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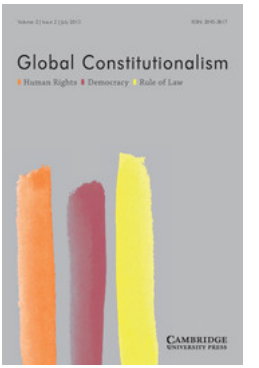

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Individuals in a pluralist world: The implications of counterterrorist sanctions

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Abstract: Counterterrorist sanctions against individuals are a prime example of pluralism. Multiple claims of constitutional authority (in resolutions of the UN Security Council, under European Union law, and national law) assume to govern the same legal situation. Choosing between these different authorities has great implications for the legal situation of individuals. This paper analyses the legal position of individuals facing this plurality of claims of constitutional authority and how their rights are largely dependent on the choices of domestic courts. Attention will be given not only to procedural and judicial rights but also to the broader implications of individual sanctions as an example of pluralism. What does it mean for popular sovereignty? Do patterns or guidelines emerge of how courts should address multiple claims of authority? The paper takes into account the latest amendments of the UN sanctioning procedure (Resolutions 1988 and 1989 (2011)).

Keywords: constitutional pluralism; counterterrorist sanctions; European Union law; individual rights; role of courts

Introduction

Amongst scholars of European Union (EU) law, counterterrorist measures against individuals have attracted a great deal of attention. On the one hand, this might surprise since individual sanctions constitute an exception in many ways. On the other hand, this attention can be justified in the light of the many complex constitutional issues that these exceptional measures raise and which force domestic and regional courts to take fundamental choices which go much further than interpreting existing law

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or deciding the case at hand. This is particularly true for UN counterterrorist sanctions and the domestic[1] measures giving effect to them. They are a prime example of the increasing multiplication of claims of authority, including ultimate authority, to govern the legal position of one individual in a given place at the same time or, if you will, a prime example of pluralism.[2]

This article will examine the changing role of the individual in our pluralist world on the basis of the example of UN counterterrorist sanctions. It will address some of the many questions resulting from legal multiplication related to the rights and obligations of individuals. This includes issues such as: the uncertainty of the legal position of individuals, procedural protection, and political influence of individuals on the laws that govern them. Accepting that no domestic legal order exists in isolation and that indeed the world has become 'pluralist' in the sense that a multiplication of potentially applicable legal regimes and therewith claims of authority to regulate one specific factual situation has taken place, raises inter alia questions such as: How should domestic courts deal with measures adopted in global governance that are irreconcilable with domestic legal standards? How can they protect the rights of individuals in a real and hands-on manner for those standing before them but avoid undermining the functioning of the global net of legal interaction in a complex pluralist world?

The first section will briefly set the scene by introducing UN counterterrorist sanctions against individuals. Readers who are familiar with the different sanctions regimes and legal instruments, and I assume a large number will be, are invited to skip the first part of this section. The second part of the section relates this reality to the discussion on 'legal' or 'constitutional pluralism'.[3] The second section will examine the different consequences for individuals of the *adoption* of UN counterterrorist sanctions and measures giving effect to them. This includes not only their procedural

[1] The term 'domestic' refers to EU and state structures, e.g., domestic courts are national and EU courts.

[2] Pluralism has attracted much attention and is understood very differently by different scholars. See on this e.g.: C Eckes and S Hollenberg, 'Reconciling Different Legal Spheres in Theory and Practice: Pluralism and Constitutionalism in the Cases of *Al Jedda*, *Ahmed* and *Nada*' (2013) *Maastricht Journal of European and Comparative Law*, Pt 2 'Theoretical Framework'; N Krisch, 'Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2010) 24 *Ratio Juris* 4, 386–412 in particular on the evolution of Neil MacCormick's understanding of pluralism; Introductory notes in M Avbelj and J Komárek (eds), 'Four Visions of Constitutional Pluralism: Symposium Transcript' (2008) 2 *European Journal of Legal Studies* 325.

[3] The distinction between these two terms relates to the question of 'ultimate authority'. It is explained in the second part of first section below.

rights, but also questions of political participation. The third section will explain the troubles into which domestic courts run when faced with challenges of domestic measures implementing UN lists of terrorist suspects. It will also consider what impact court decisions (may) have on the position of individuals and the development of guidelines on how to deal with a plurality of claims of constitutional authority. The fourth section addresses the consequences of relying on a formal hierarchy and the potential for developing shared values. A final section will conclude the discussion.

Prelude: What are individual sanctions? And why are they such an illustrative example of pluralism?

Counterterrorist sanctions against individuals

UN counterterrorist sanctions against individuals (individual sanctions) are restrictive measures adopted against private persons, who have been identified as terrorist suspects. Two counterterrorist sanctions regimes exist that do not have a link with any territory or state. The main difference is the legal context, in which the terrorist suspects are identified. The first regime consists of Security Council Resolution 1267 and the European and national measures giving effect to this resolution. Under this regime, the Al-Qaida Sanctions Committee[4] lists natural and legal persons (individuals). On 14 March 2013, the Al-Qaida Sanctions List consists of 232 natural persons and 63 legal persons. A declining trend can be observed.[5] The second sanctions regime is based on Security Council Resolution 1373. Under this second regime, the task of identifying terrorist suspects is delegated to the domestic context (autonomous sanctions). The UN has set up a sanctions committee that assists and monitors the domestic listings[6] but no names are agreed in the UN context. The present paper will focus on the Al-Qaida sanctions regime, originally established under UN Security Council Resolution 1267, because under this regime the UN makes a claim to ultimate authority to determine terrorist suspects.

The Al-Qaida sanctions regime has been reformed many times. A series of changes have been made to improve the procedural (introduction of the

[4] Previously called 1267 Sanctions Committee, at the time responsible for listing those associated with Al-Qaida and the Taliban.

[5] <http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml>, accessed 15 March 2013. On 31 December 2011, the Al-Qaida Sanctions List consists of 251 natural persons and 85 legal persons.

[6] Counter-Terrorism Committee (CTC).

delisting procedure;[7] the focal point;[8] regular review of the listings;[9] the Ombudsperson[10]) and the substantive rights (humanitarian exemptions[11]) of those listed. These changes are highly relevant to the evaluation of the role of individuals under the currently applicable sanctions regime. Most recently, the UN list of terrorist suspects, originally containing those 'associated with Al-Qaida'[12] *and* those 'associated with the Taliban',[13] has been separated into two different regimes (UN Security Council Resolutions 1988 and 1989 (2011)). This reflects the different agenda of the two types of sanctions and reduces sanctions against the Taliban to a state related sanctions regime,[14] similar, for instance, to sanctions against Libya. The Ombudsperson is struggling to ensure a minimum of fair procedures under the Al-Qaida regime.[15] She has no powers under the Taliban regime or any other state related regime.

For the EU Member States, the Union has taken over the task of giving effect to both UN sanctions regimes. Under the Treaty of Lisbon, the Union now also has explicit competence to do so:[16] Articles 75 and 215 TFEU.[17] For the present purpose, it is sufficient to explain that so far all individual sanctions, both pre- and post-Lisbon, have been adopted in a two-tier procedure, which first requires a Common Foreign and Security Policy (CFSP) instrument[18] containing the political decision to adopt these sanctions and then a regulation containing the actual operational

[7] First introduced by: Guidelines of the Al-Qaida Sanctions Committee for the conduct of its work, adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, 9 December 2008, 22 July 2010, 26 January 2011 and 30 November 2011 ('Guidelines') para 7; available at: <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>, accessed 18 January 2012.

[8] UN SC Res 1730 (2006), para 1.

[9] UN SC Res 1822 (2008), paras 25–26.

[10] UN SC Res 1904 (2009).

[11] UN SC Res 1452 (2001).

[12] UN SC Res 1989 (2011), para 1.

[13] UN SC Res 1988 (2011), para 1.

[14] UN SC Res 1988 (2011) refers explicitly to Afghanistan.

[15] See, e.g., an interview with Ms Prost of 16 July 2010, available at <http://www.thenational.ae/thenational/news/world/no-fly-list-appeals-can-be-filed-online>, accessed 18 January 2012.

[16] Before the Lisbon Treaty, the Union also implemented UN lists but its competence was highly controversial, see C Eckes, 'Judicial Review of European Anti-Terrorism Measures: The Yusuf and Kadi Judgments of the Court of First Instance' (2008) *European Law Journal* 74–92.

[17] The two separate legal bases have given raise to new problems of delimitation which go beyond the scope of the present paper. See Application in Case C-130/10, Parliament v Council, joined by the Commission, the Czech Republic, Sweden, and France as interveners (order of 10 August 2010). See on the choice of the post-Lisbon legal basis for individual sanctions: C Eckes, 'EU Counter-Terrorist Sanctions against Individuals: Problems and Perils' (2012) 17(1) *European Foreign Affairs Review* 113–32.

[18] Pre-Lisbon this used to be a CFSP common position; post-Lisbon the instrument is called CFSP decision.

measures.[19] The latter regulation is directly applicable in the EU Member States and precludes them to give effect to their obligations under UN Resolutions 1267 and 1373 under national law.[20] Post-Lisbon, the Court of Justice has full jurisdiction to review individual sanctions adopted by the Union.[21]

Member States remain competent to adopt so-called secondary sanctions, which are criminal measures for the breach of EU sanctions legislation. These apply to financial institutions or third parties, who do not comply with the directly applicable obligation not to make any financial assets available to those listed. However, several EU Member States continue to adopt parallel national measures implementing the UN Al-Qaida list.[22]

Individuals in a pluralist world: The case of sanctions

Pluralism is here understood as a description of reality (the 'is'), rather than as a normative theory (the 'ought');[23] even if it is acknowledged that also constitutionalist tendencies can be witnessed in reality.[24] Indeed, a convincing argument can be made that reality displays pluralist features:[25]

[19] See ex-Article 301 EC and Article 215(2) TFEU.

[20] Case 50/76 *Amsterdam Bulb BV v Produktschap voor Siergewassen* [1977] ECR-00137, paras 5 and 7. This is explicitly confirmed by the state reports of, e.g., Austria and the Netherlands in the Database on National Implementation Measures of UN Sanctions, and Respect for Human Rights of the Committee of Legal Advisers on Public International Law (CAHDI), Council of Europe.

[21] This includes review of both the TFEU (former Community) instrument and the CFSP decision (adopted under the TEU), see art 275(2) TFEU. See, however, Eckes (n 17).

[22] See the discussion in: UK Supreme Court, *Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant)*, judgment of 27 January 2010, [2010] UKSC 2.

[23] See for an explicitly descriptive approach: J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* and Unofficial Law 1, 1–55. See also for a distinction between 'explanatory', 'normative' and 'epistemic pluralism': N Walker, 'The Idea of Constitutional Pluralism', *EUI Working Paper LAW* 2002/1, 27 ff.

[24] See e.g.: J Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' in J Habermas and C Cronin (eds), *The Divided West* (Polity, Cambridge, 2006) 115; German Constitutional Court, BvR 1481/04, 2004 para 36, referring to a 'gradually developing international community of democratic States under the rule of law'. This characterization depends, of course, on the definition of constitutionalist tendencies, which can be broadly understood to comprise ordering principles, engagement rules, identification of shared values and approximation of rules and principles. See also Eckes and Hollenberg (n 2).

[25] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2011), chs 8 and 9 discusses, for instance, the European Convention and global risk regulation; see also J Komárek, 'The Legal World beyond the State: Constitutional and Pluralist?', presentation at the conference 'Constitutionalism in a New Key?: Cosmopolitan, Pluralist and Public Reason Oriented', Berlin, 28–29 January 2011.

legal relationships in the same place and at the same time are governed by multiple legal regimes whose claim to authority has found some recognition.

Individual sanctions are not the only but rather an extreme example of constitutional pluralism.[26] They are an extreme example for three reasons: first, three legal regimes in three different contexts, UN, EU and national, compete to govern the legal situation of those listed; second, they have an exceptional impact on the rights of individuals and third, in all three legal contexts some claim of constitutional primacy of that particular legal regime or system is made. The first point is self-explanatory. As to the second point, individual sanctions have left a stain on the image of the Security Council and the states represented in it.[27] It has been questioned whether the Security Council is competent to adopt such measures and what the potential consequences of *ultra vires* actions of the Security Council's claim to constitutional authority could and should be. In the domestic contexts, the implementation of UN counterterrorist sanctions against individuals is also very controversial: they have not only received great attention in the literature,[28] but also been challenged in numerous

[26] Legal pluralism is, of course, to some extent an expression of political pluralism.

[27] See also *Report of the European Center for Constitutional and Human Rights (ECCHR)*, 'Blacklisted: Targeted Sanctions, Pre-emptive Security and Fundamental Rights', December 2010.

[28] Comprehensively: C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, Oxford, 2009); on the infringement of human rights: G Harpaz, 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' against Terror in the Kadi Dispute' (2009) 14 European Foreign Affairs Review 1, 65–88; N Lavranos, 'The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC' (2009) 28 *Yearbook of European Law* 616 ff; T Tridimas, 'Terrorism and the COJ: Empowerment and Democracy in the EC Legal Order' (2009) 34 European Law Review 103; N Lavranos, 'Judicial Review of UN Sanctions by the European Court of Justice', 78(3) *Nordic Journal of International Law* (2009) 343–59, 357; International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights' (2009), available at <http://ejp.icj.org/IMG/EJP-Report.pdf> 116; ECCHR report (n 27); on the relationship between EU and international law: E Cannizzaro, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the COJ Decision in the Kadi Case' (2009) 28 *Yearbook of European Law* 593 ff, 599; I De Jesus Butler, 'Securing Human Rights in the Face of International Integration' (2011) 60 *International and Comparative Law Quarterly* 125–65; C Tomuschat, 'The Kadi Case: What Relationship Is There between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?' (2009) 28 *Yearbook of European Law*, 663; D Halberstam and E Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 *Common Market Law Review* 13–72, 66 ff; T Tridimas, 'Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments' (2011) 13 *Cambridge Yearbook of European Legal Studies* 455–90, 457; J Genser and K Barth, 'When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform' (2010) 33 *Boston College International and Comparative Law Review* 1, 24.

legal actions.[29] Indeed, to my knowledge nobody, neither academic nor court, has substantively argued that the implementation meets the standard of fundamental rights protection under the European Convention on Human Rights (ECHR) or under the EU Charter of Fundamental Rights. The only way, in which scholars and courts have tried to justify the legality of the implementation of individual sanctions, is by relying on formal hierarchy arguments, which make the implementation of Security Council resolutions immune from judicial review or at least allows the obligation under the UN Charter to qualify domestic fundamental rights standards in a way that they no longer exclude the adoption of individual sanctions.[30] As to the third point, individual sanctions are an example of *constitutional* pluralism rather than *legal* pluralism because of the different claims to *ultimate* authority, in that they assume recognition of their specific claim without further specific approval by the internal legal order. Chapter VII resolutions, including the sanctions resolutions, claim an extraordinary status of primacy among international law (Article 103 UN Charter). EU law, including the sanctions regulations, claims supremacy over national law in all forms. Ruling on the validity of EU sanctions regulations (*Kadi I*), the Court of Justice fiercely defended the EU's distinct nature, i.e., different from international law, by declaring that the EU is not obliged to give effect to obligations under the UN Charter.[31] The Court further introduced a constitutional layer above the EU Treaties by ruling that Member States can under no circumstances derogate from the 'very foundations' of EU law, including if that was required by their obligations under the

[29] In January 2012, approximately 40 cases are pending before the General Court and the Court of Justice against the 30 different EU sanctions regimes (including those targeting the political elites of countries, see <http://ec.europa.eu/external_relations/cfsp/sanctions/docs/measures_en.pdf>), see Report of the Committee of Legal Advisers on Public International Law (CAHDI) UN Sanctions and Respect for Human Rights, March 2011, fn 17. Prominent cases against measures under the 1267 regime are: General Court, Case T-85/09, *Kadi v Commission*, judgment of 30 September 2010; Court of Justice, C-402/05 P and C-415/05 P, *Kadi I*, [2008] ECR I-6351; Court of First Instance, Case T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649; currently pending: More than 40 cases are pending against different EU sanctions (including country regimes), see in particular C-130/10, *Parliament v Council*, joined by the Commission, the Czech Republic, Sweden, and France as interveners (order of 10 August 2010); C-584/10 P, *Commission v Kadi* (Application OJ C 72/9, 5 March 2011); C-593/10 P, *Council v Kadi* (Application OJ C 72/9, 5 March 2011); C-595/10 P, *UK v Kadi* (Application OJ C 72/10, 5 March 2011). On 20 January 2012, 27 of the 29 judgments given by the EU Courts in the category 'CFSP' concerned sanctions in some form (counterterrorist or other).

[30] See on a similar distinction between applicability and scope of fundamental rights: A Thies, 'EU Membership of the WTO: International Trade Disputes and Judicial Protection of Individuals by EU Courts' (2013) 2(2) *Global Constitutionalism* Special Issue.

[31] Court of Justice, C-402/05 P and C-415/05 P, *Kadi I*, see (n 29) para 296. It must only 'take due account'.

UN Charter.[32] Implicitly, the latter contains an extraordinary claim to constitutional authority of the EU's 'foundations' – norms that are hierarchically superior to the EU Treaties, which are an expression of the will of the Member States. Finally in the national context, the exceptional situation has arisen that a considerable number of Member States adopts national implementation measures despite the existence of a directly applicable EU regulation. This is a challenge to the – at least in practice – accepted supremacy of EU law.

By way of conclusion, the combination of these two points makes individual sanctions the extreme example of constitutional pluralism. The following section will explore the implications of individual sanctions for the position of individuals beyond the repeatedly discussed infringement of their right of access to justice.

The changing position of sanctioned individuals

UN counterterrorist sanctions have made individuals direct objects of decisions of the UN Security Council. They immediately and fundamentally change the legal position of those listed. However, so far the decision-making process has taken place completely outside of the reach of national (or other) legislative and judiciary powers. Indeed, this direct determination of individual rights has not led to new 'ports of entry'[33] of political or democratic influence of individuals in the UN context. Representatives of the national executive of five permanent and ten rotating members of the Security Council take the listing decisions. Their decisions are – as is well known – not subject to an independent control by any court in the UN context. Overall protection in the UN context remains lower than the protection provided against measures with adverse effect under domestic law.

However, the picture is not all bleak. By establishing first the so-called 'focal point'[34] and later the office of the Ombudsperson,[35] the UN Security Council has created unprecedented administrative 'ports of entry' for those listed as terrorist suspects. These administrative channels allow individuals to directly make their voice heard in the UN context irrespective of the position of their states of nationality or residence. In particular the

[32] C Eckes, 'Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order' (2012) 18(2) *European Law Journal* 230–50.

[33] P Berman, 'Global Legal Pluralism' (2007) 80(6) *Southern California Law Review* 1155–1238.

[34] UN SC Res 1730 (2006).

[35] UN SC Res 1904 (2009).

creation of the office of the Ombudsperson in UN Security Council Resolution 1904 and the extension of her powers by resolutions 1989[36] establish an independent guardian in the UN context, albeit with limited powers. She does not have the power to delete individuals or even require an official reply to her concerns. Yet, the choice of Ms Kimberly Prost, a former judge at the International Criminal Tribunal for the former Yugoslavia, confirmed an honest attempt to ensure impartiality. The existence of an independent institution that scrutinizes and evaluates the practice of the Sanctions Committee is in any event an important step in the direction of accountability.[37]

The same could be said about the judicial review of implementing measures by domestic courts. This has indeed been confirmed not only by academics[38] but also by the UN Monitoring Team.[39] Under EU law, the Treaty of Lisbon gave the Court of Justice jurisdiction to review individual sanctions adopted in CFSP decisions.[40] This is an exception to the general exclusion of jurisdiction for the CFSP. Very controversial and 'restrictive' measures[41] against individuals in a policy area that is otherwise largely used to establish general political positions have led to the understanding that increased access to court for individuals is needed. This could on the one hand be seen as an *extension* of the protection of individuals under CFSP; on the other, it is of course the direct consequence of increased *effects* on the rights of individuals in this particular policy area.

However, in all three legal contexts, UN, EU and national, the main problem remains lack of information. This directly limits the active role of individuals who are exposed to the consequences of claims they do not know and cannot rebut. It also limits the ability of other actors to ensure fair procedures. Ms Prost does not have the legal power to request or seize information. The quality and quantity of information available to Ms Prost depends on the willingness of the designating member state (and

[36] UN SC Res 1989 (2011) para 21.

[37] Similarly: L Ginsborg and M Scheinin, 'You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime' (2011) 8 *Essex Human Rights Review* 1, 7–19.

[38] See literature in (n 28).

[39] Ninth report, UN Doc S/2009/245, 13 May 2009, para 28: '[T]he Team believes that the Committee can take advantage of this independent scrutiny of the implementation of its decisions. If national and regional courts provide a forum for listed persons to bring additional information to the fore and to express their grievances, they may allow a better evaluation of the strengths or weaknesses of the cases against them, especially when the challenge is brought in the courts of the designating States, which will likely have the most information against them.'

[40] Art 275(2) TFEU.

[41] 'Restrictive measures' is the EU law term for sanctions; see art 215 TFEU.

potentially other states) to provide information to her.[42] Resolution 1989 encourages states to share all relevant information with the Ombudsperson but it does not impose an obligation. Nor does the resolution draw a line similar to the General Court under the autonomous sanctions regime that information that is not shared cannot be considered justifying a listing request.[43]

Lack of information is also the main obstacle to judicial review in the domestic context. It is to some extent due to the distance and the many layers between the individual and the authority adopting the measure. Any attempts to comply with fundamental rights is futile, as long as domestic institutions adopt individual sanctions without being able to defend this decision in court other than by referring to their duty to show blind obedience to the UN Security Council. No domestic procedural reform can remedy this fact. The General Court expressed this clearly: 'the applicant's rights of defence have only been "observed" in the *most formal and superficial* sense' (emphasis added);[44] he did not have 'even the most minimal access to the evidence against him'.[45] Indeed, judicial review of the merits is impossible so long as the domestic courts have no access to the relevant information. Under these circumstances, they cannot and should not pretend to be able to judge whether any particular measure is appropriate, or whether any particular listing is justified.

The direct restrictions of individual rights by international law measures with a claim to ultimate authority (UN Security Council resolutions adopted under Chapter VII) also has implications for popular sovereignty or the right to self-determination. One could argue that constitutional pluralism and popular sovereignty[46] stand by definition in tension with each other. This tension goes further than the simple fact that international law can constrain the (legal) exercise of sovereign rights by states or that in a globalized world states are by definition subject to factual (largely

[42] L Boisson de Chazournes and PJ Kuijper, 'Mr Kadi and Mrs Prost: Is the UN Ombudsperson Going to Find Herself Between a Rock and a Hard Place?' in E Rieter and H de Waele (eds), *Evolving Principles of International Law* (Martinus Nijhoff, The Hague, 2011) 141–62.

[43] Case T-284/08, *People's Mojahedin Organization of Iran v Council (OMPI III)* [2008] ECR II-3487, para 73.

[44] GC, *Kadi II*, para 171. This was an evaluation of the rules under Commission Regulation 1190/2008.

[45] GC, *Kadi II*, para 173.

[46] State sovereignty is often explicitly or at least implicitly understood as popular sovereignty – ultimately as an expression of 'we the people' as the sovereign of any given state. Compare on 'popular constitutionalism': see Komárek (n 25) 5 and fundamentally; EN Kurtulus, *State Sovereignty – Concept, Phenomenon and Ramifications* (Palgrave, New York, 2005) 42.

economic) constraints irrespective of the fact that they remain sovereign entities.[47] Accepting that we live in a pluralist world and that different constitutional authorities compete to govern the same legal situation means by definition that the constitutional authority of the state as the sovereign over its own territory is questioned.

UN sanctions against individuals challenge the popular sovereign within its own legal order in a more direct fashion than most other international law. Sanctions have direct effects for the legal position of individuals who have not or *very indirectly* exercised democratic participation within the legal regimes outside the state. The direct beneficiaries of the externalization of decision-making to international organizations, such as the UN, are in terms of an increase in (political) power the executives – more particularly, the executives of those UN member states that are represented in the UN Security Council. They do no longer only determine who is a terrorist suspect on the territory and within their own legal order but construct and apply a counterterrorist regime for the entire globe.

Choosing between different judicial tools and the implications for individuals

Neil MacCormick described the multiplication of potentially applicable and conflicting rules as 'not logically embarrassing, because strictly the answers are from the point of view of different systems. But it is practically embarrassing to the extent that the same human beings or corporations are said to have and not have a certain right.'[48] He questioned '[h]ow shall they act? To which system are they to give their fidelity in action?'[49] This touches upon the problem of uncertainty resulting from pluralism.[50] Individuals do not know what legal regime/system governs their actions and cannot know before a court settles this question for their specific situation.

The power to decide what legal provision, and in this context more importantly what legal regime, applies is in the hands of domestic courts. This is the case when courts rule on cases concerning individual sanctions. The rights of individuals under the UN sanctions procedure have been improved and some form of a direct access has been created through the

[47] Many constraints but certainly the growing interdependence lie outside the influence of states and are hence not subject to their consent. States are limited both in their negative liberty (free of constraints) and positive liberty (the possibility to achieve certain objectives). See for a distinction: Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, Oxford, 1969) 180.

[48] N MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18(3) *Oxford Journal of Legal Studies* 517–32, 530.

[49] Ibid 530.

[50] Nico Krisch calls this the 'rule of law critique'; see Krisch (n 2) 394.

introduction of the office of the Ombudsperson. Actions for annulment of the implementation measures, however, are eventually upheld or annulled by domestic courts. The most well-known case concerning EU sanctions giving effect to UN lists of terrorist suspects is the case of *Kadi*.[51] In short, the facts of the case are as follows. Mr Kadi was first placed on a UN terrorist list. In 2002, the EU gave effect to that listing. In 2005, the Court of First Instance (CFI) rejected his action for annulment.[52] On appeal in 2008, the Court of Justice set aside the CFI's ruling and annulled the sanctions measures as far as they concerned Mr Kadi.[53] In response, the EU institutions introduced very basic procedural rights, such as notification and the (limited) possibility to be heard, into the EU sanctions regime and relisted Mr Kadi.[54] In 2010, the General Court ruled in favour of the second action for annulment.[55] It followed the Court of Justice's line in the appeal in *Kadi II* and annulled the measures. This time the Commission, the Council and the UK appealed.[56] At the time of writing,[57] the case is still pending.

Kadi required the EU Courts to take a choice between the competing constitutional claims of the UN and the EU, while keeping in mind potential national voices in the background. On the one hand, they could choose to give effect to the Member States' obligations under the UN Charter at the price of lowering the standard of fundamental rights protection within the European legal order and potentially undermining the EU's status as an autonomous legal order, separate from international and national law. This position disregards the EU's own claim to constitutional authority. It also, at least potentially, invites national constitutional courts to make a parallel argument and question the supremacy of EU law,[58] and herewith its claim to constitutional authority. On the other hand, the EU Courts could choose to protect Mr Kadi's rights but potentially place Member States in breach of their UN obligations under the UN Charter. This position could be seen to reduce the effectiveness of the international security system[59] and challenge the

[51] CJEU, *Kadi I*, see (n 29).

[52] CFI, Case T-315/01 *Kadi v Council* [2005] ECR II-3649. The Court of First Instance is since the entry into force of the Lisbon Treaty called 'General Court'.

[53] CJEU, *Kadi I*, see (n 29).

[54] See EU Regulation 1286/2009, O.J. 2009 L 346/42, of 22 December 2009.

[55] GC, Case T-85/09, *Kadi II* [2010] ECR II-5177.

[56] CJEU, Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P (pending), see (n 29).

[57] March 2013.

[58] Eckes, see (n 32).

[59] G de Búrca, 'The European Court of Justice and the International Legal Order after Kadi', *Jean Monnet Working Paper* No. 01/09, 4, criticizing the ECJ for expressing 'important parts of its reasoning in chauvinist and parochial tones'; J Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, Cambridge, 2009) 219, criticizing the ECJ in acting like an 'ostrich'.

UN Security Council's claim to constitutional authority. It also, at least potentially, invites national legislators to adopt parallel national measures in breach of EU law. As is well known, the CFI opted in *Kadi I* for the first approach. It recognized the constitutional authority of the Security Council and ruled as a consequence that it did not have jurisdiction to review the European implementation measures in the light of the EU standard of fundamental rights protection because of the underlying Chapter VII resolution. On appeal, the Court of Justice took the opposite position. It sided with the constitutional authority of EU law in the EU legal order and protected the rights of the applicant.[60]

To give a full picture of individual sanctions as an example of constitutional pluralism, it is necessary to turn to the national and regional context. National courts, both in third countries and in EU Member States, as well as the European Court of Human Rights (ECtHR) have not been spared the difficult decision between the different legal regimes governing individual sanctions. In third countries, parallel challenges should not surprise since UN sanctions are given effect in national legislation. To give but one example: after the CFI's decision in *Kadi I* but before the appeal, the Swiss Supreme Court was asked in to rule on the validity of the Swiss measures of implementation (*Nada*).[61] It sharply criticized the UN sanctions regime but took a line similar to the CFI and found Switzerland obliged to give effect to the UN sanctions regime even if the implementing measures clash with the ECHR (to add another legal regime to the equation). More surprising are the challenges in national courts of the EU Member States, since the UN Al-Qaida list is given effect in directly applicable EU regulations. In principle, any further national implementation is a breach of EU law.[62] However, several Member States, including the UK, chose to adopt parallel measures of implementation.[63] On 10 January 2010

[60] See for a full account of the CoJ's ruling: C Eckes, 'International Sanctions against Individuals: A Test Case for the Resilience of the European Union's Constitutional Foundations' (2009 15(3) *European Public Law* 351–78; A Gattini, 'Joined Cases C-402/05 P and 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008, nyr' (2009) 46 *Common Market Law Review* 213–39; T Tridimas and J Gutierrez-Fons, 'EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?' (2009) 32 *Fordham International Law Journal* 660–730.

[61] Swiss Supreme Court, *Youssef Mustapha Nada v Staatssekretariat für Wirtschaft* [2007] 1A.45/2007.

[62] Case 50/76 *Amsterdam Bulb BV v Produktschap voor Siergewassen* [1977] ECR-00137, paras 5 and 7.

[63] After UK Supreme Court's decision in *Ahmed* (see (22)) the UK started to rely on EU legislation for the implementation of UN Security Council Resolution 1267, see The Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 No 1197 and The Al-Qaida (Asset-Freezing) Regulations 2011 No 2742.

(*Ahmed*), the UK Supreme Court gave a ruling on the legality of national measures giving effect to the UN Al-Qaida sanctions list.[64] The Court did not question *whether* individual sanctions could be adopted within the UK legal order but *how* and more importantly *by whom* they could be adopted. It framed the issue in terms of separation of powers and parliamentary supremacy and came to the conclusion that the legislator (not the executive) is free to adopt individual sanctions as long as the legislation makes an explicit reference to the necessary derogation from fundamental rights.[65] The UK Supreme Court briefly considered the Court of Justice's ruling in *Kadi I* and declared it not relevant because the Union was not bound by obligations while the UK is. The directly applicable EU regulation governing the exact same legal situation was simply ignored by the UK Supreme Court. This might be a peculiar choice in light of the fact that the EU's constitutional claim is significantly stronger in national legal orders than that of the UN Security Council. To name but the most obvious indications: The supremacy of EU law is well-established practice. National Constitutions are amended to comply with EU law.[66] The UK Supreme Court's 'peculiar' choice only confirms the power of courts to accept or reject external claims of constitutional authority (EU and UN) in the particular case. The UK Supreme Court ruled that national Parliament could authorize national Government to give effect to UN Security Council resolutions. Consequently, it did not endorse the Security Council's independent constitutional authority either.

An additional regional jurisdictional lever was added when the Swiss case *Nada* was brought to the ECtHR. The Strasbourg Court ruled on 12 September 2012 that, even though Switzerland was limited in what it could do in compliance with the UN Charter, it had acted in violation of the Convention by not doing all that it could when implementing the sanctions to adapt, as far as possible, to the specific circumstances of the applicant.[67] Within its jurisdictional mandate under the Convention,

[64] UK Supreme Court, *Ahmed* (n 22).

[65] Admittedly this is an understanding of fundamental rights that is quite unique to the UK: see AV Dicey, *Introduction to the Study of the Law of the Constitution* (3rd edn, Macmillan, Basingstoke, 1915), stating: Parliament has 'the right to make or unmake any law whatever; and … no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament'. This has not changed with the adoption of the Human Rights Act 1998 – see UK Supreme Court, *Ahmed* (n 22) para 111, per Lord Phillips; 193 per Lord Brown; and 240 per Lord Mance.

[66] Polish Constitutional Court, European Arrest Warrant case, Judgment of 27 April 2005, No P 1/05.

[67] ECtHR, *Nada v Switzerland*, Judgement of the Grand Chamber, Appl No 10593/08, 12 September 2012, 196–9. Eckes and Hollenberg, see (n 2).

the ECtHR focused on the specificities of the case and in particular the question of whether the judgment of the Swiss Supreme Court violated the Convention, rather than an evaluation of the UN sanctions procedure.[68] By contrast, the Court considered the efforts that the Swiss Government made within the UN system, to assist the applicant to seek exemptions and delisting.

In essence, both the Court of Justice and the UK Supreme Court approached the conflicting claims of authority similarly. They both rejected the external claim and argued within the self-referential logic of their own constitutional framework. It is a logical position for domestic courts, whose powers are created by and rooted in their respective legal orders to respect the domestic constitutional claim.[69] The outcome of the two rulings was, however, different. In the case of the UK Supreme Court, the internal logic of the domestic constitutional framework allowed for Parliament to set aside fundamental rights and give effect to the international obligation. The ECtHR by contrast recognized the UN Security Council's claim of authority. It considered what Switzerland could have done *within the UN legal framework* to comply with the Convention. Any external claim of authority by institutions that do not have internal implementing powers will depend in practice on the value given to it by the applying institutions, which are, at least in the event of conflict, usually the domestic courts.

Beyond hierarchy: Shared principles and values

In a pluralist view, courts 'cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled'.[70] No court can set the rules for all others. Krisch for instance argues that court decisions (such as the UK courts decisions on *Ahmed*) that avoid 'statements of principle' on a 'quest for reconciliation' constitute a 'judicial voice in a new, pluralist context'.[71] Indeed, pluralism does not appear to aspire to develop guidelines of how to develop interface norms.[72] Not setting rules and avoiding statements of principle, however, could become 'the norm', which if followed by domestic courts could establish a 'pluralist practice'.

[68] This seems to be criticized by S Eckert and T Biersteker, 'Due Process and Targeted Sanctions an Update of the "Watson Report"', available at <http://www.watsoninstitute.org/pub/Watson_Report_Update_12_12.pdf> 26–7.

[69] See also Boisson de Chazournes and Kuijper (n 42).

[70] AG Maduro, C-402/05 P and C-415/05 P, *Kadi I*, para 44.

[71] Krisch, see (n 25) 165.

[72] See (n 25).

In this pluralist practice, there is ideally a competition for the better (suited) norm applicable in any given factual situation without establishing more broadly applicable rules of principle. However, as we have seen above, domestic courts have a natural tendency to argue within their own constitutional framework and give voice to the constitutional claim of their legal order. This is a practice that naturally places limits on the legitimacy and transferability of their arguments. At the same time, the implications of the decisions of domestic courts can go far beyond the individual case and beyond the domestic legal order. It is difficult to gauge the influence of the Court of Justice's *Kadi I* ruling on the UN sanctions procedure. Several authors appear to relate the UN reforms and the Court of Justice's position.[73] Also, the Monitoring Team made a specific reference stating that it 'believes that the decision of the Court of Justice … [in *Kadi I*] has changed the terms of this debate'.[74]

In the context of individual sanctions, the choice between relying on institutional hierarchy and substantive grounds was particularly relevant. Without reliance on a formal argument of hierarchy, the domestic implementation of the UN Al-Qaida sanctions breaches national constitutional law,[75] EU law, the ECHR[76] and the International Covenant on Civil and Political Rights.[77] An abundance of literature[78] and several judgments of national courts[79] as well as the EU Courts[80] have confirmed that the UN sanctions regime cannot be implemented without breaching well-established fundamental rights standard. However, besides blatantly breaching the core of the right to procedural and judicial protection, as well as the right to property,[81] the adoption of individual sanctions has brought a more fundamental problem to the fore. The CFI's ruling of 2005 takes a standpoint that could have – if it had not been set aside by the Court of Justice – led to a structural gap in the EU's fundamental rights protection. In Luxembourg, such a structural gap has been closed by the Court of Justice – at least for the time being.[82] However, an appeal against

[73] Ginsborg and Scheinin, see (n 37). Generally on the effects of noncompliance: A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP, Oxford, 2011) 203.

[74] Ninth report, UN Doc S/2009/245, 13 May 2009, para 27.

[75] See, e.g., Swiss Supreme Court, *Nada* (n 61).

[76] See in particular art 6 and 13 ECHR.

[77] See in particular art 14 ICCPR.

[78] See literature in (n 28).

[79] E.g., Swiss Supreme Court, *Nada* see (n 61); UK Supreme Court, *Ahmed* see (n 22).

[80] See (n 29).

[81] I Cameron, 'Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play', *European Parliament Policy Department report*, October 2008, 38–9.

[82] Court of Justice, C-402/05 P and C-415/05 P, *Kadi I,* see (n 29).

the decision of the General Court in *Kadi II* is pending in Luxembourg; the ECtHR's decision in *Nada* recognized the UN Security Council's claim of authority, without ruling specifically on the apparent conflict with the ECHR. In the logic of the specific case it was strictly speaking enough to rule that Switzerland did not do all it could under the UN system. However, this makes it far from certain whether the Strasbourg Court would step up to declare a violation where the implementing state did all it could but was forced to choose between its obligations under the Convention and its obligations under the UN Charter. Similarly, the ruling of the UK Supreme Court in *Ahmed* demonstrates that giving voice to the domestic constitutional claim does not exclude a blatant breach of established human rights standards either, where this is possible within the internal constitutional set-up.

While there might be no (clear) evidence that domestic courts develop a hierarchical perspective on international law by placing human rights at its apex,[83] this is at least the outcome of what the Court of Justice did in *Kadi I*. Indeed, even within the hierarchy of EU law the Court of Justice elevated the 'very foundations of the [EU] legal order' as they were expressed in ex-Article 6(1) TEU to a superior position above ordinary primary law.[84] These 'foundations' include essentially 'liberty' and 'democracy' and the 'protection of fundamental rights'. These are EU values. At the same time, the EU has not been created in isolation. Nor has the Court of Justice developed these foundations in a vacuum. Whether the Court could have referred to more external sources more explicitly is a different issue. Shared principles already exist. Human rights conventions adopted under the auspices of the UN prohibit counterterrorist sanctions against individuals as they were adopted at the time the *Kadi* appeal was decided and as they are currently adopted by the UN. The Court of Justice was walking on a fine line when giving its ruling in the *Kadi I* appeal. It was criticized for taking a myopic approach by not referring to international human rights standards.[85] At the same time, the CJEU, or the ECtHR for that matter, would have pretended to be a world court if it had analysed the legal situation within a global legal framework. The CJEU chose the way of compromise. It referred to the ECHR, as it does regularly, and it based its ruling on EU standards. This is a pluralistic way of strengthening the importance of fundamental rights.

[83] See E de Wet and J Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systematic Integration' (2013) 2(2) *Global Constitutionalism* Special Issue.

[84] Court of Justice, C-402/05 P and C-415/05 P, *Kadi I*, para 304.

[85] See literature in (n 59).

Conclusions

Neil MacCormick stated that radical pluralism suggests that we need to 'run out of law (and into politics)'.[86] Within the EU, the tension between the political and the legal become increasingly obvious.[87] While the political is and remains pluralist because political contestation happens and remains possible, both within and ultimately outside the EU framework, EU law and national law – *inter alia* because of the acceptance of supremacy – appear to become almost by definition more and more constitutionalized, or if you will, entangled in a hierarchical (constitutional) whole.[88] Legally, it could be argued that the EU has taken a route of 'retrospective inevitability'.[89] The Court of Justice's decision in *Kadi I* further strengthens this development at least in two ways: it establishes the 'very foundations' as supra-constitutional EU law and it defends the EU's constitutional claim against the UN.

At the same time, other constitutional claims have been voiced (and also been heard) in the case of individual sanctions. The Security Council by adopting a Chapter VII resolution; the CFI and the Swiss Court by giving primacy to UN law; the Court of Justice (and the General Court) by annulling the EU sanctions regulation; the UK Supreme Court by placing Parliamentary sovereignty above EU law (implicitly) and above human rights, including those protected by the ECHR; and the ECtHR by evaluating Switzerland's attempts to comply with the Convention within the framework of its UN obligations, have all expressed or supported in one way or another a claim of ultimate authority – either on the part of their own legal context or on the part of the UN. They all legitimatized the recognition of authority within their own legal context, but their actions or decisions had consequences beyond its borders. Opting for an internal justification is as such a pluralist choice. It avoids establishing universal principles. At the same time, we do not only witness specific legal measures originating in different legal contexts that compete to govern a specific legal situation and that might lead to different human rights standards. We also witness an increasing acceptance that external controls and constraints

[86] See (n 48) 519. He also argues that 'pluralism under international law' suggests that we do not need to do so 'quite as fast'. See also Krisch (n 25) 23.

[87] Not only but also in the context of the sovereign debt crises, see: ACELG blog, <http://acelg.blogactiv.eu/2013/03/01/italian-elections-and-the-european-union-till-politics-do-us-part/>.

[88] The Member States have moved the legal instruments mitigating the crisis in the realm of public international law (e.g., the European Stability Mechanism). This raises many questions to the limits of EU law and might contradict EU law in several ways. It also highlights the internal constitutionalization that Member States escaped.

[89] This term is taken from MacCormick (n 48) 519.

have an added value.[90] Courts refer to international and foreign law for inspiration and to support their argument.[91]

Uncertainties resulting from a multiplication of (somehow recognized) claims to constitutional authority cannot be denied. However, it is of limited value to compare these uncertainties against a hypothetical backdrop of the ideal constitutional structure in which the hierarchically superior level has (near-)perfect enforcement powers or in light of the extreme situation of who could claim to have the last word if any given conflict runs out of hand. It is more interesting to observe the actual practice of how those in the position to recognize constitutional authority shape reality by choosing for or against one or another norm and consequently authority. Practice shows that the real competition of constitutional claims takes place in domestic courts and on their terms. This usually means within the logical framework of the domestic legal order and triggered by cases brought by individuals.

A normative evaluation of this practice must not exclude an evaluation against an ideal standard. Yet it should be kept in mind that if any individual claim is evaluated against an ideal standard it is unlikely to succeed – either in the UN, the EU or the national context. In the specific case of UN sanctions against individuals, this does not suggest resignation or surrender of basic human rights, only because an external claim of ultimate authority emerges.[92]

[90] Consider, e.g., the Lisbon Treaty declaring that the EU shall accede to the ECHR (art 6(2) TEU; Declaration 13) despite the fact that its human rights protection has been recognized as equivalent to Convention standards (ECtHR, *Bosphorus v Ireland,* App No 45036/98, (2006) 42 EHRR 1) and that it has adopted a legally binding Charter of Fundamental Rights (art 6(1) TEU). See also C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76(2) *Modern Law Review* 254–85.

[91] See, e.g., for the specific case of individual sanctions ECtHR, *Nada* (n 61).

[92] Ginsborg and Scheinin, see (n 37). Perhaps, the years of the Rolling Stone's approach ('you cannot always get what you want') to human rights protection in the area of counterterrorism are over and we should remain less retro and more forward-thinking.