Controlling the Most Dangerous Branch

From Afar: Multilayered Counter-Terrorist Policies and the European Judiciary

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1 Introduction

Incrementally but potentially irreversibly, we have become used to exceptional restrictions of fundamental rights intended to contain international terrorism. Many of these restrictions do not originate within the national legal order with its traditional political and legal constraints. Instead, they are at least partially decided outside the traditional state structure – often in multilateral and multilayered decision making processes. It has become a platitude to state that international terrorism cannot be contained in the national context but that it requires an international response. This international response has led to a shift from policy making within states to policy making between states and ultimately to an ‘externalization’ of rulemaking in the area of counter-terrorist policy.

Counter-terrorist sanctions against private individuals (‘individual sanctions’) adopted within the context of the European Union (EU) and within the context of the United Nations (UN) are but one of the policies adopted as part of the international attempt to contain terrorism. However, they are an exceptionally illustrative example of the executive’s power grasp: the dangers of counter-terrorist policies and of externalized rulemaking have mutually reinforced each other in individual sanctions. This makes the power grasp sufficiently extreme to raise concerns of separation of powers and to require reconsidering the outer limits of executive power exercised outside the state and the role of the judiciary in enforcing these limits. The case of Kadi has become notorious in this regard.

The objective of this article is to (re-)consider the role of the judiciary in the face of extreme exercise of externalized executive powers in form of multilayered counter-terrorist policies. It is structured as follows. The following Section Two introduces the UN and the EU individual sanctions systems and argues that the adoption of individual sanctions at both levels is characterized by a deep disregard for fundamental rights. Section Three examines the positions of the EU and national

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3 ‘Multilayered’ policy-making or decision-making refers to processes that take place at the national, European, and international level. ‘Multilayered’ is used instead of multilateral because often the same players are involved at different layers and the different layers do not stand in a clearly hierarchical relationship with each other.
courts when called upon to adjudicate on individual sanctions. Section Four
develops how implementing individual sanctions has become an impossible task for
the EU institutions and the Member States. Section Five discusses concerns regarding
the separation of powers and the changing role and tasks of the judiciary when
adjudicating on individual sanctions. A final section will summarize and draw
conclusions.

2 Executive Power and Multilayered Counter-Terrorist Policies: Who
Decides Whether Someone is a Terrorist?

Two regimes of counter-terrorist sanctions against individuals should be
distinguished. The most important difference between the two is who takes the
decision to list someone as a terrorist suspect. Under the first sanctions regime, it is a
UN Sanctions Committee that lists individuals as terrorist suspects (the 1267
Committee). Under the second sanctions regime, the UN has obliged its member
states to identify and list individuals as terrorists in decentralized (national) lists. For
the EU Member States, the EU has taken over the task of listing terrorist suspects
both under the first (giving effect to UN lists) and under the second (autonomous)
regime.

While the first regime is harshly criticized the second (autonomous) sanctions
regime is met with approval by the EU Courts. Security Council Resolution 1373, one of the reactions to 9/11, requires UN member states to draw up their own lists of
terrorist suspects. Procedural rights can in principle be guaranteed at the domestic
level since the lists of terrorist suspects are drawn up by UN member states – or by
the EU on behalf of its Member States. The actual listing decision is not externalized
to the UN. This paper will predominantly focus on the first sanctions regime and use
the second one as a point of comparison where this appears to have added value.

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5 See for a comprehensive discussion of both sanctions regimes: Christina Eckes, *EU
Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford:

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

7 Prominent examples of those that have been on autonomous lists are the Kurdistan
Workers’ Party (PKK), the People Mujahedin of Iran, and Basque organisations.
The first sanctions regime was set up on 15 October 1999 (two years before 9/11). UN Security Council Resolution 1267\(^8\) was the very starting point of the UN practice of sanctioning private individuals as terrorist suspects.\(^9\) It created a Sanctions Committee (1267 Committee) that directly produces lists of terrorist suspects and obliges the UN member states to give effect to these lists by freezing all financial assets of those listed. Since 1999, a series of resolutions has aimed to improve the procedure while maintaining the original sanctioning regime. First the reference to Afghanistan and therewith all territorial limitation was removed.\(^10\) Besides economic sanctions, travel bans were imposed on all those listed.\(^11\) The exchange of identifying information between the designating state and the 1267 Committee was improved, \textit{inter alia} by introducing a ‘statement of case’.\(^12\) In 2006, the so-called ‘focal point’ was introduced. It is an administrative body, to which individuals can submit their requests to be deleted from the list.\(^13\) Individuals are not guaranteed either a review of their case or a reaction to their views, but with the introduction of the focal point they depend at least no longer on the good will of their state of residence or nationality for submitting delisting requests. Delisting criteria were introduced that the 1267 Committee \textit{may} consider.\(^14\) However, as the word ‘may’ demonstrates these criteria do \textit{not} have to be considered by the 1267 Committee, nor do they give those listed a right to be removed if they are met. Plus, at the UN level there is no court to interpret these criteria and to review what the Committee does with them. In 2008, ‘narrative summaries’ setting out reasons for listing were made available on the UN Security Council’s website and all 1267 listings were reviewed.\(^15\) In 2009, the position of an Ombudsperson was created who is responsible for laying out the reasons supporting a delisting request.\(^16\)

The described piecemeal approach to procedural reform stretched out over more than a decade demonstrates how difficult it is to introduce procedural standards. The fifteen governments which at any one time are represented in the

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\(^{9}\) See in particular: Ibid, para 4 b).


Security Council could not agree to introduce a structural reform or any form of independent review of the Committee’s listing decisions. The Ombudsperson cannot be considered to offer a ‘remedy’ against the listings within the meaning of Article 13 of the ECHR. Even though she should be impartial and independent, she ‘assists’ the 1267 Committee, gathers information and facilitates communication between individuals who request delisting and the Committee. Her office neither allows her to review the 1267 Committee’s actions nor to take decisions with legal effect in the sense of annulling or even challenging listings. Yet, only an independent body that can grant relief can provide a remedy.

Within the EU, the Union has replaced its Member States in giving effect to the UN terrorist lists. Since the entering into force of the Lisbon Treaty the Union has explicit competence to adopt restrictive measures against individuals in Articles 75 and 215 TFEU. The Court of Justice was given jurisdiction to review individual sanctions in Article 275 TFEU. Just as the UN sanctions regime, the European sanctions regimes have been amended several times. On the one hand, the EU has given effect to the amendments at the UN level. On the other hand, steps were taken to improve the procedure in order to comply with the rulings of the European Courts.

The most recent amendment at the EU level was introduced by EU Regulation 1286/2009. It intended to bring the sanctions regime in compliance with the ruling of the Court of Justice in the Kadi I appeal. With this regulation, the Union was said to have shifted from ‘automatic compliance’ to ‘controlled compliance.’ After being notified that someone is listed by the UN Sanctions Committee, the Commission

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17 The current Ombudsperson is Ms. Kimberly Prost who is a former ad litem judge of the International Criminal Tribunal for the former Yugoslavia.
18 Resolution 1904, para 20: [...] to appoint 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, to be Ombudsperson [...].
19 ECtHR, Conka v Belgium (Appl No. 51564/99), judgment of 5 Feb 2002, para 75 [emphasis added]: ‘...The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief. ...’
20 The first instruments were: Common Position 1999/727/CFSP 15 November 1999; EC Regulation 337/2000 of 14 February 2000. See also current Articles 75 and 215 TFEU.
21 Before the Lisbon Treaty, the Union also implemented UN lists but its competence was highly controversial, see: Christina Eckes, ‘Judicial Review of European Anti-Terrorism Measures: The Yusuf and Kadi Judgments of the Court of First Instance’, European Law Journal (2008), 74–92.
23 Court of Justice, Case C-402/05 P and C-415/05 P, Kadi I, [2008] ECR I-6351.
24 ECCHR Report, supra note 4.
continues to immediately freeze that person’s funds. The difference is that now the Commission issues a ‘statement of reasons’, notifies the person of their listing wherever possible, and gives them the opportunity to express their views.25 Article 1(1)(b) of Regulation 1286/2009 defines ‘statement of reasons’ provided by the Commission as the publically releasable portion of the ‘statement of case as provided by the Sanctions Committee’. The statements of case on the UN website,26 however, remain at the level of vague and general allegations. Unsurprisingly, on a public website no evidence is given and the specific connection of the individual person with terrorism is not in any way specified. Hence, sharing the information that is publicly available on the UN website alone will not be enough to ensure due process.27 However, as we will see in the following section, the EU Courts continue to annul sanctioning measures. This is itself a form of due process, notwithstanding that they do so because they cannot review the merits of the case for lack of information.

By way of conclusion, both the UN and the EU sanctions systems have been in place for more than a decade. They have both been reformed repeatedly. Reluctantly, both the UN Security Council and the EU institutions have formally introduced some form of very basic procedural safeguards. However, the sanctions regimes both at the UN and at the EU level continue to infringe most fundamental procedural rights.28 No due process is guaranteed at the UN level, even after the many reforms. At the EU level, substantive judicial review remains impossible; yet, the EU Courts grant relief to those who are listed and sanctioned under the procedurally flawed system.

25 EU Regulation 1286/2009, supra n 16, in particular: recital 6, Article 1(1)(b), Article 1(9). See below Section 3 ‘Catch-22-Position’ for a critical analysis.
26 Check the UN website for an impression of the lack of detail of these statements: http://www.un.org/sc/committees/1267/narrative.shtml.
27 See also below Section 3(2) ‘The European Institutions in a Catch-22-Position’.
28 Agreeing with this conclusion the report of the ECCHR, ‘Blacklisted: Targeted Sanctions’, supra n 4.
3 Multilayered Counter-Terrorist Policies and the Judiciary

3.1 Kadi History

The single most important court case concerning individual sanctions is the case of Kadi. It is so well-known amongst scholars of EU law that it could almost be said that a whole ‘Kadi industry’ has developed. Kadi raises legal issues from fundamental rights protection, over the institutional functioning of the European legal order, to the Union’s relationship with international law. Also, Kadi was the first element in a growing body of case-law of the EU Courts but also of national courts concerning individual sanctions giving effect to UN lists of terrorist suspects.

Within the EU, Mr. Kadi was listed for the first time as a terrorist suspect on 19 October 2001. In the same year, he brought an application for annulment to the General Court, which the General Court dismissed on 21 September 2005. In essence, the General Court found that it did not have full jurisdiction to review the EU regulation because of the prevailing force of the underlying Security Council resolutions. It found itself only competent to review the Council regulation in the light of jus cogens and came to the conclusion that the regulation complied with that standard. Mr. Kadi appealed to the Court of Justice.

On 3 September 2008, the Court of Justice set aside the General Court’s judgment. In summary, the Court of Justice confirmed that the European legal

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30 The former Court of First Instance (CFI) was renamed into General Court by the Treaty of Lisbon. This article will throughout refer to the lower EU Court as General Court.
order is autonomous in that no norm of international law can change the competence division under the European Treaties. In its argument, the Court of Justice stayed firmly within the logic of EU law. However, even though the Court’s ruling in *Kadi I* can be seen ‘an act of civil disobedience to international law’ it ‘is nevertheless loyal to the principles which underpin international law.’34 As was shown above, the implementation of UN lists of terrorist suspects violated the core of the right to judicial protection which is protected not only under EU law but also under numerous international human rights treaties.35 Upholding these rights should therefore be seen as strengthening fundamental principles of international law – even against the will of the Security Council. Furthermore, the Court of Justice introduced a new inviolable core into European constitutional law by drawing absolute redlines for how far Member States can go when they derogate from EU law. Even if their action falls within the scope of Article 351 TFEU, which allows Member States to honour their obligations under prior international agreements,36 they cannot set aside the ‘foundations’ of European law. These foundations which include principles relating to state organisation such as ‘liberty’ and ‘democracy’ and the ‘protection of fundamental rights’ – all expressed in ex-Article 6 TEU.37 They also include the idea of separation of powers, irrespective of the fact that no specific form is prescribed or agreed.38

The Court exercised full judicial review and annulled the Council regulation in so far as it concerned Mr. Kadi for breaching his right to judicial protection, his rights to be heard and his right to respect for property. One of the main points of criticism was that the Court had never been in the position to exercise a meaningful judicial review, because it simply had no access to the relevant information.39 The Court gave the political institutions three months to reform the sanctioning system before the

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35 Articles 6 and 13 ECHR; Articles 2(3) and 14 of the International Covenant of Civil and Political Rights.
36 In this case: Article 351 TFEU.
37 Court of Justice, *Kadi I*, para 303-4
39 Court of Justice, *Kadi I*, supra note 21, para 351.
regulation became void. After certain adaptations such as issuing of a statement of reasons and notifying the applicant, the Council and the Commission relisted Mr. Kadi.\textsuperscript{40} Mr. Kadi responded by bringing a new application for annulment before the General Court (\textit{Kadi II}).

\section*{3.2 ‘See What You Did!’ – The General Court Attacks the Court of Justice over United Nations Counter-Terrorist Sanctions}

The ruling of the General Court in \textit{Kadi II} on 30 September 2010 is the latest in a long series of rulings concerning UN sanctions against terrorist suspects. On 30 September 2010, the General Court gave a ruling whose main theme could be described as: ‘We do what you want – under protest!’ The General Court boldly criticized the Court of Justice, an institution that does not allow dissenting opinions in order to preserve consensus and authority. The General Court opined that once the inherent competence of the Security Council was accepted, judicial ‘review would encroach on the Security Council’s prerogatives’ and that indeed ‘a review of the legality of a [Union] act which merely implements, at [Union] level, a resolution affording no latitude in that respect necessarily amounts to a review, in the light of the rules and principles of the [European] legal order, of the legality of the resolution thereby implemented’.

\textsuperscript{41} This clearly contradicts the Court of Justice’s position that judicial review by the EU Courts extends to the European legal instrument only and not to the underlying UN resolution.\textsuperscript{42} The General Court further concluded that ‘the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law – in this case the law deriving from the Charter of the United Nations’.\textsuperscript{43} The difference in view is obvious. While the Court of Justice treated the European legal order as autonomous and denied any hierarchical relationship between European and international law, the General Court insisted on the hierarchical superiority of the UN Charter (‘UNC’) over the European Treaties. In the end and after making clear that it was \textit{not} bound by the points of law, the General

\textsuperscript{40} Entry 22 in Commission Regulation 36/2011, of 18 January 2011, O.J. 2011 L 14/11.
\textsuperscript{41} General Court, \textit{Kadi II}, para 114 and 116 [adapted to post-Lisbon terminology].
\textsuperscript{42} Court of Justice, \textit{Kadi I}, paras 286 et seq.
\textsuperscript{43} General Court, \textit{Kadi II}, para 119 (emphasis added).
Court applied the principles of the Court of Justice decision in *Kadi I*, reviewed the regulation in the light of European standards of procedural and judicial protection and concluded that it had to annul it.

While both the General Court’s and the Court of Justice’s ruling in *Kadi I* have attracted much scholarly analysis (in particular the General Court’s decision has extensively been criticized), the General Court’s decision in *Kadi II* has not been subject to the same amount of attention. This might not only be the case because the ruling has only been given recently, but also because it does not raise many new points of law. It rather takes a sharper tone on the same legal issues. Yet, it is still worth a moment of thought. Openly contradicting the premise of the Court of Justice’s decision unnecessarily undermines the authority and credibility of the Court of Justice’s reasoning. Furthermore, the General Court added ‘that certain doubts may have been voiced in legal circles’ on whether the Court of Justice’s ruling was consistent with international law and with the EU Treaties and ‘acknowledge[d] that those criticisms are not entirely without foundation.’ First of all, ‘certain doubts’ by ‘legal circles’ appear a rather vague source of information. Secondly, even though some distinguished scholars have criticized the Court of Justice many others have applauded the appeal decision. Be this as it may, *Kadi II* raised questions as to the role and influence of the individual judge in shaping the legal discourse and the actual outcome of the case. The judge acting as the juge rapporteur was the same both in the CFI’s *Kadi I* ruling and in the General Court’s *Kadi II* ruling. In between of course, the Court of Justice had set aside the *Kadi I* ruling and fundamentally changed the line of approach. In *Kadi II*, the General Court went far in criticizing the Court of Justice. Indeed to my knowledge, the acridity of the General Court’s criticism is unprecedented. This may, on the one hand, be due to deep disagreement on substance; on the other hand, it seems that only a toxic cocktail of

44 Ibid, para 112.
45 See above notes 32 and 33.
46 General Court, *Kadi II*, para 115.
47 Ibid, para 121.
hurt personal pride, bitterness in the face of the lower court’s powerless position, and frustration with the impossibility of compliance with the UN resolution could have resulted in such scathing criticism. Not so much in outcome but certainly in the tone of the judgment, *Kadi II* demonstrates the relevance of the individual judge. This should be kept in mind for the further discussion on the role and tasks of the judiciary in a multilayered governance setting.

After the *Kadi I* appeal decision, but before *Kadi II*, the General Court ruled on two other cases concerning individual sanctions. The difference between *Kadi II* and these two cases is that in *Kadi II* the applicant challenged sanctions that were adopted under the reformed listing procedure. The Council had already attempted to remedy the procedural deficiencies that had led the Court of Justice to annul Mr. Kadi’s listing. Hence, while the previous two cases concerned the listing procedure that the Court of Justice had declared to be insufficient, *Kadi II* was the first ruling on individual sanctions adopted under the reformed procedure. It is so far the only case discussing the impossibility explained in the next section.

From a legal point, the most important development in *Kadi II* was that the General Court developed the applicable standard of review. It ruled that the review standard is the same as for the second autonomous sanctions regime. This means that even though the political institutions enjoy broad discretion concerning the assessment of the appropriateness of the listings, it is for the EU Courts to ‘establish whether the evidence is factually accurate, reliable and consistent’, as well as ‘whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.’

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51 Ibid, paras 123 et seq. The applicable standard of review in particular was challenged by the Commission: appeal brought on 13 December 2010 by the European Commission against the judgment of the General Court (Seventh Chamber) delivered on 30 September 2010 in Case T-85/09: *Kadi v Commission*: Court of Justice, Case C-584/10 P, *Commission v Kadi*.

52 Ibid, para 139.

53 Ibid, para 141.

54 Ibid, para 142.
Controlling the Most Dangerous Branch From Afar

conceivable on whether and what evidence is communicated to parties, it is not possible to rely on evidence that is not even communicated to the EU Courts.

In Kadi II, the General Court followed the Court of Justice unwillingly. It applied and defined the required ‘full review’, but did so in a way and manner that gave the impression that the General Court actually wanted to demonstrate that the Court of Justice’s ruling had not been thought through to the end, i.e. that it let to undesirable outcomes. The final word on individual sanctions based on UN lists has not yet been spoken at the European level. The General Court stated in Kadi II that within the ‘hierarchical judicial structure’ it falls to the Court of Justice to ‘reverse precedence’, to acknowledge the serious difficulties that the institutions encounter and to lower the judicial review to a level that would allow the implementation of the UN Security Council resolution. Appeals by the Commission, the Council and the UK are pending against the Kadi II decision of the General Court. Yet, the General Court may have been guilty of wishful thinking by hoping that the Court will offer a Keck-like revision of its own approach to individual sanctions giving effect to UN lists of terrorist suspects.

3.3 Other Relevant Case Law

3.3.1 On Individual Sanctions

Besides in the appeal in Kadi I, the Court of Justice has only dealt with a very limited number of cases concerning individual sanctions: two appeals before and so far two preliminary rulings since its Kadi I decision, plus a case which more indirectly concerned counter-terrorist listings. A case worth mentioning in the present was the Segi appeal. It concerned the special situation that the applicant

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55 Ibid, para 147.
56 Ibid, para 145.
57 GC, Kadi I, paras 122-123.
58 Court of Justice, Case C-584/10 P, Commission v Kadi. See also the Council’s appeal against the same judgment: Court of Justice, Case C-593/10 P, Council v Kadi and the UK’s appeal against the same judgment: Court of Justice, Case C-595/10 P, UK v Kadi.
59 In C-267/91 and C-268/91, Keck and Mithouard [1993] ECR I-6097, the ECJ famously limited its broad approach to measures having equivalent effect. It explicitly noted: ‘…the Court considers it necessary to re-examine and clarify its case-law on this matter.’ (para 13) and ‘By contrast, contrary to what has previously been decided,…’ (para 16).
60 Case C-355/04 P, Segi v Council [2007] ECR I-1657. The only other pre-Kadi case (2007) is the case of PKK, which is of no further relevance for the present discussion [Case C-229/05 P, PKK and KNK v Council [2007] ECR I-439].
was listed in Common Position 2001/931/CFSP only and not in the implementing Community regulation (autonomous sanctions).  

Common Position 2001/931/CFSP was adopted on the basis of a joint legal basis of ex-Articles 15 (Common Foreign and Security Policy - CFSP) and 34 (old third pillar; now Area of Freedom, Security and Justice - AFSJ) TEU. Hence, it is a cross-pillar instrument. The General Court considered the relevant provisions of the Common Position to belong to the third pillar and found its jurisdiction limited under the third pillar. It concluded that therefore it could not rule on the applicants’ action. The Court of Justice did not accept direct jurisdiction either but relied primarily on review by the national courts of ‘any decision or other national measure relating to the drawing up of an act of the European Union or to its application’ supplemented by the possibility of seeking a preliminary ruling. Indeed, it interpreted this possibility of a preliminary ruling very broadly, stating that ‘[t]he right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties.’ Hence, Segi opened an avenue for preliminary rulings concerning common positions that was not codified under the European Treaties before Lisbon. This continues to be relevant so long as the European institutions do not adopt post-Lisbon CFSP decisions, which is at present the situation for both sanctions giving effect to UN lists and autonomous sanctions.

Since Kadi I the Court has been asked to rule on two preliminary references. This demonstrates that (at least some) national courts are open to ask for interpretation of sanctions instruments - including ex officio. Others could choose the same route to question the validity of the European sanctions instruments. Indeed, since it appears impossible to give effect to UN lists of terrorist suspects without infringing European fundamental rights standards a long line of preliminary references might be waiting just around the corner. Furthermore, this could go

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61 Ex-Article 301 EC.
63 Ibid, para 56.
64 Para 53.
65 Compare the old Article 35(1) TEU, not enable national courts to refer a question to the Court for a preliminary ruling on a common position.
66 Court of Justice, Case C-550/09, E and F (DHKP-C case) [2010] ECR I-0000. Court of Justice, Case C-340/08, M (FC) and Others v Her Majesty’s Treasury [2010] ECR I-0000.
further than actions to annul individual listings. It could result in a challenge of the whole European sanctions system.

Besides the Court of Justice, several national courts have also been confronted with individual sanctions. This adds a further layer to the discussion of the role and tasks of the judiciary in Section 5. It is also relevant for the discussion of the catch-22 of Member States in the following section.

In 2007 (the appeal in Kadi I was pending), the Swiss Supreme Court sharply criticized the UN sanctions regime but eventually it took the same line as the CFI and found Switzerland obliged to give effect to the UN Security Council resolutions (Nada).\textsuperscript{67} On 4 June 2009 (after the Court of Justice’s ruling in Kadi I), the Federal Court of Canada delivered a decision in the case of Abdelrazik,\textsuperscript{68} concerning a Sudanese-Canadian who was refused entry into Canada because he was placed on the 1267 UN terrorist list. Justice Zinn conceded that Mr Abdelrazik’s rights under the Canadian Charter were breached. He criticized the UN sanctions regime with his much cited comment that: ‘[o]ne cannot prove that fairies and goblins do not exist any more than Mr. Abdelrazik or any other person can prove that they are not an al-Qaida associate.’\textsuperscript{69}

Finally on 10 January 2010, the UK Supreme Court directly gave a ruling on national measures giving effect to the 1267 regime.\textsuperscript{70} In the case of Ahmed, the UK Supreme Court did not focus on the fundamental rights implications but on the separation of powers and more specifically on parliamentary sovereignty. This makes this case particularly interesting for the discussion of multilateral institutions, since decision making in multilateral institutions is dominated by the executive. The UK Supreme Court did not focus on whether individual sanctions could be adopted within the UK legal order at all but how and more importantly by whom this could be the case. It came to the conclusion that the legislator (not the executive) is free to adopt individual sanctions as long as it explicitly confirms the necessary derogation from usual fundamental rights standards.\textsuperscript{71} The UK Supreme Court briefly

\begin{itemize}
\item \textsuperscript{67} Swiss Supreme Court, \textit{Youssef Mustapha Nada v Staatssekretariat für Wirtschaft} [2007] 1A.45/2007.
\item \textsuperscript{68} Federal Court of Canada, \textit{Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada} [2009] FC 580.
\item \textsuperscript{69} Ibid, paras 51-53.
\item \textsuperscript{70} UK Supreme Court, \textit{Ahmed, supra} n 3.
\item \textsuperscript{71} Admittedly this is an understanding of fundamental rights that is quite unique to the UK: see A.V. Dicey, \textit{Introduction to the Study of the Law of the Constitution} 3 (Macmillan,
considered the Court of Justice’s ruling in *Kadi I* and declared it not relevant because the Union was not bound by obligations while the UK is. The existing and binding EU law on the exact same matter was simply ignored by the UK Supreme Court.

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

### 3.3.2 On the Status of UN Security Council Resolutions

When ruling on individual sanctions, courts have taken inspiration from case law on the status and legal effects of Security Council resolutions more broadly. The UK Supreme Court for instance referred in *Ahmed* repeatedly to the House of Lords’ decision in the case of *al Jedda*, in which obligations under the UN Charter were given priority over the European Convention.72 *Al Jedda* concerned the UK’s responsibility under the ECHR for the exercise of powers delegated by the UN. In the UK, the Human Rights Act 1998 incorporates most Convention rights into domestic law, with the effect that these become directly enforceable by domestic courts. The scope of rights under the Human Rights Act is interpreted as depending on the scope of the Convention rights that it mirrors.73 In other words, if a Security Council resolution displaced the appellant’s rights under the European Convention in the Strasbourg Court, he would also automatically lose his rights under the UK Human Rights Act.

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72 House of Lords, R (Al-Jedda) v Secretary of State for Defence (Justice and another intervening) [2007] UKHL 58; [2008] 1 AC 332. See Section 2(3)(2) below.

73 Hence, the change of the ECtHR’s focus from ‘jurisdiction’ to ‘attribution’ (see above text accompanying n. 44-51) also changed the rights of individuals under the UK HRA. Compare: *Al-Skeini*, ibid, paras 10 and 134.
More specifically in the case of Quark Fishing, the House of Lords ruled that rights under the UK Human Rights Act cannot go beyond the rights protected in Strasbourg. As a consequence of this interpretation of the Human Rights Act, the House of Lords had in fact directly to consider the relationship between the UN Charter and the ECHR. The House of Lords decided by majority that the UK’s obligations under the Convention were qualified by Articles 25 and 103 UNC.

The discussion is not limited to domestic courts. The European Court for Human Rights (ECtHR) has ruled several times on cases involving the implementation of UN Security Council resolutions. In the cases of Behrami and Saramati, the applicants challenged the omission by UNMIK to clear a cluster bomb that led to the death and injury of two children (Behrami) and the extrajudicial detention of the applicant by KFOR (Saramati). The ECtHR found both the omission by UNMIK and the applicant’s detention by KFOR attributable to the UN. UNMIK, the international civil presence in Kosovo, was established as a subsidiary organ of the Security Council. This led to automatic attribution of all its actions (and omissions) to the UN. In Saramati, the Court found ultimate authority and control to lie with the UN and held as a consequence that the impugned act was attributable to the UN. In the earlier case of Bosphorus, the ECtHR avoided all discussion of the

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74 R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2006] 1 AC 529, paras 33-34: The HRA was intended to “bring rights home” by providing “a remedial structure in domestic law for the rights guaranteed by the Convention.” This led the HL to conclude that the territorial scope of the HRA was “intended to be coextensive with the territorial scope of the obligations of the UK and the rights of victims under the Convention”. See also: Article 21(1) HRA 1998 defining the European Convention “as it has effect for the time being in relation to the United Kingdom.”

75 See also R(Al-Skeini and others) v Secretary of State for Defence (The Redress Trust intervening) [2007] UKHL 26, [2007] 3 WLR 33. This case also concerned acts of the UK armed forces in Iraq. Here, the House of Lords ruled that the HRA will usually apply to acts of UK public authorities where the victim is within UK jurisdiction as defined in Art. 1 ECHR. See in particular: paras 56-59 (per Lord Rodger), para 88 (per Baroness Hale), paras 138-140 (per Lord Brown). Lord Carswell agreed with Lord Rodger, at para 96.

76 House of Lords, Al-Jedda, supra n 4, para. 3; see below a critique of the lack of precision with which the Lords, excluding Baroness Hale, used the terms ‘displacing’ and ‘qualifying’.


78 UN interim administration for Kosovo.

79 ECtHR, Behrami and Saramati, supra n 67, para 151.

80 Ibid.

81 Ibid, para 141; See also: District Court in The Hague of 10 September 2008 (Case number / cause-list number: 265615 / HA ZA 06-1671), ruling that the ECHR is not applicable to
Security Council resolution\textsuperscript{83} by hiding behind the existence of a Community regulation that had been adopted to implement the Security Council resolution and that had been interpreted by the Court of Justice to apply to the contested act.\textsuperscript{84} Yet, the ECtHR ruled in \textit{Bosphorus} on the merits. This appears to indicate that the Strasbourg Court does not simply accept the formal argument that the existence of a Security Council resolution as sufficient to suspend Convention rights. Hence, \textit{Bosphorus} appears to suggest a different reading of \textit{Behrami}. Further, the ECtHR did not in fact rule on the relationship between the Charter and the Convention in \textit{Behrami}, but found itself incompetent \textit{ratione personae} because the acts and omissions were attributable to the UN.\textsuperscript{85} Both \textit{Al Jedda}\textsuperscript{86} and the Swiss case \textit{Nada} are now pending before the ECtHR.\textsuperscript{87} This will allow the Court to revisit its position on the status of UN Security Council resolutions.

4 The Continued Infringement

4.1 The Catch-22 of the European Institutions

Lack of information is the main problem of the EU institutions when they give effect to UN lists of terrorist suspects. As was mentioned above, the EU’s move from ‘automatic compliance’ to ‘controlled compliance’ might superficially appear to address the procedural flaws by providing a notification and a statement of reasons, as well as offering those listed the formal opportunity to be heard. The problem
remains that the Commission can only share information that it possesses. Hence, the
crucial question is whether the Commission actually has access to the relevant
information when it gives effect to the decisions of the Sanctions Committee. On a
closer reading, the amending regulation displays the limitations with disillusioning
clarity. The fact that the European ‘statement of reasons’ is exclusively based on – or
indeed identical to – this publically available source appears to confirm the existing
assumption that the Commission does not actually receive specific confidential
information before listing someone. The General Court considered that even under
the new rules the ‘applicant’s rights of defence have only been “observed” in the
most formal and superficial sense’,88 and that the applicant did not have ‘even the most
minimal access to the evidence against him’.89 Issuing a purely formal and empty
statement of reasons remains window-dressing only.

Under the 1373 autonomous sanctions regime, the EU institutions should have
access to the relevant information but are notoriously trying to avoid sharing
information with the EU Courts.90 It is true that the Council takes the listing decision
based on a decision of a national competent authority. Yet, the relevant legal
provision stipulates that decisions by the competent national authorities should be
‘based on serious and credible evidence or clues, or condemnation for such deeds’.91
The listing is a separate procedure with a separate outcome.92 The national
procedure serves a different purpose. Often, but not always, it is criminal. In order to
exercise its discretion of whether or not to list someone, the Council must have access
to substantive information that the listed person has links with terrorism. However,
the General Court has repeatedly found that it is simply not in the position to assess
the well-foundedness of a particular autonomous listing because the Council is
unwilling or unable to share the relevant information even with the judiciary.93

Particularly, in the cases of OMPI III, concerning challenges the autonomous listing
of the Organisation des Modjahedines du peuple d’Iran (OMPI), the General Court made

88 171. This was an evaluation of the rules under Commission Regulation 1190/2008.
89 173
90 See in particular: Case T-228/02, Organisation des Modjahedines du peuple d’Iran v Council
and UK (OMPI I) [2006] ECR II-4665; Case T-256/07, People’s Mojahedin Organization of
Iran v Council (OMPI II) [2008] ECR II-3019; Case T-284/08, People’s Mojahedin
Organization of Iran v Council (OMPI III) [2008] ECR II-3487.
91 Article 1(4) of Common Position 931/2001/CFSP.
92 See for more detail: Christina Eckes and Joana Mendes, ‘The Right to be Heard in
Composite Administrative Procedures: Lost in between Protection?’, forthcoming.
93 Case T-228/02, OMPI I (n 10 above), paras 162, 165, and 166.
clear that it will annul a listing if the Council does not or cannot demonstrate the specific reasons why a person was listed. Confirming its earlier position that considerations of security or international relations cannot justify concealing information from the EU Courts, the General Court ruled that the Council is not entitled to base decisions on information that is not communicated to the Court. The Council’s reluctance to share the relevant information could indicate that in reality it did not possess it but that the autonomous decisions are also exclusively based on unsubstantiated requests of the Member States.

In conclusion, under the 1267 regime the EU institutions do not have the relevant information and under the 1373 regime they are unwilling to share it with the judiciary (even though they should have it). Under these circumstances, substantive judicial review remains a farce (simulacrum): The judiciary is unable to carry out any meaningful review of the merits. Yet ultimately, it has the power to annul the listings because they infringe procedural rights. This is what the EU Courts have correctly been doing. They annulled listings for procedural flaws and refused to vest them with false additional authority. The annulments are in fact a form of judicial review and satisfy the applicants’ right of access to court.

4.2 The Catch-22 of the Member States

As was developed in the previous section, the political institutions cannot possibly comply with European procedural standards when giving effect to UN listings. However, once the political institutions of the EU refrain from re-listing persons on the UN lists, Member States are likely to continue to adopt national lists. They would otherwise breach their obligations under international law, because even if the Union itself is not a member of the UN, all EU Member States are and they remain bound by their obligations under the UN Charter, irrespective of what the Union does. This begs the question whether Member States could adopt the necessary measures of implementation under national law without infringing EU law. EU law could preclude them from adoption national measures.

94 Case T-284/08, OMPI III (n 12 above), para 73.
95 GC, Kadi I, 123.
96 Court of Justice, Kadi I, supra note 21, para 351; GC, Kadi II, para 183.
This will depend on whether adopting individual sanctions is a competence of the Union that pre-empts Member States from adopting these measures themselves and whether even if this is the case they could successfully rely on Article 351 TFEU in order to derogate from European law. Pursuant to the doctrine of pre-emption,\(^97\) now codified in Article 2 TFEU, Member States are precluded from adopting national measures in three instances: first when the Union has exclusive competence in the field (Article 3 TFEU), second when the Union has exercised a shared competence (Article 4 TFEU), and thirdly when Member States may adopt measures but are precluded from undermining the effet utile of EU law (Article 4(3) TEU).\(^98\) Individual sanctions are not part of the exclusive competences in Article 3 TFEU.\(^99\) Hence, only the two latter possibilities need to be considered.

The European Treaties provide two legal bases for the adoption of individual sanctions: Article 75 TFEU and Article 215 TFEU. As to the pre-empting effect of Union legislation on individual sanctions, it appears convincing that under either of the two sanctioning regimes Member States are precluded from sanctioning someone when that specific person is listed in a directly applicable regulation. Beyond this specific effect of pre-empting Member States from targeting an already sanctioned individual, which is based on the general principle of EU law that Member States are not allowed to implement regulations,\(^100\) the two Treaty bases for individual sanctions should be examined separately as to their potential pre-empting effect.

Article 75 TFEU forms part of the provisions on the Area of Freedom, Security and Justice (AFSJ) and is a shared competence (Article 4(2)j TFEU). It first requires adopting (by ordinary legislative procedure) a ‘framework for administrative measures with regard to capital movements and payments’. Member States are pre-empted from taking action once the Union has exercised its competences (second pre-emption possibility). So far however, the Union has not (yet) adopted such an administrative framework under Article 75 TFEU. Autonomous sanctions continue


\(^{99}\) For an argument why individual sanctions are neither part of competition policy nor part of the common commercial policy see: Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights*, Chapter 2.

\(^{100}\) Case 39/72, *Commission v Italy* [1973] ECR 101; Case 50/76 *Amsterdam Bulb BV* [1977] ECR-137.
to be adopted based on the relevant pre-Lisbon legislation. Hence, at the moment we still need to consider the pre-empting effect of measures adopted under the old Article 301 EC.

The nature of the Union’s competence under ex-Article 301 EC and now Article 215 TFEU is more difficult to determine. They both require the same two-tier adoption procedure: the Council has to first adopt a CFSP decision under the TEU in order to be able to adopt restrictive measures under ex-Article 301 EC, now Article 215 TFEU. Restrictive measures under both provisions cannot be adopted without adopting a prior CFSP decision. Yet, the Union’s competence for CFSP is neither exclusive nor shared. Member States remain free to adopt national policies alongside the CFSP, but must remain within the framework set by the CFSP. They cannot act contrary to the objectives of the CFSP (third pre-emption possibility). CFSP decisions concerning sanctions specifically call upon the Union to adopt sanctions under ex-Article 301 EC, now Article 215 TFEU. Hence, any national measure adopted after a CFSP decision would run contrary to the objectives of that CFSP decision. Hence, Member States should be precluded from taking action at this point. However, if the Council cannot agree on the adoption of a CFSP decision, which requires unanimity, Member States should remain competent to adopt national sanctions.

Additionally, Article 351 TFEU allows Member States under strictly interpreted conditions to derogate from European law, irrespective of potential pre-emption. However as was discussed above in Section 3.1, the Court of Justice has introduced redlines around the ‘foundations’ of EU law, which include fundamental rights. In Kadi I, Article 351 TFEU was not directly applicable since it concerned a challenge of an instrument of European law. The Court of Justice addressed this issue therefore only in passing. In the event of an enforcement action, it appears likely that Member States attempt relying on Article 351 TFEU to justify their conduct. The UN Charter is for all Member States an agreement concluded prior to the creation of the Union, respectively prior to their accession. Furthermore, the Court of Justice appears to assume that Article 351 TFEU applies to national measures adopted in order to

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102 See for Article 301 EC:
103 Article 2 TFEU deals with it in a separate paragraph 3.
104 With the exception of Germany.
105 At the time Article 234 EEC, then Article 307 EC.
implement UN Security Council resolutions if these measures are necessary.\textsuperscript{106} However, individual sanctions in their present form breach the most fundamental procedural rights.\textsuperscript{107} It could therefore be argued that if Member States gave effect to UN terrorist lists under national law they would breach the inviolable foundations of European law. Implicitly, this appears to have been the understanding of the Court of Justice in \textit{Kadi I}.

Further, the adoption of any national measures is likely to breach fundamental rights standards protected both under national and under international law. In principle, the national authorities of the Member State are in the same position as their European counterparts: UN sanctions cannot be given effect in compliance with the ECHR or national procedural standards either. However, national courts could take a legal approach different from the Court of Justice. For instance, they could argue, similar to the General Court in \textit{Kadi I} that the primacy of resolutions under Chapter VII allow derogation from the standard of protection under either the ECHR or national law. The approach of the UK Supreme Court in \textit{Ahmed} by contrast, which also allows for the implementation of UN terrorist lists, must be seen as something apart. The UK situation is particular.\textsuperscript{108} Usually, parliaments are not free to limit human rights as far as they consider necessary and appropriate.

By way of conclusion, once the Union has adopted a sanctioning regulation, put in place the administrative framework for autonomous counter-terrorist sanctions under Article 75 TFEU, or agreed on a CFSP decision Member States are precluded from adopting national measures. Derogating from European law on the basis of Article 351 TFEU appears excluded since individual sanctions breach fundamental rights that form the inviolable foundations of the European Union. In any event, Member States remain bound by the UN Security Council resolutions and liable under international law, but they cannot give effect to them without breaching European law. In practice, sixteen Member States are already adopting parallel national lists irrespective of directly applicable EU regulations.\textsuperscript{109} This is in breach of European law, arguably also international law and possibly even their own national constitutional law.

\textsuperscript{106} Court of Justice, Centro-Com, [1997] ECR I-81, paras 58-59. The Court left the determination of whether the measures at hand were necessary to the national courts.

\textsuperscript{107} See Section 3 above.

\textsuperscript{108} See above Section 3.3.1.

\textsuperscript{109} UK Supreme Court, Ahmed (n 62 above), para 22.
4.3 Outlook

Under both provisions, Articles 75 and 215 TFEU, specific restrictive measures are adopted by the Council acting by qualified majority following a proposal of the Commission (Article 75 TFEU) or a joint proposal from the Commission and the High Representative (Article 215 TFEU). However, since Articles 215 and 75 TFEU set out very different procedures for the first ‘basis instrument’ (CFSP decision or framework under the AFSJ), the choice of the legal basis is crucial not only for pre-emption but also for the involvement of the different institutions of the Union and Its Member States respectively. On 11 March 2010, the European Parliament challenged the regulation that reformed the European sanctioning regime giving effect to UN sanctions, arguing that ‘having regard to its aim and content, the correct legal basis for the Regulation is Article 75 TFEU’ and not Article 215 TFEU. In the alternative, the Parliament argued that the requirements of Article 215 TFEU were not satisfied in absence of a new CFSP decision (post-Lisbon). Clearly, the Parliament wants the measures to be adopted on the basis of a legal provision that will give it much more extensive legislating powers. The choice of the legal basis appears to depend on the origins of the list of the terrorist suspects: Article 75 TFEU as the basis for the autonomous sanctioning procedure (1373 regime) and Article 215 TFEU as basis for sanctions based on UN lists (1267 regime). This appears to be the case irrespective of whether the measures target EU-internal or EU-external terrorists since Article 215 TFEU does not contain a reference to ‘third countries’ (as did Article 301 EC) or ‘third country nationals’. The Court’s ruling on this application could bring the continuous adoption of individual sanctions on the basis of pre-Lisbon instruments to a stop.

So far no judicial challenges have been brought against entire European legal instruments implementing UN sanctions lists. Individuals have only directly

110 Application in Case C-130/10, Parliament v Council, joined by the Commission, the Czech Republic, Sweden, and France as interveners (order of 10 August 2010).
113 With regard to former Article 301 EC it was argued that it could not serve as a basis for sanctions against third country nationals. However, it could not serve as a basis for individual sanctions at all see: Christina Eckes, EU Counter-Terrorist Policies and Fundamental Rights, Chapter 2.
challenged their own designation as a terrorist. However, challenges against the entire legal instrument are conceivable either indirectly under Article 277 TFEU or in a preliminary ruling under Article 267 TFEU. While the Court would have direct jurisdiction both for an administrative framework adopted under Article 75 TFEU and for the CFSP decision requiring the Union to take action under Article 215 TFEU (Article 275 TFEU), the Court’s jurisdiction remains far from certain for the pre-Lisbon instruments on the basis of which sanctions are currently adopted within the Union. While the autonomous lists of terrorist suspects adopted on its basis are regularly updated the Common Position itself has not been amended since the entering into force of the Lisbon Treaty. With regard to sanctions implementing UN lists, the situation is similar. Council Regulation 1286/2009 of 22 December 2009 (post-Lisbon) was based on Common Position 2002/402/CFSP of 27 May 2002 (pre-Lisbon). Further, this Council regulation only amended (it did not replace) the existing Regulation 881/2002, which also predates Lisbon. By contrast, sanctions against government officials of specific countries have been adopted on the basis of post-Lisbon CFSP decisions. There are no transitional provisions regulating the Court jurisdiction for pre-Lisbon Common Positions providing for individual sanctions. Therefore, Segi remains for the moment good law. Only preliminary references are possible against pre-Lisbon CFSP common positions concerning individual sanctions.

By way of conclusion, the situation where individual sanctions are based on pre-Lisbon instruments cannot continue for long. The Parliament has challenged this practice. National courts have started to ask for preliminary rulings. They might equally refer questions concerning the validity of the instruments that set up the European sanctions regimes. If the Court of Justice came to the conclusion that the


sanctions instruments as such are invalid the responsibility would fall back to the Member States.

5 Individual Sanctions: an Issue of Separation of Powers?

Multilayered governance in general and individual sanctions more in particular have raised concerns with regard to the separation of powers. The executive takes specific measures that directly change the legal rights of individuals outside of any constitutional framework and also out of the judiciary’s reach. Besides this apparent power grasp of the executive, the judiciary is faced with new challenges.

5.1 The Doctrine

The doctrine of separation of powers in its purest form requires that the government be divided into three branches in order to ensure political liberty: the legislature, the executive, and the judiciary and that each of these branches must remain confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches.\(^{117}\) Hence, the essential idea is a commitment to political liberty ensured through restraints of governmental power,\(^{118}\) which are based on divisions of power that prevent concentration in the hands of a single group of men.\(^{119}\) One core requirement of the separation of powers is an independent judiciary that is able to exercise some control over the other branches.\(^{120}\)

The common understanding of separation of power is that the executive takes individual decisions to apply laws within a framework set by the legislative and ultimately by the constitutive power that has vested the constitution. The judiciary controls that the executive remains within the limits set by the legislator and that the legislator remains within the procedural and in many systems also within the material limits of a higher ranking constitution. However, the specific choices differ.


\(^{118}\) This allows one branch to check and balance the others, see: G Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971).


The content of the doctrine has evolved over time into very different systems, all purporting to adhere to separation of powers.\textsuperscript{121} Also, as is well-known, the Court of Justice speaks of ‘institutional balance’ rather than separation of powers\textsuperscript{122} within the European legal system.\textsuperscript{123}

5.2 \textit{Shaking up the Established Division?}

The doctrine of separation of powers becomes even more complicated where several layers of governance are involved. International governance was called an indispensable ‘fourth branch of governance’.\textsuperscript{124} However, most types of multilayered governance, including the adoption of individual sanctions, are exercised by the political executive.\textsuperscript{125} States are represented in these multilateral institutions by their government. Hence, when internal policies are externalized, they fall nearly exclusively within the \textit{de facto} exercise of powers by the executive. Therefore, multilayered governance should not so much be seen as a fourth branch but rather an attempt to disproportionately strengthen the second. No new separation of powers is necessary. The existing practice has to be considered in the light of the original doctrine.

Individual sanctions are a particularly drastic example of the unfettered exercise of executive powers because they combine counter-terrorism with externalization.\textsuperscript{126} Individual sanctions breach core fundamental rights and their consequences for the listed individual are dire: those sanctioned are publically labeled as terrorists and denied access to their financial assets. In its most recent ruling of 30 September 2010, the General Court left no doubt that individual sanctions are ‘particularly draconian’ and speculated whether they might have to be considered criminal measures.

\textsuperscript{121} See a comparison of the American, the British and the German system with ample references to other political systems at: Bruce Ackerman, ‘The new Separation of Powers’, Harvard Law Review Vol. 113, Jan 2000, pp. 634-729.

\textsuperscript{122} This principle requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (Case C-70/88 Parliament v Council [1990] ECR I-2041, paragraph 22).


\textsuperscript{125} Ibid.

\textsuperscript{126} See above.
irrespective of their administrative disguise.\textsuperscript{127} The harm that individual sanctions do, not only to the economic situation but also to the reputation of those listed, can only be imagined after reading the factual background of sanctions cases. However, they have also done great harm to the reputation of the Security Council and to the ‘fight’ against terrorism,\textsuperscript{128} as well as decision-making by multilateral institutions more broadly.

The fact that individual sanctions, an act of the executive, restrict fundamental rights so drastically makes judicial review even more pressing.\textsuperscript{129} Indeed, the call for the judiciary to check and balance the executive’s attempt to grasp power by locating its exercise outside the state appears a logical conclusion in the light of the doctrine of separation of powers. It is the traditional function of the judiciary to control compliance of decisions of the executive within the constitutional and legislative framework. This is not particular to multilayered governance.

Particular to multilayered governance is that decisions are taken outside of this constitutional framework and without parliamentary control. By externalizing a policy field, such as counter-terrorism, the executive usurps tasks of general rule-making that traditionally fall within the function of the legislative. This is aggravated where this external exercise of executive powers is not subject to judicial review. This is for example the case for UN counter-terrorist sanctions. Similarly, this is the case at the EU level specific terrorist listings are subject to very limited judicial control through the preliminary ruling procedure only (Segi). In fact, the Union continues to adopt individual sanctions on the basis of pre-Lisbon instruments, which are neither subject to direct judicial control,\textsuperscript{130} nor subject to parliamentary control.\textsuperscript{131} Further, if

\begin{itemize}
\item \textsuperscript{127} General Court, \textit{Kadi II}, para 149. See also UK Supreme Court, Her Majesty’s Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty’s Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty’s Treasury (Appellant), judgment of 27 January 2010, [2010] UKSC 2, paras 60 and 192, speaking of ‘prisoners of the State’.
\item \textsuperscript{129} See: Christina Eckes, ‘Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?’, \textit{European Law Journal} 2011, \textit{forthcoming}.
\item \textsuperscript{130} The common position containing the listing decisions can only be challenged under the preliminary ruling procedure, see Court of Justice, \textit{Segi}, supra note 56 and the discussion above.
\end{itemize}
domestic courts, as have some national courts done, accept that the primacy of Security Council resolutions under international law has the effect of setting aside (or at least qualifying) domestic constitutional principles, the executive is largely able to free itself from constitutional constraints. It can take unfettered action through multilayered governance.

However, where the judiciary reviews (and has the power to annul) individual sanctions – and within the European Union this is the case currently for measures adopted under the old EC Treaty (Article 301 EC) and for measures adopted under the TFEU – there is no problem of the separation of powers. The same is true for the implementation of UN sanctions lists (not for the lists themselves) where courts have agreed to review the domestic measures of implementation.

5.3 Be Aware of the Consequences

Besides controlling the executive, it is also the traditional role of the judiciary to reconcile different norms and to identify those applicable based on a hierarchical reasoning. In a multilayered environment involving several layers of law (domestic and international) no hierarchy is established a priori. Most constitutions regulate the hierarchical status of international law. However, many constitutions do not specifically address the status of the ECHR or of obligations under the UN Charter. Courts have developed ‘soft’ mechanisms that lead to reconciliation of different layers of norms without having to take a black and white decision between them. These traditional mechanisms are for instance consistent interpretation and the specific ‘taking due account’ of non-binding norms. However, these ‘soft

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131 As was discussed above, an action by the Parliament challenging this practice is pending: application, OJ C 134/26.
132 See specifically on individual sanctions: Christina Eckes, EU Counter-Terrorist Policies and Fundamental Rights, Chapter 5. It is also the classical idea of dualism that there is no direct hierarchical relationship between international and domestic law.
133 Article 24 of the German Constitution (Grundgesetz); Article 52-55 of the French Constitution; Article 93 and 94 of the Dutch Constitution (grondwet).
134 Ibid.
135 Examples of the Court of Justice’s case law concerning Security Council resolutions are: Court of Justice, Kadi I, supra note 21, para 296-297, with reference to C-117/06, Möllendorf and Möllendorf-Niehuus [2007] ECR I-8361, para 54; C-84/95, Bosphorus Airways [1996] ECR I-3953, para 14; see also: Opinion of AG Kokott in C-188/07, Commune de Mesquer [2008] ECR I-4501, paras 103 and Opinion of AG Kokott in C-308/06, Intertanko [2008] ECR I-4057, para 78. AG Kokott argued that the duty of loyalty requires to interpret European law as far as possible in a way that conflicts with the Member States’ international law obligations can be avoided.
mechanisms’ are not apt to reconcile domestic law with international law that requires specific action against specific persons without leaving any margin of discretion to the implementing states. These specific measures are considerably more difficult to integrate into the domestic legal order.

Adjudicating on individual sanctions giving effect to UN lists of terrorist suspects requires courts to develop new mechanisms of reconciliation. The Court of Justice argued that it did not challenge the primacy of Security Council resolutions by reviewing their domestic implementation. This is technically true, but it is also true that in effect the Court deprived this primacy of effect within the European legal order.\textsuperscript{136} If taken as a precedent this could fundamentally disturb the effectiveness of multilayered governance, not only by the Security Council but also by other bodies.\textsuperscript{137} The judiciary’s decision on which norms are applicable is not only a decision on the applicability of the correct law to a specific situation. Annulling counter-terrorist sanctions against a specific person is not only an annulment of that particular measure because it breached higher norms of law. This would be something that happens on a daily basis within national legal orders. The different norms governing individual sanctions do not stand in a straightforwardly hierarchical relation towards each other but require relating by the force of legal reasoning. Therefore, deciding whether a decision of the UN Security Council can or cannot set aside or at least qualify national legal requirements for implementation, entails a broader stand on which legal sphere is supreme and who takes the final decision. However, depending on the approach that the judiciary chooses and depending on the legal reasoning this is not a substantive decision. If they apply technical legalistic arguments, they opt for a hierarchical black and white solution to the problem. This ultimately places the judiciary in the position to decide whether or not multilayered governance can set aside domestic constitutional rules.

It is not argued that this should be the case. In fact, the opposite is argued. The separation of powers requires courts to control the executive – whether it acts within or outside of the domestic constitutional framework. However, if courts decide to

\textsuperscript{136} General Court, \textit{Kadi II}, para 118.

\textsuperscript{137} The German Constitutional Court used the Court of Justice’s ruling in Kadi as one argument for its residual competence to review the compatibility of EU law with the core identity of the German legal order: Bundesverfassungsgericht (BVerfG): Lisbon decision, judgment of the Second Senate of 30 June 2009 (2 BvE 2/08; 2 BvE 5/08; 2 BvR 1010/08; 2 BvR 1022/08); 2 BvR 1259/08; 2 BvR 182/09, para 340.
apply the full range of domestic constitutional constraints to any implementation of
decisions taken in form of multilayered governance this deprives multilayered
governance of its effects whenever it runs counter to the specific choice of restraints in
the particular country. Therefore, courts should acknowledge that different legal
systems and spheres protect values differently. Courts should allow themselves a
margin of appreciation of the merit of an externalized executive decision through the
looking glass of the value choices of their own constitution. They should not apply it
purely hierarchical considerations. Purely hierarchical considerations do not
acknowledge that different forms of constitutional constraints can achieve the same
result: respect for fundamental rights and the separation of powers. The involvement
of many different actors with different interests and agendas in these multilayered
governance fora might be considered as also supplying some form of checks and
balances. Individual sanctions are an extreme example of where the executive went
wrong and where it disregarded core fundamental values. While courts should not
hesitate to protect these fundamental values and annul individual sanctions, they
should not lead to a greater legal protectionism more broadly.

In conclusion, individual sanctions do not only raise issues of the separation of
powers. They also place the judiciary in the position to develop new mechanisms of
reconciling different layers of law. Specific decisions adopted by multilayered
governance confront courts with a black-or-white, yes-or-no choice between different
legal spheres. This requires the judiciary to decide whether multilayered governance
is effective. As we have seen above, even within the same domestic structure courts
have taken very different decisions on this. Ultimately, it might be desirable that
domestic constitutions give more guidance on how courts should handle conflicting
norms from different legal spheres.

5.4 A Substantive Approach

When facing specific decisions taken by the executive outside the constitutional
framework of states, courts are required to creatively and constructively apply the
constraints of their own constitutional setting to new factual situations. Moving away
from the black and white solutions based on legalistic arguments of hierarchy,
scholars and courts are increasingly searching for more nuanced ways of deciding
conflicts of norms based on a reasoning on substance rather than form. This might
**prima facie** appear to increase the power of courts, since they do not only apply decisions on the formal status of norms but weigh the importance of the different instruments. Ultimately however, the technical legalistic perspective equally depends on premises chosen by the judge. In the specific case of European sanctions giving effect to UN counter-terrorist lists for instance, the decision depends on whether EU law is seen as domestic law or international law (is Article 103 UN Charter applicable?), and whether the EU is considered to be obliged to give effect to obligations under the UN Charter.

Softer mechanisms of reconciling of different layers of norms lead to solutions based on a substantive reasoning.138 They allows the courts to take due account of the values represented by these different legal spheres. It also implies that different systems have chosen different ways of ensuring the protection of fundamental rights and the separation of powers (assuming that the different spheres purport to adhere to these principles). This should not exclude to ultimately disregard decisions taken in multilayered governance if they blatantly breach fundamental rights. To the contrary, the substantive redlines that the Court of Justice introduced in *Kadi I* for the derogation from EU law, even if the technical rules of the European Treaties provide for the possibility of derogation, demonstrate openness towards a substantive approach.139 The General Court sharply criticized the Court of Justice for this choice. It argued that the Court of Justice ‘seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law – in this case the law deriving from the Charter of the United Nations.’140 However, drawing absolute lines of which core values cannot be compromised could become an important element of developing a more flexible substantive approach of trying to reconcile norms from different levels on a value basis without making a black and white choice. Another possible (element of a) substantive approach reconciling different legal spheres is the so-called *Solange* approach. 141 Under the *Solange* approach, judicial review depends on the level of

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138 Examples are consistent interpretation, taking due account – see Section 5.3 above.

139 In this case: Article 351 TFEU. See Section 3.1 above.

140 General Court, *Kadi II*, para 119.

141 This approach was repeatedly suggested to the Court of Justice as a way of addressing individual sanctions originating at the UN level: Opinion of AG Maduro, C-402/05 P and C-415/05 P, *Kadi I*, para 56; raised by both parties: Court of Justice, Cases C-402/05 P and C-415/05 P, *Kadi I, supra*, para 256 and 319; see also: Piet Eeckhout, ‘EC Law and UN Security Council Resolutions’ (n 16 above), p. 183 et seq; Ernst-Ulrich Petersmann,
protection in the external legal sphere where the norm originates. ‘So long as’ that legal sphere provides respect for certain principles and values, the domestic court does not exercise judicial review of every individual case but restricts itself to a residual review that this respect continues to exist.

In the case of counter-terrorist sanctions giving effect to UN lists of terrorist suspects in their current form, any substantive approach upholding the most basic constitutional constraints should lead to the same factual outcome than a formal approach fully applying domestic constitutional constraints. The danger lies elsewhere. First, some courts have opted for a formal approach that ultimately allows for the adoption of individual sanctions irrespective of the fact that they breach the most fundamental rights (CFI in *Kadi I*; Swiss Supreme Court in *Nada*; UK Supreme Court in *Ahmed*). Second, a formal approach strictly applying domestic constitutions closes the door to constructive multilayered governance that respects the fundamental value choices of the domestic legal order. A substantive approach, by contrast, leaves the door open for other specific decisions adopted in multilayered governance, even if they do not fully comply with domestic constitutional constraints. Individual sanctions are an extreme example and should not easily lead us to closing that door.

6 Conclusions

Individual sanctions are an example where the governments represented in the Security Council circumvented constraints that traditionally apply to specific executive actions. As a result, the judiciary was placed in the position of the ultimate arbitrator, not only of the individual act (this is its traditional role), but of the structural hierarchical relationship between different legal spheres, which ultimately represent the will of different authorities: the Security Council on the one hand, and the constitutional legislator on the other. Those domestic courts which did not allow the implementation of individual sanctions defended not only the autonomy of the domestic legal order and fundamental rights, but also the separation of powers. This left both the EU institutions and the Member States in a catch-22. Yet arguably, the

courts had no better alternative. At the same time, it is worrying that this decision is left to individual domestic courts. We have seen that they have taken very different stands on the hierarchical integration of this form of governance. Rather than being up to the individual court to decide whether or not norms from a particular legal sphere can trump domestic rules constitutions should address this situation. The constituent power should obligate the judiciary to enter into a substantive argument and reconcile different norms at a substantive level that is in line with the value choices of the domestic legal order. Where the existing hierarchical constitutional rules were not meant to cover this new form of multilayered governance the principled value choices of the domestic legal order should be upheld. Within a world characterized by multilayered governance the executive must also be able to exercise a certain margin of discretion. The choice should simply not be between the two extremes that the executive is either allowed to overstep all boundaries by externally exercising their powers or that the judiciary strikes down all attempts of finding a reliable international solution by making them subject to each and every internal constitutional constraint. Constituent powers could use the extreme case of individual sanctions to introduce soft mechanisms of dealing with multilayered governance that require courts to make substantive arguments.