, Kadi, par. 135 see also Tridimas, P. Takis and Gutierrez-Fons, Jose A., (2008). EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?, *Fordham International Law Journal*, Forthcoming; Queen Mary School of Law Legal Studies Research Paper No. 11/2009, retrieved 20.03.2010 from SSRN: <http://ssrn.com/abstract=1271302>, p7

*domestic law or of international treaty law*".<sup>74</sup> This is at least true from an international law perspective. Together with Article 25 of the UN Charter, this above mentioned principle would also apply to measurements adopted by the UN Security Council.<sup>75</sup>

Additionally, the judgement recalls that the EC Treaty permits the member states to give precedence to all obligations which came into being before the existence of the European Community. Therefore, member states are free to give priority to their international agreements.<sup>76</sup>

After having established that UN Resolutions can be seen as prevailing, the CFI declared that this, in turn, would not mean that the Community is bound by the UN Charter as it is not "*a member of the United Nations or an addressee of the resolutions of the SC, or the successor to the rights and obligations of the Member States for the purposes of public international law*".<sup>77</sup>

As a result of these considerations the final finding of the CFI is that does not lie in the scope of the Court's responsibility and, more important, not in its field of power to review the legality and validity of the contested Regulation.

The reason for this is, first of all, that *the resolutions of the SC fall, in principle, outside the ambit of the Court's judicial review and ... the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law*".<sup>78</sup>

Secondly, as Besson (2009) summarises the decision of the Court, any review of the contest EC Regulation regarding the question whether or not it is compatible with the EU Fundamental Rights, "*would imply reviewing the legality of a UN Security Council Regulation, thus not only violating member states' duties under international law, but also the Community's duties under EC law*".<sup>79</sup>

To sum up the part of the judgement which is concerned with the possibility of legal review of the EC Regulation affecting an individual's life, one has to state that the CFI has denied such review because the EC Regulation is an implementing instrument and because the original measure, i.e. the UN Security Council Resolution, does not belong to the framework of the EC.

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<sup>74</sup> Case T-315/01, Kadi, par. 181

<sup>75</sup> Besson, S. (2009). European Legal Pluralism after *Kadi*, *European Constitutional Law Review*, No. 5, pp 237-264, p 251

<sup>76</sup> Besson, S. (2009). European Legal Pluralism after *Kadi*, *European Constitutional Law Review*, No. 5, pp 237-264, p 251

<sup>77</sup> Case T-315/01, Kadi, par. 192

<sup>78</sup> Case T-315/01, Kadi, summary of the judgement par. 5

<sup>79</sup> Besson, S. (2009). European Legal Pluralism after *Kadi*, *European Constitutional Law Review*, No. 5, pp 237-264, p 250

Afterwards the CFI turned to the claims of the applicants that their Human Rights and Fundamental Freedoms have been disrespected. Due to the fact that the Court had established the principle that judicial review is not possible, it only addressed human rights violations in a limited way. Nevertheless, this can be seen as backdoor because, according to the CFI, it “*is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens*”.<sup>80</sup>

The principle *jus cogens*, is a term that is used in international public law. It refers to rules of international law which are higher, i.e. more important than other agreements or measurements agreed upon by the international community. Hence, they bind all actors involved in international law. Moreover, these higher rules cannot be violated which in turn makes derogation impossible.<sup>81</sup>

As already mentioned in the beginning of this chapter, it was said that both applicants plead for the annulment of the EC regulation implementing the UN Security Resolution which established a list of possible terrorist and partisans of the Taliban or Osama Bin Laden. To recall they claimed that their right to a fair hearing, the right to respect for property and the right to effective judicial review have been disregarded.<sup>82</sup>

In its judgement the Court addressed these violations through the application of *jus cogens* because, as mentioned before, only a breach of this principle would make the resolution invalid.

Regarding the respect (or here better disrespect) of the right to have property, the CFI found no violation due to several reasons.

In its reasoning the CFI stated first of all that, even though the Universal Declaration of Human Rights would ensure that nobody loses its property without a certain cause, one could not speak in the situation under examination of an arbitrary act.<sup>83</sup> The reason for this is that the aim of the deprivation of the suspect’s property is a common welfare and the improvement of security.

Secondly, the Court claims that there is the possibility to become subject of exemption to the freezing of funds because the Security Council would not impose inhuman sanction.<sup>84</sup>

Hence, there is no breach of the respect of property because the standard of such a respect as defined by the *jus cogens* principle would be ensured.<sup>85</sup>

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<sup>80</sup> Case T-315/01, Kadi, par. 226

<sup>81</sup> Tzanou, M. (2009). Case - note on Joined Cases C - 402/05 P & C - 415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities, *German Law Journal*, Vol. 10, No. 2, pp 123-154, p 148

<sup>82</sup> see footnote 70 and 71

<sup>83</sup> compare Case T-315/01, Kadi, par. 241

<sup>84</sup> compare Case T-315/01, Kadi, par. 240



Also the argument of a breach of fair hearing was turned down. Here the line of argumentation was split into two parts: the right to be heard before the Council of the EU and the right to be heard by the Sanctions Committee itself. The former would then be concerned with the adoption of the contested regulation and the latter with their inclusion to the list.<sup>86</sup>

In both cases the CFI ruled that there is no breach of the right to fair hearing because, as regards the former case, the principle of fair hearing as executed by the EC does not “*apply in such circumstances, where to hear the person concerned could not in any case lead the institution to review its position*”<sup>87</sup> and because, regarding the latter case, the Committee encourages the UN member states to “*inform, to the extent possible, individuals and entities included in the Committee’s list of the measures imposed on them*”.<sup>88</sup> Yusuf also claimed that his right to judicial review has been disregarded. However, the CFI is of a contrary position stressing the fact that the Court is reviewing the compliance with the *jus cogens* standard. This according to the CFI would already build up an effective judicial review.<sup>89</sup>

On the basis of its extensive observations about the respect for Fundamental Rights, the CFI conclude that there is no reason why the contested EC regulation should be annulled. Yusuf as well as Kadi were not satisfied with this decision and brought an appeal before the European Court of Justice.

In the meantime two other cases about the same issue were brought before the CFI. In the cases Ayadi and Hassan, the CFI mainly repeated its findings of the Kadi and Yusuf judgements.<sup>90</sup> However, it also made progress regarding the level of Human-and Fundamental Rights protection. Mr Ayadi brought forward that the exemptions for the freeze of funds that can be granted by the Sanctions Committee are ineffective. According to Eeckhoudt, the CFI in its answer to this argument agreed that freezing funds is a very incisive sanction which in certain cases could construct an obstacle for a normal life.<sup>91</sup> Nevertheless it also declared that the measurements taken are in the right dimension as they have to be balanced against the aim of the Sanction and that a normal life is possible given the status of being listed.<sup>92</sup>

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<sup>85</sup> compare Case T-315/01, Kadi, par. 242

<sup>86</sup> Tzanou, M. (2009). Case - note on Joined Cases C - 402/05 P & C - 415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities, *German Law Journal*, Vol. 10, No. 2, pp 123-154, p 148

<sup>87</sup> Case T-315/01, Kadi, par. 258

<sup>88</sup> Case T-315/01, Kadi, par. 266

<sup>89</sup> Case T-315/01, Kadi, par. 288 and Yusuf par. 345

<sup>90</sup> Case T-253/02 Ayadi v Council, *supra*. n. 1, paras. 115-117; Case T-49/04 Hassan v Council and Commission, *supra* n.1, paras. 91-93

<sup>91</sup> Eeckhoudt, P. (2007). Community Terrorism Listings, Fundamental Rights, and UN SC Regulations: In Search of the Right Fit, *European Constitutional Law Review*, Vol 3, pp 183-204, p 187

<sup>92</sup> Eeckhoudt, P. (2007). Community Terrorism Listings, Fundamental Rights, and UN SC Regulations: In

What was new in the on-going reasoning of the CFI is that it argued that the member states of the Union have to take over more responsibility. They are responsible for the examination and the approval of any derogation from the Sanctions normally imposed.<sup>93</sup>

Beside this, it became clear in Hassan that the member states are subject to certain obligation if they are acting as an agent in a de-listing request (see chapter three sub-heading 3.1.2 of this thesis) and that this obligations would stem from the Community's fundamental rights as a general principle of EC law.<sup>94</sup>

Therefore one can say that the judgements shifted the need of respecting and acting in compliance with the Community's right standards from the European to the national level.<sup>95</sup>

Like in the Kadi and Yusuf judgements the CFI refused to annul the regulation.

In 2008 the ECJ finally decided about the appeals made by Kadi and Yussuf. The both cases were put together and become the joint cases C-402/05 P and C-415/05 P.<sup>96</sup>

In line with the CFI also the ECJ holds that the Council has the competence to adopt the contested regulations, namely Regulation 881/2001. However, it builds its argumentation on different pillars than the CFI. Even though both Courts used the same Article, in addition to the ones which build the legal foundation of the Regulation, the CFI uses Article 308 EC in order to support the link between Article 301 and economic sanctions while the ECJ considers this article as appropriate because it covers a general goal of the European community. This objective is the general underlying aim (made explicit in Articles 301 and 60) that it should be "*possible to adopt such measures through the efficient use of a Community instrument*".<sup>97</sup>

As regards the ability of the EU Courts to provide judicial review and, as a result of this, the protection of Fundamental-and-Human Rights, the ECJ fundamentally overthrow the CF's judgment. The error of the CFI, according to the ECJ, has been the establishment of immunity for Regulations based on international agreements if the norms of jus cogens are respected.

Concerning the former issue, the ECJ opines that since the EC Regulation under consideration would be build on a valid legal basis, (UN) Resolutions would fall under the scope of review that can be examined by the Community Courts. More detailed, the ECJ's argumentation is that the review of possible Human-and Fundamental Rights breaches "*must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee*

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Search of the Right Fit, *European Constitutional Law Review*, Vol 3, pp 183-204, pp 187-188

<sup>93</sup> Case T-253/02, Ayadi, paras. 118-132

<sup>94</sup> Case T-49/04, Hassan, paras. 114-120

<sup>95</sup> Eeckhoudt, P. (2007). Community Terrorism Listings, Fundamental Rights, and UN SC Regulations: In Search of the Right Fit, *European Constitutional Law Review*, Vol 3, pp 183-204, p 188

<sup>96</sup> joined cases C-402/05 P and C-415/05 P, ECJ, Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities

<sup>97</sup> joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, summary of the judgement, par. 3

*stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement*”<sup>98</sup> and that “*the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights*”.<sup>99</sup>

Moreover, the ECJ did not find a paragraph in the UN Charter which would force the EU (hence, also the EC) to accept and afford primacy to UN or other international agreements.<sup>100</sup>

Nevertheless there is a restriction of scope of this principle: a review of the lawfulness of a contested measure has only an effect for the instantaneous Community act and not for the original agreement. Thus, in the words of the ECJ “*a judgment given by the Community judicature deciding that a Community measure intended to give effect to a resolution of the Security Council is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law*”.<sup>101</sup> In our particular case, this means that only EC Regulation 881/2001 is considered and not the UN Security Council Regulation 1267.

Build on this argumentation the ECJ argued that a legal review is possible not only from a *jus cogens* perspective.<sup>102</sup> Hence, it went on to consider the possible breaches of Human-and Fundamental Rights of the appellants coming along with the implementation of the 1267 UN Security Council Resolution at the European level.

Regarding the rights of defence, to which the ECJ also counts the right to be heard and the right to effective judicial review, the Court found that “*the right to be heard*” as well as “*the right to effective judicial review of those rights were patently not respected*”.<sup>103</sup> The argumentation of the ECJ regarding this breach is that the Community institutions are obliged to inform the listed suspect about his/her inclusion so that they are able to bring an action against their inclusion. The ECJ pointed out that this is not the case because the regulation would not include a procedure for information.<sup>104</sup> This in turn, so the ECJ further, leads also to a breach of the right to legal remedy because the appellants would not have the possibility to defend themselves adequately before the EC Courts.<sup>105</sup>

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<sup>98</sup> joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, par. 316,

<sup>99</sup> joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, par. 285

<sup>100</sup> Johnston, A. (2009). Case and Comment: Frozen in time? The ECJ finally rules on the Kadi appeal, *Cambridge Law Journal*, Vol. 68, issue 1, pp 1-45

<sup>101</sup> joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, par. 288

<sup>102</sup> joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, par. 329

<sup>103</sup> joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, par. 334

<sup>104</sup> Michaelsen, C. (2009). Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities: The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees, *Melbourne Journal of International Law*, 15, 10(1)

<sup>105</sup> Michaelsen, C. (2009). Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities: The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime

Regarding the right to property the ECJ held that also this right was disrespected. Although the ECJ claimed that freezing the funds of a suspect might be justifiable due to the common interest behind the sanction's logic, it stressed that this argument cannot count in the particular case because the applicants do not have sufficient access to the Community institutions in order to defend their point of views. As a result, the regulation was annulled. However, it is important to note that this is only true for the applicants. The effects of the regulation stayed valid for three month in order to give the Council the opportunity to react and to set aside the legal defects. According to the ECJ, this is essential as the inclusion of an individual might be based on justified reasons and so lawful.<sup>106</sup>

After this appeal the CFI had to judge in another case concerned with the UN terrorist list: the case Omar Mohammed Othman v Council and Commission.<sup>107</sup> In its judgement the CFI ruled that several Human Rights, such as the right of defence and the right to be heard have been breached. According to the CFI, the reason for these breaches would lay in the fact that the listed person has not been informed about the information on which the inclusion is based.<sup>108</sup> Furthermore, the Court also contested that the right to an effective legal remedy has been violated and that the principle of effective judicial protection has been disregarded.<sup>109</sup> Besides this, the Court also decided that the institutions must have the possibility to remedy the infringements adopting a new measure to the extent that the applicant is concerned following the correct procedural ways.<sup>110</sup> As a result of the last point, Othman remained on the list because the Council agreed upon his conclusion again not breaches any procedural features. Additionally, several other cases are pending before the CFI and are dealt with in the near future.<sup>111</sup>

#### **4.1.2 Findings regarding the EU list under UN regulation**

The beginning of the establishment of case law concerned with the EU terrorist list which is only reproduced marked the famous Kadi case. In Kadi and Yusuf it become obvious that the CFI considered the request for annulment of the Regulations under consideration as a matter

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with European Due Process Guarantees, *Melbourne Journal of International Law*, 15, 10(1)

<sup>106</sup> Johnston, A. (2009). Case and Comment: Frozen in time? The ECJ finally rules on the Kadi appeal, *Cambridge Law Journal*, Vol. 68, issue 1, pp 1-45

<sup>107</sup> Case T-318/01 Omar Mahammed Othman v Council and Commission

<sup>108</sup> Case T-318/0, Othman, par. 8

<sup>109</sup> Case T-318/0, Othman, par. 91

<sup>110</sup> Case T-318/0, Othman, par. 89

<sup>111</sup> Cases T-135/06 *Al Bashir Al-Faqih*; T-136/06 *Sanabel Relief Agency*; T-137/06 *Ghunia Abdrabbah*; T-138/06 *Taher Nasuf*.

that lays outside the jurisdiction of the Community Courts. The result of this consideration is that a judicial review is not possible. Moreover, when it comes to the protection of Human-and Fundamental Rights, the Court only endorsed a review of claimed breaches in the scope of jus cogens.

This judgement was reproduced for a long period of time. This, however, does not mean that no changes have been made. In the cases Ayadi and Hassan it became clear that the CFI transferred some points of an effective protection of Human-and Fundamental Rights from the European level to the national level.

The situation of individuals listed on the reproduced list was therefore quite difficult.

Their legal protection was narrowed down to a simple examination of abidance of the broadest standards of Human Rights protection available at the international level, i.e. of international law. Only if this very broad standards have been violated the decision to list an individual could be challenged and, during this challenge, overturned.

The legal protection of listed persons, regarding their ability to have the decision reviewed and to sue for the annulment of the Regulation which implements the UN Resolution, is therefore also cut even though the CFI showed that it will not restrict an individual's access to the judiciary. This brings the individuals in an unfavourable situation. The reason for this is that it is hard to prove that the principles of jus cogens have been violated on the basis of the opportunities and information a suspicious person can use.

Nevertheless, the judgment of the cases Ayadi and Hassen opened up a better legal protection. Since the CFI argued that it is the responsibility of the member states of the EU (and so also of the UN) to uphold and secure the Human Rights of the suspected persons (of a specific member state) during the listing as well as de-listing procedure, suspects can more easily track the right contact person and rulings about an issue might also be delivered much faster. Nevertheless, there is still no conform and deep legal protection because the national courts do not have the power to set aside EC regulations. The judgements of the CFI show the connection between the decision-making procedure, the initial actor and the way of implementation and the ability of the court to review the contested act.

First of all, the UN is an independent actor who is also established on a higher level than the EU. Hence, the CFI ruled that it cannot review these higher norms.

Secondly, the listing-de-listing procedure described in chapter three determines the power of the EU Courts. Member states as the deciders are made responsible for the correct listing and de-listing of their citizens as it became clear in Ayadi and Hassan. The EU is not affected and

involved in this process. Consequently, it is not in the jurisdiction of the courts to make judgements about the listing-and-de-listing procedure.

The biggest development regarding the protection of listed suspects came with the judgement of the ECJ in the appeal of Kadi and Yusuf.

The ECJ differed in its opinion from the CFI's position in all important points concerned with legal protection. As this judgement is the new common approach when making inquiries about the EU/UN terrorist list, one has to say that the situation of legal protection of the listed persons has improved distinctively.

First of all, the ECJ argued that the Regulation is fully reviewable to the extent that it concerns the Regulation and the listing decision. Hence, it is not only willing to give precedence to access to Courts and effective judicial review, but actually does it.

Secondly, contrary to the CFI, the ECJ ruled that it would have the jurisdiction to investigate Human Rights breaches beyond the jus cogens framework. Consequently, listed individuals must no longer be satisfied with a limited review and have a much better chance to be successful in their claims.

To sum it up, there has been a development in the case law: the restricted view of the CFI was overturned by the ECJ which in turn applies a much stronger approach of legal protection. The ECJ, contrary to the CFI, set aside the strong influence of the listing procedure and the way the Resolution was transformed at the EU level because it believed that the end measure, namely a EC Regulation, must be an subject to judicial review.

## **4.2 Case law related to the autonomous EU list**

In turn to judgements by the Community Courts where the appellants are persons, groups or entities listed on the autonomous terrorist list. As it is the case for the reproduction Sanctions Committee list, the CFI is the responsible Court at the EU level while the ECJ functions as a Court of Appeal.

### **4.2.1 Analysis of case law related to the autonomous EU list**

The first case was brought before the CFI in 2002. The applicant here was no individual suspected of being a terrorist or a supporter of the same, but an organisation, namely the Organisation des Modjahedines du peuple d'Iran (hereafter OMPI). This organisation was

founded in 1965 with the aim to replace the regime of Shah of Iran by a democratic one. However, it did not use only peaceful means for reaching this aim, but had an armed branch which operates in Iran. Due to this, the authorities suspected the OMPI to be a supporter of terrorist groups and attacks.<sup>112</sup>

Challenging their listing, the Organisation started a lawsuit with the aim of reaching the annulment of Common Position 2001/931/CFSP and the subsequent implementing decisions.<sup>113</sup>

Regarding the argument that the Common Position has to be annulled, the OMPI first of all argued that it would be directly affected by it so that the wish of annulment is admissible.<sup>114</sup> Secondly the entity claimed that the principles of the rule of law as laid down Article 6(2) TEU would also apply to EU acts having their legal base in the second and third pillar (i.e. Common Foreign and Home Affairs and ....Justice and Home Affairs).<sup>115116</sup> Moreover, as a result of this, and due to the fact that judicial determination would be a part of the principle of the rule of law, the OMPI states that the contested measurements fall within the scope of actions whose validity can be reviewed by the Community Courts.<sup>117</sup> Thus, the organisation concludes that *“in the light of, ..., the primacy of Community law as enshrined in Article 47 EU, the Court is competent to declare illegal an act adopted on the basis of Common Foreign and Home Affairs and ...Justice and Home Affairs”*.<sup>118</sup>

The CFI, in its response to this argumentation, stressed that the Courts would not have the power to review the lawfulness of Common Positions because such an action is not mentioned in the treaties.<sup>119</sup> Consequently, the CFI dismissed the request for the annulment of Common Position 2001/931/CFSP.<sup>120</sup>

The situation is however different when it comes to the annulment of the decision under consideration in the suit.

The reasons for annulment of the conditions brought forward by the appellant all relate to Human-and Fundamental Right breaches. The plaintiff mentioned the infringement essential

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<sup>112</sup> Case T-228/02, Organisation des Modjahedines du peuple d'Iran v Council of the European Union, par. 1

<sup>113</sup> Porretto, G. (2009). The European Union: Counter-Terrorism Sanctions Against Individuals and Human Rights Protection, Transitional Justice Institute Research Paper No. 09-08, in Penelope Mathew and Miriam Gani (eds.) (2008) *Fresh Perspectives on the 'War on Terror'*, Canberra: ANU E Press, pp 235-268, 262

<sup>114</sup> Case T-228/02, OMPI, par. 38

<sup>115</sup> Case T-228/02, OMPI, par. 39

<sup>116</sup> Note that the Lisbon treaty abolished the pillar structure. However, for the analysis of the case law at the time the judgement was delivered the different pillars (and so legal basis) had a profound impact and are mentioned here due to this reason, note also that the name of the third pillar was changed into Police and Judicial Co-operation in Criminal Matters

<sup>117</sup> Case T-228/02, OMPI, par. 39

<sup>118</sup> Case T-228/02, OMPI, par. 40

<sup>119</sup> Case T-228/02, OMPI, paras. 48-60

<sup>120</sup> Case T-228/02, OMPI, par. 60

procedural requirements, infringement of the right to effective judicial protection and a breach of the principle of presumption of innocence. Beside this, the OMPI also saw its right to revolt against tyranny violated.<sup>121</sup>

Most important, the Organisation des Modjahedines du peuples d'Iran pled that its right to fair hearing was disrespected because it did not have any possibility to express its views on the accusation that it is a supporter of terrorist acts. And this, according to the line of argument of the suspect, would be in contrast to the Articles.

At the same time, so the OMPI further, not providing the affected individuals with the grounds, legal as well as factual ones, which lead to the inclusion and with information about the responsible authorities is clearly a breach of the obligation to state reason as manifested in EC law by Article 253 TEC.<sup>122</sup>

Before examining the point of view the CFI expressed in its judgement regarding the alleged breaches of Human-and Fundamental Rights it is essential to note that the CFI held that the Fundamental Right standards inherent in the Community's legal order must be applied to the full extent.<sup>123</sup> The reason for this is that the original Security Council Regulation 1373 "*does not specify individually the persons, groups and entities who are to be the subjects of those measures*" and that there are no UN "*rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them*".<sup>124</sup>

The just mentioned reasoning about the application of Community standards builds at the same time the foundation for the reasoning for the necessity of respect of the right to fair hearing. According to the CFI, the Council must respect the right to fair hearing when executing the resolution because "*the adoption of the ensuing measure of freezing funds, involve the exercise of the Community's own powers*".<sup>125</sup> Due to the fact that the Community has discretionary power and independently from any UN action established the list the OMPI is subject to, the resolution would not fall under the principle of primacy granted to UN law.<sup>126</sup> As a result the Court ruled that the Court is able to make an inquiry about the respect

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<sup>121</sup> Case T-228/02, OMPI, par. 61

<sup>122</sup> Porretto, G. (2009). The European Union: Counter-Terrorism Sanctions Against Individuals and Human Rights Protection, Transitional Justice Institute Research Paper No. 09-08, in Penelope Mathew and Miriam Gani (eds.) (2008) '*Fresh Perspectives on the 'War on Terror'*', Canberra: ANU E Press, pp 235-268, p 263

<sup>123</sup> Case T-228/02, OMPI, par. 101

<sup>124</sup> Case T-228/02, OMPI, par. 101 see also Hinarejos, A. (2007). Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists, *Human Rights Law Review*, Vol. 7, No. 4, pp 793-811

<sup>125</sup> Case T-228/02, OMPI, par. 107

<sup>126</sup> Tridimas, P. Takis (2009). Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order,



of Human Rights in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001. Hence, the CFI went on to examine the Human Rights situation.

When it comes to the right to fair hearing and the right to get reason (obligation to state reasons), the Court indeed found that these rights were breached.

Its reasoning for this is that the OMPI has not been informed about the reason against it, even though an Article 1 (4) of the Common Position 2001/931 would require the setting up of a material file and that an effective and efficient defence of the applicant's rights is not possible without the necessary information.<sup>127</sup>

Therefore the CFI established that individuals, groups and entities must be informed about the evidence on which the national authorities proposed their listing and on which the final decision about the listing is made. Such statement of information must be delivered "*either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds*".<sup>128</sup>

The issue of effective judicial protection is discussed against the just established need of fair hearing and the importance of the obligation to state reason. According to the CFI, a legal review of the lawfulness of the decision to freeze assets falls within the jurisdiction of the Community Courts. Thus, so the CFI in its judgement, "*the Community Courts have jurisdiction in actions for annulment brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application or misuse of powers*".<sup>129</sup> In the judgement it became obvious that effective judicial protection is one the highest rights within the Community legal order. Judicial protection can be provided on basis of Article 230 TEC under which an affected individual can 'fight' for the annulment of a legislative measure, e.g. a regulation or framework decision.

Nevertheless the OMPI, in this particular case, could not benefit from this finding because the CFI also claimed that it is not in a position to conduct a review as it regards the lawfulness of the decision under consideration.<sup>130</sup>

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*Queen Mary School of Law Legal Studies Research Paper No. 12/2009*, pp 1-36, retrieved 20.03.2010 from SSRN: <http://ssrn.com/abstract=1365385>, p 23

<sup>127</sup> Tridimas, P. Takis (2009). Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order, *Queen Mary School of Law Legal Studies Research Paper No. 12/2009*, pp 1-36, retrieved 20.03.2010 from SSRN: <http://ssrn.com/abstract=1365385>, p 23

<sup>128</sup> Case T-228/02, OMPI, par. 129

<sup>129</sup> Tridimas, P. Takis (2009). Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order, *Queen Mary School of Law Legal Studies Research Paper No. 12/2009*, pp 1-36, retrieved 20.03.2010 from SSRN: <http://ssrn.com/abstract=1365385>, p 26 ; Case T-228/02, OMPI, par. 153

<sup>130</sup> Case T-228/02, OMPI, par. 172

The reason for this is that the Court did not see itself able to make a statement about the question on which national decision as mentioned “*in Article 1(4) of Common Position 2001/931 the contested decision is based*”.<sup>131</sup>

Beside this the Court finds in this lapse that “*the contested decision does not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant’s right to a fair hearing was not observed*”.<sup>132</sup>

Against this conviction the final decision of the CFI is that the contested decision has to be annulled. However, this only holds for the OMPI, other listed individuals are not concerned by this annulment.<sup>133</sup>

During 2002 and 2009 also other lawsuits were brought before the Community Courts. One of these is the issue raised by the Kurdistan Workers' Party (PKK) and Kurdistan National Congress (KNK).<sup>134</sup>

The PKK was over years engaged in armed conflicts in order to reach self-determination for the Kurds. The KNK is the umbrella organisation to which the PKK belonged for years. The KNK has the aim to support fight between the Turkish government, or better say Turkish authorities, and the PKK within the framework supported such action by financing them.<sup>135</sup>

In this particular case, the CFI, in an order from 2005, dismissed the application for annulment of the decision that adds the PKK to the autonomous terrorist list. I will divide the examination of the reason into two parts: one for the case of the PKK and one for the KNK.

As regards the dismissal of the application of annulment made by the PKK, the CFI has two main arguments. The first one is that the PKK would no longer exist and the second is that the representative of the PKK did not represent the latter one in a good manner.<sup>136</sup> The former argument is left aside in the final decision while the latter one is stressed. The CFI seems to think that the representative of the PKK brought the action. Hence, even though the PKK is directly affected by the decision, the application has to be rejected because the representative is not individually and directly concerned.<sup>137</sup> Regarding the KNK, the application was declared as inadmissible because the KNK would not be individually and directly affected by the contested decision as the KNK “*cannot avail itself of the fact that one of its members is*

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<sup>131</sup> Case T-228/02, OMPI, par. 166

<sup>132</sup> Case T-228/02, OMPI, par. 173

<sup>133</sup> Case T-228/02, OMPI, par. 174

<sup>134</sup> Case T-229/02, Kurdistan Workers' Party (PKK) and Kurdistan National Congress (KNK) v Council of the European Union

<sup>135</sup> Cuyvers, A. (2008). Case 229/05 P, PKK and KNK v Council, Judgement of the Court of Justice of 18 January 2007, [2007] ECR I-439, *Common Market Law Review*, 45, pp1487-1505, 1487 f

<sup>136</sup> Order of the CFI, par. 41

<sup>137</sup> Cuyvers, A. (2008). Case 229/05 P, PKK and KNK v Council, Judgement of the Court of Justice of 18 January 2007, [2007] ECR I-439, *Common Market Law Review*, 45, pp1487-1505, 1489

*entitled to bring an action for annulment of the contested decision, it must be held that it is not individually concerned by that decision”.*<sup>138</sup>

The two applicants were not satisfied with the decision of the CFI and therefore bought an appeal before the ECJ.<sup>139</sup>

Also in this case the judges distinguished between the PKK and the KNK. The ECJ set aside the decision of the CFI that the application for annulment by the PKK is inadmissible discussing the same points as the CFI. But contrary to the CFI, the Court of Appeal found that the PKK could still be considered as a exiting legal person. Its reasoning is as follows:

*“It follows that since, by Decision 2002/460, the Community legislature took the view that the PKK retains an existence sufficient for it to be subject to the restrictive measures laid down by Regulation No 2580/2001, it must be accepted, on grounds of consistency and justice, that that entity continues to have an existence sufficient to contest this measure. The effect of any other conclusion would be that an organisation could be included in the disputed list without being able to bring an action challenging its inclusion.”*<sup>140</sup> Secondly, the ECJ holds that the person acting on behalf of the organisation is able to represent the latter in a good manner.

As a result of these considerations the ECJ set aside the CFI rulings and ruled that the claim of the PKK is admissible and that the CFI should now judge about the matter. The application of the KNK however was rejected. The line of argumentation is in this case that the KNK is indeed (as the CFI stated) not directly and individually affected and that as a result of this also the principle of does not apply.<sup>141</sup>

The newest case dealt with before the CFI is, at least at the time of writing, the case brought forward by Mohamed El Morabit.<sup>142</sup> The plaintiff claimed that his Fundamental Rights would have been violated because listing him again every time a new list was without awaiting the judgement in a suit he initiated before the Gerechtshof te Den Haag would infringe the principle of presumption of innocence. The CFI judged about the matter in September 2009.<sup>143</sup> In this case however, the CFI rejected Morabit’s appeals. The CFI argued that the principle of presumption of innocence would not be violated as it does not preclude the adoption of interim measures. Such measures, so the CFI further, do not constitute penalties

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<sup>138</sup> Order of the CFI, par. 56

<sup>139</sup> Case C-229/05 P, Osman Ocalan, on behalf of the Kurdistan Workers’ Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council of the European Union

<sup>140</sup> Case C-229/05 P, par. 112

<sup>141</sup> Cuyvers, A. (2008). Case 229/05 P, PKK and KNK v Council, Judgement of the Court of Justice of 18 January 2007, [2007] ECR I-439, *Common Market Law Review*, 45, pp1487-1505, 1495

<sup>142</sup> Cases T-37/07 and T-323/07 Mohamed El Morabit v Council

<sup>143</sup> European Commission-Legal Service (2009). Summaries of important judgements: T-37/07 and T-323/07 Mohamed El Morabit v Council, judgment of 2 September 2009, retrieved 27.04.2010 from [http://ec.europa.eu/dgs/legal\\_service/arrets/07t037\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/07t037_en.pdf)

and as a consequence of this not judge about an individual's guiltiness. Additionally, the Court held that the Council do not have to wait until the national Court has delivered its decision because such behaviour would defer the fight against terrorism.<sup>144</sup> Hence, the argumentation of Morabit was rejected and his appeal dismissed.

#### **4.2.2 Findings regarding the autonomous EU terrorist list**

When it comes to the EU independent terrorist list, OMPI represents one of the first lawsuits as well as one of the most fundamental ones.

In OMPI the CFI right from the beginning considered the respect for Human Rights as a part of and secured and accomplished by Community law. Thus, the listed individual, in a lawsuit that aims at the annulment of the contested regulations and decisions, can rely on the fact that the Courts will not deny an inquiry for breach of Human and Fundamental Rights right away. On the contrary, the CFI strengthened the rights of the affected individuals claiming that an effective judicial review of the decisions as well as the EC Regulations falls within the Community Courts' field of competence. This in turn also increased the level of legal protection granted in suits concerned with the validity of listings to the EU autonomous list.

Moreover, regarding the important right of fair hearing and the right to get reason, the CFI created a strong framework of legal protection because it forces the Council to provide a statement of reason to the newly listed suspect in which the grounds for listing are laid down. Additionally, the Council as well as the member states' authorities are obliged to offer the possibility to have a hearing about the issue to the listed groups and entities at several different stages of decision-making. In OMPI, the Court annulled the Regulation and the decision under consideration which was the first annulment within the framework of terrorist list. Hence, one can state that the CFI was willing and able to give full legal protection in form of judicial review of the regulation as it regards errors in the respect for Human and Fundamental Rights as well as the breaches of Community standards of law.

However, there are also rulings in which the CFI restricted the legal protection of suspects on basis of reasons that infringe their rights to access to Court as well as their right to have a fair hearing. Such an infringement of the principle of legal protection was created by the CFI in its judgements about the PKK and the KNK.

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<sup>144</sup> European Commission-Legal Service (2009). Summaries of important judgements: T-37/07 and T-323/07 Mohamed El Morabit v Council, judgment of 2 September 2009, retrieved 27.04.2010 from [http://ec.europa.eu/dgs/legal\\_service/arrets/07t037\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/07t037_en.pdf)

In the convictions it became clear that the Community can only deal with requests when the applicant is directly affected. However, this is difficult to establish in the case of groups or entities because these actors most of the time rely on advocates or other representatives.

Additionally, it held that a listed entity must still exist and operate. This idea makes any action of no longer existing entities inadmissible prohibiting any retroactive lawsuits.

As a result of these concerns, the scope of full legal protection was restricted to a limited scope of plaintiffs for a quite long period of time.

It was only when the PKK and the KNK appealed before the ECJ that a development was started.

The restriction of the scope of affected people was nullified and a new principle became valid. This principle states that representation is possible if it is clear that the representative speaks for the affected person or entity.

The ECJ in its position as a safeguard of EC law therefore contributed to the enhancement of the legal protection of individuals and now also of groups and entities' position faced with their listing and claiming that their Human Rights have been violated.

To conclude, there has been a change in the case law regarding the autonomous list because the ECJ widened the scope of application and because the CFI, right from the start, declared that the right to information, i.e. the obligation to give reason, has to be strengthened.

### **4.3 Comparison of case law regarding the question of legal protection and the question whether there has been a development**

In this sub-section the two judgements of the two lists will be compared with each other in order to make a statement regarding the question which list's case law experienced more and/or more fundamental developments and regarding the question which list offers more legal protection.

Concerning the former, it is obvious that the reproduced terrorist list has been subject to much more and much more fundamental changes than the autonomous one has. In the beginning there has not been any legal protection for listed individuals and entities. Only during the course of time and due to the efforts taken by the affected persons, the state of reasoning of the Community Courts changed. In end, legal protection is given because the Courts are able and willing to review the lawfulness of EC actions which implement the UN Resolution. Nevertheless there are certain limitations. Here the most significant limitation is that the

member states are responsible for the compliance with Human Rights and Fundamental Freedom standards and not the European Community.

The situation is different when it comes to the challenging of decisions of listing connected to the autonomous terrorist list.

First of all, the starting point of examination was already very different: there was no doubt by the CFI that it is within its jurisdiction to judge about the regulation and decisions under contestation.

Secondly, Human Rights considerations have been an integral part of the review (at least to the extent that the plaintiff argues for Human Right breaches) because the case law and the treaties would provide for such an examination.

Regardless of these positive points there is also one slightly more negative one: a suit will only be dealt with if the suspect is directly concerned.

Consequently, both lists have been object to different improvements so that one has to say that both lists now ensure legal protection in a good way even though there are still restrictions. Nevertheless it is important to note that the development in the case law regarding the reproduced list is much deeper and more essential.

## 5. Conclusion

The purpose of this thesis is to show whether there has been a development in the case law of the EU Courts regarding the legal protection of individuals listed on one of the two EU terrorist lists.

In order to answer this research question, the second chapter dealt with the reasons for establishing terrorist lists at an international or European level. The chapter also shed light on the question what the legal foundations are. The answer of this question was that the first EU terrorist list is build into the UN framework while the second is operating within the EU scope of action. Moreover, it became obvious that both lists are going back to UN Security Council Regulations but that the autonomous list is independently annexed to one of these Resolutions. Hence it was also described how the UN Resolutions establishing the terrorist list itself as well as the resolution to which the independent list is annexed are transformed to and implemented at the European level.

Then, the third chapter provided a much deeper view into the workings of the EU terrorist lists analysing the decision-making procedure when it comes to the listing or de-listing of suspects as well as determining what for consequences a listed person or entity has to face. The findings of the former inquiry are that the decision-making procedure is largely based on norms, but that there are no real rules. Secondly, it is very much a secret procedure based on fuzzy secret services and intelligence services' information. Beside this, individuals are only, if at all, informed about their listing after the decision has been made. One of the findings was also that the EU has no opportunity to influence who is listed or de-listed at the UN level other than acting indirectly through their member states.

When it comes to the consequences both lists call out the freezing of the suspect's funds and assets in order to cut the flow of money to terrorist organisations and to prevent the payment of terror attacks. The only difference is that suspicious persons on the reproduced list are also subject to travel bans.

In the fourth part of this thesis, the research really goes down to the cases dealt with by the EU Courts. For both lists five and three respectively cases have been examined. For the EU list under UN regulation the cases were: Kadi, Yusuf, Ayadin, Hassan and the appeal of both Kadi and Yusuf before the ECJ. The cases discussed in order to analyse the situation of the autonomous EU list were: OMPI, PKK and KNK, as well as the appeal of the PKK and the

KNK. These cases have been reviewed regarding the question whether there has been a development regarding the legal protection of the individuals.

The outcome of the case analysis is that there is indeed a development in the case law of the Community Courts for both terrorist lists in relation to the question of legal protection. An important finding was that the development recognisable in the judgements of the UN terrorist list is much more fundamental regarding the level of legal protection than the development in the case law of the other list. The reason for this is that the CFI only granted a minimum of legal protection at the beginning following a monistic approach. That means that the CFI held the view the UN regulations must be seen as higher than EU law and must therefore be applied without changes. In the other examined judgements however the CFI and even more so the ECJ left this approach behind. As a result, the monistic definition was and the UN list became reviewable. Hence, it becomes obvious that, at least in the beginning of the case law, the decision-making procedure at the UN level and the implementation of the resolutions at the EU level had an impact on the way the CFI judged and was willing as well as able to grant legal protection to the affected individuals. Only during the course of time, the Courts realised that such an approach is no longer in coherence with the legal order of the Community and that the legal protection of listed suspects has to be improved.

Even though the changes regarding the reproduced list were bigger this does not mean that the development of the other case law is unimportant. Here, the essential development was that the CFI established that the Council must provide a statement of reason to the newly listed suspect. Due to such a statement individuals can build their claim on a better foundation improving so not only the right to have reason but also the right to proper defence. Also here one can identify the significance of listing-procedure and the fact that now the EU can decide for itself how and who to list. As a result of this the way the Courts can protect the individuals closely depends on the actor, i.e. the UN or the EU, and the specific listing procedure.

To conclude, both case laws clearly show a significant development in relation to the issue of legal protection of listed individuals so that in the end both lists can be subject to a review of breaches of Human Rights and Fundamental Freedoms which in turn improves the situation of affected individuals.

This development is relevant insofar as it shows that the Courts not only have the jurisdiction to consider de-listing requests of affected individuals but that they are actually required to review de-listing issues within the framework of Human Rights. And that not only in regard to the European legal order but also when it comes to international law. Human Rights and



Fundamental Freedoms are therefore, as a part of the internal legal order of the EU, extended to the sensitive issue of security and protection.

Despite these positive changes made by Courts, in reality it is still very hard for individuals to have their de-listing be executed. That is true also in cases where the Courts declared the listing as invalid. The reason for that is that the de-listing procedure of the UN list is still completely in the hands of the Security Council. At the EU-level the situation does not seem to be much better. Although the Council is now required to inform the suspects about their listing and to give proper reasons, it is still quite a fight to be de-listed.

Hence, one has to keep an eye on the up-coming case law related to the terrorist list in order to make a statement about the Courts' ability to further strengthen and enhance the respect Human Rights.

## Reference list

### Books and articles

Annan, K. (2003). Conference Report, keynote address, Conference on “Fighting Terrorism for Humanity”, International Peace Academy, New York, 22 September 2003

Besson, S. (2009). European Legal Pluralism after *Kadi*, *European Constitutional Law Review*, No. 5, pp 237-264

Cameron, I. (2003). European Union Anti-Terrorist Blacklisting, *Human Rights Law Review*, Vol.3, No.2, pp 225-256

Cameron, I. (2006). Terrorist Financing in International Law, in Ilias Bantekas (general ed.) (2006) *International and European Financial Criminal*, London: LexisNexis Butterworths, pp 65-95

Cortright, D. (2004). An Action Agenda For Enhancing the United Nations Program on Counter-Terrorism, article presented at Fourth Freedom Forum, Goshen: India, October 2004

Cortright, D. (2005). Kann die UN den Terrorismus effektiv bekämpfen?, *Wissenschaft & Frieden*, No. 4/2005 retrieved 22.02.2010 from <http://www.uni-kassel.de/fb5/frieden/themen/Terrorismus/un.html>

Cuyvers, A. (2008). Case 229/05 P, PKK and KNK v Council, Judgement of the Court of Justice of 18 January 2007, [2007] ECR I-439, *Common Market Law Review*, 45, pp 1487-1505

Dhanapala, J. (2005). The United Nations' Response to 9/11, *Terrorism and Political Violence*, Vol. 17, issue 1, pp 17-23

Eeckhoudt, P. (2007). Community Terrorism Listings, Fundamental Rights, and UN SC Regulations: In Search of the Right Fit, *European Constitutional Law Review*, Vol 3, pp 183-204

Feinäugle, C.A. (2008). The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?, *German Law Journal*, Vol. 09, No 11, pp 1513-1539

Fromuth, P. (2009). The European Court of Justice: Kadi Decision and the Future of UN Counterterrorism Sanctions, *The American Society of International Law*, Vol. 13, Issue 20, electronic publication, retrieved 05.03.2010 from <http://www.asil.org/insights091030.cfm>

Hinarejos, A. (2007). Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists, *Human Rights Law Review*, Vol. 7, No. 4, pp 793-811

- Hoffmann, J. (2008). Terrorism Blacklisting: putting European Human Rights Guarantees to the Test, *Constellations*, Vol. 14, No. 4, pp 543-560
- Hudson, A. (2007). Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights, *Berkeley Journal of International Law*, Vol. 25, Issue 2, pp 101-125
- Johnston, A. (2009). Case and Comment: Frozen in time? The ECJ finally rules on the Kadi appeal, *Cambridge Law Journal*, Vol. 68, issue 1, pp 1-45
- Keller, H. and Fischer, A. (2009). The UN Anti-terror Sanctions Regime under Pressure, *Human Rights Law Review*, Vol. 9, Issue 2, pp 257-266
- Kirkwood, L.T. (2006). The European Union Counter-Terrorism Strategy: Origins, Problems and Prospects, retrieved 3.3.2010 from <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA462613&Location=U2&doc=GetTRDoc.pdf>, pp 1-99
- Lopez, G.A., Cortright, D., Millar, A., and Gerber-Stellingwerf, L. (2009). Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists, *A report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame*, retrieved 03.03.2010 from [http://www.fourthfreedom.org/pdf/Overdue\\_process.pdf](http://www.fourthfreedom.org/pdf/Overdue_process.pdf)
- Luck, E.C. (2004). Tackling Terrorism, in David M. Malone (ed) (2004) *'The United Nations Security Council'*, Boulder, Colo., Lynne Rienner Publishers, pp 85-100
- Lugna, L. (2006). Institutional Framework of the European Union Counter-Terrorism Policy Setting, *Baltic Security & Defence Review Volume*, Vol. 8
- Michaelson, C. (2009). Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities: The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees, *Melbourne Journal of International Law*, 15, 10(1) <http://www.austlii.edu.au/au/journals/MelbJIL/2009/15.html>
- Porretto, G. (2009). The European Union: Counter-Terrorism Sanctions Against Individuals and Human Rights Protection, Transitional Justice Institute Research Paper No. 09-08, in Penelope Mathew and Miriam Gani (eds.) (2008) *'Fresh Perspectives on the 'War on Terror''*, Canberra: ANU E Press, pp 235-268
- Rostow, N. (2002). Before and After: The Changed UN Response to Terrorism Since September 11, *CORNELL I.L.J.*, Vol. 35, No. 3, pp 475-490
- Simoncini, M. (2009). Risk Regulation Approach to EU Policy against Terrorism in the light of the ECJ/CFI jurisprudence, *German Law Journal*, Vol.10, No.9, pp 1526-1549
- Tappeiner, I. (2005). The Fight Against Terrorism: The lists and the gaps, *Utrecht Law Review*, Vol.1, No.1, pp 87-125
- Tridimas, P. Takis and Gutierrez-Fons, Jose A., (2008). EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?, *Fordham International*

*Law Journal, Forthcoming*; Queen Mary School of Law Legal Studies Research Paper No. 11/2009, retrieved 20.03.2010 from SSRN: <http://ssrn.com/abstract=1271302>

Tridimas, P. Takis (2009). Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order, *Queen Mary School of Law Legal Studies Research Paper No. 12/2009*, pp 1-36, retrieved 20.03.2010 from SSRN: <http://ssrn.com/abstract=1365385>

Tzanou, M. (2009). Case - note on Joined Cases C - 402/05 P & C - 415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities, *German Law Journal*, Vol. 10, No. 2, pp 123-154

Van den Henrik, L. (2007). The Security Council's Target Sanctions Regime: In need of better protection of Individuals, *Leiden Journal of International Law*, Vol. 20, Issue 4, pp 797-807

## **Cases**

Case C-229/05 P. Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council of the European Union

Case T-306/01. Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities

Case T-253/02. Ayadi v Council

Case T-49/04. Hassan v Council and Commission

Case T-229/02. Kurdistan Workers' Party (PKK) and Kurdistan National Congress (KNK) v Council of the European Union

Cases T-37/07 and T-323/07. Mohamed El Morabit v Council

Case T-228/02. Organisation des Modjahedines du peuple d'Iran v Council of the European Union

Case T-318/01. Omar Mahammed Othman v Council and Commission

Case T-315/01. Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities

Joined cases C-402/05 P and C-415/05 P. Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities

## **Official documents**

Common Position 2001/931/CFSP, of 27 December 2001 on the application of specific measures to combat terrorism, *OJ* 2001, L 344/93

Council Common Position 2001/154/CFSP of 26 February 2001 concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP, *OJ* 2001, L 57/1

Council Common Position 1999/727/CFSP of 15 November 1999 concerning restrictive measures against the Taliban, *OJ* 1999, L 294/1

Council Regulation 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *OJ* 2001, L 344/70

Council Regulation (EC) 337/2000 14 February 2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *OJ* 2000, L 43/1

European Commission-Legal Service (2009). Summaries of important judgements: T-37/07 and T-323/07 Mohamed El Morabit v Council, judgment of 2 September 2009, retrieved 27.04.2010 from [http://ec.europa.eu/dgs/legal\\_service/arrets/07t037\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/07t037_en.pdf)

European Union (2008). Factsheet: The EU list of persons, groups and entities subject to specific measures to combat terrorism, retrieved 03.03.2010 from [http://www.consilium.europa.eu/uedocs/cmsUpload/080206\\_combatterrorism\\_EN.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/080206_combatterrorism_EN.pdf)

Security Council Committee established pursuant to Resolution 1267 (2008). Guidelines of the Committee for the conduct of its work” retrieved 01.03.2010 from [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf)

UN Security Council Resolution 1267 (1999) retrieved 01.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement>

UN Security Council Resolution 1333 (2000) retrieved 01.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement>

UN Security Council Resolution 1390 (2002) retrieved 01.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/216/02/PDF/N0221602.pdf?OpenElement>

UN Security Council Resolution 1617 (2005), retrieved 1.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/446/60/PDF/N0544660.pdf?OpenElement>

UN Security Council Resolution 1904 (2009), retrieved 25.03.2010 from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>