

The EU Antiterrorist Sanctions

ENZO CANNIZZARO¹

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I. INTRODUCTORY REMARKS

THE FIELD OF antiterrorism indisputably constitutes one of those in which political needs constantly tend to condition and overshadow the legal dimension. This generic observation, far from rendering legal analysis superfluous, has the opposite effect: stressing the necessity of an impartial and objective legal analysis, unleashed from the constraint of political necessity.

One of the main problems which arise in this context is to determine the most appropriate way to control antiterrorist action: through the political process or rather through judicial review. In many modern legal orders, these two aspects are closely interrelated. Judges generally tend to attenuate the standard of review of highly politically motivated acts in the belief that the legality of these acts ought to be controlled mainly through the political process by organs endowed with political legitimacy.

¹ Professor of International and European Law, University of Rome 'La Sapienza'.

In the EU legal order, this relationship seems to be inverted. The ECJ has substantially upheld the view that antiterrorist action falls largely, if not exclusively, within the intergovernmental realm, where Member States' predominant role is still undisputed. However, it has refused to draw from this premise the consequences sought by the Member States and by the EU political institutions, namely the immunity of politically motivated acts from judicial control. Quite the contrary, in one of the boldest courses embarked upon in its over 40 years of activity, the ECJ has subjected antiterrorist sanctions to a strict judicial scrutiny. This course is carved out in this famous conclusion: '[t]he Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights.'²

The relationship between political control and judicial control thus represents the invisible thread around which this chapter will unfold. In the first part, attention will be brought to the Treaty provisions which establish the EU competence in the field of antiterrorist sanctions. In spite of its technical character, this issue is of extraordinary interest even from a systemic viewpoint. The field of antiterrorist sanctions constitutes the only EU policy which explicitly straddles the foreign policy competence and the material competences of the EU. The exercise of this competence entails a sequence of acts based on different and perhaps irreconcilable decision-making procedures: a common foreign and security policy (CFSP) decision, to be taken through intergovernmental mechanisms, determines the conditions for the adoption of restrictive measures to be taken through the procedure laid down by Article 215, para (1). The complexity of this normative paradigm is at the origin of a number of legal problems, some of which still remain unsolved.

The second issue is perhaps even more interesting, as it goes to the heart of the troubled question of judicial control over the foreign relations power, an area traditionally apportioned to the executive and dominated by the harsh needs of foreign policy. In particular, the ECJ has ruled that restrictive measures adopted in order to give effect to Security Council (SC) resolutions are nonetheless subject, 'in principle', to the same standard of control applicable to measures of purely domestic origin. The course embarked upon by the ECJ, tenaciously defended in isolation against virtually all the powerful political actors of the EU, deserves great respect and appreciation. Beyond its uncontroversial virtues, however, this tendency is not without cost. It is based on a cultural paradigm, which tends to consider the domestic EU legal order as a safe area, based on respect for human rights and on the rule of law, as an ideal antagonist to the international legal order, which by contrast is considered as an arena dominated by the harsh needs of *raison d'état*. From a technical view point, it tends to insulate the internal legal order

² Judgment of 3 September 2008, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, [2007] ECR I-6351, para 326.

and to assume that international rules are incapable, by themselves, of producing direct effects internally and need to be implemented by domestic rules, which are therefore subject, 'in principle', to the same standard of control applicable to other purely internal rules.

The development of each of these parts entails the need to enter into lengthy and complex technical arguments. This is almost unavoidable. If foreign relations law epitomises the complexities of the law of European integration, antiterrorist sanctions epitomise the complexities of foreign relations law. They represent an impenetrable conundrum, which seems to defy the technical skill and the political wisdom of every interpreter. In the present chapter, one will not attempt to attain the impossible: to lend coherence to an inherently incoherent system. More modestly, an endeavour will be made to sketch the contours of a frame of reference, which can be of avail for further analysis.

II. THE COMPETENCE OF THE EU TO ADOPT ANTITERRORIST SANCTIONS

A. Article 215 TFEU: A Rule or an Exception?

Antiterrorist sanctions are adopted under Article 215 TFEU which establishes, as is well known, a two-step procedure: a CFSP act directs the EU institutions to adopt the sanctioning act, which will be adopted by the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Common and Security Policy and the Commission. The historical origin of that provision heavily affects its systematic coherence.

The predecessor of Article 215, namely Article 301 TEC, was drafted with a view to codifying a pre-existent practice whereby the Community's powers were used for sanctioning purposes after a decision of the Member States taken within the frame of political cooperation. As the ECJ said in *Bosphorus*

by Regulation No 990/93 the Council gave effect to the decision of the Community and its Member States, meeting within the framework of political cooperation, to have recourse to a Community instrument to implement in the Community certain aspects of the sanctions taken against the Federal Republic of Yugoslavia by the Security Council of the United Nations.³

The procedure established by Article 215 still follows this scheme, based on a combination between CFSP and a specific substantive competence of the EU on restrictive measures. The uniqueness of this competence thus lies in the fact that the Treaties do not assign specific objectives to this act. Rather, the objectives are to be drawn from the CFSP act which constitutes a pre-condition for its enactment.

³ Judgment of 30 July 1996, Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953, para 13.

The reasons for setting up a procedure combining these two acts lay in the circumstance that each of these acts is unable, by itself, to produce the desired result. There is, notoriously, a fundamental difference in nature between the CFSP and the other substantive EU policies. The first has a purely functional scope, in the sense that CFSP measures are qualified only by the political objectives pursued. Conversely, substantive policies have a material scope and can pursue only the specific objectives assigned by the Treaties. To avoid the danger of overlap, and primarily the use of the intergovernmental procedures of the CFSP to adopt measures substantively falling within one of the other policies of the EU, a normative barrier has been erected contextually with the inclusion of the CFSP within the system of the founding Treaties. This normative barrier was explicitly enshrined in Article 40 TEU, in the pre-Lisbon version, which envisaged that the exercise of the CFSP, 'shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty'.

Thus, restrictive measures could not be adopted by CFSP acts since they fell, by their substance, within the scope of other EU policies, most commonly within the scope of the commercial policy. As the ECJ said in *Centro-Com*,⁴ 'the Member States cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the common commercial policy on the ground that they have foreign and security objectives'.⁵

This decision can hardly be read as entailing that restrictive measures fall plainly within the scope of the commercial policy. This construction was ruled out by the ECJ's plain words in *Kadi I*: '[h]aving regard to [their] purpose and object' (namely to combat international terrorism), restrictive measures do not relate 'to international trade in that [they are] essentially intended to promote, facilitate or govern trade'.⁶ The Court concluded, in paragraph 187, that restrictive measures 'could not, therefore, be based on the powers of the Community in the sphere of the common commercial policy'.

On the other hand, substantive EU policies were prevented from entering the field reserved to the CFSP. This prohibition was an indispensable corollary of the principle of conferral, which assigned specific objectives to each competence of the Union, and reserved the pursuit of political objectives in the international arena to the CFSP.

Political motivation was, indeed, the hallmark of the CFSP. This EU policy was characterised by considerable indeterminacy, since it was virtually the only EU competence unleashed from a substantive field and purely functional in nature. Correspondingly, politically motivated actions could not be adopted under one of the other EU substantive policies.

⁴ Judgment of 14 January 1997, Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, [1997] ECR I-81.

⁵ Para 26.

⁶ Para 185.

In the light of this regime of segregation, the role of Article 301 TEC was precisely to establish a link—the only one expressly provided for in the normative plan—between the political and the substantive dimensions of the EU.⁷

This state of affairs, notably corresponding to the will of the Member States to maintain control over the politically motivated action of the Union, has not substantially changed with the Lisbon reform and with the setting up of a new, integrated system of external action. This new system undoubtedly attempts to attenuate the regime of mutual exclusion between CFSP and other EU substantive policies. However, the means employed are not fully appropriate to attain this aim. The impression is that the necessity to change the preceding system and to confer unity and coherence on the EU external system has not prompted a substantial change but stopped at the inescapable crossroads, from which many different routes depart: one leading to the full absorption of the CFSP in EU substantive policies on the external plane; one leading to the opposite extreme, to a creeping intergovernmentalisation of these substantive policies, with an indeterminate number of options in the middle.

Article 21, paragraph (2), TEU assigns a set of objectives, mainly of a political character, to the full range of policies which are part of the EU's external action, including the external aspects of all the EU's substantive policies. A textual interpretation of Article 21, paragraph (2) thus seems to indicate that the EU acts falling within the realm of external action can freely pursue the objectives assigned in that provision, including those which appear as purely political and which were, in the pre-Lisbon system, assigned only to the CFSP.⁸

Other provisions, among which is, pre-eminently, the revised Article 40 TEU, seem rather to indicate the maintenance of the pre-Lisbon system,⁹ with the exclusive competence of the CFSP to pursue political objectives and the exclusive competence of the other EU policies to pursue the substantive objectives respectively assigned to them.¹⁰

⁷ In legislative practice, this barrier proved not to be an absolute one. See E Cannizzaro, 'Unity and Pluralism in the EU's Foreign Relations Power' in *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate* C Barnard (ed), *Collected Courses of the Academy of European Law* (Oxford, Oxford University Press, 2007) at 193.

⁸ For a discussion on the interpretation of this provision, see L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25 *European Journal of International Law* 1071, and my reply, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2015) 25 *European Journal of International Law* 1093, at 1093.

⁹ See the opinion of AG Bot (Case C-658/11, *European Parliament v Council of the European Union*, delivered on 30 January 2014): this provision sets out the obligation 'to define the boundaries between the CFSP and the Union's other policies' (para 86). In the opinion of the Advocate General, the test to assign the objectives of Art 21, para (2), to the various competences of the Union is one of proximity: 'in so far as Article 21(2) TEU sets out the common objectives of the Union's external action, that provision should be read in conjunction with the more specific provisions applicable to each policy in order to determine the Union policy to which a certain objective is more specifically related' (para 88).

¹⁰ Art 23 TEU assigns the pursuit of the objectives laid down by Art 21, para (2), to the primary competence of the CFSP, which 'shall be guided by the principles, shall pursue the objectives of, and be

Rather than defining the relationship between political objectives and substantive means of action, the new EU's external action seems to have created a crucible in which different, and possible antithetical, theoretical options have been put together with no single one clearly predominating over the others. This makes particularly difficult the search for the best interpretative option. Not surprisingly, the scholarship is sharply divided between conservation and innovation; the case law of the ECJ exhibits considerable uncertainty and practice continues to develop intermediate solutions through arrangements designed to establish informal means of communication between the political and the substantive dimension of the European integration.¹¹

Yet, in all evidence, the construction of the provisions setting up the EU external action deeply affects the construction of Article 215 TFEU. Should one assume that the EU Institutions are empowered to pursue autonomously the objectives of Article 21, paragraph (2), the maintenance of a two-step procedure for the adoption of restrictive measures would represent an exception to that system since in that particular area the pursuit of political objectives would continue to be conditional on a previous CFSP deliberation. If the setting up of an integrated external action did not change the means-ends relationship at the basis of the exercise of EU competences prior to the entry into force of the Lisbon Treaty, Article 215 would still constitute an exception, but in the opposite sense: in a system still founded on the reciprocal isolation of the CFSP and, respectively, of the other EU's substantive policies, the Member States are nonetheless empowered to use the means of action transferred to the EU for sanctioning purposes.

conducted in accordance with' these. For the policies included in Part V of the TFEU, the wording is much more nuanced (see Art 207, which speaks of the 'the context of the principles and objectives of the Union's external action'; Art 208, para (1), Art 212, para (1), and Art 214, para (1), which speak of the 'framework of the principles and objectives of the Union's external action'). A difficult issue arises with regard to the objectives of the development cooperation policy. Under Art 208 TFEU, 'Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty'. Other objectives specifically assigned to the development cooperation policy under Art 177 TEC, such as the protection and the promotion of human rights, have been expunged from the terms of the provisions governing this specific substantive policy and included in Art 21, para (2), among the objectives assigned to the external action of the Union. This can hardly entail that development cooperation policy is barred from autonomously pursuing this objective, which has featured in that policy from its very beginning and which is one of its *raison d'être*. Therefore, precisely this exclusion could constitute a formidable argument in favour of the autonomy of the EU in the pursuit of objectives included in Art 21, para (2), through its substantive policies. A more moderate position has been taken by the ECJ in Case C-377/12 *European Commission v Council of the European Union* (Judgment of 11 June 2014, EU:C:2014:1903), where the Court seems to say that the objectives of Art 21, para (2), TEU can be pursued by development cooperation acts only insofar as these acts are mainly designed to attain the primary objective assigned to that policy, namely the eradication of poverty. All in all, this conclusion seems to attenuate the famous decision of the ECJ in Case C-268/94, *Portuguese Republic v Council of the European Union* (Judgment of 3 December 1996, [1996] ECR I-6177), para 24.

¹¹ For a closer analysis, I refer to my work *Unity and Pluralism in the EU's Foreign Relations Power*, n 7 above.

In a different, evolutive, perspective, the decision of the drafters of the Treaty to leave unaltered the complex two-step procedure of Article 215 TFEU for the adoption of restrictive measures, in spite of the changing institutional and normative landscape of the EU external action, constitutes an element for the overall interpretation of other Treaties' provisions concerning the relationship between the CFSP and other substantive policies of the EU: namely to maintain the guardianship of the CFSP over the political use of substantive policies.¹²

B. The 'Bridge' Between the CFSP and Other EU Substantive Policies

In *Kadi I* the Court considered that Article 215 TFEU constitutes 'a bridge ... constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP'.¹³

It would be erroneous, however, to assume that Article 215 is based on a combination of competences. One can hardly believe that a combination of two competences can produce a greater effect than that which may be produced by the sum of either competence. This would be tantamount to presuming that a combination of two shortcomings can exceed their sum.¹⁴

Even leaving aside mathematical analogies, a simple consideration of the structure of the decision-making procedure established by Article 215 clearly shows that it is not the result of a combination of legal bases. Under ECJ case law, a combination of competences entails a combination of their corresponding procedures. According to consistent case law, a measure 'that simultaneously pursues a number of objectives, or that has several components, which are inseparably

¹² On the relationship between CFSP and other substantive EU act, see, among the most recent contributions, ME Bartoloni, *Politica estera e azione esterna dell'Unione europea* (Napoli, Editoriale Scientifica, 2012); P Van Elswege, *EU External Action after the Collapse of the Pillar Structure: in Search of New Balance between Delimitation and Consistency* (2010) 47 *Common Market Law Review* 1007.

¹³ See n 1 above, para 197.

¹⁴ The idea that Art 215 simply constitutes a mere sum of pre-existing competences re-emerges periodically in literature and case law. This is probably what the ECJ had in mind when it said, in *Kadi I*, that 'a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP' (para 197). Were this metaphor meant to convey the idea that Art 215 is simply the intersection between two pre-existing competences, it would not be particularly felicitous. It would be quite a miraculous bridge, one which connects two shores, neither one capable of sustaining its pillars. In a different perspective, in Case C-548/09P, *Bank Melli* (Judgment of 16 November 2011, [2011] ECR I-11381, the Court, upholding the previous decision of the General Court, said that 'Art. 60 EC and 301 EC are provisions expressly envisaging that action by the Community may prove necessary in order to attain one of the objectives specifically assigned to the Union by Article 2 EU, namely the implementation of a common foreign and security policy' (para 58). From this passage, one can reasonably infer that these two provisions do not combine pre-existing competences but, rather, establish a new competence, which puts together the objectives assigned to the CFSP with specific means of actions.

linked without one's being incidental to the other ... will have to be founded, exceptionally, on the various corresponding legal bases.¹⁵

Article 215, like its predecessor, Article 301, does not combine the two legal bases and does not merge their respective procedures.¹⁶ It rather establishes a sequence of acts, each based on its own legal basis and each adopted through its own procedure. The problem thus arises as to the legal nature of this strange procedure: if it is not a combination of legal bases, what else may it be?

The problem of the legal nature of the competence set up by Article 215 has been dealt with in short by the ECJ in *Bank Mellî*.¹⁷ The Court ruled out that the adoption of restrictive measures requires a combination of legal bases. It rather stressed the autonomy of each of the two acts, which have to be adopted each according to its own procedure. The CFSP act appears thus as a mere condition for the adoption of the restrictive measures by the Council, by a qualified majority, on a joint proposal of the High representative for CFSP and the Commission, whilst Parliament is merely informed.

The conclusion ought, therefore, to be drawn, that Article 215 TFEU is a competence of a new kind, whose decision-making procedure is based on a sequence of acts, one representing the condition for the adoption of the other.

C. Nature and Implication of the Bridge Constructed by Article 215, paragraph (2)

The holding of the ECJ in *Bank Mellî* seems to entail the full autonomy of the two component parts of Article 215. The former, the CFSP decision, should determine the political objectives only; the second should provide the means of action. Neither of these two dimensions of the European integration would be thus subordinate to the other.

As pointed out in the preceding paragraph, this model has inspired, in other areas, practical arrangements implemented where the need was felt, to establish an informal coordination between the CFSP and other EU substantive policies. In areas of shared consent, the EU supranational institutions have largely agreed to act within a framework of political objectives laid down by CFSP acts.¹⁸

¹⁵ See, inter alia, Judgment of 11 June 2014, Case C-377/12, *Commission v Council*, para 34, EU:C:2014:1903.

¹⁶ According to the well-settled case law of the ECJ, a combination of competences cannot disrupt the logic of the system. Moreover, as the Court said in *ECOWAS* (Judgment of 20 May 2008, Case C-91/05, *Commission v Council*, [2008] ECR I-3651), para 76, a combination of legal bases 'is impossible with regard to a measure which pursues a number of objectives or which has several components falling, respectively, within (a substantive EU policy), and within the CFSP'.

¹⁷ See n 14 above.

¹⁸ See, inter alia, Council Decision 2012/123/CFSP of 27 February 2012 amending Decision 2011/523/EU partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic ([2012] OJ L54, 28 February 2012, p 18). In spite of this heading, the Council decision is founded on the basis of article 217 TFEU.

However, this is not precisely the model upheld by the Court in *Bank Melli*. Having asserted the formal autonomy of the two acts which formed the sequential procedure established by Article 215, the Court abstained from dealing with the insidious issue of their substantial autonomy and did not seize the opportunity to clarify the respective roles of the two components of the ‘bridge’ constructed by that provision.

This appears highly regrettable. If the CFSP act were empowered to determine the content of the restrictive measures, the formal autonomy of the substantive EU act adopting restrictive measures, designed to pursue the objectives set by the CFSP act, would be not much more than an optical illusion. As the claimant in *Bank Melli* rightly observed, the list of the individuals addressed by the measures, annexed to the Regulation adopted under Article 301 TEC, merely reproduced the list annexed to the CFSP act. Consequently, to amend that Regulation, the procedure laid down by Article 215, paragraph (1), second sentence, would not be sufficient. A new act would need to be adopted on the basis of the CFSP procedure.

Thus, far from having a different object and content, the two acts, the CFSP act adopted on the basis of an intergovernmental procedure, and the Regulation, adopted by the Council by qualified majority, tend substantially to coincide. The coincidence between the measures adopted by the CFSP act and those adopted by the regulation envisaged by Article 215, paragraph (1), second sentence, is confirmed by the analysis of the legislative practice, which shows that the CFSP generally predetermines the contents of the restrictive measures, which only nominally are adopted by the Council, on majority voting.

D. Antiterrorist Sanctions between Intergovernmental and Supranational Method

The idiosyncratic features of Article 215 TFEU as a legal basis for EU action should warn against assigning to it a broader scope than necessary. It should instead be considered an exceptional legal basis, to be used only in the absence of other viable alternatives.

The scope of Article 215 has been the subject of the litigation between the Parliament and the Council decided by the ECJ in Case C-130/10.¹⁹ The Court was asked to see whether Article 215 was the proper legal basis for a regulation aimed at amending the famous Regulation (EC) No 881/2002 on restrictive measures directed against individuals connected with terrorist networks, and to bring that regulation into line with the EU standard of protection of human rights. In the Parliament’s view, this amended regulation ought to be adopted, instead, under Article 75 TFEU.

¹⁹ Judgment of 19 July 2012, Case C-130/10 *Parliament v Council*, EU:C:2012:472.

As is well known, the two twin-competences originally envisaged under Article 301 and Article 60 TEC have been transposed by the Lisbon Treaty in Article 215 and Article 75 TFEU. However, their respective decision-making procedures diverged dramatically. Whereas Article 215 TFEU still remained based on a combination of CFSP and substantive policies acts, Article 75 TFEU underwent a different evolution and has been fully drawn up within the realm of substantive EU competences. Its text now reads:

[w]here necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

Thus, albeit radically different as to their legal nature and their decision-making procedures, both provisions, Article 75 and Article 215, paragraph (2), TFEU, provide for a legal basis for the adoption of antiterrorist sanctions. It is therefore necessary to identify the distinctive character of the two respective competences.

At first sight, the distinction is self-explanatory. Article 75 is included in Title V of Part III of the TFEU, concerning EU policies and internal actions, and is specifically designed to prevent and combat terrorism and related activities. Article 215 is included in Part V of the TFEU, concerning the EU external action and concerns, more generically, restrictive measures.²⁰ At first sight, Article 75 applies to measures designed to address internal threat, whereas international threats require the more engaging procedure laid down by Article 215.

Although intuitively appropriate, this conclusion is not free from ambiguity. Indeed, the identification of the internal or international nature of a terrorist threat is not an easy task. A number of tests may be employed, considering, for example, the origin of the threat, their targets, the objectives pursued by terrorism and so on. No one, however, appears to be capable of distinguishing unequivocally between internal threat and international threat. This is probably due to the fact that the internal/international divide is particularly inappropriate to determine the nature of the EU competence with regard to antiterrorist sanctions, which, almost inevitably, straddles this line. Sanctioning measures against terrorists, indeed, possess a dual component: they are taken and performed internally but often are designed to produce their effect internationally.

In Case C-130/10, the Court adopted a formal test. In response to the objection of the Parliament, concerning precisely the difficulty of distinguishing internal from external terrorism, the Court—after recalling that the contested regulation

²⁰ Less distinctive appears the qualification of the measures enacted under Art 75 as ‘administrative’, a word not employed elsewhere in the founding treaties, and whose precise meaning appears to be controversial; the more so as the administrative measures under Art 75 have to be adopted through the ordinary legislative procedure and, therefore, constitute legislative acts.

was aimed at modifying a previous regulation adopted under Article 301 TEC, the predecessor of Article 215—concluded that the international dimension of that particular threat emerged from the existence of a CFSP act, precisely to give effect to a Security Council decision.²¹

Attractive as it may be, this argument begs the question. Due to the indeterminacy of the material scope of CFSP, it is illogical to deduce the international nature of a terrorist threat from the existence of a CFSP act, and to identify, on that ground, the legal basis of the EU action. This is tantamount to saying that the Member States, acting on a unanimous vote, in the context of a CFSP, are empowered to determine the legal basis of an EU act.

But was there a different option available? I submit that there was. The ECJ could have acknowledged that the objective of the contested regulation was not so much to adopt sanctioning measures, but rather to enhance the protection of fundamental rights for individuals already targeted by antiterrorist sanctions, and, by so doing, to contribute to creating an area of freedom, security and justice with respect for human rights, in the sense of Article 67 TFEU. This conclusion would have minimised the scope of Article 215 and, therefore, of the only EU competence based on the combination of the CFSP and one of the other EU substantive policies, according to the *ECOWAS* doctrine.²²

By following the opposite path, the ECJ seems to indicate that the existence of a CFSP act is sufficient to draw the EU action entirely into the intergovernmental realm,²³ namely that when foreign policy objectives are at stake, even indirectly, the decision-making procedure must be intergovernmental in nature.

III. JUDICIAL REVIEW AND ANTITERRORIST SANCTIONS

A. Limits to the EU Power to Adopt Antiterrorist Sanctions

The second part of this chapter will deal with the limits to antiterrorist sanctions with regard to the protection of fundamental rights. For the purposes of the current study, as part of a collection of writings on the external dimension of European integration, this analysis will be limited to sanctions originating from

²¹ Case C-130/10, n 19 above, see para 76. After recalling that the difference between these two legal bases depends on the existence of ‘a bridge ... between the actions of the Community involving economic measures ... and the political objectives of the EU Treaty’, the Court went on to say that ‘Article 215 TFEU expressly provides such a bridge, but this is not the case with Article 75 TFEU, which creates no link with decisions taken under the CFSP’ (para 59). The judgment of the ECJ, 14 June 2016, Case C-263/14 *European Parliament v Council of the European Union*, nyr, is based on an analogous rationale.

²² See n 16 above. Judgment of the ECJ, 20 May 2008, Case C-91/05 *Commission v Council* [2008] ECR I-3651 (*ECOWAS*).

²³ This impression emerges from a passage incidental to the line of reasoning of the judgment. The Court explained, in para 82, that ‘the difference between Article 75 TFEU and Article 215 TFEU, so far as the Parliament’s involvement is concerned, is the result of the choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union’s action under the CFSP’.

international law and, more precisely, from SC resolutions. Does the EU encounter in this field the same limits put on its other policies or actions? Is the international origin of the most part of antiterrorist sanctions relevant in attenuating these limits?

These and other related issues have been dealt with in the complex and thoughtful case law of the ECJ, among which are the worldwide celebrated *Kadi* decisions.²⁴

All of them are very well known in full detail and there is no point in dwelling upon them at any length. Reference to these cases will be restricted to what is strictly necessary to complete the analysis undertaken in the preceding section.

The ECJ case law seems to be based on a chain of assumptions, most of which are of a theoretical character. The basic assumption is that the UN Charter does not impose a particular model of implementation of SC resolutions and, therefore, the EU is permitted to transpose SC resolutions through implementing legislation instead of according direct effect to the resolutions. In the view of the ECJ, this process has the effect of severing the link between the obligations flowing from SC resolutions and the legislation enacted to give effect to it.

EU legislation designed to give effect to SC resolutions, consequently, is to be treated as ordinary legislation, subject to domestic, not international standards of review, including domestic principles which protect individual fundamental rights. Finally, insofar as the application of these domestic standards does not affect the effectiveness of EU law, the standard is, in principle, a full standard with regard to the scope as well as to the intensity of review.²⁵

In spite of the ECJ's considerable effort, this impressive theoretical framework does not decisively contribute to the solution of the questions asked above. Regardless of whether the EU is among the direct addressees of the SC resolutions, as some could be inclined to believe, or whether it is only indirectly bound by the resolutions, by virtue of the reference made to them by the CFSP acts, the fact remains that the effects of SC resolutions within the EU legal order, direct or indirect as they may be, are conditional upon their compliance with primary EU law. If the SC resolutions are entitled to produce a direct effect within the EU legal order, they have to be directly in compliance with EU primary law; if the resolutions do not have a direct effect, nonetheless, they have to be 'indirectly' in compliance therewith, through the means of their implementing legislation.

Nor does the direct or indirect character of the reference to international law constitute an element for determining whether SC resolutions enjoy immunity

²⁴ Judgment of 3 September 2008, Joined cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi I)*, see n 2 above; Judgment of 18 July 2013, Joined cases C-584/10 P, C-593/10 P & C-595/10 P, *Commission v Yassin Abdullah Kadi (Kadi II)*, EU:C:2013:518.

²⁵ See A Cuyvers, "Give me one good reason": The Unified Standard of Review for Sanctions after *Kadi II* (2014) 51 *Common Market Law Review* 1759; P Leino, "In Principle the Full Review": what Justice for Mr Kadi? in R Liivoja and J Petman (eds), *International Law-making: Essays in Honour of Jan Klabbers* (London, Routledge, 2014) 225.

from domestic judicial scrutiny. Neither international law nor the UN Charter establishes the obligation to grant immunity to SC resolutions within domestic orders. International law and the UN Charter only require the parties to abide by SC resolutions. Article 103 of the UN Charter establishes the additional obligation to grant priority to obligations flowing from the Charter over other conflicting obligations. By no means does this obligation entail that SC resolutions must be granted primacy vis-à-vis constitutional principles in domestic legal order. From a domestic perspective indeed, the application of Article 103 ultimately relies on domestic constitutional rules and principles.

Thus, the only remaining question is one of standards: namely whether the standards of legality applicable to purely domestic norms are equally applicable to norms having an international origin, designed to regulate international situations and to produce their effects primarily in their own legal environment.

Trends in comparative law show that domestic judges tend to adjust internal standards of review when international rules are at stake. Many techniques have been developed to take into account the international origin of certain rules when subject to domestic scrutiny. Let me briefly recall the well-known principle of *völkerrechtsfreundlichkeit*, which has inspired a number of contemporary legal orders. An analogous principle, which can be well indicated as a principle of 'openness' of the EU legal order, emerges from Article 3, para (5), TEU.²⁶

Issues regarding the normative contents of this provision have been extensively discussed in legal scholarship. However, for the limited purpose of the present contribution, there is no need to enter into this learned discussion and to determine precisely the various possible effects produced by such a provision. It is sufficient to refer to the main view shared among scholars, according to which such a provision has the effect of enlarging the set of fundamental values and interests of the EU legal order by including respect for international law and for the UN Charter. We can safely conclude, therefore, that compliance with international law and with the UN Charter corresponds to a constitutional interest of the EU legal order and concurs with others in determining the standard of review for underlying legislation.

The principle of 'openness' of the EU legal order may have significant implications for domestic judicial review of international rules. First, it may mean that domestic judges should abstain from reviewing the internal validity of international rules in the light of the domestic standard of protection of human rights if a mechanism of judicial review exists at the international level, substantially equivalent to the standard applied domestically.

²⁶ 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

This is the well-known doctrine of equivalent protection, increasingly applied by domestic and international judges as a cross-border conflict-settling technique. In *Kadi I*, the ECJ seems to have implicitly contemplated the possibility of employing such a technique.²⁷ In *Kadi II*, the ECJ expressly referred to the insufficiency of the administrative procedure of review instituted at the UN level and known as ‘delisting’, and indicated that by no means did such a procedure satisfy the engaging requirement of the domestic principles of effective judicial protection.²⁸ One could speculate, *a contrario*, that, if the UN delisting procedure were substantially equivalent to EU domestic principles, the ECJ could have decided to decline its jurisdiction.

The principle of equivalent protection may be considered as the procedural articulation of the ‘openness’ of a legal order. There is, however, another substantive articulation. Before reviewing international law in the light of domestic standards, domestic courts must primarily assess its validity within the same international legal order.²⁹ It would be preposterous to assume that the process of implementation of international law entails severing its ties with its original legal context. For example, before applying a treaty, a domestic judge ought to assess that it is still in force under the grounds of invalidity or termination enshrined in the Vienna Convention on the Law of Treaties and in general international law. Thus, domestic judges are empowered also to consider the existence of substantive higher standards of the international legal order and employ them to review the lawfulness of international ‘ordinary’ law.

The theoretical interest of this technique lies in the fact that it tends to decouple the substantive from the procedural competence to determine the legality of international law. When reviewing the validity of inferior international law, domestic judges act, within their own legal order, as decentralised organs of the international community. In a certain sense, such a doctrine still recognises the primary competence of the international legal order to determine the legality of its rules from a substantive viewpoint, whilst the domestic legal order only supplies the procedural machinery.

The idea that the European judicature has the power to review SC resolutions in the light of international peremptory law was put forward by the CFI in *Kadi I*³⁰ but subsequently reversed by the ECJ.³¹ The CFI’s decision paved the way

²⁷ This has been noted by a number of scholars. See J Kokott and C Sobotta, ‘The Kadi Case—Constitutional Core Values and International Law—Finding the Balance?’ (2012) 23 *European Journal of International Law* 1015.

²⁸ See Joined cases C-584/10 P, C-593/10 P & C-595/10 P, *Commission v Yassin Abdullah Kadi (Kadi II)*, n 24 above, para 133.

²⁹ See E Cannizzaro, ‘Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case’ (2009) 28 *Yearbook of European Law* 593.

³⁰ Judgment of 21 September 2005, Case T-315/01, *Yassin Abdullah Kadi v Council and Commission*, [2005] ECR II-3649, para 226.

³¹ In para 287 of the *Kadi I* decision (n 24 above), the ECJ said: ‘With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted

to dismiss the applicant's claim, since, in the view of the General Court, international peremptory law did not include an individual right to effective judicial protection. Arguably, the ECJ must have felt that the reference to the uncertain category of peremptory law was improper to secure full protection of individual fundamental rights. In consequence of this perception, the ECJ sought shelter in the most comfortable categories of domestic review. In *Kadi II*, the ECJ said, albeit in passing, that

[s]uch a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned, those being shared values of the UN and the European Union.³²

In consequence thereof, the ECJ proceeded to assess the legality of SC resolutions against a purely domestic standard of review. Whereas the ECJ was fully legitimated to do so, in terms of judicial policy this choice does not seem the most appropriate one. It is not based on the superior legitimacy coming from international law and, quite the contrary, contributes to spreading mistrust on the capacity of international law to impose itself on reluctant States and ultimately disrupts its capacity to control their conduct. In a systemic perspective, the unilateral determination of the legality of SC resolutions on the basis of a purely domestic standard may further have a legitimising effect of analogous claims by other States, including those based on different conceptions about individual fundamental rights.³³

B. *Jus Cogens* as a Limit to the Domestic Application of Antiterrorist Sanctions

A different course could have been grounded on the consideration that the effects, direct or indirect as they may be, of SC resolutions within the EU legal order primarily depend on the effects of the resolutions within their own legal order. This means that the balance between collective security interests and individual interests ought to be struck primarily within the international order.

By no means does this conclusion depend on the particular mechanisms of implementation of international law within domestic legal orders. As said before, once implemented in domestic legal orders, international law must be administered and adjudged by domestic courts, regardless of whether it can be applied directly

by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*.

³² Ibid para 131.

³³ On the ECJ's perception of its role in the international legal order, see, recently, V Fikfak, 'Kadi and the Role of the Court of Justice of the European Union in the International Legal Order' (2013) 15 *The Cambridge Yearbook of European Legal Studies* 587.

or through implementing legislation. In the case at hand, SC resolutions had to be considered by the ECJ as part of EU law through the reference made by EU acts implementing them. It follows that the ECJ was empowered to determine the international legality of these resolutions as part of its overall assessment aimed at determining the conditions under which the EU implementing legislation ought to be applied within the EU legal order.

There is a case to be made that those SC resolutions conflicting with peremptory rules of international law are invalid. This argument is grounded on two premises: first that the activity of the SC to maintain and restore international peace and security is not free from legal restraints and that, on the contrary, it is bound to respect peremptory rules; secondly that peremptory law includes also rules protecting individual fundamental rights which the same SC has contributed to promoting and to bringing into existence.

The assessment of the international validity of SC resolutions by the ECJ would have produced a number of beneficial consequences both in terms of legal technique and of judicial policy. First, it would have contributed to the further development of standards of protection of human rights within the international legal order as a limit to the discretionary powers of the SC. Secondly, this course of action would have had a beneficial effect also on the role of the SC as a global institution entitled to govern individual conduct relevant for the maintenance and restoration of international peace and security. The progressive transformation of the SC from an entity addressing only the States, and imposing obligations on them, to an entity which aspires to govern individual conduct, would have been accompanied by a corresponding evolution of the set of values and interests which constitute a limit to its powers.³⁴ Finally, the adoption of an international standard of review of SC resolutions would have contributed to dispelling the fear that the EU aims to impose its own standards and its own values on the rest of the world.

By seeking refuge in the comfortable categories of its own legal order, the ECJ has not only made an impeccable exercise of dualism; it has also crystallised the present state of international law, and has missed an opportunity to sow the seeds for its further development. A *völkerrechtsfreundlicher* position may have constituted a more resolute step in the direction of the desired change; it would have presented the EU as a leading authority championing the development of a sphere of international human rights law as an antidote against the exercise of power at the international level. It would have contributed to the development of an international rule of law against the somewhat disquieting idea of a rising international global authority unleashed from legal restraint.

³⁴ I have developed this idea in more details in my article 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 13 *International Organisations Law Review* 195.