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File ID	156786
Filename	Terrorism blacklisting : putting European human rights guarantees to the test

SOURCE (OR PART OF THE FOLLOWING SOURCE):

Type	Dissertation
Title	Communication rights, democracy & legitimacy : the European Union
Author	J. Hoffmann
Faculty	Faculty of Social and Behavioural Sciences
Year	2009
Pages	339

FULL BIBLIOGRAPHIC DETAILS:
http://dare.uva.nl/record/325289

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TERRORISM BLACKLISTING: PUTTING EUROPEAN HUMAN RIGHTS GUARANTEES TO THE TEST[1]

Abstract

To help arrive at a legitimate judgment a trial is essentially a fact-finding process, during which the accumulation of information enables all parties to advance their arguments and perspectives and eventually a judge to establish the "truth" and, thus enabled, a just decision. This study argues that this fundamental function of the legal process is being undermined by the implementation of United Nations Security Council (UNSC) Resolutions targeting individual terrorism suspects within the European legal order. The European Union (EU) is founded on the rule of law principles and guarantees respect for the fundamental rights protected in the *European Convention on Fundamental Freedoms and Human Rights* (ECHR). However, the ensuing case law demonstrates that the constitutional structure of the EU itself may result in an undue differentiation in legal protection of certain suspects and shows how the European Court of Justice (ECJ) is in the process of elaborating a minimum standard of protection within the European legal order realizing the inherent link between access to information and justice.

An earlier version of this article has been published as:
Hoffmann, J. (2008). Terrorism Blacklisting: Putting European Human Rights Guarantees to the test. *Constellations, 15*(4): 543-560.

1. Introduction

„Das Verfahren ist nämlich im Allgemeinen nicht nur vor der Öffentlichkeit geheim, sondern auch vor dem Angeklagten. Natürlich nur soweit dies möglich ist, es ist aber in sehr weitem Ausmaß möglich. Auch der Angeklagte hat nämlich keinen Einblick in die Gerichtsschriften, und aus den Verhören auf die ihnen zugrunde liegenden Schriften zu schließen, ist sehr schwierig..."[2]

(Franz Kafka, Der Prozeß)

Events following the attacks of September 2001 have led to the proclamation of a so-called "war on terrorism" that has triggered a series of hastily taken[3], far-reaching measures that many fear may prioritize perceived increases in security above the protection of individual rights of suspects. This is also mirrored by the extension of the imposition of "smart sanctions"[4] against suspected terrorists or terrorist organizations by the UNSC, which has been subject to much criticism (*inter alia* Almqvist, 2008; Alvarez, 2003; Andersson, Cameron & Nordback, 2003; Eeckhout, 2007; Tomuschat, 2003).

The technique of "terrorism blacklisting" poses a challenging test to the robustness of human rights guarantees in the face of the emphasis on executive discretion and secrecy that has accompanied it. The framing of the multiplicity of reactions to 9-11 as being part of a "war" may also have led to a shift of what is considered a proportionate counter-measure or a legitimate use of violence. Indeed, in order to end up on an EU terrorism blacklist, it is not necessary for a person, organisation or entity to have committed any terrorist acts against a *non-military* target as is required under the *Convention for the Suppression of the Financing of Terrorism*.[5] More importantly maybe, it is not required that the target be a democracy (Cameron, 2003*b*: 236). Thus, an organization which previously may have been seen legitimately resist a totalitarian regime may today well be considered to have terrorist aims. Also, it is interesting to note that there is no time dimension when it comes to the definition of terrorist organisations.[6] Not surprisingly, the strongly pronounced political component in the listing procedure has given rise to many concerns.[7]

There is much to say about the general problems and perils of the practice of blacklisting for fair trial principles, especially since access to legal redress is complicated by the absence of a competent international court and the reluctance of European courts to assume competence to review UNSC resolutions.[8] To this point, most critical analysis of the problems involved in the practice of blacklisting has focused either on the "legislative"

function the Security Council assumes when issuing binding orders of general application or the alleged violations of the rights of its targets during the process. In the present paper, not the process of UN decision-making but its consequences within and for the European Union legal order will be discussed. The EU represents its own legal system, which explicitly incorporates human rights guarantees and the rule of law. It is argued here that these principles are challenged by UN Resolutions that (are interpreted to) require the EU to take measures against suspects that have been put on a blacklist through a process that violates the very rights, it formally guarantees. On a general level, the extensive reliance on secret intelligence for listings and broad room for maneuver for the executive branch make it difficult to uphold an adequate level of judicial review and thus the right to an effective remedy. While suspects are not routinely informed of the measures to be enforced against them, let alone the reasons for the placement or the information and their sources underlying it, neither their lawyers nor indeed judges will be able to fulfill their task lacking the ability to uncover and evaluate the necessary evidence or even their sources in files consisting of material classified as confidential in the name of public security.

Suspects thus have no chance of presenting their version of events, to dispute the relevant facts or correct false information. Defense lawyers are not in the position to defend their clients beyond the procedural level concerning the validity of the allegations against them and judges are left with the impossible task to balance the public interest in the effective prevention of the financing of terrorism and the fundamental safeguards inherent in the European legal order. The role of information is always a prominent one in the pursuit of justice through trial. The practice of terrorism blacklisting, however, may be a particularly fruitful subject for analysis, since it is this new instrument which puts the most pressure on the European judicature to demarcate the limits of acceptable secrecy. For legal scholarship, those cases may provide a meriting starting point to develop a more refined understanding of the way information is being used in the context of political decision-making and of the proper reaction of the judicature to the inevitable challenges of the ongoing counter-terrorism measures.

Concerning the EU more specifically, it will be argued that its quasi-constitutional legal edifice allows for a lack in legal accountability of the executive branch and results in the differential treatment of suspects. Concerning measures which directly impact individual

human rights, these consequences are dangerously undermining the rule of law and the very credibility of the Union's commitment to the rule of law, the protection of human rights as well as anti-terrorism measures in general.

Even if the Pillar structure has made it possible that there are varying degrees of legal protection concerning the different European instruments (as will be elaborated below), unfettered discretion of the Council cannot be accepted within a system governed by the rule of law. Enabling a minimum of judicial supervision to ensure individual rights in this process means making the process more transparent and thus sharing information to enable the process of fact-finding, review and thus justice.

This will ultimately have to lead to a standard to determine the minimum amount of information necessary for all parties to guarantee an adequate standard of fair trial and thus to prevent justice from being subjected to a permanent state of emergency as a consequence of the "war on terrorism" that would undermine the European rule of law in the long run. This is also becoming the focal point in the European cases that have ensued in response to various listings.

It is therefore proposed here that a "turn to information" take place in the analysis of the major legal issues surrounding terrorism blacklisting considering the role of information for (a) the rights of the individual and (b) the proper functioning of the Court.

In the subsequent analysis, the system of "smart sanctions" will be briefly described, the interaction between the international and European legal system will be disentangled and the degree of legal safeguards described. Furthermore, the political process of listing and de-listing will be briefly sketched and developments in recent case law of the Community Courts discussed.

Special attention will be paid throughout this paper to issues pertaining to the access to and use of information in the process of listing as well as during trial and the implications this has for legal as well as political accountability within the European legal system.

2. Legal framework of the "smart sanctions" regime

2.1. The interplay of legal systems

In order to understand and analyze the legal issues at hand, first it will be necessary to briefly sketch the interplay of the international and European system.

The regime of smart sanctions originates in UNSC Resolutions. Concerning the EU, there are two scenarios, which are of interest here. In *Resolutions 1267* (1999, concerning the *Taliban*) and *Resolution 1333* (2000, concerning Osama Bin Laden and *Al Qaida*) the UNSC specified lists of names of persons and organizations whose funds were to be frozen, whereas *Resolution 1373* (2001 in the aftermath of *9-11*) contains no detailed list but rather the general obligation to take measures against terrorism suspects as contained in the *UN Convention for the Suppression of the Financing of Terrorism* (1999).

The above UNSC Resolutions are binding on all UN member states and have been implemented through various instruments available in the EU legal order, which in turn are binding on its Member States. The question to what extent the EU, not being a member of the UN, is bound by UNSC Resolutions in the first place has been the subject of much discussion. In its *Yusuf* decision[9], the Court of First Instance (CFI) took the position that the EU is not merely to defer to the obligations that its Member States have as UN members, but that in fact UN Resolutions bind the EC as a result of EC law.[10] Furthermore, it is argued, Article 133 TEC, which gives the EC exclusive competence in matters of external trade, makes it necessary to implement UNSC Resolutions via the process of communitarization instead of directly through domestic legislation.[11] This process can follow distinct routes, each having its own consequences when it comes to the possibility of challenging a listing. Below, the main avenues of communitarization will be briefly laid out and the implications this has for the available means of legal redress explained to form the background before which attention can be focused on the role information plays in the process of listing and de-listing.

2.2. Ways of communitarization

To implement UNSC Resolutions the EU Member States usually first reach a Common Position within the framework of a Common Foreign and Security Policy (CFSP, Second Pillar) on the basis of Article 15 TEU (or a Joint Action on the basis of Article 14 TEU). This has been

done implementing both the specific *Taliban* and *Al Qaida* Resolutions and the more general *9-11* Resolution.[12] The Common Positions include a list of persons, organizations and entities on which sanctions are to be imposed. Those Common Positions in turn contain instructions to the EC to implement the measures through First Pillar instruments, mostly Regulations, on the basis of Article 301 TEC and Article 60 TEC. These measures subsequently take direct effect in the domestic legal orders.

The EC Regulations implementing the UN Resolutions concerning the *Taliban* and *Al Qaida* have attached to them lists of names that were drawn up at the UN level, while Regulations implementing the more general *9-11* Resolution contain a list that is a result of consultations at the EU level.

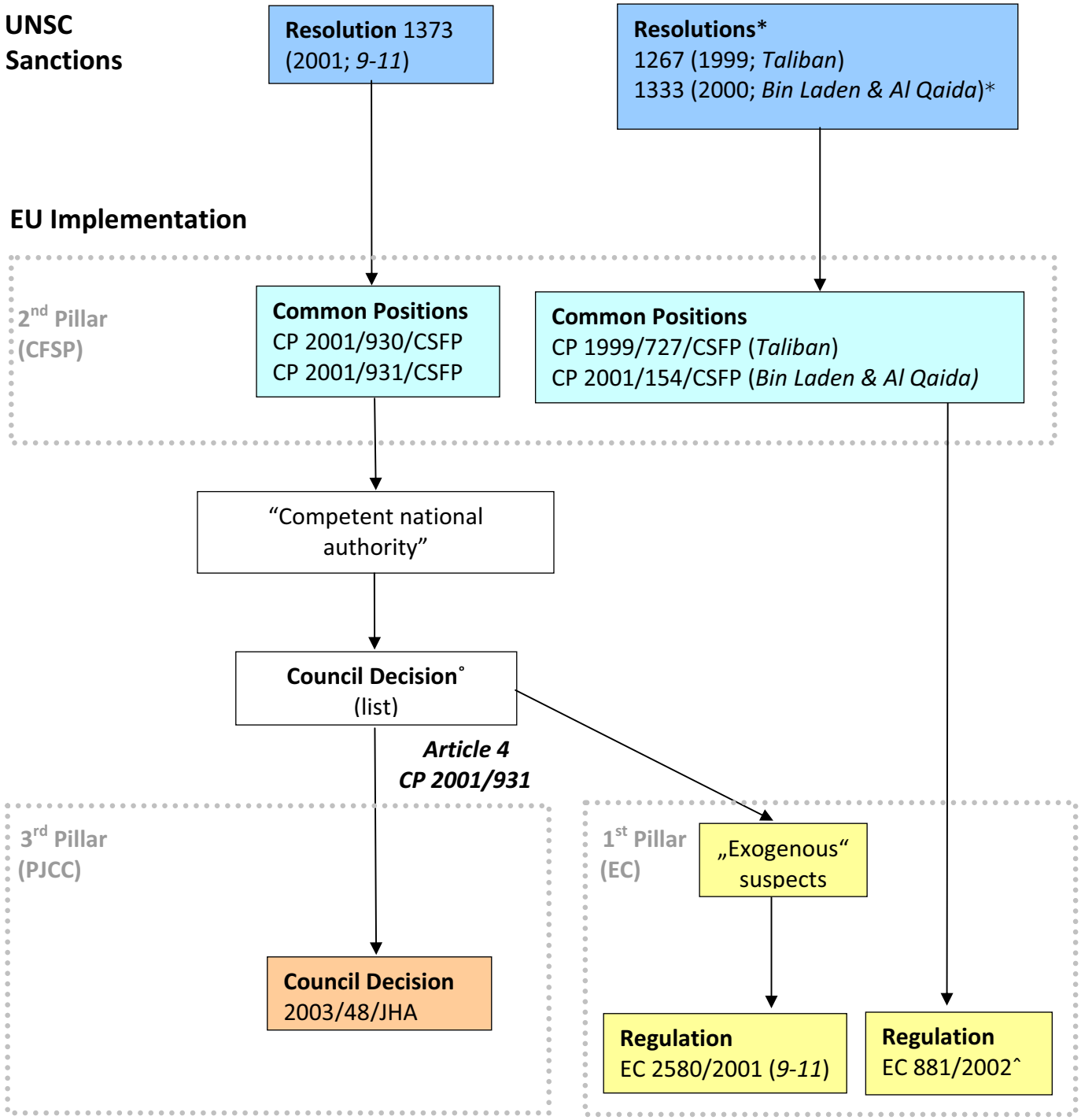
Within the latter EU list, however, there is a further distinction between "exogenous" and "endogenous" terrorism suspects.[13] The former are those organizations that have their roots and primary activities outside the EU territory and are placed on the list within the framework of the Second Pillar. The latter, however, are organizations which have their roots and center of activity within the territory of the EU and which are placed on the list under the Third Pillar (Police and Judicial Cooperation in Criminal Matters, PJCC).

This distinction becomes evident in *Common Position 2001/931*, Article 2 of which requires the EC to freeze funds, financial assets and other financial resources of the persons, organizations and entities listed in its Annex. Some names on that list are then marked with an asterisk, whose importance is explained in a footnote: the names so marked are to be "subject of Article 4 *only''* (*emphasis added*). As a consequence, those persons, organizations and entities will be affected exclusively by Article 4, which refers merely to the obligations of Member States "to afford each other the widest possible assistance in preventing and combating terrorist acts" and are thus excluded from the effect of the EC Regulation that provides for financial sanctions. The asterisk marks all terrorism suspects that are "endogenous" to the EU such as members of the Basque ETA and Northern Irish organizations.

Thus, the double legal basis of Articles 15 TEU and 34 TEU of *Common Position 2001/931* translates into two different regimes for terrorism suspects depending on their classification as "exogenous" or "endogenous". As a consequence there is a regime, implemented through instruments under the First Pillar, which results in financial sanctions

of "exogenous" suspects and another regime, which is implemented by means of instruments under the Third Pillar demanding closer cooperation between Member States concerning "endogenous" suspects. This distinction may be explained by the very logic of the Pillar Structure: since the Second Pillar is concerned with Common Foreign and Security Policy, it may simply seem too much of a stretch to construe measures against the EU's own citizens under its auspices (Cameron, 2003b: 233.).[14] Therefore, the CFSP Council would not be competent to take such a decision concerning "endogenous" terrorism suspects.[15]

For the sake of clarity, below, the various ways of communitarization have been visualized in a model.



° Every update of the list annexed to CP 2001/931 takes the form of a new Council Decision.

* Other related UNSC Resolutions are: Res. 1390 (16 Jan 2002) renewing the Taliban/Al Qaida lists (implemented by CP 2002/402/CFSP); Res. 1452 (20 Dec 2002, Al Qaida) introducing humanitarian exceptions such as living expenses, Res. 1455 (17 Jan 2003) requiring the submission of updated implementation reports within 90 days, Res. 1526 (30 Jan 2004), strengthening the role of the committee and establishing a Monitoring Team; Res. 1617 (29 July 2005) detailing the criteria for "association with" terrorist organisations and Res. 1735 (22 Dec 2006) specifying criteria for de-listing

ˆ Replacing EC 337/2000 and EC 467/2001 in response to UN Resolutions 1333 and 1390.

2.3. The lists and access to court

UNSC Resolutions are binding on all Member States and cannot be set aside by a judge. Also, there is no general international court or tribunal to which listed subjects could appeal the UN Resolutions directly. However, at the EU level, the EC Regulations ultimately implementing the Resolutions are subject to review by the Community Courts, if only to a very limited extent which is confined to breaches of *ius cogens*[16] (this will be elaborated further below).

The distinction between "endogenous" and "exogenous" terrorism suspects within the EU list has further consequences for the opportunity to have access to a Community Court. While within the "supranational" First Pillar (EC) it is accepted that instruments have direct effect, it is well established that neither under the Second nor the Third Pillar provisions may confer rights and duties on individuals (Nettesheim, 2006: 30). In analogy, judicial protection is diverging between the Pillars, with the First Pillar clearly giving the widest protection to individuals, who have standing to bring direct action before the Community Courts under Article 230 (4) TEC if they are "directly and individually affected".[17] Regarding the Second Pillar, there is traditionally no individual protection whatsoever, while Article 35 TEU provides for indirect access to the ECJ under the Third Pillar by way of referrals by national judges.

Even though the Court's role under the Second Pillar is more limited than under the First Pillar, the CFI has recently decided that it is competent to review the legality of a decision that led to placement on the list, which means there is a certain level of judicial protection for "exogenous" terrorism suspects.[18] Concerning actions against "endogenous" terrorism suspects, however, there is no competence of the Court, which means that those individuals do not have the opportunity to have the Community Courts review the legality of the decision that resulted in their placement on the list directly.[19]

3. How to become listed: Information in the political process

In the case of the UN, a special sanctions committee is making up the list of names. When it comes to the EU lists, it is the Council of the EU that decides which names will be added to the list. Thus, in both cases, it is an executive body that takes the decision. In the course of the years, both regimes have been modified in reaction to broad criticism and also court

decisions. For example, while the initial setup did not include any provisions that would address basic living expenses, in 2002 a "humanitarian exemption" was introduced by *Resolution 1452*, which allows for the coverage of those expenses. Relatively little is further known about the precise procedure that is employed for the purpose of composing and updating the list.

3.1. The UN Committee

At the time of writing, the UN lists 125 entities and 365 individuals as associates of Al Qaida or the Taliban.[20] Article 6 of *Resolution 1267* (*Taliban*) created the *1267 Committee*, which consists of all members of the UNSC. Resolution 1333 (*Bin Laden & Al Qaida*) further gives the Committee the power to draw up and update a list of people and organizations associated with Bin Laden.[21]

In order to produce the list, the relevant suspects must first be identified. Article 16 (b) of *Resolution 1333* provides that identification is based on "information provided by States and regional organizations". Based on Article 2 of *Resolution 1390* (updating *Resolutions 1267* and *1333*), the Committee keeps the lists updated.

Resolution 1526 (2004) further strengthened the mandate of the Committee and created an Analytical Support and Sanctions Monitoring Team (Articles 2 and 6).

There is nothing more detailed about the procedure which leads to placement on the list. There are, however, guidelines[22] that the Committee has adopted that include rules on placement on, revision of and de-listing from the list (Articles 5, 6 and 7). According to the guidelines, names are placed on the list on the basis of "relevant information" (Article 4b, 5a and 5d).

The Committee operates on the basis of consensus. Further, the guidelines specify that the state of a suspect's nationality or residence may start de-listing procedures. The information according to which names are produced usually comes from sources outside the UN bureaucracy, which itself lacks the ability and knowledge to identify persons (Cameron, 2003*a*: 165). Ultimately, much of the information that lies behind a placement concerning terrorism lists naturally is classified intelligence. This means, among other things, that not even the Committee *itself* is in a position to evaluate the evidential basis on which a person, organization or entity is placed on the list, since requests for disclosure of such information

will most likely be met with refusal on the basis of national security concerns (Cameron, 2003*a*; Almqvist, 2008). As a consequence, the Committee has a rather formalistic role in the whole procedure, which is factually limited to ratifying decisions upon a confidential "no-objection" procedure. Clearly, in such a procedure there is ample room for placements that may not be motivated exclusively by a legitimate concern for security, but that may be abused to put pressure on political opponents or serve vested interests.[23] The imbalance of power between government officials and suspects may be obvious. To an outsider, it is not always clear which state proposed a certain name in the first place. Targeted individuals are not informed before they are listed, nor are they given the opportunity to demonstrate that their listing is not justified according to the Resolutions or to know the reasons and access relating evidence that led to their placement. Under the various UN sanctions regimes, in no case there exists an opportunity for individuals or entities to directly petition the respective UNSC committee (Fassbender, 2006).[24]

The criteria for being listed – being "associated with" Osama Bin Laden or Al Qaida – are as vague as they could be. Only in 2004, with the passage of *Resolution 1526*, did the UNSC request states to include "identifying information and background information, to the greatest extent possible" indicating such association when proposing new names and to inform those included in the list "to the extent possible" (Article 18). More recently, a notification procedure has been established by *Resolution 1735* (2006).

Article 4 of *Resolution 1617* (2005) introduced an obligation for states, when proposing new names for the consolidated list, to provide "a statement of case describing the basis of the proposal", which in turn may be used to respond to queries from member states whose nationals or residents have been included on the list (Article 6). This, however, did not apply to the more than 400 names that at that point had already been listed without such a statement of case (Chesterman, 2006: 1112).

Depending on the prior consent of the designating state, the Committee may decide to release the information provided to third parties while states continue to have the opportunity to require confidentiality.[25] Apparently, the average statement of case of the Committee runs about a page and a half of information (Idem: 1115).

Due to the consensus nature of the procedures, once a placement has taken place, any Security Council Member can subsequently block its removal by veto. In the de-listing

procedure, states that are involved with a certain case (the designating state and the petitioned state) will thus play the leading part. They will ultimately have to solve any disagreement by negotiation (Fassbender, 2006). Giving reasons is not required for either a request for favoring or opposing removal.

Article 14 of *Resolution 1735* (2006) specifies considerations that may be taken into account by the Committee when assessing de-listing requests.[26] No legal rules exist, however, that would oblige the Committee or the Council to de-list in case certain conditions are met (Idem). Obviously, under current conditions, there is also no way for suspects to demonstrate any change of their situation, since they are routinely left unknowing what kind of "circumstance" got them on the list in the first place.

Remarkably, none of the Security Council Resolutions mentions the issue of independent (judicial) review – whether affirmatively or negatively.

3.2. The Council procedure

By December 2007 there were 48 groups and 54 individuals on the EU terrorist list.[27] As mentioned above, when it comes to the EU list, it is the Council's decision which names are contained in the list.

Implementing *Resolution 1267*, *Common Position 931* determines in Article 1(4) that placement will occur:

> 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[28] (sic) for such deeds. […] For the purposes of this paragraph 'competent authority' shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by the paragraph, an equivalent competent authority in that area. (*emphasis added*)

How exactly persons or entities end up on the list remains unclear, since here there is no such thing as the guidelines adopted by the *1267 Committee* or any more detailed description of the requirements supplied files would have to fulfill in order to qualify as containing "precise information" or "serious and credible evidence". A "competent authority", on whose decision placement depends, in the sense of Article 1(4) need not

necessarily be a court and the involved decision need not be a conviction. The information necessary could just as well originate from intelligence services or an investigation team. In effect, also here there remains considerable leeway for political considerations in the listing procedure.

In addition to the lack of transparency concerning the procedure of listing, neither *Common Position 931* nor *Regulation 2580* provides for a complaint or de-listing procedure. Neither the organizations that were considered for inclusion nor the states that objected to a placement are made public. Yet, the discrepancy between some more extensive national lists (such as the UK list) and the EU list may serve as an indicator for the fact that refusals do occur (Cameron, 2003*b*: 235). It is also not clear, how much information is required to accompany a refusal.[29]

An agreement on introducing a de-listing procedure was reached only in 2007, when a new Council working party (also referred to as the "clearing house") was mandated to oversee the implementation of *Common Position 931* and whose deliberations and evaluation of the information that underpin listing and de-listing will remain classified (Council of the European Union, 2007).

3.3. A lack of information at all stages

To summarize the above, there is a lack of transparency and review at all stages of the process from proposing a listing to the de-listing procedures that broadly still applies to all the various lists despite more recent improvements:

α) the information on which listing is based does not have to fulfill (public) minimum criteria of reliability

β) there is no independent assessment of the evidence[30]

χ) the information cannot be subjected to thorough review by either an independent international judicial organ or other states

δ) before being listed, the targeted individual or entity is not informed and has no right to know the content or origin of the evidence against her or him

ε) there is subsequently no right to a hearing and no opportunity to present the accused's account or to dispute the correctness of the facts

ϕ) after having been listed, neither a targeted person or entity nor her or his defense lawyer have a right to access the information that is the basis for listing

γ) even if a judge is competent in a certain case, there would be a lack of available information to enable a substantial judicial review

The above circumstances together make it virtually impossible for anyone having been listed to enforce accountability for her or his listing. The lack of an effective right to information creates a *kafkaesque* situation in which the accused is left ignorant of the reasons for the listing as well as the authors of the information underlying the accusations and in the end without a chance to effectively challenge the correctness and validity of any of this directly.
As such, there is no burden of proof for imposing sanctions via the mechanism of the UNSC, which pursuant to Article 39 of the UN Charter may decide which measures are to be taken "to maintain or restore international peace and security" once it has identified a threat to the peace (Chesterman, 2006: 1110). Non-forcible measures as provided for in Article 41 of the Charter are furthermore broadly defined.

Also within the European context, the decision of the Council is reached in a decidedly political process without judicial oversight or rules that would formally restrict the discretion in evaluating the information as would be the case in traditional criminal proceedings. Thus, there is no mechanism to assess either the accuracy of information or the proportionality of the adopted measures. Clearly, in order to take a well-informed decision to agree or disagree with a proposed listing, states are dependent on intelligence information of their own agencies or other states' sources.[31] In the absence of some kind of national interest in a particular situation, however, there is little incentive to challenge a proposal (Idem: 1115). The potential for abuse and strategic horse-trading within such closed-door proceedings may be obvious.

4. Information in the legal process

Before taking a closer look at the consequences of the use of information during the legal proceedings surrounding blacklisting, it will be necessary to establish which legal norms and rights are at stake and to what extent they apply to the actors involved and within the distinct legal spheres. This will be limited to the European order for reasons of space. Still, it

should be pointed out that, although there is no consensus among legal scholars, the arguments within the debate about the UN's human rights obligations concern rather the *extent to and basis on which* they are applicable to the UN rather than *if* they are (Fassbender, 2006).

4.1. Human rights guarantees within the European Union

Whereas the EU as such is not a signatory to the *European Convention on Fundamental Freedoms and Human Rights* (ECHR), its founding treaties recognize the rights guaranteed in the Convention as general principles of Community law (Art 6 TEU).[32] It is important to point out that the guarantee spelled out in this article does not contain any restrictions, rather it appears to be an unqualified requirement of Community law from which no derogation is foreseen. The ECJ has also repeatedly referred to those rights and accepted them as legitimate justification for deviating from internal market principles.[33]

The most relevant articles of the ECHR for our purposes in the context of blacklisting may be Article 1 of Protocol 1 (protection of property) [34], Article 6 (access to court and the right to a fair trial), and Article 13 (the right to effective remedies).[35]

Despite the formally non-criminal nature of financial sanctions[36], in the logic of the European Court of Human Rights (ECrtHR) case law specifying autonomous interpretation, it may be conceivable that given the severity of the effects[37] and the "timelessness" of blacklisting the procedure may amount to a "determination of a criminal charge" in the eyes of the Court giving rise to the full application of Article 6 ECHR.[38]

According to the case law of the ECrtHR full application of Article 6 would then require "equality of arms" between prosecution and defense[39], an adversarial procedure and thus an opportunity to "inspect the files prior to the hearing".[40]

The Court has however recognized that derogation from the requirement to grant access to the relevant documents is justified to protect fundamental rights of another individual or to safeguard an important public interest (Cameron, 2006). While the Court recognizes that terrorism creates special obstacles to investigators and prosecutors, it has denied that terrorism as such could be an autonomous justification for restrictions of rights granted in the ECHR.[41] On the other hand, it has recognized that the requirements of a fair trial may be modified in anti-terrorism matters and has thus allowed for special composition

of courts and procedures to uphold secrecy (Idem). Yet, the Court refuses to accept that access to a court could be completely blocked or the court disabled to decide on the merits of a case on "national security" grounds and maintains the crucial importance of the independence, impartiality and competence of the court as well as the principle of "equality of arms" (Idem).[42]

Even if it were not the case that blacklisting would be considered effectively a criminal sanction[43], Article 6(1) would still be applicable concerning rights such as the right to property or reputation.[44]

Article 13 of the ECHR only becomes relevant in case an application falls within the scope of another material right and is then applied as a subsidiary article. The Article provides for the right to an "effective remedy". If Article 6(1) was deemed to be applicable, this remedy would have to be "judicial". If not, the question becomes what would constitute an "effective" remedy. The minimum requirement of this right in cases of terrorism blacklisting would seem to be that there be adversarial proceedings and a competent, independent authority accessible and able to access the information that led to placement, even in case such information is not publicly available (Idem). So there must at least be the possibility of such an appeal authority to reject an executive decision as unreasonable or unfounded. While such an authority need not necessarily be a court, there are certain minimum requirements for procedural safeguards to be observed such as the amount and detail of reasons given to explain the decisions at stake or the transparency of the review procedure.[45] This requires a minimum of information to be delivered on the basis of which at least marginal review could take place. As the EcrtHR pointed out in *Tinnelly*, *in casu*, even access to judicial review had not amounted to an effective remedy since there had not been an independent review of the facts that had led to the government's decision to refuse Mr. Tinnelly a contract on grounds of national security.[46] After all, the Court observed, the judge in the case did not have access to the necessary (secret intelligence) information that had been used to arrive at the decision and was thus unable to assess the facts and engage in substantial review. It also noted that possibilities obviously existed, which would safeguard national security concerns while at the same time according the individual a sufficient degree of procedural justice.

Recognizing the centrality of information in the process of justice in cases of terrorism blacklisting, it is interesting to have a closer look at the progression in the approach of the Community judges to this issue.

4.2. European Community Courts case law

Various persons and entities affected by placement on one of the lists have appealed to the European Courts to challenge a number of regulations and decisions.

In December 2001, in *Aden,* the Court of First Instance (CFI) already pointed out the problem of opacity that is the result of a lack of access to information that underlies listing, which makes it impossible for the courts to review the lawfulness of placement.[47] Many have followed suit in an attempt to challenge the legality of the decisions leading to their designation as "terrorists" and the consequences thereof.

Since there are different ways of getting on one of the lists and consequently different opportunities to request judicial review, the below analysis will categorize the case law accordingly.

The UN list

The two decisions in *Yusuf* and *Kadi* have been subject of much criticism and have placed the reasoning of the CFI concerning the place of international law within the European legal order at the center of attention of scholarly writing (see *inter alia* Kotzur, 2006; Labayle, 2005; Lavranos, 2006; Eeckhout, 2007).

In a nutshell, the Court held that the measures taken by the EU, as far as required by the UNSC, to fall outside the scope of judicial review (notably this was seen as a consequence of EC law itself, not international law). Correspondingly, it refused to apply fundamental rights contained in EU law as a threshold to review such regulations since this would amount to an indirect review of the UNSC Resolutions. Still, the Court went on to consider norms of *ius cogens* as the ultimate constraint on UNSC powers and relied on those norms as legitimate limit beyond which review would be called for.[48] The action of the appellants, however, was not successful, since the Court did not consider the sanctions to infringe on these peremptory norms of international law and thus concluded it could not review the legality of the taken measures.[49]

Concerning the information used to decide on their placement, the Court observes in the *Kadi* and *Yusuf* cases that there is no opportunity to respond to the authenticity and relevance of facts used to justify listing.[50]

In order to understand the full impact of this reasoning, it is important to note here that the listing of these suspects cannot be reviewed at the national level, since the sanctions applied to them are implemented by means of EC Regulations, which do not allow for any direct review of legality by domestic courts.

The EU list: "Endogenous Terrorists"

As "endogenous" terrorism suspects, Basque Youth organisation *Segi* and prisoner association *Gestoras pro Amnistía* have tried to challenge their placement on the list in vain.[51] They indirectly challenged the legality of the provision of the underlying *Common Position 2001/931*[52] on the application of specific measures to combat terrorism, which in their case are *not* implemented via a EC Regulation.

The CFI held that it was outside the scope of its judicial power to adjudicate a claim for damages based on an EU action within the Second or Third Pillar. So, even though the Common Position explicitly mentions the right to bring such a claim by erroneously listed persons[53], the Court did not consider this a sufficient basis for a power of judicial review. It considered its jurisdiction limited to establish whether the correct decision procedure had been followed. In fact, the very claim Segi made was that the Council had chosen the instruments precisely *because* no judicial remedy was available and had thus exceeded its powers by taking measures under the Second and Third Pillar in order to minimize democratic and judicial control.[54] Again here, the (lack of) availability of information becomes important: due to the lack of publicly accessible (preparatory) documents, any intention on the part of the Council can hardly be proven (Tappeiner, 2005: 115).

So, the outcome seems to be that while the rule of law criterion formally remains in tact, the current Pillar system evidently makes it possible to take far-reaching measures against individual citizens outside the reach of democratic scrutiny and the possibility of judicial review. The CFI concluded with the contemplation that indeed, the present situation would most probably leave the applicants without recourse to any effective legal protection at either the national or the Community level.[55]

The ECJ eventually dug somewhat deeper, examining the rationale of its limited jurisdiction, and held that preliminary rulings can be requested concerning measures adopted by the Council which are "intended to produce legal effects in relation to third parties since *it would run counter to [its] objective to interpret Article 35(1) EU narrowly"* (*emphasis added*).[56] Thus, concerning *Common Position 2001/931*, the Court clearly recognized - contrary to the earlier CFI decision - the possibility of a national court to ask for a preliminary ruling on the question whether there was an intention to produce effects on third parties.[57] On the basis of this reasoning, the Court concluded that Segi and Gestoras are in fact not left without a remedy, are thus not able to claim ineffective judicial protection and rejected their appeal. National courts will now be the forum to seek review and effectuate the right to an effective remedy. As a recent report to the Parliamentary Assembly of the Council of Europe points out, however, the preliminary ruling procedure, which would be the consequence of a request made by a national judge on the basis of Article 35 TEU, would still render it difficult for individuals to directly challenge the underlying Common Position. It is thus doubtful whether this procedure would indeed amount to an "effective remedy" in the sense of Article 13 ECHR (Committee on Legal Affairs and Human Rights, 2007).

Segi and Gestoras Pro Amnistía also appealed to the ECrtHR against 15 EU Member States.[58] Also there, their appeal was unsuccessful since the Court did not consider the mere listing as a violation of the Convention. Consequently, the applicants cannot be considered "victims" in the sense of the Convention, since formally the inclusion in the list itself does not have any legal effect.[59] Given the fact that after their listing, the spokespersons of both Segi and Amnsitía have been incarcerated and their activities declared criminal by a Spanish court[60], this assertion leaves serious doubts. Still, the issue of secretiveness and its consequences for suspects' chances of defending themselves was not addressed.

The EU list: "Exogenous Terrorists"

Concerning actions brought forward by "exogenous" terrorism suspects, the *Kurdistan Workers' Party (PKK), Aydar, Sison*, the *Organisation des Modjahedines du Peuple d'Iran (PMOI)* and the Dutch foundation *Al Aqsa* have contested the EC measures taken to implement the *9-11* Resolution. The series of cases lodged by Mr. Sison[61] has been maybe the most direct targeting of the informational aspect of those cases: since trying the more

indirect avenues had thus far been unsuccessful in securing access to the necessary information to enable him to challenge his listing, his defense brought a case specifically asking for the disclosure of the relevant documents on the basis of EU legislation on public access to documents.[62]

Initially the CFI ruled that the right to access to information as contained in *Regulation 1049/2001* on public access to documents could not be invoked to be granted access to the relevant documents on the basis of which placement on the EU list had occurred nor could it be relied upon to come to know the identity of the authors of such documents.[63] This has been confirmed by the ECJ.[64]

In conclusion, the Court hinted at the recognition that the appellant may well have legitimate interests in the disclosure of the information sought, but that the instruments to maximize *public* access to documents could not be construed to serve those individual aims.[65]

When it comes to grounds for refusal to grant access, the Regulation provides that disclosure *must* be refused if it would undermine public security. The Court considered that the Council had a wide margin of appreciation in deciding what constituted such "undermining" and thus concluded that it had not made a "manifest error" of assessment when it refused Mr. Sison access, even partially, on the basis of Art 4(1) of *Regulation 1049/2001.*

Not only concerning the content of the sought documents was Mr. Sison unsuccessful with his appeal, but also with regard to the identity of their authors. The ECJ ruled that the Council was entitled on the basis of Article 4 (1) of *Regulation 1049/2001* to refuse disclosure of the documents as well as the identity of their authors or the third countries involved.[66] Since third parties must consent to disclosure of documents of which they are the author, Mr. Sison's alternative option would be to challenge the refusal of giving consent directly there, possibly before the court of a third, non-EU state. However, also here the ECJ held that there was no obligation to disclose the identity of third parties, who in turn are entitled to deny the content, indeed the very existence, of sensitive documents. Considering the possibility of challenging the decision of the "competent authority" which is a formal condition for EU listing, at the national level, it would be left to the applicant to take his pick out of the countries, whose "competent authority" presumably

could have taken the decision he could then contest (Cameron, 2003*b*: 244). This is obviously not a viable choice and not a valid argument to bring forward in favour of the existence of an "effective remedy".

In effect this means that in the face of a "war against terrorism" upholding the secrecy of the sensitive documents, as defined by Article 9 of *Regulation 1049/2001*, was prioritized over a defendant's right to a fair trial, in which he would have to be able to defend himself.

A new minimum standard

Given the above routes all led to nothing close to improving the situation of suspects, many critics had taken to hoping for increased transparency at the level of UN decision making or to calling upon the creativity and courage of national judges to find a way to safeguard a residue of fundamental rights protection in Europe.

In one recent case[67], however, an applicant succeeded in his endeavor to be de-listed. In December 2006, the ECJ reached a remarkable ruling, which may constitute the first reaction of the Court to signal its unwillingness to give unfettered discretion to the Council and protect the rule of law against erosion for the sake of the "war against terrorism". The ruling could be read as the proverbial "line in the sand"; a demarcation of a minimum level of protection against the *kafkaesque* proscription procedures adhered to so far.

The lack of information available to suspects and their subsequent incapacity to avail themselves of their rights is indeed at the center of this decision. The Court ruled that since the Council had not provided the appellants (PMOI) with any information concerning its listing decision, their right to a fair hearing had been breached and subsequently annulled the part of the Council Decision that had placed the PMOI on the list implementing *Regulation 2580/2001*.[68] Thus, in cases where the EU institutions are the responsible actors considering names for listing and subsequent measures implemented in a EC Regulation, the Court insisted that the right to a fair hearing, effective judicial protection as well as an obligation to state reasons on the part of the institutions exists and can be effectuated through an appeal to the Community judge. In essence, the Court annulled the contested part of the Council decision as a result of the lack of information and the opaqueness of the listing procedure.

In its judgment the Court pointed out that

> Not only has the applicant been unable effectively to make known its views to the Council but, in the absence of any statement, in the contested decision, of the *actual and specific grounds* justifying that decision, it has not been placed in a position to avail itself of its right of action before the Court, given the aforementioned links between safeguarding the right to a fair hearing, the obligation to state reasons and the right to an effective legal remedy. It must be borne in mind that the *possibility of regularising the total absence of a statement of reason*s after an action has been started is currently viewed in the case-law as prejudicing the right to a fair hearing.[69] (*emphasis added*)

The targeted entities will still only hear about their listing after the measures will have taken effect, since the necessity of a surprise effect has been recognized, while the lack of giving the opportunity of a fair hearing will have to be compensated by an especially strict judicial review. [70]

That means that the statement of reasons will have to

> [...] disclose in a *clear and unequivocal* fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof.[71] (*emphasis added*)

The right to a fair hearing will have to be effectuated primarily at the national level and then "as part of the national procedure which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4) of Common Position 2001/931".[72] The Court did emphasize that the evaluation of evidence *must indeed have taken place* at the national level before it can be considered applicable. Has the competent national authority not assessed the available evidence, there must still be notification and a hearing at Community level to fill up the lack at the national level. This nuance may become of special relevance when it comes to those entities that have been "copy-pasted" from US lists.[73]

The Court also made clear that its review of lawfulness of the implementing EC Regulation under Article 230 TEC would imply an "assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based".[74]

Significantly, the Court did not only base its reasoning on the lack of information provided to the appellants, but went on to point out that neither the documents contained in the file made accessible to it, nor the responses received by the Council or the UK had enabled it to

"conduct its judicial review, since it is not even in a position to determine with certainty [...] exactly which is the national decision [...] on which the contested decision is based".[75] Whereas the Court recognized that the Council indeed enjoys a broad measure of discretion when it comes to amending or updating the list, that the Council's assessment of the facts cannot be substituted by the Court's and that there are legitimate restrictions to the right to a hearing, it pointed out that when it comes to push and pull, it was not capable of reviewing the lawfulness of the decision at hand due to the lack of available information. Thus, in the end, the Court had simply not been brought into a position to satisfactorily answer the question put before it.[76] In July 2007, the same reasoning led to the de-listing of the Dutch Al-Aqsa[77] foundation. Also Mr. Sison has eventually profited from the elaboration of this new minimum standard.[78]

5. Concluding remarks

It is no coincidence that the series of cases discussed above show a common preoccupation with information as a precondition for justice and all of them, in last instance, revolve around a right to information. The legal process is inherently a fact-finding mechanism, which cannot work properly without a minimum pool of information. If that is lacking, "procedural justice" becomes a hollow concept, a mere fig leaf with which to cover up a blatant lack of accountability as a result of secretive decision-making.

The "first generation" of suspects[79] to bring an action before the courts targeted the decision-making process within the UN, thus implicitly challenging the non-availability of information about the procedures as well as the secrecy surrounding the underlying evidence.[80] It had been their aim to engage the Court in more than a mere review of lawfulness of the contested Regulation to address the secrecy surrounding the Security Council procedure. Given the role assigned to the Security Council under Chapter VII in making the political assessment of what constitutes a threat to international peace and security, the Court had found it impossible to "verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken''.[81] Their rights were thus not effectuated by the Court that pointed to the deliberate absence of an independent international court which the "Security Council [had not considered] advisable to establish".[82] The Court decisions in *Yusuf* and *Kadi* echoed

among legal scholars and led many to argue their uneasy fit with existing case law of the ECJ on the protection on fundamental rights, judicial review and the rule of law. Especially when one considers the meek democratic credentials of sanctions policies adopted by executive organs, the need for judicial scrutiny in order to safeguard fundamental rights guarantees becomes utterly urgent (Eeckhout, 2007: 201).

The European judges effectively declined to adopt an approach similar to the German *Solange*-logic[83] to protect the integrity of its own human rights protection against being undermined and thus, UN-designated suspects are legally speaking left empty-handed when it comes to challenging the information underpinning their listing. They will have to rely on their state of nationality or residence intervening on their behalf through the channels of diplomacy, while the information that has been gathered about them and their evaluation will remain within the realm of politics.

With reference to the EU list, the Court has carved out a striking differentiation between "exogenous" and "endogenous" terrorism suspects. While it keeps emphasizing the importance of a sufficient degree of transparency for suspects to avail themselves of their rights, it has effectively closed the door in the face of attempts to gain direct access to the documents underlying the decision for placement through the Regulation concerning public access.[84]

In its PMOI judgment, however, the Court has now made a clear case for the protection of certain procedural rights of exogenous suspects and has thereby established a minimum threshold as to information that will have to be provided to suspects. Still, judicial review even in those cases remains limited to the factual assessment of "grave mistakes" – while it remains to be seen, what would constitute such a mistake. Also, on a more practical level, it remains questionable how effective judicial intervention is given the fact that to this day, even the successful applicants (PMOI) remain on the EU list – they have brought a new case before the ECJ.

When it comes to "endogenous" terrorism suspects, where the Council has taken recourse to Common Positions to implement UNSC sanctions, it will have to be the domestic legal systems of the Member States to compensate the lack of protection and access to a fair hearing at Community level.[85] Remarkably, however, the indirect avenue to the Community level by means of the preliminary ruling procedure has been put on the table, thereby

expanding the traditional role of the Court to include "*all* measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties" (*emphasis added*).[86] This certainly indicates a certain amount of uneasiness in the face of the degree of legal protection and could strengthen the rule of law in the European legal order in the long run. For now, applicants are left to hope that domestic judges will be better equipped to review Council decisions and eventually to gain access to secret intelligence that they need.

5.1. The right to information and review/remedies

The inherent relationship between the right to information and the right to a judicial remedy was recognized by the Court when it considered that "the parties concerned can make genuine use of their right to a judicial remedy only if they have *precise knowledge* of the content of and the reasons for the act in question" (*emphasis added*).[87] Moreover, however, in order for the Court itself to exercise its role, it must be in a position to "make up its mind" about the case before it. Here, the accumulation of information becomes a basic premise of access to an effective remedy.[88]

The judges of the ECJ have already hinted at the course which upcoming cases may be expected to take. Since, even if a sufficient statement of reasons will be provided in the future to listed entities, it cannot be taken for granted that the Court will consider *itself* sufficiently informed to fulfill its task when called upon to actually engage in substantial legality review. Since such a review is the only available procedural safeguard that ensures the availability of legal remedies and a fair balancing of interests concerning the limitations of the right to a fair hearing imposed by the Council, the Court has stressed that there must be a strict, impartial and independent judicial review. In order to be able "to review the lawfulness and merits of the measures to freeze funds" it has announced that it will consequently *not* consider it "possible to raise objections that the evidence and information used by the Council is secret or confidential".[89]

To come back to the initial aspects of information involved in the listing and de-listing process, it can be concluded from the case law of the Community Courts that, whereas the evaluation of the reliability of the information remains within the political process and thus behind closed doors, there will now be – if only in the case of "exogenous"

suspects – a limited review of the nature of such "evidence" by a judicial authority. The Court has thus far not considered it necessary to rule on the question whether the appellants and/or their lawyers may be provided with the allegedly confidential information or whether this will have to remain a prerogative of the Courts.[90] Thus, a procedure remains to be defined "so as to safeguard the public interests at issue whilst affording the party concerned a sufficient degree of judicial protection". Again, the upcoming decisions of the Community judges will have to shed more light on this procedure. It should be clear, however, that a lack in the equality of arms as a consequence of non-disclosure of information to the defence would have to be compensated by a more rigorous examination by the Court. Yet, finally, even if access to confidential information by the Court will be effectuated, the question remains whether courts are in fact fit to make a proper assessment of the matter lacking expertise to judge its reliability (Cameron, 2003: 249). Furthermore, a clear standard of evidence would have to be elaborated in order to ensure consistent application.

5.2. The future of blacklisting within the EU

So far, no court has held the regime UN blacklisting to be invalid, but pending appeals before the ECJ in *Kadi* and *Yusuf* may well threaten such an outcome. In January of 2008, Advocate General Maduro issued a devastating opinion concerning Kadi's appeal to the ECJ – he clearly disagreed with the Court's finding that it had merely limited jurisdiction to review the EC Regulation, even though it was implementing a UNSC Resolution, since international law can only take effect under the constitutional principles of the Community, including the protection of fundamental rights and the rule of law.[91] He goes on to find that the Regulation in fact did infringe on Mr. Kadi's right to property, right to be heard and right to effective judicial review and therefore concludes it should be annulled as far as it concerns him.

Also, in the light of the reasoning of the ECJ in its *PMOI* decision, it would seem that the distinction between UN designated terrorism suspects and those designated by the EU may come to be seen to undermine the European fundamental rights guarantees beyond an unacceptable level. As Maduro points out, "the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general

principles of Community law and deprive individuals of their fundamental rights".[92] In consequence the Community Court would have to apply proper judicial review of the implementing regulations without being able to hide behind an unconvincing interpretation of the supremacy of the UN Charter. Also, the differential treatment of terrorism suspects, which are currently the effect of the Community Courts' decisions, is hardly acceptable.

Also, it will be in the coming judgments, after the Council has adapted its information procedure, that the Court will have to elaborate on a standard of how much and what kind of information it will need to fulfill its role of conducting proper judicial review. Even though, this role is limited to assessing whether the procedures have been followed correctly and no manifest error of assessment has been made, it is now clear that it will not accept a merely *pro forma* standard statement of case with varying names in the addressee line. It must be pointed out once more, however, that at this point, the vindication of these information rights is only applicable to a limited number of targeted entities, which brings to light the rather worrisome consequence of the current Pillar structure that the Council can take action against individuals that profoundly affect their status without being subject of the direct scrutiny of a Community judge.

Another observation should be that, in the long run, the judges of the ECrtHR in Strasbourg just might reconsider their approach to presume the existence of "equivalent protection" within the EU. Thus, it may well be that the "peaceful coexistence" between Luxembourg and Strasbourg as result of the *Bosphorus* ruling[93] will be disrupted since the current system may well come to be considered as "manifestly deficient". While the *Bosphorus* ruling of the ECrtHR recognized the availability of equivalent protection within the EU, it has also made clear that this assumption can be refuted and that there can be residual responsibility of state parties even when implementing legal obligations arising out of membership to an international organization.[94] Maybe Segi (EU endogenous) cannot be considered a victim in the sense of the Convention, but what about Yusuf (on UN list) or Sison (EU exogenous)?

A parallel development may also take place at the domestic level. In response to the *Yusuf* and *Kadi* judgments, many observers have noted that the CFI's refusal to review the implementing legislation might give rise to another wave of domestic resistance à la *Solange,*

which would again intensify the judicial dialogue about the supremacy of Community law (Eeckhout, 2007: 202).

In the end, the way in which Europe will manifest itself in the face of a sanctions regime, which a recent Resolution of the Parliamentary Assembly of the Council of Europe has described as "totally arbitrary" and "unworthy" of the EU, is a matter of credibility.[95] The "war on terrorism" has unleashed a powerful political force which has employed secret detention centres, "extraordinary renditions" and is currently undermining the prohibition of torture. In a climate of fear, human rights guarantees are most easily undermined. Yet, those guarantees are made exactly for the sake of preventing executive power to trump individual rights in difficult situations, when public pressure to "do something" is high. The European constitutional order must not be abused to circumvent those guarantees and Community judges must not defer to the pressures of an international political climate which would lead to a permanent state of emergency and a sell-out of human rights protection within the EU. Defending those rights by means of diplomatic pressure within the UN as well as judicial diligence is the only credible and coherent path of action of the Union and the states that make it up.

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[1] This study is based on the author's LL.M. dissertation (July 2007) and has been updated until September 2008, which excludes the later appeal judgment in *Kadi*.

[2] "Generally, the trial is not only hidden from the public, but also from the accused. Of course, only to the extent possible, but it is possible to a very large extent since the accused does not have access to the court documents and to infer from the interrogations the content of the underlying documents is very difficult…" (Translated by the author).

[3] As for example the decision on the *European Arrest Warrant*, which was adopted at record speed after the 9-11 attacks and contains a number of controversial amendments such as the abolition of the double criminality requirement for certain behaviour or the abolition of the political offence exception.

[4] Instead of sanctioning a whole country, so-called 'smart sanctions' are targeted at certain individuals and/or organizations. In this paper, the term will be used to describe the placement of individual or organizations on blacklists of suspected terrorists and the subsequent freezing of their financial assets and funds.

[5] Adopted by the General Assembly on 9 December 1999.

[6] So, for example, the placement of the PKK in 2002 triggered substantial debate since, by that time, the organisation had formally renounced its military struggle against the Turkish troops and been lawfully operating for some years (Cameron, 2003*b*: 236).

[7] For a discussion of the regime of smart sanctions as a tool of neo-colonialism and repression of legitimate resistance movements see McCulloch and Pickering (2005), Hayes (2005). Another interesting example is the Danish association "Rebellion" (called "Opror" in Danish), which was founded in reaction to domestic anti-terrorism measures and the more general ideological underpinnings of the "war on terrorism". For more details see (http://www.statewatch.org /terrorlists/listsrebellion.html). [Retrieved 13 August 2008].

[8] Since there is no higher international forum that allows individuals to challenge Security Council Resolutions, the European level is the final instance in those cases.

[9] Case T-306/01 *Yusuf and Al Barakaat* v *Council and Commission* [2005] ECR II-3533, para. 231 – 259.

[10] This reasoning bears some analogy with the ECJ's position on the EEC's succession of the Member States into GATT. For a critique of the reasoning employed by the Court see Eeckhout (2007).

[11] Case T-306/01 *Yusuf and Al Barakaat* v *Council and Commission* [2005] ECR II-3533, para. 252; 255.

[12] Common Positions 1999/727/CFSP (*Taliban*), 2001/154/CFSP (*Al Qaida*) and 2001/930/CFSP and 2001/931/CFSP (together implementing the *9-11* Resolution) respectively.

[13] The terms as such are not used but are translated by the author from the distinction introduced by. Langendoen (2007: 378).

[14] For a possible different reasoning, see Tappeiner (2005).

[15] All the above does not mean, however, that states could not implement the UN Resolution providing for financial sanctions in relation to "endogenous" suspects or subject those persons to criminal prosecution. The example of the Netherlands makes clear that it may even be possible to declare the application of *Regulation 2580* to "endogenous"' terrorism suspects, though such

reasoning appears to be in blatant contradiction to the working of the Regulation (Tappeiner, 2005).

[16] In *Yusuf*, the Court observed that "the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations. Nonetheless, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to i*us cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible". Case T-306/01 *Yusuf and Al Barakaat* v *Council and Commission* [2005] ECR II-3533, para. 276-277.

[17] The so-called Plaumann-formula as formulated by the ECJ. Case 25/62 *Plaumann v Commission* [1963] ECR 95.

[18] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* ECR II- 4665.

[19] Case T-338/02 *Segi association, Araitz Zubimendi Izaga and Aritza Galarraga v Council* [2004] ECR II-1647. Segi's appeal was dismissed by the ECJ on 27 February 2007 (see Case C-355/04 P *Segi and Others* v *Council* [2007] ECR I-0000.

[20] The Consolidated List can be accessed online at: (http://www.un.org/sc/committees/1267/pdf/ consolidatedlist.pdf) [Retrieved on 12 July 2008].

[21] Also, the *1267 Committee* works together closely with the *Counter-Terrorism Committee* created by *Resolution 1373* (*9-11*). See for example Article 15 of *Resolution 1526* (30 January 2004).

[22] The guidelines can be found online at: (http://www.un.org/docs/sc/committees/1267/pdf/ 1267_guidelines.pdf) [Retrieved on 12 July 2007].

[23] This was also the major claim of Mr. Sison who said to have been blackmailed by the Philippine government with placement on a blacklist in order to keep him from continuing his opposition.

[24] In response to widespread critique, several improvements have been made which ameliorate, if not adequately remedy, the procedures. These measures include the establishment of a "focal point" to which listed suspects may make direct requests for de-listing. *Resolution 1735* (2006).

[25] *Resolution 1735* (2006) further specifies the requirements for the statement of case required and asks States to designate that information which may be publicly released.

[26] Those include the death of a suspect, but also "mistake of identity", changes in circumstances so that "the individual or entity no longer meets the criteria set out in relevant Resolutions" and "whether it has been affirmatively shown that the individual or entity has severed all association", as defined in *Resolution 1617* (2005), with Al-Qaida, Osama bin Laden, the Taliban, and their supporters, including all individuals and entities on the Consolidated List.

[27] *Common Position 2007/871/CFSP* (20 December 2007) updating *Common Position 2001/931/CFSP* on the application of specific measures to combat terrorism and repealing *Common Position 2007/448/CFSP*.

[28] Probably, this formulation emanates out of a literal French translation and what was meant here is "conviction".

[29] The EU list also contains names from the *1267 Committee* list, while it remains unknown whether there is any additional layer of verification before taking over the data of alleged terrorists.

[30] Though various governments have made proposals such as introducing a ombudsman-like constructions or the introduction of administrative review panels, little progress has been made (Chesterman, 2006: 1117).

[31] The role of intelligence in this respect must not be underestimated. Since the implementation of a European Defence and Security Policy in 1999, the 9-11 attacks in 2001 and the Madrid bombings in 2004, intelligence cooperation among Member States has been intensified. To respond to the increased cooperation the Joint Situation Center (SITCEN) was established to support the decision-making of the High Representative, Europol information systems have been enlarged and updated and the Framework Decision on the *European Arrest Warrant* has simplified police cooperation and the exchange of information.

[32] In fact, it cannot be as a result of lacking competence. This situation might, however, be alleviated in the future. The *Draft Treaty on a Constitution for Europe* had already foreseen in an EU accession.

[33] See for example Case C-112/00 *Eugen Schmidberger, Internationale Transporter und Planzüge v Austria*, [2003] ECR I-5659.

[34] Concerning the right to property, blacklisting is interpreted as "control on use", which leaves a wide margin of appreciation to Member States. Also, national security is usually considered to fulfill the "pressing need"-criterion to justify restrictions on this right (Cameron, 2006).

[35] As Dick Marty, Rapporteur of the Committee on Legal Affairs and Human rights of the Council of Europe points out in a recent report, there are a number of other rights, which are potentially violated by the current regimes including the right to life, to health, to private and family life, to reputation, to freedom of movement and to freedom of religion (Committee on Legal Affairs and Human Rights, 2007).

[36] In the *Yusuf* and *Kadi* cases the understanding of the sanctions as being preventive rather than punitive in fact played an important role in the decision that the measures did not violate fundamental rights of the applicants.

[37] In fact, the full effects of listing may not even have been anticipated by its instigators. So, for example, in a recent judgement the ECJ decided that a listed person cannot be registered as the owner of a building while German authorities have reportedly refused to pay social benefits to a wife of a listed individual and withdrew the political refugee status of several Iranian exiles who support PMOI. For more examples see Committee on Legal Affairs and Human Rights (2007).

[38] *Engel and Others v The Netherlands* (App nos. 5100/71; 5101/71; 5102/71;5354/72;5370/72) 08 June 1976, para. 82. Concerning the time dimension, it can hardly be argued that the "war against terrorism" is likely to be a short-term effort. Given the fact that there is no such thing as a "sunset"-clause that would provide for an automatic end of the sanctions, this interpretation of the nature of the sanctions may turn out to be overly formalistic. At least at this point, there seems no end in sight of the "war on terrorism" and thus of the process of blacklisting. In any case it remains highly unclear, as to when sanctions would be lifted, which makes the "provisional, administrative" freezing of assets resemble a much more serious measure such as confiscation.

[39] *Wloch v Poland (A*pp no 27789/95) 19 October 2000.

[40] *Schöps v Germany (A*pp no 25116/94) 13 February 2001, para. 51.

[41] *O'Hara v UK* (Appl. No. 37555/97) 16 October 2001. See Kooijmans and Simmelink (2006: 1119).

[42] See also the court's reasoning in *O'Hara v UK* (App no 37555/97) 16 October 2001, para. 35.

[43] In its recent *Sison* decision, the ECJ did not comment on the applicability – as brought forward by the defence - of Article 6 (3) (a) ECHR which explicitly concerns *criminal* sanctions. Case C-266/05 P, *Jose Maria Sison v Council* (1 February 2007), para. 29.

[44] Once a decision impacts an individual's financial situation, the Court will generally find that Art 6 (1) applies, see for example *Salesi v Italy* (App no 13023/87) 13 April 1993.

[45] *Chahal v The United Kingdom* (App no 22414/93) 15 November 1996.

[46] *Tinnelly & Sons Ltd and Others and McElduff and Others v The United Kingdom* (App no 20390/92) 10 July 1998.

[47] Case T-306/01 *Aden and Al Barakaat International Foundation v Council and Commission* [2002] ECR II-02387, para 76. The applicants first asked the Court to annul EC *Regulation 2199/2001* (amending Regulation 467 implementing UN *Resolution 1267*) and to declare *Regulation EC 467/2001* to be not applicable to them. They pleaded that the Council had exceeded its powers under Articles 60 and 301 TEC and violated Article 249 TEC when it ordered sanctions against private individuals. While they claimed infringement of their right to a fair hearing and a lack of legal protection, two of the three persons involved were taken off the *1267 Committee* list as a result of a de-listing application by the Swedish government.

[48] So, paradoxically, while the Court explicitly renounced its competence to (even indirectly) review UNSC Resolutions, it went on to entitle itself (as well as national judges) to engage in a legality review of UNSC measures concerning compliance with *ius cogens*, the exact content of which remains subject to much disunity. As Eekhout points out, this move could be considered to encompass the "worst of both worlds" since the outcome of this reasoning was an insufficient degree of protection of fundamental rights and at the same time a dubious claim on jurisdiction to review UNSC Resolutions on the basis of *ius cogens* (2007: 197).

[49] For some interesting arguments and considerations concerning the merits of the CFI's approach and the question whether the German constitutional Court's *Solange*-jurisprudence may have provided for a more fruitful approach, see Ley (2006) and Eeckhout (2007). Also in its decision in *Ayadi*, the CFI considered the application of EU fundamental rights to measures implementing UN sanctions to be outside of its powers. However, the Court then supplemented its earlier stance with an obligation of Member States to protect individuals by means of diplomatic protection. As Nettesheim (2006) points out, this substitution of judicial protection has been preceded by decisions of the Court that asked Member States to compensate lacking access to Community Courts through giving them standing in domestic courts instead. The choice of diplomatic protection as a last resort in case of lacking legal protection, however, seems like a rather weak alternative that fits more smoothly into the world of traditional international law governed by intergovernmentalism and absolute state sovereignty than into the supranational architecture of a growing European constitutionalism. The CFI did, however, stress that the way of starting national proceedings, rather then at EU level, remains open.

[50] Case T-306/01 *Yusuf and Al Barakaat v Council and Commission* [2005] ECR II-3533, para. 186 and Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, para. 273. For a more detailed analysis see *inter alia* Bulterman (2006) and Kotzur (2006). For a recent overview of the status of cases see: (http://www.statewatch.org/terrorlists/terrorlists.html). [Retrieved on 13 August 2008]. In *Ayadi* and *Hassan*, the CFI reiterated this reasoning, while it did recognize that certain obligations, which find their basis in the respect for fundamental rights as general principles of EC law, apply to Member States, when they receive a request for removal from the list. Case T-253/02 *Ayadi v Council* [2006] ECR II-2139; Case T-49/04 *Hassan v Council and Commission* [2006] ECR II-52.

[51] They commenced proceedings for damages for alleged disadvantages suffered as a consequence of being listed by the EU in accordance with Article 235 in conjunction with Article 288 (2) TEC. As explained in the prior part of this paper, they cannot start an annulment action on the basis of Article 230 TEC since they are not subject to the effect of the *Regulation 2580/2001* on the basis of *Common Position 2001/931*. Joint Cases Case C-355/04 P *Segi and Others* v *Council* [2007] ECR I-000 and Case C-354/04 P *Gestoras Pro Amnistía v Council* [2007] ECR I-0000. Gestoras Pro Amnistía is a Basque group made up of relatives of ETA prisoners which aims at their release.

[52] Which has been renewed and updated by the Common Positions 2002/340 and 2002/462.

[53] According to the Council Declaration of 18 December 2001 annexed to the minutes at the time of the adoption of *Common Position 2001/931* and *Regulation 2580/2001*: "The Council recalls regarding Article 1(6) of *Common Position 2001/931* that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress".

[54] While the Court is not competent to adjudicate the issue, the European Parliament is not in a position to affect the measures under the Second and Third Pillar.

[55] Still, the mere "probability" that the appellants would be stripped of access to judicial protection could not serve the Court as a sufficient reason to assume such powers. Case T-338/02, *Segi association, Araitz Zubimendi Izaga and Aritza Galarraga* v *Council*, [2004] ECR II-1647, para. 38. During the appeals procedure, Advocate General Mengozzi advanced a different analysis of the cases.

[56] Case C-354/04 P *Gestoras Pro Amnistía v Council* [2007] ECR I-0000, para. 53

[57] Idem, para. 54.

[58] Joint cases *Segi* and *Gestoras Pro Amnistía* (App no 6422/02 and 9916/02) 23 May 2001.

[59] For a critical analysis of the Court's assessment that the inclusion in the list has *no* legal effects whatsoever, see Tappeiner (2005: 118).

[60] For more detail see Basque Observatory of Human Rights online at: (www.behatokia.info/docs/Info/EUlists/esp/eulistsesp.doc) [Retrieved on 02 May 2008].

[61] Mr. Sison is a citizen of the Philippines suspected of being the Head of the New People's Army, currently living in the Netherlands. Sanctions against Mr. Sison were applied by the Dutch authorities even before his name was put on the *1267 Committee* list and the EU list since he had appeared on the list of the executive order of the American President of 12 August 2002. See Sanctieregeling terrorisme 2002 III, *Stcr.*2002 no. 153/6, 2.

[62] It has been argued that trying to appeal to rules on public access should be seen as an example of "bad choice" and a sign of lacking legal competence. Still, it is pointed out, the amount of cases being rejected on the basis of what seems to be a failure on the side of applicants may indeed represent a problem apart: an overly complex legal situation which in itself may jeopardize the rule of law (Almqvist, 2008: 313).

[63] Joined Cases T-110/03, T-150/03, T-405/03, *Sison* [2005] ECR II-1429.

[64] Case C-266/05 P, *Sison* ECR I-1233.

[65] Idem, para. 48.

[66] For Mr. Sison's version of events see (http://www.bulatlat.com/news/4-17/4-17-offensive.html). [Retrieved 11 August 2008].

[67] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* ECR II- 4665. Before the current judgment, 13 challenges had been dismissed, out of which seven are under appeal at the ECJ. Another seven are currently pending.

[68] In accordance with earlier case law, it did not annul the most recent amendment of the underlying Common Position 2001/931. Also the claim for symbolic damages of 1 Euro was dismissed as inadmissible.

[69] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* ECR II- 4665, para. 165.

[70] Idem, para. 128.

[71] Idem, para. 141.

[72] Idem, para. 119.

[73] Idem, para. 125.

[74] Idem, para. 154.

[75] Idem, para. 166.

[76] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* ECR II- 4665, para. 172.

[77] Case T- 327/03 *Al-Aqsa* v *Council* (11 July 2007).

[78] Case T-47/03 *Sison* v *Council* ECR II-2047.

[79] Case T-306/01 *Yusuf and Al Barakaat* v *Council and Commission* [2005] ECR II-3533; Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

[80] Idem, para. 191.

[81] Idem, para 339.

[82] Idem, para 340.

[83] BverfGE 37, 271 *Solange I* (29 May 1974).

[84] A noteworthy side-effect of this ruling has been to *de facto* limit the addressees of potential requests for information to the Council, since there is no right to know about either the authors of the relevant documents or even their very existence in the first place. Case C-266/05 P, *Jose Maria Sison v Council* ECR I-1233, para. 94; 95.

[85] Case C-354/04 P *Gestoras Pro Amnistía v Council* [2007] ECR I-0000, para. 56. While access to sensitive information will be subject to the procedure of each national system, it remains uncertain how national judges could be able to gain access to information made available by third (Member) States on whose assessment the decision of a national authority, other than a judicial authority, may have been based.

[86] Idem, para. 53. For a more elaborate discussion of this issue see Peers (2007).

[87] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* ECR II- 4665, para. 89.

[88] Case T-47/03, *Sison* v *Council,* ECR II-2047**,** para. 137.

[89] Idem, para. 155.

[90] Idem, para. 205.

[91] Opinion of Advocate General Poiares Maduro Case C-402/05 P *Kadi v Council and Commission* (16 January 2008).

[92] Idem, para. 34.

[93] *Bosphorus v Ireland (*App no 45036/98) 30 June 2005.

[94] Since there is no necessary conflict between UN blacklisting and adherence to the ECHR, Article 103 UN Charter will not be a legitimate basis to be invoked by a ECHR state party in good faith to avoid its obligations when either adopting or implementing the sanctions.

[95] *Resolution 1597* (2008), adopted 23 January 2008, para. 61.

LIST OF CASES

TERRORISM BLACKLISTING

Court of First Instance

Case T-306/01 *Yusuf and Al Barakaat* v *Council and Commission* [2005] ECR II-3533

Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649

Case T-306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II-2387

Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] OJ 2002 C 247/20

Case T-338/02 *Segi association, Araitz Zubimendi Izaga and Aritza Galarraga v Council* [2004] ECR U-1647

Case T-253/02 *Chafiq Ayadi v Commission* [2006] OJ 2002 C 289/25

Joined Cases T-110/03, T-150/03, T-405/03, *Sison* [2005] ECR II-1429

Case T-253/04 *Zubehir Aydar v Council* [2004] OJ 2004 C 262/28

European Court of Justice

Case 25/62 *Plaumann v Commission* [1963] ECR 95

Case C-112/00 *Eugen Schmidberger, Internationale Transporter und Planzüge v. Austria*, [2003] ECR I-5659

Case C-354/04 P *Gestoras Pro Amnistía v Council* [2007] ECR I-0000

Case C-355/04 P *Segi and Others* v *Council* [2007] ECR I-0000

Case C-266/05 P *Jose Maria Sison v Council* (1 February 2007)

Case C-229/05 P *Osman Ocalan and Serif Vanly v Counci*l (18 January 2007)

Case C-303/05 *Advocaten voor de Wereld* [2007] , OJ 2007 C 140/05

European Court of Human Rights

Wloch v Poland (App no 27789/95) 19 October 2000

Schöps v Germany (App no 25116/94) 13 February 2001

O'Hara v UK (App no 37555/97) 16 October 2001

*Bosphorus v.Ireland (*App no 45036/98) 30 June 2005

Joint cases *Segi* and *Gestoras Pro Amnistía* (App no 6422/02 and 9916/02) *2*3 May 2001

Other

Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), advisory opinion, [1962], ICJ Reports 151

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