2 The Implementation of Security Council Resolutions in the European Union Revisited

*Eva Nanopoulos**

2.1 Introduction

This chapter looks at the interface between United Nations (UN) law and the law of the European Union (EU) in the context of the EU's implementation of a series of UN Security Council (SC) Resolutions requiring members of the UN, including EU member states, to freeze the assets of individuals and groups identified by a SC Sanctions Committee as associated with Al-Qaida and the Taliban.[1] For the sake of clarity, it focuses on the implementation of SC Resolution 1390 (2001), the instrument that maintained the UN sanctions regime in place after the fall of the Taliban in 2001. Resolution 1390 is part of a broader network of SC Resolutions imposing sanctions on the Taliban and Al-Qaida, but it is beyond the scope of this contribution to discuss the entire legal regime.[2] In the EU, this instrument was given effect by means of Common Position 2002/402/CFSP[3] and Regulation 881/2002,[4] which was subsequently amended by Regulation 1286/2009.[5]

The chapter proposes a solution to the problem of guaranteeing the effective implementation of the UN sanctions regime within the legal parameters and constraints imposed by the

* Bob Alexander Fellow and Lecturer in Law at King's College, Cambridge, where she is also acting as Director of Studies in Law and Equal Opportunities Tutor.

1 The UN Taliban regime and the Sanctions Committee were established by SC Res. 1267 (1999). At first, the Committee was established to ensure the proper implementation of the sanctions. After SC Res. 1333 (2000) expanded the regime to cover Osama bin Laden and his associates, including members of the Al-Qaida organization, the Sanctions Committee was assigned the task of maintaining a list of such persons on the basis of information provided to it by states and international organizations.

2 More recently, UNSC Resolutions 1988 (2011) and 1989 (2011) split the regime into two: the UN Al-Qaida regime and the UN Taliban regime. Therefore, the Taliban are now subject to a separate regime.

3 Common Position 2002/402/CFSP, OJ 2002 L 169/4.

4 Council Regulation 881/2002, OJ 2002 L 139/9.

5 Council Regulation 1286/2009, OJ 2009 L346/42.

EU legal order. The issue arose as a result of the landmark ruling[6] of the Court of Justice (ECJ) in *Kadi I*. Kadi was included on the list of the Sanctions Committee in 2001. Action at EU level followed, and Kadi sought annulment of the sanctions imposed upon him claiming, *inter alia*, that they were adopted in breach of his fundamental rights. At first instance, the General Court (GC) declined jurisdiction to review Regulation 881/2002 in the light of EU law on the grounds that it was mandated by a SC Resolution to which the institutions were bound to give effect and which left them virtually no leeway in the implementation process.[7] The only caveat, according to the GC, was review on the basis of *Jus Cogens,* a body of non-derogable norms binding the international community as a whole, including the SC.[8] No violation was however found; the GC upheld the validity of the sanctions imposed upon Kadi.[9] The decision was overruled on appeal.[10] The ECJ's starting point was the autonomy of the EU legal order and the basic principle that the Union is founded on the rule of law. This, according to the Court, meant that no international agreement can alter the principle that the institutions must be subject to review for the compatibility of their acts with the Treaties, including with EU fundamental rights.[11] It was thus irrelevant that the sanctions found their origin in, or were mandated by, a Resolution of the SC: the ECJ annulled the measures imposed upon Kadi on the ground that they breached due process rights and the right to property. Obviously conscious of the security implications

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6 M. Zgonec-Rozeg, 'Case note: Joined Cases C-402/05 P & C-415/05 P', 103 *AJIL* 2009, p. 305, at p. 308; C. Deirdre & C. Eckes, 'The *Kadi* Case: Mapping the Boundaries between the Executive and the Judiciary in Europe', 5 *I.O.L.R.* 2008, p. 365. Tridimas and Gutierrez-Fons describe it as the most important judgment ever delivered on the relationship between international law and EU (then Community) law. *See* T. Tridimas & J.A. Gutierrez-Fons, 'EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?', 32 *Fordham Int'l L.J.* 2008, p. 660. Others describe it as significant but not ground-breaking in that respect. *See* P. J. Cardwell, D. French & N.D. White, 'Case Comment: *Kadi v. Council of the European Union* (C-402/05 P)', 58 *ICLQ* 2009, p. 229, at p. 233. Others praise it for its contribution to the debate on the fragmentation of international law. *See* S. Besson, 'European Legal Pluralism after Kadi', 5 *EuConst* 2009, p. 237.

7 Judgment of 21 September 2005 in Case T-315/01, *Kadi v. Council and Commission* (*Kadi I*) [2005] II-3649.

8 A similar approach was then taken in Switzerland. *See* Switzerland, Federal Tribunal, Case 1A 45/2005 (Schweizer Bundesgericht) *Youssef Mustapha Nada v. Staatssekretariat für Wirtschaft*, 14 November 2007, 133 BGE II 450.

9 The judgment has been subject to severe criticisms. *See* G. Porretto, 'The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection', *in* P. Mathew & M. Gani (eds.), *Fresh Perspectives on the "War on Terror"*, ANU E Press, 2008; P. Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit', 3 *EuConst* 2007, p. 183; W. Vlcek, 'Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice', 11 *E.F.A. Rev.* 2006, p. 491; M. Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities', 19 *LJIL* 2006, p. 753.

10 Judgment of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council and Commission* (*Kadi I*) *[*2008] ECR I-6351. For an overview of the differences between the GC's and the ECJ's positions as regards the issues raised by the *Kadi I* litigation *see* N. Lavranos, "Joined Cases C-402/05P and C-415/05P", 36 *Legal Issues of Econ. Integration* 2009, p. 157.

11 Joined Cases C-402/05 P and C-415/05 P *Kadi I*, at paras 281-282.

of its decision, however, it granted the Council three months to remedy this inconsistency, a period during which Kadi's assets remained frozen.

The judgment of the ECJ in *Kadi I* thus makes clear that the EU cannot implement SC Resolutions that entail action contrary to EU fundamental rights. This raises a number of difficulties. From the perspective of the member states, annulment of the EU implementing measure risks engaging their international responsibility since they are bound, pursuant to Article 25 of the UN Charter, to carry out decisions of the SC. On a broader level, it risks questioning, incidentally, the legality of the underlying UN decision,[12] as well as jeopardizing the authority of the SC and the broader UN enterprise.

These considerations help to explain why, despite its human rights credentials,[13] some discontent has been expressed with the ruling, not only by academics writing in the aftermath of *Kadi I*[14] but also by the institutions, the member states and, quite remarkably, the GC.[15] Two months after the judgment, the Commission stated that the sanctions imposed on Kadi remained justified.[16] Kadi filed a second application for annulment with the GC, which initiated a second stage in the *Kadi* saga. Applying the principles laid down by the ECJ, the GC found that the sanctions continued to violate Kadi's fundamental rights and annulled the Regulation in so far as it concerned the applicant.[17] Clearly, however, the GC was not entirely convinced. The institutions had seized upon this opportunity to reopen the question of the relationship between the UN and the EU. While the GC felt compelled by the ECJ's ruling in *Kadi I* to ensure the 'full review'[18] of the Regulation, it acknowledged that the criticisms of the ECJ's judgment "were not without foundations".[19] Nevertheless, the GC held that it was for the ECJ to examine the respondents' questions in future cases brought before it, and, if appropriate, to reverse its previous case law on the matter. The institutions

12 A. Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions', *in* A. Reinisch (Ed.), *Challenging Acts of International Organizations before National Courts*, OUP, 2010, at p. 59.

13 N.T. Isiksel, 'Fundamental Rights in the EU after *Kadi and Al Barakaat*', 16 *ELJ* 2010, p. 551; N. Neuwahl, 'L'Union Européennes et les Résolutions du Conseil de Sécurité des Nations Unies – Contrôle de la Légalité en Vertu des Droits de L'Homme et Autonomie de L'Organisation des Nations Unies', 20 *Revue Québécoise de Droit International* 2007, p. 159.

14 *See* G. De Burca, 'The European Court of Justice and the International Legal Order after *Kadi*', 51 *Harv. Int'l L.J.* 1, 2010; L. Finlay, 'Between a Rock and a Hard Place: The *Kadi* Decision and Judicial Review of Security Council Resolutions', 18 *Tul.J.Int'l & Comp. L.* 477, 2010; E. Klein, 'International Sanctions from a Human Rights Law Perspective: Some Observations on the *Kadi* Judgment of the European Court of Justice', 4 *Intercultural Human Rights Law Rev*iew 111, 2009; A. Gattini, 'Joined Cases C-402/05P & 415/05P', 46 *CML Rev.* 213, 2009; L.M.M. Hinojosa, 'Bad Law for Good Reasons: the Contradictions of the *Kadi* Judgment', 5 *I.O.L.R.*339, 2008.

15 Although the GC did follow the approach of the ECJ in Case T-318/01. *Othman v. Council and Commission* [2009] ECR II-1627 and Joined Cases T-135/06 to T-138/06 *Al-Faqih and Others v. Council*, OJ 2010 C328/28.

16 Commission Regulation 1190/2008, OJ 2008 L322/25.

17 Case T-85/09, *Kadi v. European Commission* (*Kadi II*), Judgment of 30 September 2010, not yet reported.

18 Case T-85/09, *Kadi II*, at paras 125-126. The GC endorsed the ECJ's conclusions in Joined Cases C-402/05 P and C-415/05 *P*, *Kadi I*. *See* Joined Cases C-402/05 P and C-415/05 P *Kadi I*, at para.326.

19 Case T-85/09*, Kadi II*, para.121.

and the United Kingdom (UK) took up the GC's suggestion and each appealed the decision to the ECJ.[20] Their argument, essentially, is that the GC should have granted the Regulation immunity and/or, alternatively, that *full* judicial scrutiny was not, in the circumstances, the appropriate standard of review. The debate over the relationship between the UN and the EU, and what it entails in practice for the status and review of measures intended to give effect to Chapter VII Resolutions in the EU, is thus still very much alive.

In a way, this chapter is another contribution to what appears to be an ongoing debate. Yet, the aim is not to take a firm position among the spectrum of opinions expressed on the ECJ's ruling, but to offer a pragmatic solution to the issue of implementation of SC Resolutions in the EU. To that effect, the debate will be recast, perhaps in terms that do not necessarily give credit to all the broader issues at play. This contribution thus proceeds on the assumption that the relationship between UN law and EU law (and its concrete effects) is best analysed in the limited context in which it arises, namely, the now long established practice of the member states to act through the medium of the EU to give effect to UN sanctions regimes. It will therefore focus, not on the rules governing the relationship between UN law and EU law per se, but on the 'triangular' relationship[21] between the UN, the EU and the member states. When viewed from that angle, Section 2.2 will show that once the member state agree to discharge their UN obligations collectively by means of an EU instrument, this can be held to create an EU law obligation for the EU institutions to give effect to the relevant SC Resolution. Section 2.3 examines the impact such a finding would have for judicial review. It argues that when faced with a challenge to the relevant EU implementing measure, the EU Courts should engage in a balancing exercise between that obligation and other requirements of EU primary law. Section 2.4 acknowledges that there are bound to be situations where these two set of obligations will prove impossible to reconcile. In these circumstances, however, it concludes that member states can still act to give effect to a UN mandate alone, subject to the most marginal scrutiny only. In the light of this, Section V draws some general observations on the status of SC Resolutions in the EU.

2.2 The Union's Obligation to Give Effect to UN Sanction Regimes

2.2.1 No General Obligation

In *Kadi I*, the ECJ did not explicitly consider whether the EU is bound by the UN Charter. This may have been a deliberate choice, prompted by its autonomy agenda. It was at any

20 Case C-595/10 P. *UK and Northern Ireland v. Kadi*, appeal brought on 16 December 2010; Case C-593/10 P, *Council v. Kadi*, appeal brought on 16 December 2010; Case C-584/10 P. *Commission v. Kadi*, appeal brought on 13 December 2010.

21 J.W. van Rossem, 'Interaction between EU law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community', 40 *NYIL* 2009, p. 183, at p. 204.

rate convenient, for it avoided an examination of whether *EU law* has anything to say on the status of measures intended to implement SC Resolutions in the EU.

There is agreement that the EU is not directly bound by the UN Charter under international law. As the GC recalled in *Kadi I*, the EU is not a member of the UN, nor an addressee of SC Resolutions, nor the successor of the member states' rights and obligations under international law.[22] And it would be arguably rather premature to speak of the UN Charter as customary international law.

Neither can a general obligation to give effect to UN decisions be unequivocally derived from the EU Treaties. The treaty provisions that refer to the UN Charter commit the Union to the furtherance of UN principles and objectives but they do not appear to create legally enforceable obligations.[23] In *Kadi I*, moreover, the GC had relied on what has come to be known as the doctrine of functional succession, whereby an international agreement can become binding on the institutions if the EU assumes the powers previously exercised by the member states in the area governed by the said agreement.[24] Since then, the ECJ has however made clear that the doctrine only applies to cases where the EU has acquired powers in *all the fields* to which such an agreement relates.[25] By contrast, the overlap between EU law and the UN Charter only materialises in the field of economic and financial sanctions;[26] the member states remain the primary actors in all other areas governed by the UN Charter.

The picture, however, appears rather different when one has regard to the principles and rules governing this particular area of EU activity.

2.3 The 'CFSP/TFEU' Mechanism

The procedure for the adoption of economic sanctions in the EU is special, for it involves, quite uniquely, two stages. First, a unanimous political decision on the need for economic coercion is taken at the level of the Common Foreign and Security Policy (CFSP);

22 Case T-315/01, *Kadi I*, at para.192.

23 For a discussion *see* P. Eeckout, *External Relations of the European Union. Legal and Constitutional Foundations*, OUP, 2004, at pp. 436-444. Art. 3(5) TEU now also adds that the Union shall contribute "to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

24 Judgment of 12 December 1972 in Joined Cases 21-24/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* (*International Fruit*) [1972] ECR 1219.

25 Judgment of 3 June 2008 in Case C-308/06, *Intertanko v. Secretary of State for Transport* [2008] ECR I-4057; Judgment of 14 October 1980 in Case C-812/79, *Attorney-General v. Juan C. Burgoa* [1980] ECR-2787.

26 R. Schütze, 'EC Law and International Agreements of the Member States – An Ambivalent Relationship?' (2006-2007) 9 *C.Y.E.L.S*, 2006-2007, p. 387, at p. 403.

sanctions are then imposed by means of EU Regulations adopted under Article 215 of the Treaty on the Functioning of the European Union (TFEU).[27]

To a large extent, the so-called 'CFSP/TFEU' bridge[28] was inserted in the Treaties to establish a firm and uncontroversial basis for the EU to give effect to relevant Resolutions of the SC. Indeed, before the Treaty of Maastricht, the member states agreed that common action was needed (including when necessary to discharge their Charter obligations), under European Political Cooperation;[29] that political decision was then by necessity implemented by means of a Community (EC) Regulation adopted under the Common Commercial Policy.[30] In the light of the Treaty of Lisbon (TL), moreover, it is clear that the 'CFSP/TFEU' mechanism has been gradually transformed to match relevant developments at the level of the UN. Old Articles 60 and 301 of the Treaty establishing the European Community (TEU) (now Art. 215 TFEU) originally only expressly enabled the adoption of economic sanctions against third countries.[31] In line with the introduction of 'smart sanctions' on the international plane, the TL amended those provisions to confer the Council an express power to impose restrictive measures on private actors,[32] including on persons having no specific territorial basis (as was the case with the Taliban and Al-Qaida after the fall of the Taliban regime).

The peculiar nature of this 'CFSP/TFEU' bridge was in fact noted by the ECJ. The Court observed that the coercive powers of the Union are conditioned by the prior adoption of a decision under the CFSP, which creates an obligation for the institutions to adopt the "measures necessitated by that act".[33] Where the purpose is to give effect to a SC Resolution,

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27 Art. 215 TFEU provides: "Where a decision, adopted in accordance with Chapter 2 of Title V of the [TEU], provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. [. . .]".

28 This expression is borrowed from Professor Alan Dashwood. *See in particular,* A. Dashwood, "Mixity in the Era of the Treaty of Lisbon", *in* C. Hillion & P. Koutrakos (Eds.), *Mixed Agreements Revisited*, Hart 2010. Before the TL, this was commonly referred as the "inter-pillar" mechanism/bridge.

29 The EPC was a forum where representatives of the member states met to discuss political issues of common concern. It was formalized by the 1970 Luxembourg Report.

30 For a detailed account of the history of sanctions in the EU *see* P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law: the Legal Regulation of Sanctions, Exports of Dual Use Goods and Armaments*, Hart 2001.

31 Arts. 60 and 301 EC could be used to impose sanctions on people associated with the governing regime of a third country. If the relevant persons had no links to a specific geographical basis, Art. 308 EC was used alongside Arts. 60 EC and 301 EC to enable the Council to take the necessary measures. Art. 308 EC, provided: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

32 To that effect, a second paragraph was added to Art. 301 EC which is now Art. 215(2) TFEU.

33 Joined Cases C-402/05 P and C-415/05 P, *Kadi I,* at para. 296.

the ECJ added, that obligation means that the EU must take "due account of the terms and objectives of the Resolution concerned and of the relevant obligations under the Charter [. . .] relating to such implementation".[34]

There is, however, something rather odd about the Court's approach. If the obligation enshrined in Article 215 TFEU is to take the measures necessitated by the CFSP decision, and if the CFSP decision requires the Union to take the measures necessary to give effect to a SC Resolution, does not it follow that the obligation imposed on the EU is actually to adopt the measures required by the SC Resolution?[35] The ECJ offered no explanation for translating an *obligation of result* – to take the specific measures required by the CFSP decision – into some kind of *best effort obligation* when those measures find their origin in a Resolution of the SC. This is particularly surprising when read alongside the ECJ's reaffirmation, in an earlier part of its judgment, that the EU must observe international law in the exercise of its powers.[36] Why take note of the peculiar nature of the 'CFSP/TFEU' mechanism and the obligation provided for in Article 215 TFEU if the purpose was merely to re-state the *status quo, i.e.* that the EU institutions are required to take account of relevant provisions/measures of international law when they adopt economic and financial sanctions?

Admittedly, Article 215(2) TFEU merely states that the Council *may* adopt restrictive measures against individuals and hence falls short of the mandatory obligation enshrined in Article 215(1) TFEU governing the imposition of sanctions upon states. Yet, this distinction in the wording of Article 215 TFEU was not even discussed by the ECJ. And it does not alter the fact that the Council can impose sanctions on individuals only on the basis of a prior CFSP act and that it is limited to the adoption of the *specific* measures required by that act. The fact that this could translate into an obligation to comply with the terms of any UN Resolution to which the CFSP decision purports to give effect more clearly emerges when consideration is given to the relationship between the 'CFSP/TFEU' bridge and Article 347 TFEU, read in the light of the principle of loyal cooperation.[37]

2.4 Article 347 TFEU and the Duty of Loyal Cooperation

Article 347 TFEU (old Art. 297 EC) imposes a duty of consultation upon the member states

34 *Ibid.*, at para. 296.

35 Halberstam and Stein thus argue that the EU's "obligation under Art. [215 TFEU] to implement the [CFSP] call for economic sanctions should suffice to commit the [Union's] implementing measure to the observance of international law". D. Halberstam & E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *CML Rev.* 2009, p. 13, at pp. 65-66.

36 Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, at para. 291.

37 Note also that the EU is under a duty to ensure consistency in its external action. In particular, under Art. 13(1) EU, the Union shall ensure the consistency of its policies and actions; while under Art. 21(3) TFEU it "shall ensure consistency between the different areas of its external action and between these and its other policies".

> with a view to taking together the steps needed to prevent the functioning of the internal market being affected by *measures which a Member State may be called upon to take* [*inter alia*]*in order to carry out obligations it has accepted for the purpose of maintaining peace and international security* [emphasis added].

There is little doubt that such obligations include obligations prescribed in Chapter VII SC Resolutions.

Admittedly, Article 347 TFEU mentions only national measures, not EU measures adopted to carry out UN decisions. But this is mainly because none of the scenarios which it describes (other scenarios include, for example, measures that member states may need to take to respond to a state of war or internal distress) were originally envisioned as capable of forming the basis of EU action.[38] The story turned out rather differently as far as the implementation of UN sanctions regime is concerned.[39] For more than 30 years, the practice has been for the EU to give effect to SC Resolutions calling for the imposition of economic and financial sanctions on behalf of the member states. As a result, the measures needed to discharge UN obligations and referred to in Article 347 TFEU are now effectively adopted by the EU, not the member states.

This development, or transfer of power, did not necessarily render Article 347 TFEU completely irrelevant in relation to measures intended to give effect to UN mandated sanctions in the EU. Although it is no longer readily apparent, the choice for centralised EU action constitutes, in effect, the outcome of the duty of consultation provided for in Article 347 TFEU. This more clearly appears from the sanctions imposed against Argentina during the Falklands conflict.[40] The preamble to Regulation 877/82[41] stated that following the measures imposed by the UK against Argentina, the member states consulted each other pursuant to Article 347 TFEU (then Art. 224 EEC)[42] and reached the conclusion that coordinated action by means of a [Union] instrument was necessary.[43] Through this formula, the link between the Article 347 TFEU duty of consultation and the EU sanctions as the "steps needed to prevent the functioning of the internal market being affected" by the implementation of UN obligations, was made. When an express legal basis was inserted in the Treaties for the adoption of economic sanctions, this link was arguably preserved, indeed institutionalised, by the 'CFSP/TFEU' mechanism. The member states

38 D. Bethlehem, 'The European Union', *in* V. Gowlland-Debbas (Ed.), *National Implementation of United Nations Sanctions: A Comparative Study*, Martinus Nijhoff, 2004.

39 Art. 347 TFEU was actually used by the member states only once, for the collective fulfilment of their obligation to resume economic relations with Rhodesia.

40 Koutrakos 2001, at p. 61.

41 Council Regulation 877/82, OJ 1982 L102/1.

42 *Ibid.,* Recital 2.

43 *Ibid.,* Recital 3.

now consult each other under the framework of the CFSP, agree that common action is needed, *inter alia*, to prevent the functioning of the internal market being affected, and to this end, the measures which they are "called upon to take"[44] under the relevant UN mandate are adopted by the EU under Article 215 TFEU. From that perspective, the 'CFSP/TFEU' mechanism and the resulting EU sanctions are best conceived of as the exercise and outcome of the duty of consultation provided for in Article 347 TFEU. Common centralised EU action is thus the expression of the member states' fulfilment of their obligation under Article 347 TFEU to consult each other in order to prevent disruptions to the common market.

The argument, then, is that fulfilment of the member states' obligations under Article 347 TFEU creates a corresponding duty, reading Article 347 TFEU together with the principle of loyal cooperation which under Article 4(3) of the Treaty on the European Union (TEU)[45] now also expressly refers to the loyalty owed by the EU institutions to the member states, for the EU institutions to ensure that the measures required by the relevant SC Resolution are properly implemented. This is an obligation of EU law, which the institutions owe to their member states as a result of the division of competences between them in the field of economic sanctions and which arises once the member states agree to discharge their Charter obligations through the medium of the EU as signified in the relevant CFSP act. The adoption of such an act would thereby triggers a duty for the Council to use its powers under Article 215 TFEU in such a way as to ensure that, notwithstanding the recourse to a Union instrument, the member states' Charter obligations are adequately fulfilled. Applied to the facts of the *Kadi* case, this analysis would mean that once Common Position 2002/402 entrusted the Union with the task to give effect to the UN Taliban/Al-Qaida regime, the institutions became legally bound – reading Article 347 TFEU together with Article 4(3) TEU, to take the specific measures required by Resolution 1390, *i.e.* to freeze the assets of all those included on the list drawn up by the Sanctions Committee.

2.5 Effects on the Status and Review of EU Measures Implementing SC Resolutions

If anything, the *Kadi* saga shows how significant the question of the binding effects of SC Resolutions can be in practice. The GC relied, among other things, on the duty of the institutions to carry out decisions of the SC to decline jurisdiction over Regulation 881/2002. The ECJ, on the other hand, paid little regard to the status of SC Resolutions

44 Art. 347 TFEU.

45 Art. 4(3) TEU provides: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. [. . .]".

in the EU[46] and treated the relevant Regulation as any other act of the institutions for the purposes of judicial review. The present analysis would lead to yet a third option, halfway between these two positions. Contrary to the view of the GC, the obligation to give effect to SC Resolutions, itself derived from the Treaties, cannot absolve the institutions from compliance with their other duties under EU law and from the scrutiny of the Courts.[47]

Contrary to the somewhat rigid approach of the ECJ, however, it is argued that judicial review could consist of a balancing exercise between the institutions' duty to respect fundamental rights, and their obligation to give effect to SC Resolutions the implementation of which has been entrusted to them by the member states.

2.5.1 Hierarchical Rank

To say that the institutions are under a duty to implement Chapter VII Resolutions does not mean that in doing so, they become entirely absolved from judicial scrutiny. As the ECJ rightly recalled, the EU is based on the rule of law and the respect for fundamental rights. In other words, EU law imposes a number of conditions on the lawful exercise of power in the EU, which the institutions cannot avoid by invoking the obligations of their member states under international law. From that perspective, there was force in the ECJ's finding that neither Article 351 TFEU,[48] nor Article 347 TFEU, relieve *the EU institutions* from their duties under Article 6 TEU or indeed the EU Charter of Fundamental Rights. None of the Treaty provisions defining the powers of the EU judicature, moreover, makes special provision for the review of *EU measures* intended to implement Resolutions of the SC.

Yet in *Kadi I*, the ECJ took the view that, were SC Resolutions to be classified in the hierarchy of norms operating in the EU Legal order, they would rank above secondary EU acts, but below EU primary law, in line with Article 218 TFEU.[49] That would have arguably[50] been the case if the UN Charter were among the treaties to which the Union is a party, which it is not.

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46 Although some authors have read the judgment as a confirmation of the GC's finding that UN law is binding on the institutions. *See* S. Griller, 'International Law, Human Rights and the Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*', 4 *EuConst* 2008, at p. 538. For a view that the ECJ on the contrary assumed that SC Resolutions do not bind the EU *See* Gattini 2009, at p. 230.

47 A. Hinarejos, 'Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists', 7 *H.R.L.Rev.* 2007, p. 793.

48 Art. 351(1) TFEU provides that "the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties".

49 *In Kadi II*, the GC itself noted that this statement "has given rise to a number of questions". *See* Case T-85/09, *Kadi II*, at para.120.

50 It is not precluded, however, that even if the UN Charter was an agreement to which Art. 218 TFEU could apply, the Charter would have had to be given special treatment on account of the special nature of that document for the international community.

Article 218 TFEU has therefore little to say on the hierarchical status of measures intended to implement Resolutions of the SC and its effects on the jurisdiction of the Courts.
In line with the findings of Section I, such measures would be covered instead by the duty of the institutions to give effect to UN decisions under Article 347 TFEU read together with Article 4(3) TEU. This is an obligation of primary EU law, as is the obligation enshrined in Article 6 REU regarding the protection of fundamental rights. There would thus be no grounds for Article 6 EU to be granted automatic precedence over the duty to carry out decisions of the SC, particularly since the latter obligation is but an aspect of the principle of loyal cooperation, itself a central tenet of the EU legal order.
It would have been otherwise only it were established that EU fundamental rights, including the right to effective judicial protection, have acquired some kind of supra-constitutional status which places them above other governing principles of the EU legal order. As general principles of EU law, fundamental rights were originally perceived as equal to the founding Treaties.[51] It would have been rather strange, especially in a hybrid legal order such as the EU, for principles developed by a judicial body, which itself derives its authority from the Treaties, to be granted a status superior to those principles which have received the express assent of the member states. Moreover, Article 6 REU now specifically provides that the rights and principles set out in the Charter "shall have the same legal value as the Treaties". The coherence of the EU's system of fundamental rights protection would be undermined if fundamental rights enjoyed a superior status when framed in terms of the general principles of EU law, but not when invoked through the medium of the Charter, in which case they appear to be equal to the Treaties.[52] New Article 6 TEU should therefore be viewed as overturning any statement of the ECJ in *Kadi I,* which may have been interpreted as conferring a superior status on human rights.[53]
It may be added that if the ECJ were to grant these two set of obligations an equal hierarchical rank, it would not necessarily undermine the foundations of the EU legal order. Pursuant to Article 2 TEU, the Union is founded on the rule of law and respect for human rights; under Article 3 TEU, the Union is to contribute to peace, security, as well as respect for the principles of the UN Charter. Article 21(2) TEU states that "the Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action [. . .] and of the external aspects of its other policies". These objectives include both the consolidation of human rights[54] and the preservation of peace in accordance with the purposes and

51 *See* for instance, T. Tridimas, *The General Principles of EU Law*, 2nd edn, OUP, 2006, at p. 51.
52 Art. 6(3) TEU does not make any mention of the hierarchical status of fundamental rights as general principles of law in the EU legal order.
53 On the view that this was not in fact the ECJ's intention *see* L. Peech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU law', 6 *EuConst* 2010, at p. 365.
54 Art. 21(2)(b) REU.

principles of the UN Charter.[55] Thus both set of values, – the principles governing the protection of fundamental rights *and* those underpinning the UN Charter, should inform the exercise of power in the EU.

2.6 Effects in Practice: The Need for a Balancing Exercise

This would mean that judicial review should consist of a balancing exercise between the duty to comply with relevant UN obligations and other requirements of EU law. Before examining the concrete implications of such a finding for cases like *Kadi*, it must be acknowledged that this balancing exercise would come into play only rarely, a consideration that also explains why, before *Kadi I*, the review of measures intended to implement SC Resolutions had raised relatively little controversy.[56]

First, the nature of the underlying UN obligation is often such that no conflict with EU law actually arises. A telling example is SC Resolution 1373 (2001) which requires states to freeze the funds of people associated with terrorist activity without actually identifying any particularindividual or group thereof: this is left for the member states and hence the EU institutions to decide. Faced with a challenge to the EU implementing measure, the GC annulled the sanctions on the ground that due process rights were not respected.[57] Contrary to the situation in *Kadi I*, the GC noted, the decision to freeze the applicant's assets was taken in the exercise of the institutions' autonomous powers[58] and was thus fully reviewable by the Courts. Likewise, UN state-sanctions regimes typically leave sufficient leeway for national authorities to implement the relevant Resolutions in line with their domestic legal requirements.

Secondly, the likelihood for conflict appears to be increasingly diminished by a presumption that, unless explicit language is used to the opposite effect, the SC does not intend to put members of the UN in breach of their human rights obligations. In the recent *Al-Jedda v. UK* case, the European Court of Human Rights (ECtHR) reiterated that the SC must act in accordance with the principles and purposes of the UN, which include the respect for, and promotion of, fundamental rights. The conclusion then drawn by the Strasbourg Court is worth quoting in full:

> [a]gainst this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the [SC] does not intend to impose

55 Art. 21(2)(c) TEU.

56 *See* Judgment of 30 July 1996 in Case C-84/95, *Bosphorus v. Minister for Transport, Energy and Communications, Ireland and the Attorney General [*1996] ECR I-3953.

57 Judgment of 12 December 2006 in Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council* (*OMPI*) [2006] ECR II-4665.

58 *Ibid.,* at paras 103 and 107.

> any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a [SC] Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the [UN's] important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the [SC] to intend States to take particular measures which would conflict with their obligations under international human rights law.[59]

In that respect, Resolution 1390 is somewhat of an isolated case – though admittedly one that allowed for the interface between the UN Charter, the EU and its member states to be fully tested, in that it imposes an unusually strict and clear-cut obligation on members of the UN.[60] States have virtually no discretion in the implementation process: they have to freeze the funds of the individuals and groups designated by the Sanctions Committee. Given that a successful challenge to the sanctions would lead to the applicants' assets being unfrozen, a direct clash arises between the EU institutions' duty to give effect to the Resolution and the right of those affected by acts of the institutions to an effective remedy. Moreover, the nature of the obligation spelled out in Resolution 1390 arguably makes clear the SC's intention to derogate, in this particular instance, from fundamental human rights. Thus here, the balancing exercise would come into play and require a balance to be struck between the right to effective judicial protection (which would in principle require a full review of the merits of anti-terrorism sanctions) and the requirement that the assets of the individual concerned be frozen in implementation of Resolution 1390. This may have a number of concrete implications for the Courts. It may affect, first, the *standard or intensity of review*. Thus, when called upon to examine the substantive basis for labelling a person a terrorist, the EU Courts would have to pay a degree of deference to the assessment of the Sanctions Committee. It may also, in certain exceptional circumstances, affect the *scope of judicial review*. So long as the UN does not offer a level of fundamental rights protection equivalent to that applying in the EU, the decision that a person is a terrorist cannot be left entirely to the UN for that would amount to granting precedence to the obligation to give effect to SC Resolutions over the protection of fundamental rights. But there may be instances where, although the EU Courts have not been provided with the full evidentiary basis of a designation, the information forwarded to them convincingly establishes that the person has connections with Al-Qaida. In such a case, the duty

59 *Al Jedda v. United Kingdom* (2011) 53 EHRR 23, at para. 102.

60 Although in the recent judgment of the ECtHR in *Nada v. Switzerland*, the Strasbourg still found that certain aspects of the UN sanctions regime left sufficient leeway to national implementing authorities to implement them in the light of Art. 8 ECHR. *Nada v. Switzerland*, Appl. No. 10593/08, 33 B.H.R.C. 453.

to implement Resolution 1390 would militate in favour of the EU Courts' upholding the EU implementing measures, even though a merits review would normally require them to scrutinise *all* the evidence which is relevant to the decision to freeze the funds of the individual or entity concerned.

Moreover, as part of this balancing exercise, the EU Courts could take account of relevant developments at the level of the UN concerning due process standards (even if these fall short of the kind of review mechanism that would justify complete deference to the assessment of the Sanctions Committee along the lines of the *Solange* doctrine). Thus, some weight could for instance be given to the establishment of the Office of the Ombudsperson,[61] which is responsible for dealing with claims for delisting, and the recent abandonment of the rule that a person can only be removed from the list by consensus. Instead, the principle is now that consensus is needed to *block* any recommendation for delisting put forward by the Ombudsperson, albeit that lacking such consensus, the matter falls back for consideration by the SC and is therefore subject to the veto of the permanent members.[62]

2.7 The Member States' (Residual) Power to Implement Charter Obligations

This is not to say that the recognition of an EU law obligation to implement certain UN decisions will solve all problematic cases. There are on the contrary bound to be situations where it will be impossible for the EU institutions to implement a SC Resolution without putting other principles of EU law unduly under strain and where the relevant EU implementing measure will have to be annulled. Following *Kadi I*, the argument was thus made that the judgment of the ECJ effectively puts the member states in a 'Catch 22' position,[63] trapped between complying with their obligations under the Charter and hence acting in breach of EU law, or failing in their duty to carry out decisions of the SC in order to pay full respect to the requirements of the EU Legal order.[64] Under this approach, there would be no place in the EU for the implementation of SC Resolutions which involves action contrary to EU law given that, if the EU implementing measure is annulled, EU law allegedly prevents the member states from discharging their Charter obligations themselves.

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61 UNSC Resolution 1904 (2009). As originally established, the mechanism was not considered to fulfil the requirements of effective judicial protection. *See* Case T-85/09, *Kadi II*, at para. 128.

62 UNSC Resolution 1989 (2011), particularly paras 21-35. On these developments, *see* D. Tladi & G.Taylor, 'On the Al-Qaida/Taliban Sanctions Regime: Due Process and Sunsetting', 10 *Chinese Journal of International Law* 2011.

63 K.S. Ziegler, 'Case Comment: Strengthening the Rule of Law, but Fragmenting International Law: the *Kadi* Decision of the ECJ from the Perspective of Human Rights', 9 *H.R.L.Rev* 2009, p. 288, at p. 304; Deirdre & Eckes 2008.

64 A similar argument was raised by the Commission before the GC in *Kadi II*. From the perspective of the member states, the Commission stated, that conflict will need – by operation of Art. 103 UNC, to be resolved in favour of the implementation of Charter obligations. *See* Case T-85/09, *Kadi II*, at para. 100.

But this is not necessarily an accurate description of the member states' position. From the perspective of international law, the situation appears quite straightforward: Article 103 UNC[65] grants priority to the implementation of SC Resolutions over conflicting EU obligations. This section will show that the primacy of UN decisions on the international sphere is, to some extent, preserved by the Treaties, insofar as they largely leave the *member states* free to discharge their Charter obligations, notwithstanding a possible incompatibility with EU law.[66] It is beyond the scope of this contribution to examine the division of competences between the EU and the member states in the field of economic and financial sanctions in detail. However, for the purposes of the discussion below, it can be assumed that if the EU implementing act were annulled (and/or more broadly, in the absence of an EU law provision covering the field), the member states would regain their power to implement their Charter obligations alone. Indeed, given the need for a prior CFSP decision, the competence of the EU in this area can at best be described as shared between the EU and the member states. In fact, it is striking that despite the existence of Regulation 881/2002, some states, like the UK, maintain parallel domestic regimes which impose sanctions on those designated by the Sanctions Committee.

2.7.1 The Applicability of Article 347 TFEU

Two provisions are potentially relevant to the adoption of national measures intended to implement Charter obligations: Article 347 TFEU and Article 351 TFEU. It can be recalled that Article 347 TFEU allows the member states to derogate from EU law, *inter alia*, in order to fulfil obligations that they have undertaken for the purpose of maintaining international peace and security, whilst Article 351 TFEU allows them do so in relation to obligations stemming from pre-Union agreements. Both provisions were examined by the GC and the ECJ in *Kadi I*. But neither of them made any attempt to establish which of those was most relevant to the issue at hand, albeit they were admittedly examining the legality of *EU measures,* and not *national measures*, intended to implement SC Resolutions.

By contrast, authors like Gaja reject the applicability of Article 351 TFEU to the relationship between Charter obligations and EU law.[67] There are three prongs to his argument: (i) Germany was not a member of the UN prior to its accession to the EU; (ii) the Charter

65 Art. 103 of the UN Charter reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

66 The GC had already made the point that Arts. 347 TFEU and 351 TFEU entail a duty for the EU institutions, including the Courts, not to impede the performance of the member states obligations under the Charter. *See* Case T-315/01, *Kadi I*, at para.197.

67 For a discussion focusing instead on the effects of Art. 351 TFEU *See*: G. Martinico, O. Pollicino & V. Sciarabba, 'Hands Off the Untouchable Core: A Constitutional Appraisal of the *Kadi* Case', 11 *E.J.L.R.* 2009, p. 281.

cannot be considered an agreement to which the Article 351(2) TFEU duty to remove any incompatibility between pre-Union commitments and those stemming from the Treaties applies and finally (iii) applying Article 351 TFEU would treat the Charter as any other pre-Union agreement in terms of how far it allows member states to depart from Union law. While ruling out completely the relevance of Article 351 TFEU may go a step too far, there is force in the argument that Charter obligations ought not to (and must not) be treated like any other international agreement in the EU – a point that is arguably reinforced by the very existence of Article 347 TFEU. The specific reference, in Article 347 TFEU, to obligations undertaken for the preservation of peace and security makes clear that the special status of SC Resolutions in the EU does not derive, at least solely, from their nature as pre-Union commitments, but mainly from the subject matter to which they relate. If Article 351 TFEU were truly meant to apply to SC Resolutions, there would have been little added value in a provision like Article 347 TFEU. The latter should thus be considered as *lex specialis* Article 351 TFEU when it comes to measures implementing Chapter VII Resolutions. It can also be noted that old Article 60 TEU on the Union's power to adopt financial sanctions specified, in its second paragraph, that it was without prejudice to Article 347 TFEU.[68] Although no such reference is made in new Article 215 TFEU, this nonetheless appears to confirm the relevance of Article 347 TFEU to the adoption of economic sanctions by the member states in pursuance of a UN mandate.

2.8 The Scope of the 'Article 347 TFEU Derogation'

In *Kadi I*, the ECJ acknowledged that Articles 351 TFEU and 347 TFEU allowed certain provisions of EU law to be derogated from, but, crucially, that this did not extend to the core or foundational principles of the EU legal order enshrined in Article 6 TEU.[69] The Court did not explain why or how it had reached this conclusion. It simply stated that Article 351 TFEU cannot prevent the review of *EU secondary acts*, which is at any rate irrelevant to the present discussion that focuses on the review of *national,* not Union measures, implementing SC Resolutions. Nor was any more attention paid to Article 347 TFEU. The opinion of Advocate General (AG) Maduro was, on this point, equally ambiguous. While he focused on the effects of Article 351 TFEU, he cited ex Article 60 TEU and Article 347 TFEU in a footnote as the basis upon which the member states could act to implement SC Resolutions alone. It is thus unclear whether his finding that Article 351 TFEU could not provide "a source of a possible derogation from Article [6 TEU]" was intended to cover Article 347 TFEU as well, or not.

68 Art. 60(2) TEU provided: "Without prejudice to Article 297 EC and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments [. . .]".

69 *See* Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, at para. 303.

On the contrary, a number of considerations[70] in fact suggest that EU law imposes virtually no limits on the member states' capacity to implement UN decisions. Or, in other words, that Article 347 TFEU should be read as allowing them to depart from the whole of EU law,[71] if, and to the extent that, a SC Resolution so requires. In that regard, it must be recalled that fundamental rights do not necessarily benefit from a supra-constitutional status which would distinguish them from other core principles of the EU legal order. Thus, if it can be established that national measures implementing SC Resolutions are, on the basis of Article 347 TFEU, absolved from compliance with EU law, this would include, in principle, EU fundamental rights.
This approach could find support, first, in the *wording* of Article 347 TFEU. For the sake of clarity it is worth reproducing the article in full:

> "Member States shall consult each other with a view to taking the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."

The ECJ appears to have interpreted the reference to the internal market as meaning that Article 347 TFEU only allows derogations from the rules governing the common market. That reference, however, is linked to the duty of consultation, not to the measures that member states "may be called upon to take". Article 347 TFEU indeed takes for granted the member states' ability to take measures to alleviate a threat to their security and thus confirms that EU law does not impose any *substantive constraint* on their powers in these areas. The only limit Article 347 TFEU imposes is *procedural* in nature and arises only if there is a risk to the functioning of the common market; in those situations, member states must consult each other in order to find a way to avoid any disruption. Put more succinctly, the very *raison d'ĕtre* of Article 347 TFEU is to *prevent the functioning of the internal market being affected*, not to regulate the actions of the member states in the sensitive fields to which that provision refers. Moreover, if the reference to the common market were to be interpreted in the way advocated by the ECJ, Article 351 TFEU, which does not mention it at all, would arguably have a broader scope than Article 347 TFEU in terms of how far it allows the member states to derogate from Union law. Yet, not only did both the ECJ and the AG expressly reject the argument that Article 351 TFEU gives pre-Union agreements precedence over the protection of fundamental rights, but this would go against the spirit of this provision as a whole. While Article 351(1) TFEU allows member states to depart from EU law to honour their pre-Union commitments, paragraph 2 requires them to remove any incompatibility between

70 For a similar stance as to the special nature of Art. 347 TFEU *see* P. Koutrakos, 'Is Article 297 EC a "Reserve of Sovereignty"?', 37 *CML Rev.* 2000, p. 1339.

71 Trybus notes that "in these extreme situations the response to a threat takes precedence over the entirety of the law of the EU". *See* M. Trybus, *European Union Law and Defence Integration,* Hart, 2005, at p. 68.

those commitments and the founding Treaties. Article 351 TFEU does not therefore give the member states an indefinite and blanket authorization to act contrary to Union law. In sum, to say that Article 347 TFEU only permits derogations from the rules governing the internal market is not to fully appreciate the linguistic differences between Articles 351 TFEU and 347 TFEU and the precise wording of Article 347 TFEU, which in fact suggest that the latter provision has a broader scope than that granted to it by the ECJ.

Second, a broad interpretation of Article 347 TFEU is warranted by the *nature* of that provision. Article 347 TFEU is akin to an emergency clause. It covers "wholly exceptional"[72] situations of crisis which may require the adoption of extraordinary measures otherwise unacceptable from a rule of law perspective. If the member states could not, in such circumstances, depart from the principles laid down in Article 6 TEU, the result would be that in the event of war, for example, they would have to abide by their EU law obligations whilst most probably absolved from compliance with a number of their own domestic law requirements. Even in such circumstances, member states should not of course act unconstrained by law. But the question is whether EU law[73] should provide that limit given that the situations falling within the scope of Article 347 TFEU strike at the heart of the member states' security and defence interests, and are thus best left regulated at the national level. In that regard, it is worth highlighting that Article 347 TFEU itself draws no distinctions between the scenarios to which it applies. There are thus no grounds to treat the implementation of SC Resolutions differently than say, measures adopted in response to a declaration of war, when it comes to determining the extent to which member states can depart from the Treaties.

Thirdly, this construction appears to be warranted by the *position* of Article 347 TFEU within the broader framework of the Treaties. Trybus notes that Articles 346 (old Art. 296 TEU) and 347 TFEU are clearly separated from other derogatory provisions, which indicates the drafters' intention to apply a distinct regime to these two set of exemptions.[74] Ordinary derogation provisions are grouped under the title governing the internal market and are each attached to one of the four freedoms – *i.e.* they allow derogations from the particular provision to which they relate.[75] By contrast, Articles 346 TFEU and 347 TFEU are included among the "general and final provisions", which suggests that they do not purport to apply to a specific area of EU law but can be invoked to derogate from the Treaties more broadly.[76]

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72 Judgment of 15 May 1986 *in* Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR-1651, at para.27; Opinion of AG Jacobs in Case C-120/94R *Commission v. Hellenic Republic* ("*FYROM*") [1996] ECR I-1513, at para. 46.

73 Trybus notes that "in these extreme situations the response to a threat takes precedence over the entirety of the law of the EU". *See* Trybus 2005, at p. 168.

74 *See* M. Trybus, 'The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security exceptions', 39 *CML Rev.* 2002, p. 1347, at p. 1360; Koutrakos 2001, at pp. 80-81.

75 *See* Art. 36 TFEU regarding derogations from the free movement of goods.

76 A. Arda, 'Member States Right to Derogate from the European Treaties: A Commentary on Article 297 TEC', *in* C. Campbell, P. Herzoge & G. Zagel, *Smit & Herzog on the Law of the European Union,* 2nd edn, LexisNexis Matthew Bender, 2005, at p. 7.

Interestingly, and although his findings appear to have been targeted at Article 351 TFEU, AG Maduro on the contrary used the case law on ordinary derogation provisions in support of his conclusion that, if the member states took action to implement SC Resolution 1390 alone, they would still have to act compatibly with fundamental rights as protected in the EU legal order: "in the light of the Court's ruling in *ERT*, it may be assumed that, *to the extent that their actions come within the scope of [EU] law*, Member States are subject to the *same [EU] rules* for the protection of fundamental rights *as the [EU] institutions themselves* [emphasis added]".[77] On that basis, he concluded that "if the Court were to annul the contested regulation on the ground that it infringed [EU] rules for the protection of fundamental rights, then, by implication, Member States could not possibly adopt the same measures without – in so far as those measures came within the scope of [EU] law – acting in breach of fundamental rights as protected by the Court".[78] Whatever the merits of the AG's analysis as regards Article 351 TFEU, it appears to be misplaced when it comes to determining the effects of Article 347 TFEU. Not only does his reasoning ignore the special nature of this provision, but as the next section demonstrates, reliance upon Article 347 TFEU is not subject to the ordinary powers of the EU Courts; indeed, in such circumstances, the member states can be brought directly before the Court under Article 348 TFEU. This provision defines the appropriate scope and standard of review in this area and suggests indeed that the exercise of the member states' power to implement SC Resolutions is subject to the most marginal judicial scrutiny only. Thus, contrary to the view of the AG, it would appear that the member states are not, in fact, in the same position as the institutions when acting to implement SC Resolutions, in so far as compliance with EU fundamental rights is concerned.

2.9 The Limited Powers of the EU Courts over National Measures Implementing SC Resolutions

2.9.1 The Jurisdiction of the ECJ under Article 348 TFEU

The TFEU makes special provision for the adjudication of cases involving reliance on Article 347 TFEU. Indeed, these can be brought directly before the Court under Article 348(2) TFEU which provides that:

> [B]y way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making *improper use of the powers provided for in Articles 346 and 347* [emphasis added].

77 Opinion of AG Maduro in Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, at para. 30.
78 *Ibid.*, at para. 30.

Article 348 TFEU was used only once against Greece for a unilaterally imposed embargo on the Republic of Macedonia. The *FYROM* case never made its way to the ECJ but the opinion of AG Jacobs provided a comprehensive analysis of the Court's powers under this provision. He identified three stages in the review of measures adopted under Article 347 TFEU (then Art. 224 EEC). First, the Court must establish whether the member state concerned would be acting contrary to EU law if it were not for the possible reliance on Article 347 TFEU. Secondly, it must verify that the situation falls within one of the scenarios envisaged in Article 347 TFEU. Finally, it must check whether the state has made improper use of the powers "recognised" to it therein.[79] On the facts of the case, the AG found that the Greek embargo was contrary to the CCP[80] but could be justified under Article 347 TFEU. He considered that the situation did not amount to "serious disturbances affecting the maintenance of law and order", but that there was a lack of judicially applicable criteria for the Court to determine whether the situation amounted to "a serious international tension constituting a threat of war". Accordingly, a large margin of appreciation had to be left to Greece's own appraisal of the situation. As to the third condition, whether an embargo was the best way for the two countries to solve their grievances was held to lie within Greece's political judgment. No evidence of improper use was found.

2.10 Back to Basics: Would Implementation of the UN Regime Involve Action Contrary to EU Law?

Applied to the present context, the first issue is whether, in the absence of an EU measure covering the field, the member states would be acting contrary to EU law if they froze the assets of those designated by the Sanctions Committee. The question is reminiscent of the AG's assertion that the *ERT* judgment would apply only if the national implementing measures fall within the scope of EU law; indeed, only in such circumstances are the member states bound to respect EU fundamental rights. Moreover, a breach of those rights would not in itself be sufficient to bring the member states within the scope of EU law, including Article 347 TFEU, or the jurisdiction of the EU Courts. This is also implicit in the terms of Article 347 TFEU given that the duty of consultation arises only if action taken to implement a Resolution of the SC is liable to affect the common market.

When called upon to decide whether Article 352 TFEU could have been used, prior to the entry into force of the Treaty of Lisbon (TL), as an additional legal basis for the adoption

79 AG Jacobs in Case C-120/94R, *Commission v. Hellenic Republic* (*FYROM)* (1996) ECR I-1513, at paras 30-31. *See* for an overview, Koutrakos, *Trade Foreign Policy and Defence in EU Constitutional Law*, *supra* note 30, at pp. 156-158.

80 AG Jacobs in Case C-120/94R, *FYROM,* at para. 40.

of Regulation 881/2002, the ECJ held in *Kadi I* that the measures required by Resolution 1390 offer, by their very nature, a link to the operation of the common market. If these were implemented by the member states unilaterally, the Court continued, this could affect trade between the member states, particularly as regard the free movement of capital and the freedom of establishment, and further result in distortions of competitions. These two assertions had been explicitly rejected at first instance[81] and this aspect of the ECJ's ruling has not been generally well received.[82] For present purposes it will be assumed that lacking a Union act covering the field, the member states would be acting contrary to EU law by giving effect to Resolution 1390 alone, thereby triggering the application of Article 347 TFEU and the jurisdiction of the Court under Article 348 TFEU. It must be noted, however, that in cases where an incompatibility with the Treaties is impossible to establish, the member states would not be acting within the scope of EU law, which would consequently have nothing to say on the legality of national measures adopted to implement a decision of the SC.

2.11 The Existence of a Situation Covered by Article 347 TFEU

Secondly, the Court would have to verify that any national sanctions regime is meant to give effect to an obligation the member state concerned "has accepted for the purpose of maintaining peace and international security", *i.e.* that it is covered by Article 347 TFEU. There is little doubt that there exist judicial criteria which the Court can apply to determine the existence of such an obligation and which are clearly fulfilled where the member states are acting in implementation of a decision of the SC adopted under Charter VII of the UN Charter. Where the relevant Resolution is framed in broad terms, one of the roles of the CJEU will be to determine whether the particular measure a member state seeks to justify under Article 347 TFEU is really covered by the UN mandate.[83] If a national measure goes beyond what is required by the UN decision, the corollary is that there is no international obligation warranting that particular course of action. In such a case, it will not be possible for the member state concerned to rely on Article 347 TFEU, and the CJEU will subject the measure to full judicial scrutiny.

In a case such as the UN Taliban regime, however, the ECJ has no such leeway: a national measure freezing the assets of a person designated by the Sanctions Committee would clearly be one which it is "called upon to take" to carry out the obligation enshrined in Resolution 1390. The second condition relating to the invocability of Article 347 TFEU

81 Case T-315/01, *Kadi I*, at paras 102-114.

82 *See* A. Johnston, 'Frozen in Time: the ECJ Finally Rules on the Kadi Appeal', 68 *CLJ* 2009, p. 1, at p. 2; M. Cremona, 'EC Competence', 'Smart Sanctions' and the '*Kadi* Case', 28 *YEL* 2009, p. 559.

83 *See* for a similar conclusion Trybus 2005, at p. 186.

would therefore be fulfilled and the ECJ's role will be limited to checking that the person whose assets have been frozen is indeed included on the list of the Sanctions Committee, *i.e.* that the national measure at stake is covered by Resolution 1390.

2.12 'Improper Use'

Much of the case would then revolve around the exact meaning of "improper use of the power provided for in Article 347 TFEU" and the precise powers this grants to the Court. The issue is particularly delicate in this context. The Court's jurisdiction under Article 348 TFEU covers the *means* chosen by the member states to fulfil their Charter obligations, not those *obligations themselves*. Thus, given the negligible level of discretion enjoyed by the member states under Resolution 1390, the scope for improper use and thus for judicial scrutiny is commensurably reduced.

That being said, Article 348 TFEU allows the ECJ to sanction measures which a member state adopted for a purpose other than to respond to one of the situations described therein.[84] That will be the case, for example, if a member states did not freeze the assets of X because it was required to do so by a SC Resolution, but to pursue some other unrelated domestic interest. AG Jacobs had further suggested that a national measure that is genuinely aimed at fulfilling Charter obligations could be tainted of impropriety if it was adopted in breach of the principles of equal treatment and proportionality.[85] On the facts of the case, he considered that this was not a matter for the Court to decide since it could not legitimately "criticize the appropriateness of the Member State's response",[86] which rested on a "political analysis which the Court is ill equipped to carry out".[87] *A contrario*, if and to the extent that the means chosen by the member states to give effect to a SC Resolution are suitable for judicial determination, they would, in principle, be reviewable by the Courts for their compatibility with the principles of equality and proportionality. Under this approach, there would be little scope for the Court to second-guess national authorities as to whether X is a terrorist (an assessment which, in the case of Resolution 1390, is in any event an integral part of the obligation imposed on the member states by the UN and which will be dealt with by the Court as part of its duty to determine whether the situations falls within the scope of Art. 347 TFEU, *i.e.* the second stage), but it could control the amount of funds frozen pursuant to the UN mandate and intervene, for example, in circumstances where the member state chose to deprive X of his very basic means of survival.

84 S. Peers, "National Security and European Law", 16 *YEL* 1996, at p. 384.
85 AG Jacobs in Case C-120/94R, *FYROM*, at para. 69.
86 *Ibid.,* at para. 85.
87 *Ibid.,* at para. 71.

Overall, the position regarding the member states' power to implement UN sanctions regimes can thus be summarized as follows: (1) in case of annulment of the EU implementing measures, the member states could give effect to the relevant SC Resolutions, here Resolution 1390, themselves; (2) if the relevant national measures do not affect the functioning of the common market, they will not even fall within the scope of EU law; (3) if they do, member states could justify such measures under Article 347 TFEU, which allows them to depart from the whole of EU law, including EU fundamental rights, if a UN Resolution so requires; (4) the ECJ will be able to sanction a disproportionate and discriminatory interference with such rights; (5) this power will only be of marginal relevance in cases such as the UN Taliban regime where member states enjoy very little discretion in the implementation process; (6) hence, despite the annulment of the EU implementing measures, EU law would not necessarily result in the member states' international responsibility, contrary, in particular, to the institutions' duty of loyal cooperation.

In passing, it has been convincingly argued that member states can derogate from the Treaties using Article 347 TFEU "only for such periods as are strictly necessary".[88] As a rule, measures falling within the scope of that provision will be temporary in nature; indeed the circumstances to which it applies are truly exceptional, and thus necessarily limited in time.[89] This is a serious issue in this context, albeit not one which the member states are immediately responsible for. The potentially permanent nature of the UN's anti-terrorism regimes is widely recognised, and criticised.[90] Yet, for the purposes of Article 348 TFEU, so long as the UN Al-Qaida/Taliban regime is in force, national freezing orders will be covered by Article 347 TFEU and hence beyond the reach of the EU judiciary save for the limited purpose described in this section.

2.13 Conclusion

Kadi I undisputedly stands as a strong reaffirmation of the centrality of human rights and the rule of law in the EU. Yet, it adds to a (growing) body of case law on the autonomy of the EU vis-a-vis the international legal order and its (potentially far-reaching) legal implications.[91] This trend, it must be conceded, sits rather unwell with global efforts to

88 Arda 2005, at p. 20.

89 AG La Pergola in *Case C-273/97*, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defence* [1999] ECR-I 7403, at para. 21.

90 *See* V. Mitsilegas, 'The European Union and the Globalisation of Criminal Law', 12 *C.Y.E.L.S,* 2009-2010, p. 337, at p. 364; J.E.K. Murkens, 'Countering Anti-Constitutional Argument: the Reasons for the European Court of Justice's Decision in *Kadi and Al Barakaat*', 11 *C.Y.E.L.S.* 2008-2009, p. 15, particularly at pp. 27-28; A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: the Quest for Legitimacy and Cohesion', 17 *EJIL* 2006, p. 881, at pp. 890-891.

91 *See also*, *e.g.,* Opinion 11/09 of the Court of 8 March 2011, not yet reported.

maintain international peace and security, as coordinated through the medium of the UN. Tellingly, although the GC felt compelled, in *Kadi II*, to comply with the ECJ's judgment in *Kadi I*, it took the time to highlight the controversies of the ruling, allegedly voicing the concerns of a number of unidentified "legal circles".[92] The GC reiterated, in particular, that full judicial scrutiny was liable to encroach upon the prerogatives of the SC and that the possible annulment of the EU implementing measures would, essentially, render the primacy of SC Resolution ineffective in the EU legal order. The consistency of the judgment with Articles 25 and 103 of the UN Charter, as well as Articles 347 TFEU and 351 TFEU was also questioned, together with its compatibility with other general EU law provisions expressing the Union's commitments to the broader UN enterprise and Declaration No. 13 annexed to the TL on the CFSP, which now stresses, in unequivocal terms, that "the [EU] and its member states will remain bound by the provisions of the Charter of the [UN] and, in particular, by the primary responsibility of the [SC] and of its members for the maintenance of international peace and security".

Ultimately, this Chapter put forward a framework for such concerns and/or criticisms to be accommodated within the quasi-constitutional structure of the EU and in line with the Union's continuous commitment to the rule of law and the protection of fundamental rights. The answer, it was argued, is to be found in the principle of loyal cooperation as it applies to the implementation of UN sanctions regimes. It was thus shown that where member states decide, by means of a unanimous decision adopted under the CFSP, to discharge their Charter obligations through the medium of the EU, the principle of loyal cooperation read together with Article 347 TFEU translates into a duty for the institutions to give effect to SC Resolutions on their behalf. In concrete terms, and as applied to the facts of the *Kadi* case, this means that a degree of deference should be paid to the assessment of the Sanctions Committee regarding the person's alleged connections with terrorism. As there is no independent mechanism of control at the level of the UN, the decision cannot be left entirely to the Sanctions Committee for that would amount to denying justice to those designated by the UN. Nevertheless, the principle of loyal cooperation would operate so as to lower the standard of review that the principle of effective judicial protection would normally require. Where these two principles cannot be reconciled at the level of the EU, the EU act implementing the relevant SC Resolutions will ultimately have to be annulled. In these cases, the burden of implementation would fall back again on the member states, whilst the duty of loyal cooperation would "transform" into a requirement for the institutions, including the Courts, not to impede the member states' performance of their obligations under the Charter. Article 348 TFEU confirms indeed that only a patent abuse of the member states' power to carry out SC Resolutions can trigger the intervention of the EU judiciary.

92 Case T-85/09, *Kadi II*, at para. 115.

This is not to say that the ECJ's emphasis on the autonomy of the EU legal order or the importance of EU fundamental rights is, in itself, misplaced. The recent judgment of the ECtHR in *Nada* appears to confirm the ECJ's own finding that UN law does not preclude the review of the "internal lawfulness" of measures intended to give effect to UN Resolutions.[93] Rather, the argument is that if the ECJ were to embrace the more nuanced approach outlined in this contribution, this might pave the way for a system which *is* able to guarantee the proper performance of Charter obligations and the effectiveness of the UN enterprise *whilst* preserving the Union's autonomy and the integrity of its values and constitutional foundations. The Union could give effect to aspects of UN regimes which are in line with EU law, *i.e.* those aspects which cannot escape annulment despite the balancing exercise to be performed by the EU Courts, and the member states those which are not. There might be some costs to the transparency of the process by which SC Resolutions are implemented in EU member states, but these are largely outweighed by the need to find a viable system of implementation which is in line with basic principles of EU constitutional law. In addition, member states have stronger mechanisms of democratic accountability, enabling them to take responsibility for measures which, whilst furthering peace and security, may prove detrimental to the individual. It would be illegitimate, by contrast, for the member states to adopt such measures through the medium of the EU precisely in order to escape any political (or indeed judicial) accountability.

Kadi II offers the ECJ an opportunity to revisit its stance. In that regard, the ECJ's ruling in *Kadi I* must be read in the light of the judgment of its junior partner at first instance. At the time, there was undoubtedly great pressure on the ECJ to reaffirm the place of judicial review (and fundamental rights) in the EU legal order. From that perspective, the statement of the ECJ that it must ensure the full review of EU measures implementing UN Resolutions could be read as recalling that such measures must be reviewed in the light of EU law, and not in the light of *Jus Cogens* norms, which the GC had chosen instead as a reference point. But it should not necessarily be taken to imply that judicial review must be carried out with no regard for the existence of an underlying UN mandate at all.[94] Now that the ECJ secured an effective remedy to those designated as terrorists by the UN, it might be willing to engage more fully with the issues arising from the relationship between the UN, the EU and the member states. The role of the Union on the international scene is certainly directly at stake.

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93 *Nada v. Switzerland*, Appl. No. 10593/08, 33 B.H.R.C. 453, para. 212. Although this is not without any controversy. *See* M. Milanovic, "European Court Decides *Nada v. Switzerland*" at <www.ejiltalk.org/european-court-decides-nada-v-switzerland//>.

94 Tridimas points out that *Kadi* is to be viewed only as the beginning, and says little about how, in the future, the ECJ will balance public security, on the one hand, and the protection of individual rights, on the other. *See* T. Tridimas, 'Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments', 12 *C.Y.E.L.S,* 2009-2010, p. 455, at p. 458.