

The European Union, the European Convention of Human Rights and the UN sanctions: which standard for Human Rights protection? An analysis of the consequences of *Kadi* and *Yusuf* jurisprudence*

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ABSTRACT

In a world which deals intensively with security challenges the human rights protection is endangered. Nevertheless protecting the European HR standard does not often imply a complete judicial protection of the rights of individuals. A pass in review of EU judicial procedures underlines deficiencies in the second and third pillar. The European Court of Justice is called in *Kadi*'s appeal to follow-up a higher standard than the Court of First Instance did with regard to the protection of human rights. The EU system might be put at risk by the review of the European Convention of Human Rights.

Keywords:- Human Rights protection- the implementation of UN sanctions in EU- the relationship EU and ECHR- the right to an effective remedy-

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Introduction

The European Union has been constantly put under pressure from different systems-domestic and European Convention of Human Rights (ECHR)- to take into due consideration the human rights (HR) protection. The European Union (EU) pledged its commitment to the rule of law and the protection of human rights in article 6 EU Treaty. In the same time, the European Community (EC)¹ tried to adopt its own instrument of HR protection: the Charter of fundamental rights, which is still not judicially enforceable². The Lisbon Treaty, if ratified, will mark a further step in this battle: the Charter will be legally binding for the EU and Member States, with the exception of Great Britain and Poland (Protocol n.7). The means to achieve this purpose are various: the respect of HR, which are part of the general principle of law, common to the constitutional traditions of the Member States; the EU's adhesion to the ECHR or the respect of the Charter of fundamental rights. At least, one of these means should help EU achieving a high standard of HR protection.

However, individuals still complain before the European courts alleging the insufficient judicial protection of their rights. The EU does not lack of good intentions, stated various principles of law, but still lack of means to enforce them. In this article, I shall not comment the deficiencies of the actions available in the first pillar of the EC; within the CFI and the ECJ have at least, fully jurisdiction on the EC acts. The lack of judicial protection is more obvious in the specific context of the second and third intergovernmental pillars- the Common Foreign and Security Policy (CFSP) and Area of police and judicial cooperation in criminal matters-within European courts, the European Court of Justice (the ECJ) and the Court of First Instance (CFI), lack and do not have a complete jurisdiction. The Lisbon Treaty, if ratified, will eliminate the differences between pillars and EC/EU institutions, still the intensity of judicial review will be variable. Meanwhile, EC institutions are in constant struggle to attract more competencies from intergovernmental to Community pillar. They hope for European courts to have jurisdiction on these issues. Also, the European Parliament should have a word to say; for now, no democratic control over the acts adopted by the Council is available.

¹ Until the entry into force of the Lisbon Treaty, which will eliminate the differences into pillars, I shall use the EC for the first pillar and the EU when I am taking into account all three pillars. The European Community (EC) will be replaced by the European Union (EU), which will enjoy of legal personality.

² The European jurisdictions and the general advocates usually make reference to it.

The reason of the set-back in the judicial and democratic control is that the foreign and security policy is still considered as a domestic sensitive issue by Member States. The Title V of the EUT has consequently excluded the CFSP's acts (joint action and common position and defined by art 14 and 15 EUT) from any review of European courts. For the third pillar, the preliminary reference procedure is only available if the Member State made a declaration of acceptance (art 35§1 EUT). The individual can not lodge an action in annulment like in the first pillar. A part of the field of the third pillar, title VI EUT, such as "Visa, asylum, immigration", "migrated" to the Community pillar, in title IV ECT, nevertheless individuals still do not enjoy of the whole range of procedures available in the first pillar: for example, the preliminary procedure is only available to last instance courts. The EU court can not review the validity of domestic measures concerning "public order and internal security" (Art 68§2 ECT and 35§5 EU). Such exceptions are contrary to an organisation bound by the rule of law and the protection of HR. Therefore, a lot of proposals were made around the constitutional convention in order to revise the EU treaty³.

These exceptions to European courts' jurisdiction become even more important when the HR are restricted in the battle against terrorism. The UN Security Council has adopted resolutions, which are mandatory for Member States under the UN Charter. The EU adopted common positions within the second pillar. Both UN resolutions and common positions listed individuals and organisations suspected of helping or doing terrorist acts. These persons listed suffered financial sanctions, like freezing of the accounts and assets. At the EU level, the Council can also nominate persons on a list updated periodically. The discussion around these decisions is not made public. These measures imply important restrictions in the rights of the defence and the right of propriety and they should be accompanied by judicial guarantees. From this point of view, a lot of procedural requirements available in the EU framework seems to be lacking. The UN resolutions do not provide any possibility for suspects to defend against the charges and to contest their nominalization before a jurisdiction. On the contrary, the provisions render available a political committee, the UN Sanctions Committee, which is the only body that can withdraw the suspects' name from the lists. Several persons nominated on these lists have lodged complaints in front of the European court. The EU institutions are

³ For further details, Oliver SCHUTTER, Rapport final « Ancrer les droits fondamentaux dans l'Union européenne », 2002, www.cridho.cpd.ucl.ac.be.

against of any kind of judicial review on these acts, because it could jeopardy the EU implementation of the UN sanctions.

This issue might be analysed form various points of view: the relationship between International and European Law, the role of the EU, as a promoter of HR, in the International society etc. My perspective has mainly an internal focus: the relationship between EC institutions and Member States. One question to be answered is how the human rights protection might be preserved without changing the constitutional equilibrium between the Member States and the EC competencies? My hypothesis is that EC institutions will use the EU standard to impose more constraints on the Member States. The latest have to enforce the UN resolutions in the battle against the terrorism. The picture gets more complicated if we consider that eventually the EU/EC's might be under review by the European Court of Human Rights (ECourtHR).

The CFI declared that has no jurisdiction to review directly the validity of CFSP acts (common-positions). However, the Court attracted indirectly a judicial review from the second to the first and third pillar, because it reviewed the validity of acts implementing the common position: Community regulations (in *Kadi, Yusuf, Hassan and Ayadi*⁴), and third pillars acts, framework decision, (in the decisions *OMPI* and *Sison*). Hence, the CFI interpreted extensively its jurisdiction in order to review indirectly second pillar acts. Before entering into the analysis of this largely discussed jurisprudence, I shall briefly note that the inter-pillar attraction might be also observed in the field of criminal cooperation. The ECJ uphold this movement: to rather use a first pillar directive than a third pillar framework decision, to implement criminal penalties for achieving the mission of protection of environment⁵.

A comparative analysis of the CFI's jurisprudence

In a world threatened by security challenges, the EU should be the guardian of the way in which the Member States protect fundamental rights with regard to International Obligations subscribed vis-à-vis of the United Nations. The European courts are confronted with a

⁴ Case T-315/01*Kadi* [2005], ECR. p. II-3649 and T-306/01, *Yusuf* [2005] ECR p. II-3533; Case T-253/02, *Chafiq Ayadi* [2006], ECR. p. II-2139 and T-49/04, *Hassan* [2006], ECR. p. II-52.

⁵ ECJ, 23rd October 2007, *Commission c. Council*. The importance of the objective of the protection of environment, considered an essential, transversal objective (art. 6 EC) of the Community, justified the use of criminal sanctions in the first pillar.

difficult choice: whether to apply the same high standard of the protection of human rights in this sensitive area of the fight against terrorism.

The CFI jurisprudence has two different outcomes. First, in *Kadi* and *Yusuf* (pronounced in the same day on 21st September 2005) and then, in *Hassan* and *Ayadi* (pronounced in the same day, on 12th July 2006), the CFI found no violation of the HR. Second, in *OMPI* (*Organisation des Modjahedines du peuple d'Iran*) and *Sison*⁶, the CFI annulled the Council's decision for the failure to state reasons.

On 16th January 2008, the conclusions of General Advocate M. Poiares Maduro were made public in the appeal C-402/05 P of M. Kadi against the CFI's decision. His conclusions contradicted in all points the CFI's analysis: he advocated for enforcing a high standard of HR, defined by the EU.

I shall briefly comment the CFI rulings in comparison with the Opinion of General Advocate M. Poiares Maduro. A comparative approach might also help to relativize some authors' point of view, published before the Opinion came out. The following points will be dealt with:

1) whether there is an European judicial review against the EU acts transposing the UN sanctions with regard to the protection of HR; 2) a comment on the CFI's findings on the allegation of violation of individual rights; 3) the debate raised between the EC institutions on the follow-up to CFI's jurisprudence in *OMPI*; 4) whether the ECourtHR will review the EU acts.

1) First issue dealt with in this jurisprudence is whether any judicial review is available against the UN resolutions of the Security Council. Moreover, do European Courts have jurisdiction to review these acts? These questions raise a delicate debate: the place of United Nations obligations in the EC legal order. The nature of the relationship between the EC legal order and International obligations will provide answers on the European courts' limits of

^{6 6} T-228/02 *OMPI* [2006], ECR. II 4665; T-47/03, *Sison* [2007].

judicial review. A. Hinarejos has an interesting point of view arguing that the UN law-EC law relationship should not be compared to the EC law-national law relationship⁷.

In *Kadi* (para. 181 *sqq*) and *Yusuf* (para. 231 *sqq*) the CFI found that International obligations prevail over all other Member States' regional obligations, such as the EC and the Council of Europe, according to the art 103 of the Charter of the United Nations⁸. The extensive interpretation of the articles 25 and 48§2 of the UN Charter concluded to the primacy of the resolutions of the Security Council adopted under Chapter VII of the Charter over Member States. The interpretation of the art 305 EC and the ECJ jurisprudence revealed to the CFI that the EC was bound by the same International obligations as the Member States (*Yusuf*, point 254, et *Kadi*, point 204 *Yusuf*, para. 234). Therefore, the European Community must transpose these obligations without enjoying any margin of discretion (*Yusuf*, point 265, et *Kadi*, point 214). Once the CFI had asserted that the EC was bound by the UN sanctions, it followed that as a rule, the CFI had no jurisdiction to review indirectly the lawfulness of the Security Council resolutions (*Yusuf*, para. 239). The CFI' self-limitation to review the validity of EU acts implementing the UN Security Council resolutions would have been largely criticized for failing to uphold the Community level of human rights protection. Therefore, the same Court affirmed an "incidental" jurisdiction to review the validity of EC acts with regard to the human rights protection, seen as *jus cogens*⁹ (*Yusuf*, para 281, *Kadi*, paras 225 *sqq*). Furthermore, the Court affirmed that such standard of HR protection applied also to UN institutions.

The CFI arguments (confirmed in *Ayadi*, para 116 and *Hassan*, para 92) were largely discussed by doctrine: for example, N. Lavranos defended the idea that UN sanctions, once "communitarised", brought automatically the European courts into the picture. Furthermore, he argued that the CFI should have invalidated EC regulations because they did not meet the standard of EC fundamental rights (art 47 of the Charter of fundamental rights and articles 6 and 13 of the ECHR), in particular the availability of a review of the listing of the names by

⁷ For further details on the special relationship between Member States law and EC law, proclaimed in an autonomous legal order, see Ioana Raducu et Nicolas Levrat, "Le métissage des ordres juridiques européens (une "théorie impure" de l'ordre juridique)", *Cahiers de droit européen*, 2007, 1-2, Bruxelles, pp.111-148.

⁸ Authors refer also to the binding force of the article 30(6) of the 1986 Vienna Convention on the Law of Treaties.

⁹ The definition of *jus cogens* found in the art. 53 of the Vienna Convention. The CFI defined it 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' (*Yusuf*, para. 277, and *Kadi* paras 227).

an independent judicial body¹⁰. The CFI should have reviewed the EC regulations on the basis of EU and ECHR standard and not in the virtue of *jus cogens*. The CFI's broader interpretation of *jus cogens*, including within its scope universally recognized human rights, is still a disputed issue in International legal practice (the ICJ's jurisprudence) and doctrine¹¹.

The CFI's opinion is also completely contradicted by the General Advocate Maduro (his analysis was foreseen by N. Lavranos)¹². The General Advocate considers that International obligations binding the EU are part of the EC legal order; still they do not prevail over the EC treaty. They do not enjoy a supra-constitutional place in the Community legal order, so they might be reviewed according to the EU constitutional framework (para 24). As a consequence thereof, the UN Security Council resolutions do not enjoy supremacy over EC/EU treaties (and fundamental rights) according to the ECJ jurisprudence (*Bosphorus* etc). The Advocate-General considers that only Member States are legally bound by the UN resolutions. He does not agree with the claim that art 308 ECT gave Member States judicial immunity concerning the implementation of UN resolutions (para 32). Member States remain under the review of EC courts. In his eyes, the European Union is bound to respect HR and the Rule of Law and no exception to the EC courts' power of review should be allowed. Consequently, the EC jurisdictions are under the obligation to review the EC acts according to the standard of protection of fundamental rights. Therefore, the CFI erred in law holding that it had no jurisdiction to review the contested regulation. Further, it should have reviewed the legality of the measure in the light of fundamental rights that are part of general principles of Community law. The European jurisdictions' role is to defend the integrity of the Community legal order.

In sum, in the *Kadi* appeal the ECJ will be confronted to prove on the one hand, consistence with its own jurisprudence and on the other, to "honour" its place in the battle against terrorism. EC courts have a limited jurisdiction in the second and the third pillars, which allow them solely to verify whether the competencies of the Community have been violated. Regarding the issue of the legal basis chosen for the contested regulation in the first pillar, the

¹⁰ Nikolaos Lavranos, 'UN Sanctions and Judicial Review', *Nordic Journal of International Law*, Volume 76, 1/2007, p 4 and 13-15 and Lavranos. 'Judicial Review of UN Sanctions by the Court of First Instance', *European Foreign Affairs Review* 11, 2006, p.480.

¹¹ Mielle, BULTERMAN, loc.cit., p.770.

¹² Nikolaos Lavranos (2007), pp. 10-12. The author argued that the EC/EU is not bound by UN Security Council resolutions *in the same way* as the Member States. Moreover, the CFI misconstrued the hierarchy of norms within the Community legal order because the UN resolutions don't have primacy over the EC Treaty. The same arguments are also developed in Nikolaos Lavranos (2006), p.478, showing in two figures how the CFI twisted the EC hierarchy of norms.

EC institutions had to adopt acts implementing the common-positions on the basis of the articles 60, 301 and 308 EC. The analysis showed that art. 308 ECT did not constitute on its own an adequate legal basis. After a long reasoning, the CFI justified the recourse to this article, additionally to the legal basis of the articles 60 and 301 ECT, for the sake of the requirement of consistency in adopting these specific measures in the first pillar¹³. The General Advocate in *Kadi's* appeal considered that adding art. 308 ECT is not of any help. Therefore, the CFI's judgement is vitiated by an error of law (para 16).

We might also suppose that the European judiciary might also be put under pressure by the ECourtHR to review the level of the HR protection in this field. The Advocate General in *Kadi*, para 36, doubted that ECourtHR limits its jurisdiction with regard to procedural domestic measures implementing UN sanctions. Such a review would have indeed, endangered the claim of the Community order to an autonomous capacity to sanction the violation of human rights by Community institutions¹⁴. The EU is confronted to a conflict between different standards of protection of fundamental rights produced at different level of governance, the UN and the EC Treaty¹⁵. But this issue will be discussed in the last part of this paper.

2) The CFI's power to review the respect of HR is limited to procedural aspects: whether there is a violation of the right to an effective remedy (which includes also, the right of the defence) and of the right to propriety. The individual contested the procedure before the Sanctions Committee was not offering all guarantees of a jurisdiction. The Court recognised the right of the individual to a fair hearing, but the restriction is justified by the purpose followed (para 328). The right of the defence is diminished because it was granted no access to information at the basis of the sanction. In the joint-case *Sison*, the CFI confirmed that it will not grant access (partial or total) to Council decisions concerning the fight against terrorism. It put into balance the restriction to the right to information relating to the protection of the public security and the interest of the purpose followed: the fight against terrorism¹⁶.

¹³ M. BULTERMANN, *loc. cit.*, p.762.

¹⁴ There were complaints before the ECourtHR of non-respect of human rights by EU. In Case C-84/95 *Bosphorus* [1996] ECR I-3953, the ECourt of HR concluded it's a relative premise of equivalent protection of human rights before the 2 systems.

¹⁵ Alicia HINAREJOS, 'Recent Human Rights Developments in the EU courts : The Charter of Fundamental rights, the European Arrest Warrant and Terror List', *Human Rights Law Review*, 2007, p. 15.

¹⁶ Joint Cases T-110/03, T-150/03 and T-405/03, *Sison* [2005], ECR. p. II-1429. In its conclusion, M. BULTERMANN foresaw these questions which were answered in the CFI's judgement, *loc.cit*, p. 772.

In *Hassan* (para 94) the applicant put forward in its defence two decisions of the Court of Appeal for the District of Columbia stating that proscription by United States Secretary of State of the parties without prior hearing infringed their right to due process. Like wise the defendants argued that State authorities have not demonstrated that a prior hearing of their case would prejudice the security of the EU or the urgency to take a decision. The CFI did not consider this argument relevant to the case, upholding Commission's arguments. The cross-reference to another jurisdiction way of interpreting domestic measures was not considered important for the CFI.

The right to an effective judicial remedy is recognised as well in International Pacts (art 8 UDHR and art. 14 IPCPR). In the same time, the CFI admitted that this right was not absolute, but relative, so it might undergo limitations. Individual can lodge a complaint against the sanctions infringed before its own State; whether his request will be addressed in front of the Sanctions Committee, a diplomatic, non-jurisdictional organism, is left entirely to the State's discretion. However, the CFI found that this indirect remedy in front of the Sanctions Committee might be "equivalent" and "adequate" to a jurisdiction. The CFI seemed to justify this lacuna in the judicial protection available to applicant by the immunity of the jurisdiction enjoyed by the UN resolutions¹⁷. Also, another alternative remedy is available to applicant, such as the possibility of review of his request of re-examination through his State that I shall briefly comment on hereinafter¹⁸. Hence, the plea related to a violation of the right to an effective remedy was also rejected (*Yusuf*, paras 341 to 346, and *Kadi*, paras 286 to 291). All the CFI findings regarding its limited jurisdiction to review are confirmed in *Ayadi*, para 116 and *Hassan*, para 92.

From my point of view, the CFI's reasoning is unsatisfactory for not considering the ambit of the right to an effective judicial remedy, as recognized in the article 47 of the Charter of fundamental rights and in the art. 13 of the ECHR. However, the CFI felt the need to further enforce the importance of this right in the EU, based on the rule of law. Therefore, in *Ayadi* and *Hassan*, the CFI attached a lot of importance to interpret the "Guidelines for the Sanctions Committee" in order to ascertain a right of re-examination of the persons listed. It derived from these Guidelines, in conjunction with Community law principles and ECHR

¹⁷ BULTERMAN, *loc.cit.*,p.771

¹⁸ I agree with M.Bultermann's opinion, *loc.cit.*, p.770, that this possibility is not a very good alternative to the lack of judicial protection of individuals.

provisions, a legal right for the affected persons and organisations against their domestic authorities to get a re-examination procedure started in front of the Sanctions Committee (*Ayadi*, paras 140-150, *Hassan*, paras 110-120). Member States are required to act in good faith ensuring the availability of a re-examination procedure to the persons nominated on the list. They could challenge in a domestic action any wrongful refusal of the competent domestic authority to submit a case for re-examination in front of the Sanctions Committee (*Yusuf* para. 317, *Kadi*, para 270). The CFI adds that any domestic procedure must meet the Community requirements of effectiveness and equivalence (*Ayadi*, paras 150-151, *Hassan*, paras 121-122). Thus, the CFI compensate the lack of judicial review at the EU level by imposing specific legal obligations on Member States¹⁹. The domestic courts' empowerment to review if the MS fulfilled their obligations under the Community law is a part of a broader movement of decentralisation of the EC judicial system. The ECJ has already held the principle of State responsibility for any failure to fulfil the EC obligations.

The CFI's attempt to impose a new right to an effective remedy on domestic level is to be appraised; nevertheless it can not replace an effective remedy at EC/International level²⁰. To uphold this argument, we consider the relative impact of the domestic jurisdiction decision, *Sayadi and Vinck*²¹, on the Sanctions Committee. The domestic jurisdiction dismissed the case against the applicants after several years. Meanwhile the Belgium State has failed to convince the Sanctions Committee to de-list their names for 3 years²². Moreover, it took the CFI a long time to deliver its judgement in *Yusuf* and *Kadi*. The president of the CFI rejected the applicant's request for interim relief since the conditions relating to urgency were not fulfilled²³. The material and moral prejudices for applicants are enormous, if we take into consideration that for now, an appeal to the CFI's decision is still pending before the ECJ.

Ayadi and *Hassan* cases might open another Pandora box: as a rule, each Member State uses its own, different standard of HR protection. Several constitutional courts, notably *BVerfG*, refused to apply EC regulations, which don't meet the German constitutional standard of HR

¹⁹ Lavranos (2007), p.7 and Lavranos (2006), pp. 481-482.

²⁰ *Ibid*, p.7.

²¹ Bruxelles Court of First Instance, *Sayadi and Vinck c Belgium*, 18 February 2005.

²² For further analysis, see M. BULTERMAN, 'Fundamental Rights and the Unites Nations Financial Sanctions Regime: The *Kadi* and *Yusuf* judgements of the CFI of the European Communities', *Leiden Journal of International Law*, 19/2006, pp. 756-757.

²³ M. BULTERMAN, p.761.

protection²⁴. Moreover, the Court has to take up the task of enforcing the right to a judicial remedy under the regime of the second pillar that do not enjoy judicially and democratically control mechanism. Therefore, the *BVerfG* maintains a ‘reserve jurisdiction’ as a back-up should the European system fail to provide sufficient protection of fundamental rights in individual cases.²⁵

With regard to the alleged violation of the right to propriety, the Court considered that the freezing of the assets is a precautionary measure and not a confiscation. Like wise, it is temporarily re-examined (*Kadi* paras 248 and 289, *Yusuf* paras 299 and 344, *Hassan* para 105, *Ayadi* para 135). The purpose of any restrictive measure is to affect the right to pursue trade or business. The importance of the aim pursued by these measures is such as to justify the negative consequences for some operators (ECHR *Bosphorus* para 167, *Yusuf* para 298, *Kadi*, para 247, *Hassan* para 101, *Ayadi* para. 125).

Therefore, in all four decisions, *Kadi*, *Yusuf*, *Hassan*, *Ayadi*, the CFI affirmed its jurisdiction but it rejected the complaint because substantial limitations of the exercise of fundamental rights must be accepted for the sake of effective implementation of UN sanctions. The same argument was used by ECJ in *Bosphorus*²⁶, which stated that restrictive measures against human rights are allowed considering the precedence of UN sanctions. Authors have disapproved CFI’s refusal to provide judicial review against UN sanctions, because the result is a lacuna concerning fundamental rights protection for affected individuals and organizations²⁷.

The General Advocate Maduro in *Kadi*’s appeal disproves the ‘incidental’ control of the CFI on the measures restricting fundamental rights. Such a judicial limitation of the Court can not be justified only by the political purpose to fight against terrorism (para 42). According to his opinion, the right to judicial review is not secured at the level of the UN, as there is no genuine and an effective mechanism of judicial control. Therefore the ECJ should provide for judicial control implementing measures of the UN resolutions.

²⁴ the Court’s critique regarded the implementation of European Arrest Warrant.

²⁵ Lavranos (2006), p.489-490.

²⁶ Case C-84/95, *Bosphorus v Minister for Transport, Energy et Communication et a*, 1996, ECR. p. I-3953.paras 22.,23.

²⁷ Lavranos (2007), p. 1-16 and Lavranos (2006), p. 477.

In my view, this CFI decision has to be analysed in combination with *OMPI* and *Sison*. Thus, we suppose that the decisions taken in *Kadi* and *Yusuf* may be a part of the Court's strategy, which is to first establish its jurisdiction to review against the CFSP's acts implementing the UN obligations, and then to punish any violation of HR.

The Court was in the position to punish the breach of the HR in *OMPI*. However CFI maintained its findings from *Kadi* and *Yusuf* with regard to the non-violation of the right to propriety and the right to an effective remedy. Moreover, it went a step further and annulled the Council decision for the violation of the rights of the defence of individuals. The Council decision to name persons and organisations on the black list fails to state reasons. This surprising decision was confirmed in *Sison*. The difference is that in *OMPI* it was the Council who decided the names to be listed and no longer the UN Sanctions Committee. We suppose that the CFI was bolder to review in full whether the contested legislation (the framework-decision implementing the common position) complies with fundamental rights protected at EC level, because the link with the UN resolutions is more indirect.

Nevertheless, it is regrettable that the CFI was not going so far as considering that the Council decision has also violated the right to an effective remedy. Indeed, the Advocate General stated that the CFI could not decline to provide for judicial review in the eventuality of no other effective remedy is available. However, the CFI has excluded any form of direct judicial control on a second pillar common position, yet individuals have no other available effective protection in this field²⁸. Even if a Community judicial review is necessary in this field, until now the CFI did not want to touch on the system of direct actions stating that there is no jurisdiction for an action in the title V EUT. In the appeal against the CFI's decision *Segi*²⁹, another second pillar common position regarding a list of terrorist organisations had been under possible review. Likewise, the ECJ did not change the CFI's stand on the issue in order to admit an action for damages against a third pillar framework decision implementing the contested common position. The ECJ could have interpreted extensively the Council declaration, which stated the right to reparation for entities envisaged in the list annexed to the common position, but it did not. The applicant might still lodge an action for damages related to the EC regulation implementing the UN Sanctions (like it did unsuccessfully in *Hassan*,

²⁸ This lack was also commented by LABAYLE, « L'Espace de liberté, sécurité et justice dans la Constitution pour l'Europe », *RTDE*, n.2, 2005, page 454.

²⁹ ECJ decides on 27 February 2007, *Segi e.a.c. Conseil*, C- 355/04 P, ECR I-1657, on the appeal against the CFI's decision on 7 June 2004, T-338/02, ECR. p. II-1647.

paras 130-146). In this case, the applicant must meet the legal and factual requirements of this action within the first pillar. Nevertheless the ECJ found a way to push its jurisdiction in the second pillar a bit broader: the common position might be reviewed indirectly if it produces legal effects in relation to third parties through art 35 EUT. Hence, the Commission or a Member State might contest the validity of the common positions, but not an individual. His only chance against the common position is to challenge the national implementation act before domestic courts and hope that the latter will ask for a preliminary ruling. The ECJ considered once again, like in *Ayadi* and *Hassan*, that the mission to ensure the protection of HR belongs to the Member States' judicial systems³⁰. The ECJ confirmed the CFI might review the validity of domestic/Community implementation acts of a common position.

Indeed, the CFI's courage in affirming a competence to review indirectly the common-position in *OMPI* is remarkable, but the CFI felt more comfortable to review indirectly a CFSP act, instead of a Security Council resolution. However, the problem of how EU will legally comply with the International obligations is an actual dilemma still did not solve by EU actors.

3) European institutions are divided on the follow-up on the *OMPI* decision. What is sure is that its decision triggered a lot of contestation from the part of EU institutions. The European Parliament took the opportunity to take position against the non-transparent way in which the Council decided the content of the freezing list³¹. Each State proposes individuals and organisations and the other States have the interest to vote this propositions if they don't want as well to see their propositions blocked by other States. The non-transparent procedure of deciding the nominations on the list was contested.

In a second action, *OMPI* contested their second 'blacklisting' according to another Council decision on 20th March 2006. It claimed that the authority of the first CFI's decision is not respected by the Council. Further, on 30th November 2006 a domestic jurisdiction rejected all charges against this organisation, without that UK government to re-examine his situation³². The Parliamentary Assembly of the Council of Europe adopted a resolution on 23rd January

³⁰ The ECJ confirmed *UPA*'s approach on giving the responsibility to ensure the right to an effective remedy to domestic systems. For further details, see Hinajeros, *loc.cit.*, p.18.

³¹ Summary of the debate, see *Bulletin Quotidien Europe*, n. 9400, on 3rd April 2007.

³² See the critics to the Member State's failure to act after *Sayadi and Vinck* decision.

2008³³ contesting the EU and UN's procedure of blacklisting persons. This procedure should no longer violate the right to a fair hearing, the state for reasons and the right to a judicial remedy. Also, the Parliamentary Assembly asked Member State to respect the authority of the EU Court decisions. This position is quite surprising considering that the Parliamentary Assembly is not an EU institution. Despite of this, it upheld a high standard of HR protection on the European continent.

In this difficult institutional context the ECJ is called to take a decision: will it come to the same conclusion like the CFI, will it follow the General Advocate Opinion (and, be even bolder than CFI) or will it be more prudent than both (like it has already been in other issues³⁴)? To answer to these difficult questions, we should follow the outcome in *Othman* and *Aydar*³⁵ and the ECJ decision on the appeal of Mr. Kadi, Yusuf and Hassan³⁶. In their appeal, all three applicants contested the CFI's analysis of protection of HR like *jus cogens*, because it didn't consider the articles 6, 8, 13 and 1 of Protocol 1 of ECHR. They asked for an analysis in the light of the protection of HR defined by the EU and the ECHR. The Parliamentary Assembly asked also for an ECourtHR decision over this matter: which law is applied on the European continent, the UN law or the ECHR? A possible decision might also call into question the ECJ and CFI's capacity to ensure an autonomous standard of HR protection in the EU.

4) A final point to be treated by this article concerns the possible review of the ECourtHR (European Court of Human Rights) on the EU legislation. The Advocate General's Opinion put emphasis on the EU's effort to observe the HR standard according to the principles affirmed in art 6 §2 EUT. Indeed, the ECourtHR has jurisdiction to review Member States' measures implementing Community law. But, first of all, the claim of the applicants must be admissible. To lodge a complaint, the individual must be a "victim" according with the art 34 of the Convention. It means his rights, defined by the Convention, must have been violated by his State. However, the State might invoke in its defence that he was just implementing the EU obligations. If the ECourtHR accepts to review the Member States' acts of

³³ See *Bulletin Quotidien Europe*, n. 9587, on 25th January 2008.

³⁴ In *UPA*, the ECJ annulled the CFI jurisprudence, which allowed a broader access of individuals to actions in annulment, on the ground that the EC treaty does not allow a substantive revision of its art 230§4.

³⁵ Req 25.06.2004, T-253/04, *Aydar* ; Req 17.12.2001, *Othman*, T-318/01.

³⁶ ECJ, Yusuf appeal, C-415/05 P and Hassan appeal, [2006], C-399/06 P.

implementation of European acts³⁷, it will indirectly review the validity of the EU acts with regard to the standard of HR protection defined by the ECHR.

On the ECJ side, this eventuality would not be very much appreciated because the ECJ's exclusive jurisdiction on the interpretation and the application of Community acts³⁸ will be put in jeopardy. Until now, the ECtHR limited itself to any direct review on the validity of EU/EC acts. Several times, individuals claimed the collective responsibility of Member States in the name of Community acts³⁹, until the *Bosphorus* case, which settled the issue. The ECtHR affirmed that the European judicial system ensures an "equivalent" level of protection of HR. Nevertheless, it reserved its competence to intervene only in a case of a "manifesting deficiency" in the HR protection⁴⁰. The ECtHR applies a 'So lange' (So long) test regarding the review of Community acts, which means that as long as the EC/EU provides a sufficient level of protection of HR that is comparable to the protection provided by the ECHR, the ECtHR will not review indirectly Community acts⁴¹.

One of the clearest examples of the insufficient judicial protection available to individuals under the ECT is their difficulty to meet the *locus standi* requirements when attacking in annulment a Community act. Therefore, their chance to contest an act implementing EU sanctions is very thin⁴². Indeed, the ECtHR was confronted with several cases in which individuals complained against the restrictive access to direct actions in annulment in front of the European jurisdictions. The CFI tried to open the access of persons to such action, but the ECJ did not accept to revise the provision concerned (art 230 §4 ECT)⁴³. The ECtHR stated that the right to a judicial remedy is effectively ensured by the possibility to bring an action in annulment before the CFI against the decision to freeze their funds, pursuant to the Article 230 §4 of the EC⁴⁴. In *Ocalan*⁴⁵, the ECJ annulled the CFI's decision⁴⁶ that declared inadmissible the complaint. However, it affirmed that the CFI's interpretation of the article

³⁷ ECtHR, *Mathews v Royaume Uni*, judgement of 18 February 1999, req. n 24833/94.

³⁸ Case C-84/95, *Bosphorus v Minister for Transport, Energy et Communication et a*, 1996, ECR. p. I-3953.

³⁹ *Mathews* and Judgement of 10 March 2004, *DSR-Senator Lines GmbH v The 15 Member States of the European Union*, Req. 56672/00.

⁴⁰ ECtHR, *Bosphorus v Ireland*, judgment of 30 June 2005, No 45036/98, para. 165.

⁴¹ N. Lavranos (2007), *loc.cit.*, p. 16 and Lavranos (2006), p.485.

⁴² The same opinion is shared by N. Lavranos (2006), p.476.

⁴³ CFI's ruling in *Jégo-Quéré* was contradicted by the ECJ in *UPA*.

⁴⁴ *Bosphorus* and Judgement of 23 May 2002 *Segi and Others and Gestoras pro Amnistia v The 15 Member States of the European Union* [2002], n 6322/02 et 9916/02, ECR 2002-V, para. 124.

⁴⁵ C-229/05 P, *PKK et KNK* 2007, ECR. p. I-439.

⁴⁶ T-229/02, *PKK et KNK c Conseil*, 2005, ECR. p. II-539.

230§4 ECT was correct, even if it restricted the individual access to the action in annulment. The ECJ confirmed that this interpretation was consequent to the standard of protection of HR in the EU, which is “equivalent to the ECHR jurisprudence”. The ECourtHR rejected, until now, any appeal on this ground because the applicant didn’t prove the quality of “victim” according to the art 34 ECHR⁴⁷. So, the ECourtHR was afraid to rule that the Community and CFSP’ acts infringed the right to an effective judicial remedy according to the art. 13 ECHR and art 6 EUT. The CFI’s and ECourtHR’s common hands-off approach towards the review of UN sanctions should be challenged⁴⁸, like the Advocate General did in *Kadi*. Which standard to apply for the HR protection (International, European, domestic)? We are facing a typical case of overlapping jurisdictions between UN institutions and European courts. If one day, the ECourtHR decides to review the special regimes, the ECJ will have to follow such jurisprudence. Otherwise, the EU will loose credibility in pursuing the objective of ensuring a high standard of HR protection⁴⁹.

In conclusion, European Courts (ECJ/CFI and ECourtHR) should cease their hands-off policy towards the UN resolutions and review the acts implementing the UN obligations in the light of fundamental rights. Thus, the decision that the ECJ will take in *Kadi*’s appeal is crucial. If the ECJ will not firmly state the right to an effective judicial remedy, it is not sure that the ECourtHR will maintain the position of expectancy (non interference in the EU judicial system) stated in *Bosphorus*⁵⁰. Further, the ECJ/CFI should also state a legal obligation for the Member States’ implementing UN sanctions to comply with their domestic judicial decision and provide the right to re-examination for the individuals before the UN Sanctions Committee. It would fill up the lacuna of European jurisdiction in the title V and VI EUT.

Therefore, the ECJ should take a firm stand in promoting that an effective judicial remedy should be made available for individuals willing to contest the EC acts, including the CFSP.

⁴⁷ ECHR, *Segi and Others and Gestoras pro Amnista v The 15 Member States of the European Union*.

⁴⁸ Lavranos, p. 485.

⁴⁹ This eventuality was signalled by General Advocate Megozi in the appeal of Segi, C-354/04 P.

⁵⁰ I share the same doubt as M. Lavranos (2007), *loc.cit.*, p.9.

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