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External dimension of the EU counter-terrorism policy

Ester Herlin-Karnell
Claudio Matera
(eds.)



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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**EXTERNAL DIMENSION OF THE
EU COUNTER-TERRORISM POLICY**

**ESTER HERLIN-KARNELL
CLAUDIO MATERA
(eds.)**

CLEER WORKING PAPERS 2014/2

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AQIM	Al-Qaeda in the Islamic Maghreb
CBRN	Chemical, Biological, Nuclear and Radiological attack
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CIA	Central Intelligence Agency
CODEXTER	Council of Europe Committee of Experts on Terrorism
CoE	Council of Europe
COSI	Committee on Internal Security
COTER	Counter-terrorism Council Working Group
CTP	Counter-terrorism policy
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EJN-Crime	European Judicial Network in Criminal Matters
ENP	European Neighbourhood Policy
ESDF	European Security and Defence Forum
ESDI	European Security and Defence Identity
EU	European Union
EUROJUST	the European Union's Judicial Cooperation Unit
EUROMED	Euro-Mediterranean Partnership
EUROPOL	European Police Office
IberRed	Ibero-American Network for International Legal Cooperation
GAERC	General Affairs and External Relations Council
GATT	General Agreement on Tariffs and Trade
GTF	Global Counter-Terrorism Forum
IGC	Intergovernmental Conference
INTERPOL	International Criminal Police Organization
JHA	Justice and Home Affairs
JITs	Joint Investigation Teams
LTTE	Liberation Tigers of Tamil Eelam
MEDA	Mediterranean countries
MLA	Mutual Legal Assistance
MOYs	Memoranda of Understanding
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
OSCE	Organisation for Security and Cooperation in Europe
PJCCM	Police and Judicial Cooperation in Criminal Matters

PKK/KONGRA- GEL	Kurdistan Workers' Party (former name)/Kurdistan People's Kongress
RELEX	Foreign Relations Council Working Group
SALW	Small Arms and Light Weapons
SIS	Schengen Information System
SSR	Security Sector Reform
TAIEX	Technical Assistance and Information Exchange instrument managed by the DG Enlargement of the European Com- mission
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TCM	Terrorism Convictions Monitor
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
VLCTIO	Vienna Convention on the Law of Treaties Between States and International Organizations
WTO	World Trade Organization

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INTRODUCTION

THE EU'S EXTERNAL DIMENSION OF ANTI-TERRORISM POLICY

E. Herlin-Karnell and C. Matera

This special issue brings together leading scholars reflecting on the ever-expanding grid of the EU's global fight against terrorism. The collection of essays focus, in particular, on the external dimension pertaining to the EU's Area of Freedom, Security and Justice (AFSJ) and its impact on counter terrorism law. In the wake of the horrific events of 9/11, followed by the Madrid and London attacks of 2004 and 2005, the EU has developed a global strategy and action against terrorism.¹ Indeed, in the past decade the fight against terrorism has been a propeller toward the adoption of a number of measures stemming from different fields of EU competence. Other than internal measures such as Framework decision on combating terrorism of 2002², the EU has also carried out a number of initiatives pertaining to counter-terrorism on the international plane; these vary from technical assistance within the framework of Development and Cooperation Agreements³ to bilateral agreements. Moreover, the EU is also involved in multilateral *fora* such as the specialised Global Counterterrorism Forum (GCTF) and international organisations such as the UN.⁴ The AFSJ framework then serves a good testing ground for the relationship between the internal and external dimension of EU action. This collection of essays serves the purpose of providing a platform for debate on these issues.

Certainly, it cannot be disputed that the threat of international terrorism has served as a catalyst for constitutional and institutional reforms as well as substantive innovations. Indeed, international terrorism can be considered as one of the 'push factors'⁵ that have triggered the development of the AFSJ and its external

¹ For the latest discussion paper on the matter see the EU Counter-terrorism Coordinator paper "EU Counter-Terrorism Strategy", JAI 337, Council doc. 9990/12 (November 2013), available at <<http://register.consilium.europa.eu/pdf/en/12/st09/st09990.en12.pdf>>, the first EU Counter terrorism Strategy dates back to 2005: Council doc 14469/4/05, 30/11/2005 (November 2013) available at <<http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf>>.

² Framework decision 2002/475/JHA on Combating Terrorism, OJ L164 22.06.2002, at 3.

³ For a study on the counter terrorism agenda with ASEAN see C. Chevalier-Govers, «Antiterrorism cooperation between the EU and ASEAN », *European Foreign Affairs Review*, n°2, 2012, 133-156.

⁴ See the latest developments within the UN context on <http://www.eu-un.europa.eu/articles/en/article_14052_en.htm> and <http://www.un.org/en/sc/ctc/news/2013-11-12_EU_visits_CTED.html> (last visited November 2013)

⁵ There is growing awareness of two conditions marking the development of AGSJ policies. The first is that security policies are reactive, rather than proactive. To this end, see R. A. Wessel, L. Marin, C. Matera, "The External Dimension of the EU's Area of Freedom, Security and Justice", in C. Eckes and Th. Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, (Cambridge: Cambridge University Press 2011) 272-300; secondly the AFSJ agenda is often a reaction to externalities, i.e., external push factors. In this respect, see J.

dimension, where counter terrorism initiatives have acquired a strategic importance. As a result of this, not only has the EU concluded a number of sector-specific agreements such as the Passenger Name Record (PNR) ones, but has also adhered to a number of international initiatives such as the Global Counter Terrorism Forum (GCTF). Parallel to this, the EU has inserted C-T clauses in its traditional instruments of external action, such as Stabilisation and Association Agreements (SAAS) and Partnership and Cooperation Agreements (PCAs). In addition, the EU's fight against money laundering and terrorism financing within the framework of the internal market provision of Article 114 TFEU confirms the increasingly holistic EU view of the fight against terrorism. Expressed differently, it has become difficult to discern not only the internal and external dimension of the AFSJ but also the external dimension of 'hard core' EU market building endeavours in the fight against terrorism when it touches upon AFSJ law.⁶ Added to this, the increased cybercrime dimension to 'traditional' terrorism has recently triggered the EU to adopt measures to fight terrorism in the digital sphere.⁷

Moreover, the external dimension of the EU's fight against terrorism confirms the increasing importance of AFSJ agencies such as Europol and Eurojust as key actors in this area. These bodies have been conferred the powers to conclude international covenants with third countries so as to enhance police and judicial cooperation.⁸ Furthermore, the fight against terrorism has also become a pivotal element in the context of the EU's foreign policy and its CFSP and CSDP connotations. Also in this context, the efforts of the international community to fight international terrorism have served as a catalyst for the EU to affirm itself as a global security actor. As a result of this, the CFSP and CSDP-based missions of the EU in Kosovo and in Niger have been construed so as to include counter-terrorism elements in their broader capacity-building objectives.⁹ However, while EU initiatives in countering-terrorism appear justified under the principles of solidarity and subsidiarity, their adoption and implementation still leave some questions unanswered. Indeed the development of the EU *qua* global security actor in the fight against terrorism has raised questions at the institutional and substantive levels.

Thus, while the development of an EU-wide strategy and policy in the fight against terrorism is in continuous expansion, these developments have occurred while the EU as a polity was undergoing numerous structural changes. The development of the EU as an actor in the fight against terrorism at home and abroad has been significantly affected by the constitutional and institutional changes that the EU has experienced over the past years. Thus, while some of the changes were directly oriented to provide the EU with an office that could bring institutions, bod-

Monar, The EU's growing external role in the AFSJ domain: factors, framework and forms of action, Cambridge Review of International Affairs, DOI:10.1080/09557571.2012.710586.

⁶ On the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM (2013) 45 /3, COM/2013/045 final - 2013/0025 (COD)

⁷ Directive 2013/40/EU , L 218/8 Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA

⁸ See contribution by *Michèle Coninsx*

⁹ Council Decision 2012/392/CFSP of 16 July 2012 on the EU CSDP mission in Niger (EU-CAP Sahel Niger) OJ 17.7.2012, L 187,p.48 and Council Joint Action 2008/124/CFSP establishing EULEX Kosovo, OJ 16.02.2008, L 42, p.92.

ies and policies together in the fight against terrorism at home and abroad, such as the office of the Counter Terrorism Coordinator¹⁰, other reforms such as the introduction of the European External Action Service (EEAS) have radically transformed the manner in which the EU is supposed to work. On top of these innovations, the entry into force of the Lisbon treaty has also reinforced the range of powers transferred to the Union that can be used in the context of the fight against terrorism both from internal¹¹ and external perspectives.¹²

However, the development of the EU Counter-terrorism policy and its *acquis* have been marked by a number of conflicts and tensions essentially pertaining to the rule of law, in its institutional and its substantive acceptations. From an institutional perspective, suffice it here to recall the disputes raised by the European Parliament against the Council in a number of cases where the choice of the right legal basis and procedural rules for the adoption of acts was at stake. This was the case in the PNR judgement and in the case C-130/10 on the legal basis to adopt sanctions against individuals.¹³ In addition, the fight against terrorism has raised a number of concerns and disputes regarding the right to effective legal protection. For example, the notorious Kadi saga illuminated the difficulties of the EU sanction system. In this case, procedural fundamental rights such as the basic right to judicial review as well as the substantive right to property were affected by the 'smart sanctions' systems adopted by the UN and implemented at EU level. Furthermore, the necessity to cooperate with international organisations and third countries in the fight against international terrorism has also raised tensions over the respect by the EU of international norms and principles. Moreover, substantive issues pertaining to human rights and the external dimension of the fight against terrorism were also repeatedly raised by academics and practitioners in relation to the transfer of personal data among States and extraditions. A main concern as expressed by academics in this area has been the EU's focus on security related measures, as well as its strong emphasis on the preventive aspect of the EU's legal arsenal to fight terrorism, while (still) leaving the fundamental rights aspect largely unaddressed. While acknowledging the need for security in the Union, a main theme of the contributing authors in this volume is the EU's need to get back to basics and guarantee the adequate protection of due process rights and upholding of the rule of law. It is against that backdrop that the papers set out to look at the procedural and substantive legal implications of the EU's combatting of terrorism and what the key challenges for the future are.

This edited volume of the CLEER working papers series builds upon the presentations and discussions that took place at the homonymous conference held in Brussels on 22 February 2013 and organised by International Centre for Counter-

¹⁰ See the press release document concerning the appointment of the first EU Counter-terrorism Coordinator, available at < <http://www.consilium.europa.eu/uedocs/cmsUpload/Transcript.pdf> >

¹¹ See for example Articles 75 and 222 TFEU, Consolidated version of the Treaty on the Functioning of the European Union [2007] OJ C 326, 26/10/2012, p. 47–390.

¹² For instance Article 43 TEU, Consolidated version of the Treaty on European Union [2007] OJ C 326, 26/10/2012, p. 13–390.

¹³ Case C-130/10, *European Parliament v Council*, judgment of 19 July 2012 (not yet reported), Case C-317/04, C-318/04, *European Parliament v Council* [2006] ECR I-4721

Terrorism, The Hague, in cooperation with the Centre for the Law of EU External Relations (CLEER).

We have asked expert scholars and leading practitioners from across the EU's institutions and universities to reflect on the legal implications of the EU's external dimension of the fight against terrorism, taking the AFSJ as the starting point. This volume provides the reader with a collection of essays that build upon the themes discussed at the conference.

The special issue is structured as follows: The first introductory contribution by **Claudio Matera** maps and identifies the different legal frameworks in which the EU's counter terrorism strategies and policy are translated into concrete initiatives. The second essay by **Joris Larik** investigates the notorious Kadi saga pertaining to the implementation of the UN sanctions regime against terrorists, terrorist organisations and their financing. In his contribution Larik argues that while the different trials have triggered a lively debate over the relationship between the international law obligations and the EU legal system, the firm position of the Council in renewing the EU implementing measures has practically averted any real breach of the EU's international obligations.

In the third essay of the volume, **Jenő Czuczai** assesses the impact of the Lisbon Treaty on the EU's suppression of terrorism. In doing so, he touches upon the governance of the EU's counter terrorism policy, with a specific focus on the relations between the Council and Parliament, also taking into consideration recent decisions of the ECJ on the matter. In his conclusion Czuczai argues that since the entry into force of the Lisbon treaty, the EU has a clearer framework in which the institutions can cooperate to implement the Union's objectives.

The penultimate essay shifts the attention from the institutions in Brussels to one of the most important operational agencies of the AFSJ: Eurojust. In this essay **Michèle Coninx** examines the operational side of the external dimension of the EU's counter-terrorism policy looking at the different roles and the different initiatives that Eurojust can take. Coninx provides extremely valuable views from practice. Finally, the last essay navigates back to the most essential aspect of any legal system: that of fundamental rights. Hence, the essay examines the EU's fundamental rights in the counter-terrorism context and how it needs to be improved. In this essay, **Maria O'Neill** explores the most controversial aspect of counter terrorism initiatives, i.e., the respect and protection of human rights at the EU level. In her essay, she looks at two specific types of counter terrorism initiatives: exchange of intelligence and data and the right to due process, analysing recent case law and legislation. Lastly, she takes a broader look and addresses the possible implications that the accession to the ECHR may have on the counter terrorism policy.

While building on the papers presented at the conference in February 2013, the papers were edited or finalised in February 2014. Hence they are published at a very timely moment in EU integration of the AFSJ: the run up to the new Multi-annual AFSJ programme - most likely to be called the Rome programme – which will supersede the Stockholm programme and which is likely to address the external dimension of the EU's fight against terrorism. The present contributions could therefore be seen as a roadmap to better counter terrorism policies in the EU.

THE EXTERNAL DIMENSION OF EU COUNTER-TERRORISM POLICY: AN OVERVIEW OF EXISTING AGREEMENTS AND INITIATIVES

Claudio Matera

1. INTRODUCTION

The impact of 9/11 on the development of the EU qua Area of Freedom Security and Justice (AFSJ) can hardly be underestimated. Indeed, not only 9/11 led the EU to develop a strategy on countering terrorism, but it also had an impact on the overall development of the AFSJ; in fact, the development of the EU qua AFSJ began in concomitance with the development of EU legislation on countering terrorism. Suffice it here to remember that on 13 June 2002 the EU adopted two fundamental instruments: the first, specifically addressed to counter-terrorism, is Framework Decision 2002/475 on Combating Terrorism¹ and the second measure is Framework Decision 2002/584 establishing the European Arrest Warrant.² Indeed, counter-terrorism objectives and legislation have served on more than one occasion as a political catalyst to integrate and develop the EU qua AFSJ. Thus, while some instruments adopted by the Union were primarily concerned with countering terrorism³, the majority of the instruments adopted pertained to EU criminal law and policing competences and only indirectly served counter-terrorism purposes.⁴

In the aftermath of 9/11, the EU swiftly adopted an action plan as a result of the extraordinary Council meeting held on the 21st of September 2001.⁵ At that time the EU immediately considered that the fight against terrorism should be conducted at the global level by making use of CFSP, CSDP and Justice and Home Affairs instruments. Indeed already on that occasion, the Council affirmed a strategic view that still resides at the heart of the EU's strategy on counter-terrorism.

¹ *OJ* [2002] L 164/3 22.6.2002.

² *OJ* [2002] L 190/1 18.7.2002.

³ For example: Framework Decision 2002/475 on Combating Terrorism, Regulation 881/2002 Imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, *OJ* [2002] L 139/9.

⁴ Other than the European Arrest Warrant there are numerous examples in this respect. For instance: Framework Decision on the execution in the EU of orders freezing property or evidence 2003/577/JHA of 22 July 2003 *OJ* [2003] L196/45 02.08.2003, Framework Decision on the application of the principle of mutual recognition for confiscation orders 2006/783/JHA *OJ* [2006] L328/59 24.11.2006, Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks *OJ* [2006] L105/54 13.04.2006 and Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing *OJ* [2005] L309/15 25.11.2005.

⁵ Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/140.en.pdf> (accessed March 2014).

More specifically, the Council held at that time that the EU's strategy on counter-terrorism had to be built upon five lines of action: i) enhancing police and judicial cooperation, ii) developing international legal instruments, iii) putting an end to the funding of terrorism, iv) strengthening air security and v) coordinating the EU's global action.

Interestingly, while the response of the EU to 9/11 immediately triggered the development of an external dimension to its counter-terrorism policy,⁶ neither The Hague Programme⁷, nor the Counter-Terrorism Strategy of 2005⁸ address the two dimensions separately. Thus, while some of the actions envisaged by the two programmes were conceived as 'external', such as the reference to capacity building in third countries,⁹ other actions such as the fight against the funding of terrorist organisations could be interpreted as both an internal and external objective.¹⁰ Consequently, while Council Joint Action 2007/501/CFSP on cooperation with the African Centre for Study and Research on Terrorism¹¹ can be understood as an implementation of the objective concerning technical assistance to enhance the capability third countries, the conclusion of the so called SWIFT agreement with the USA is an example of the second type of EU objective.¹²

However, while different programmatic documents of the EU such as the European Security Strategy,¹³ the AFSJ programmatic documents¹⁴ and the EU strategic documents on countering terrorism¹⁵ emphasise the complementarity of internal and external action to counter-terrorism (and other security threats) the development of the EU's external dimension of its counter-terrorism policy has been at the heart of numerous legal disputes and controversies pertaining to both institutional and substantive matters.

From an institutional perspective, this policy has been paying the price of two elements that have negatively affected its smooth development. The first is a structural hurdle that affects the external activities of the EU irrespective of the specific

⁶ Suffice it here to mention initiatives such the decision in April 2002 to enter negotiations with the USA to conclude the mutual legal assistance and extradition agreements, *OJ* [2003] L 181/25 19.07.2003

⁷ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (2005/C 53/01), *OJ* [2005] C 53/1 3.3.2005.

⁸ The European Union Counter-Terrorism Strategy Council Doc. 14469/4/05 REV 4, 30.11.2005.

⁹ Hague Programme, *supra* note 7, at 9 and EU Counter-Terrorism Strategy, *supra* note 8, at 15: "Deliver technical assistance to enhance the capability of priority third countries"

¹⁰ Hague Programme, *supra* note 7, at 8 and EU Counter-Terrorism Strategy, *supra* note 8, at 15: Tackle terrorist financing, including by implementing agreed legislation working to prevent the abuse of the non-profit sector, and reviewing the EU's overall performance in this area.

¹¹ Council Joint Action 2007/501/CFSP of 16 July 2007 on cooperation with the African Centre for Study and Research on Terrorism in the framework of the implementation of the European Union counter-terrorism strategy, *OJ* [2007] L185/31 17.7.2007.

¹² *OJ* [2010] L 195/5, 28 June 2010.

¹³ A Secure Europe In a Better World: European Security Strategy (Brussels, 12 December 2003) available at <<http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>>.

¹⁴ For example The Stockholm Programme – An open and secure Europe serving and protecting citizens, *OJ* [2010] C115/1, 33-34.

¹⁵ See website of the Council of the European Union >fight against terrorism >EU Strategy, available at <<http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-strategy?lang=en>>.

policy at stake. This is related to the principle of conferral and its corollary on the choice of the proper legal basis.¹⁶ Because of this principle, and as De Baere observed, unlike most nation states the EU 'must always give precedence to considerations of competence over considerations of effectiveness'¹⁷ when considering the response to an international situation; however, while the necessity to first consider issues of competence could have positively affected the adoption of counter-terrorism measures in terms of legitimacy and human rights protection, this has not emerged in the specific field of counter-terrorism.¹⁸ Moreover, considerations over competence issues in EU constitutional discourses also relate to horizontal considerations related to the balance of powers between the institutions and between the TEU the TFEU.¹⁹ The second element that has negatively affected the development of this policy is linked with the recurring constitutional changes that the EU has been undergoing in the past fifteen years: from the entry into force of the Amsterdam Treaty to this date. Indeed the AFSJ and the external relations of the EU have been two domains that have been significantly affected by the constitutional evolution of the Union. As a result of this, almost five years into the entry into force of the Lisbon Treaty, there are still specific issues such as the scope of AFSJ provisions in relation to the external dimension of countering terrorism that have only recently been clarified while others still pose constitutional tensions. Thus while case *European Parliament v Council C-130/10*²⁰ has clarified that the implementation of CFSP-based sanctions must be implemented by the means of Article 215 TFEU and not Article 75 TFEU, it is still unclear whether this judgement should serve as an authority to argue that the adoption of *any* instrument of targeted sanctions with an external dimension should be based on Article 215 and not Article 75.²¹ Similarly, while the establishment of the EEAS should have contributed to canalize the different competences of the institution into one external policy, the different prerogatives of the Council, the CTC, the EEAS and the European Commission have not always helped to develop a coherent action.²²

Yet, in spite of the institutional hurdles that have impacted on the development of the EU's counter-terrorism action, the EU has been very proactive in seeking cooperation of third countries and international organisations in the fight against terrorism. Thus not only the EU has concluded a number of bilateral agreements

¹⁶ Art. 5 TEU, Consolidated version of the Treaty on European Union [2007] OJ C 326, 26/10/2012, 13–390.

¹⁷ G. De Baere, *Constitutional Principles of EU External Relations*, (Oxford : Oxford University Press 2008), p. 10.

¹⁸ See the contribution by O'Neill in this volume.

¹⁹ On this issue see *Kadi and Al Barakat International Foundation v. Council and Commission*, Joined Cases C-402 & C-415/05, [2008] ECR I-635, par. 235, and also *Commission v Council* (Titanium Dioxide), Case C-300/89, [1991] ECR I- 2867.

²⁰ Case C-130/10, *European Parliament v Council*, judgment of 19 July 2012 (not yet reported).

²¹ For an analysis of this case see the contribution of J. Czuczai in this volume and C. Hillion, *Fighting terrorism through the EU Common Foreign Security Policy*, in I. Govaere and S. Poli (eds.) *Management of Global emergencies, threats and crises by the European Union*, Brill/Nijhoff, 2014 (forthcoming).

²² For an analysis of the institutional complexities related to the external dimension of the AFSJ see J. Monar, 'The EU's growing external role in the AFSJ domain: factors, framework and forms of action', *Cambridge Review of International Affairs*, 1-20, at 7 et seq.

with key partners such as the USA,²³ but it has also managed to expand the scope of its counter-terrorism cooperation with a number of states in its neighbourhood.²⁴ Parallel to this, it has also succeeded in cooperating, albeit with some tensions, with international organisations such as the UN.²⁵ However, while counter-terrorism initiatives at the international level have become an important facet of the EU's security agenda of the past thirteen years, not every aspect of this external activity has been systematically analysed.

As has been mentioned in the introductory observations to this volume, the external dimension of the EU's counter-terrorism policy has been developed under the influence of push factors such as international and European events that have triggered the necessity to develop a reaction to international terrorism. As the opening essay to this volume, this contribution seeks to provide the reader with an overview, a map, of the different initiatives related to counter-terrorism concluded by the EU on the basis of the following criteria: i) intelligence cooperation, ii) police cooperation, iii) mutual legal assistance and other forms of judicial cooperation, iv) administrative cooperation and v) capacity-building initiatives. To do so, this contribution will first look at how the EU manages to combine counter-terrorism objectives by combining AFSJ elements with CFSP and CSDP initiatives. Secondly, this essay will look at the insertion of counter-terrorism clauses in a variety of international instruments such as Association Agreements and will close with a short overview of the different agreements related to counter-terrorism based on AFSJ provisions.

2. THE INTERRELATIONS BETWEEN THE CFSP AND THE AFSJ IN THE FIGHT AGAINST TERRORISM

EU counter-terrorism initiatives anchored to the CFSP pillar pre-date 9/11. In this respect the most known type of activity pertaining to counter-terrorism has been the implementation of 'smart sanctions' resolutions adopted at UN level within the EU legal system; yet, the EU has itself engaged in a number of other initiatives linked to the fight against terrorism, anchored to the powers conferred to it by virtue of Title V TEU.

As has been observed elsewhere²⁶, the EU's counter-terrorism policy is embedded within the EU's Security Strategy (ESS).²⁷ However, it has also emerged that counter-terrorism initiatives pursued by the EU internationally may have an am-

²³ *Infra*, section 4.

²⁴ *Infra* section 3.

²⁵ See the contribution by Larik in this volume concerning the implementation at EU level of the Security Council's sanctions.

²⁶ C. Matera, *The European union Area of Freedom, Security and Justice and the Fight Against New Security threats. New trends and old Constitutional Challenges*, in M. Arcari and L. Balmond (eds.), *La Gouvernance globale face aux défis de la sécurité collective- Global Governance and the Challenges of Collective Security*, ES Napoli, 2012, 69-87.

²⁷ In relation to the inter-linkages between different policies in relation to the security of the EU see, F Longo, *Justice and Home Affairs as a New Dimension of the European Security Concept*, *EFARev* 18, no.1 (2013): 29-46 as well as the special issue of the *European Foreign Affairs Review* Issue 2/1 of 2012. From a legal perspective see Cremona M et al (eds) (2011) *The external*

bivalent characterisation and bring together the AFSJ field of competences with the CFSP/CSDP policies. Indeed, since the adoption of the ESS the EU has promoted a holistic²⁸ understanding of security that requires the use of “[all] powers available to the Union in an integrated way”²⁹ so as to develop a *single external policy* in relation to its safety. As an example of the intertwining of counter-terrorism initiatives with the AFSJ and the CSDP, suffice it here to mention the widening scope of the external dimension of the AFSJ, the ‘Conceptual Framework on the European Security and Defence Policy Dimension of the Fight Against Terrorism’ of 2004, the Stockholm Programme³⁰ and the Joint Staff Working Paper on the ties between the CSDP and the AFSJ of 2011.³¹

As a consequence of these policy orientations, counter-terrorism objectives may be sought and attained not only by the adoption of instruments belonging to either the CFSP/CSDP or the AFSJ, but also with the adoption of CFSP/CSDP initiatives that possess a strong link with AFSJ characteristics such as police cooperation such as the EULEX Kosovo mission.³² With the entry into force of the Lisbon Treaty the policy ambitions to combine counter-terrorism with AFSJ and with CSDP missions has been finally codified in Article 43 TEU. Indeed, Article 43 TEU holds that operations and missions falling within the scope of Article 42 TEU such as joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization may have as their objective the fight against terrorism, including the support of third countries in combating terrorism in their territories.³³

Table 1 provides an overview of recent CSDP and CFSP actions that contain counter-terrorism elements as well as AFSJ-related clauses. It aims to show how different CSDP and CFSP initiatives implement parcels of the EU’s counter-terrorism policy. The table takes into consideration three CSDP missions. While EULEX-Kosovo was adopted prior to the entry into force of the Lisbon Treaty, EUCAP Sahel Niger and EUTM Mali are the first examples of CSDP initiatives that make use of Article 43 TEU and that contain also AFSJ elements so as to implement the security strategy of the EU.

All the different instruments reported in Table 1 show how the EU has included counter-terrorism purposes in its capacity-building initiatives. While the Mali mission

dimension of the European Union’s Area of Freedom, Security and Justice, College of Europe Studies, P.I.E. Peter Lang, Brussels, and C Matera, *supra*, note 24.

²⁸ F. Longo, Justice and Home Affairs as a New Dimension of the European Security Concept, *EFARev* 18, no.1 (2013): 29-46.

²⁹ The Hague Programme: strengthening freedom, security and justice in the European Union, 13.12.2004, Council doc 1605/04, p. 33.

³⁰ The Stockholm Programme – An open and secure Europe serving and protecting citizens, *OJ* [2010] C 115/1 4.5.2010.

³¹ Joint Staff Working Paper, Strengthening Ties between CSDP and AFSJ Actors. Proposals for a Way Ahead, Sec (2011) 560 final, 05 May 2011. *Infra*, section V) ii)

³² Council Joint Action 2008/124/CFSP establishing EULEX Kosovo, *OJ* [2008] L 42/92, 16.02.2008.

³³ For an analysis see C. Hillion, *Fighting terrorism through the EU Common Foreign Security Policy*, in I. Govaere and S. Poli (eds.) *Management of Global emergencies, threats and crises by the European Union*, Brill/Nijhoff, 2014 (forthcoming).

Table 1

	Express counter-terrorism clauses and provisions	Other clauses and provisions linked to countering terrorism
COUNCIL DECISION 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) 17.01.2013 OJ L14/19 18.1.2013	Article 1 Mission “Enabling [Malian Armed Forces] to conduct military operations aiming at restoring Malian territorial integrity and reducing the threat posed by terrorist groups.	Article 11 Release of information The EU’s High Representative of the Union for Foreign Affairs and Security Policy shall be authorised to release to the third States associated with this Decision, as appropriate and in accordance with the needs of EUTM Mali, EU classified information generated for the purposes of EUTM Mali.
COUNCIL DECISION 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger) 16.07.2012 OJ L187/48 17.7.2012	Article 2 Objectives “EUCAP SAHEL Niger shall aim at contributing to the development of an integrated, multidisciplinary, coherent, sustainable, and human rights-based approach among the various Nigerien security actors in the fight against terrorism and organised crime” Article 3 Tasks To support the development of comprehensive regional and international coordination in the fight against terrorism and organised crime.	Article 15 release of information The HR shall be authorised to release to the third States associated with this Decision, as appropriate and in accordance with the needs of EUCAP Sahel Niger.
Council Joint Action 2008/124/CFSP establishing EULEX Kosovo OJ 16.02.2008, L 42, p.92	Article 3 Tasks (d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, (...)	Article 18 release of information Article 3 (a)-(c), (h) refer to judicial cooperation
Council Joint Action 2007/501/CFSP on cooperation with the African Centre for Study and Research on Terrorism OJ [2007] L185/31 17.7.2007	Article 1 on the objective: to provide the Member States of the African Union with support from the European Union in improving the organisation of their capacities in the fight against terrorism in the framework of the provisions of the European Union counter-terrorism strategy on the promotion of a partnership in this area outside the European Union.	

is focused on military forces, the other initiatives better portray the multidisciplinary approach and integrate counter-terrorism into broader considerations such as human rights (EUCAP Sahel Niger), judicial cooperation (EULEX Kosovo) and institutional support (African Centre for Study and Research on Terrorism). Furthermore, all the operational initiatives mentioned in the table also foresee the exchange of classified information, a typifying element of the EU's external strategy on counter-terrorism.³⁴ Lastly, it should also be mentioned that EUTM Mali and EUCAP Sahel are the first two examples of CFSP and CSDP missions based on Article 43 TEU, a provision inserted in the treaties by the Lisbon reform that, as it was mentioned before, confers the EU the power to engage in CFSP and CSDP missions with the specific objective of countering terrorism.

While it is too early to assess the impact of these initiatives, suffice it here to say that the introduction of Article 43 TEU appears to have successfully legitimised and implemented the *PESCA*isation and *hybridisation*³⁵ of the EU's external dimension of its counter-terrorism policy so as to strengthen the legitimacy and the role of the EU as a global counter-terrorism actor capable of assisting third countries in relation to numerous aspects of countering terrorism. Moreover, Article 43 TEU and these recent initiatives give substance to the European Security Strategy of 2003 with a view to consolidate its role in global governance as an actor against international security threats such as terrorism.³⁶

3. THE USE OF THE EU'S EXTERNAL COMPETENCES AND INSTRUMENTS TO PURSUE COUNTER-TERRORISM OBJECTIVES

A key characteristic of the EU's external dimension of its counter-terrorism policy is the ambition to develop a comprehensive policy pertaining to the security of the Union that is linked with the AFSJ and the external relations of the EU, including the CFSP and CSDP facets. This ambition, however, should not be understood as a mere policy goal; rather, the efforts of delivering a comprehensive security policy should also be read under the specific constitutional requirement of ensuring consistency between the different areas of external action and between external action and other policies of the Union under Article 21 TEU. In the context of countering terrorism this means that the combination of policing, judicial and military efforts should be integrated with other instruments of foreign action. A perfect example of this facet of the EU's counter-terrorism action is given by the space that this policy has gained in external activities conducted by the EU under Part V of the TFEU, i.e., the part of the TFEU dedicated to the Union's external action.

Since 2001 the EU has successfully managed to introduce clauses pertaining to counter-terrorism in a number of agreements. In particular the EU has pursued the objective to include AFSJ and counter-terrorism clauses whenever negotiating Association, Stabilisation and Partnership and Cooperation Agreements. This is a

³⁴ See *infra* this contribution.

³⁵ The expressions are of C Hillion, *supra* note 32, at 7.

³⁶ See B van Vooren, Blockmans and J Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension*, (Oxford: Oxford University Press, 2013).

consequence of the political objective of securing the neighbourhood of the Member States and avoid that the existence of borders in relation to policing and judicial activities while border checks are being loosened may advantage criminal and terrorist organisations to flee justice. Moreover, by including counter-terrorism and judicial cooperation clauses in a variety of agreements the EU also manages to promote the efforts of the whole international community. This last element can be deduced by the insertion of provisions that expressly refer to international norms, international organisations such as the UN and international bodies such as the Financial Action Task Force (FATF).³⁷

Table 2 below provides an overview of key agreements concluded by the EU in the past ten years in which specific counter-terrorism objectives and clauses have been inserted. The table represents seven different agreements that belong to four different types of EU external instruments and policies: one political dialogue and cooperation (Central America Countries), two Partnership and Cooperation Agreements (Iraq and Tajikistan), two Euromed agreements belonging to the European Neighbourhood Policy [Euromed Agreements] (Algeria and Egypt) and, lastly, two Stabilisation and Association Agreements [SAAs] (Albania and Serbia), a type of agreement that the EU concludes with countries that are potential candidates for EU membership. While Stabilisation and Association Agreements have broad and ambitious objectives³⁸ that are scheduled on the basis of an explicit roadmap, Partnership and Cooperation Agreements [PCAs] only seek to establish a framework upon which the parties can cooperate in the future.³⁹ Between these two types of instruments and models of cooperation we find Euromed Association Agreements, a type of association instrument aiming at developing economic, trade and political cooperation with a gradual opening of borders and frontiers of different kinds with non-EU Mediterranean countries.⁴⁰ Finally, the weakest type of agree-

³⁷ See *infra*, Table 2.

³⁸ For instance see the Stabilisation and Association Agreement with Albania. Article 1:1. An Association is hereby established between the Community and its Member States, of the one part; and Albania, of the other part. 2. The aims of this Association are: to support the efforts of Albania to strengthen democracy and the rule of law, to contribute to political, economic and institutional stability in Albania, as well as to the stabilisation of the region, to provide an appropriate framework for political dialogue, allowing the development of close political relations between the Parties, to support the efforts of Albania to develop its economic and international cooperation, also through the approximation of its legislation to that of the Community, to support the efforts of Albania to complete the transition into a functioning market economy, to promote harmonious economic relations and develop gradually a free trade area between the Community and Albania, to foster regional cooperation in all the fields covered by this Agreement.

³⁹ For example Article 1 of the Partnership and Cooperation Agreement with Iraq: 1. A partnership is hereby established between the Union and its Member States of the one part, and Iraq, of the other part. 2. The objectives of this Partnership are: (a) to provide an appropriate framework for the political dialogue between the Parties allowing the development of political relations; (b) to promote trade and investment and harmonious economic relations between the Parties and so to foster their sustainable economic development; and (c) to provide a basis for legislative, economic, social, financial and cultural cooperation.

⁴⁰ For an analysis of these model of integration with Mediterranean countries see K. Pieters, *The Integration of the Mediterranean Neighbours into the EU Internal market*, T.M.C. Asser Press, 2010. See Article 1(2) of the Association Agreement with Algeria: 2. The aims of this Agreement are to: -provide an appropriate framework for political dialogue between the Parties, allowing the development of close relations and cooperation in all areas they consider relevant to such dia-

ment is represented in the table by the Political Dialogue and Cooperation Agreement [PDCA] with countries of Central America: in this case the agreement serves the purpose of establishing a sort of agenda for future initiatives on a number of dossiers.⁴¹

The first element that emerges from the table is that in spite of the different scope of the agreements, provisions on countering terrorism are similarly, if not identically, phrased. This signifies that whether the cooperation on counter-terrorism is to be started with countries of central America or with Tajikistan, the clauses on countering terrorism include the following three main features: i) reference to UN Security Council Resolution 1373(2001)⁴² on combating terrorism and other relevant UN resolutions, ii) reference to the exchange information on terrorist groups and iii) reference to the exchange best practices on countering terrorism. Moreover, all the agreements also contain an express reference to cooperation on combating money laundering, some with a particular emphasis on combating the financing of terrorism. Interestingly, the two SAAs agreements reported in the table, like other SAAs with the sole exception of the one concluded with the Former Yugoslav Republic of Macedonia (FYROM), also contain a general -and somewhat vague- clause on the fight against terrorism.⁴³

As mentioned in the previous paragraph, independently from the general objectives of each Treaty, the main clauses on combating terrorism always follow the same structure, even in the case of the 'weaker' PDCA. Going deeper in the analysis of these provisions it emerges that these clauses appear as programmatic and habilitating clauses, i.e., clauses that mark the first step towards the establishment of future means of cooperation. Indeed even in the case of the most 'advanced' types of agreements, clauses on combating terrorism create an obligation to establish cooperation so as to prevent and suppress acts of terrorism and their financing and do not envisage more concrete instruments and mechanisms. In other words, the clauses are not executive and enforceable since these do not envisage concrete activities but only express the intention to cooperate in relation to certain specific dossiers: implementation of the relevant UN resolutions and other international conventions and obligations, exchange of information about terrorist groups and, lastly, exchange of best practices with regards to preventing and combating terrorism.

logue, -promote trade and the expansion of harmonious economic and social relations between the Parties and establish the conditions for the gradual liberalisation of trade in goods, services and capital, -facilitate human exchanges, particularly in the context of administrative procedures, -encourage integration of the Maghreb countries by promoting trade and cooperation within the Maghreb group and between it and the Community and its Member States, -promote economic, social, cultural and financial cooperation.

⁴¹ See Article 3 of the EU – Central America Political Dialogue and Cooperation Agreement of 2003, not yet entered into force, available at <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=2121>> (Accessed March 2014).

⁴² Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting, on 28 September 2001, S/RES/1373 (2001), available at <[http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf)> (Last accessed March 2014)

⁴³ See the two examples reported in the table for Albania and Serbia.

Table 2

	Express Counter-terrorism clause	Other clauses (possibly) related to countering terrorism
Stabilisation and Association Agreement with Serbia	<p>Article 7 The Parties reaffirm the importance that they attach to the fight against terrorism and the implementation of international obligations in this area.</p> <p>Article 84 Money laundering and financing of terrorism</p> <p>Article 87 Combating terrorism</p>	<p>Article 86 Preventing and combating organized crime and other illegal activities</p>
<p>Stabilisation and Association Agreement Albania 2009</p> <p>OJ 28.04.2009 L107 p.166</p>	<p>Article 5 The Parties reaffirm the importance that they attach to the fight against terrorism and the implementation of international obligations in this area.</p> <p>Article 82 Money laundering and terrorism financing</p> <p>Article 84 Counter-terrorism</p>	<p>Article 85 Preventing and combating organized crime and other illegal activities</p>
<p>Euromed Agreement Algeria</p> <p>OJ 10.10.2005 L265, p. 2</p>	<p>Article 90 Fight against terrorism</p>	<p>Article 85 Legal and judicial cooperation</p> <p>Article 87 Combating money laundering</p>
<p>Euromed Agreement with Egypt</p> <p>OJ 30.09.2004 L304/39</p>	<p>Article 59 Fight against terrorism</p>	<p>Article 57 Money laundering</p>
<p>Partnership and Cooperation Agreement with Iraq</p> <p>Signed on 11 May 2012, Council doc. 5784/11, 2 March 2011</p>	<p>Article 4 Combating terrorism</p> <p>Article 107 Combating Money Laundering and Terrorist Financing</p>	<p>Article 5 Countering proliferation of weapons of mass destruction</p> <p>Article 6 On small arms and light weapons</p> <p>Article 103 Legal Cooperation</p>
<p>Partnership and Cooperation Agreement Tajikistan</p> <p>OJ 29.12.2009 L350, p.3</p>	<p>Article 71 Fight against terrorism</p>	<p>Article 68 Money laundering</p>
<p>EU – Central America Political Dialogue And Cooperation</p>	<p>Article 50 Co-operation in the field of counter-terrorism</p>	<p>Article 48 Co-operation in combating money laundering and related crime</p>

Also other clauses such as the ones on money laundering present in the different agreements appear as habilitating clauses with the scope to individuate a framework for future cooperation and to promote international standards and regulations. However, in this context the provisions usually emphasise that the cooperation is meant to provide 'technical and administrative assistance aimed at the development and implementation of regulations and the effective functioning of mechanisms to combat money laundering and financing of terrorism' and to establish 'exchanges of relevant information within the framework of respective legislation and the adoption of appropriate standards to combat money laundering and the financing of terrorism'.⁴⁴

Taking into consideration the programmatic nature of the clauses on terrorism and money laundering, one could expect that the agreements in question would also envisage the complementary mechanisms to implement the different clauses. For instance, one could envisage provisions on the establishment of points of contact between police and judicial authorities or the creation of ad hoc mechanisms of communication and cooperation. However, this is not the case. Rather, counter-terrorism clauses present in the different agreements are complemented by the insertion of other clauses pertaining to police and judicial cooperation; yet, also in this case the provisions do not seem to provide concrete operative tools.

On the column on the extreme right of Table 2 the reader can find the reference to provisions and clauses of the different agreements that relate to police and judicial cooperation. Taking as a first example Article 85 of the SAA with Albania we can notice that the provision in this agreement merely contains a list of types of crime against which the Parties wish to cooperate and does not refer to, nor it establishes, concrete mechanisms of cooperation.⁴⁵ While for countries that have concluded SAAs the lack of concrete mechanisms to cooperate is compensated by the existence of Mutual Legal Assistance and other bilateral instruments under the framework of the Council of Europe, this gap poses questions concerning the effectiveness of counter-terrorism clauses for the other agreements taken in to consideration by Table 2.

The potential impasse related to the lack of provisions concerning mechanisms to convey police and judicial cooperation is partially solved by the specific clauses such as Article 85 of the Euromed agreement with Algeria or Article 103 of the PCA with Iraq in which the contracting Parties agree to establish such mechanisms and conclude Mutual Legal Assistance agreements. However, what emerges from agreements other than SAAs is the lack of coherence and consistency in the inser-

⁴⁴ See as an example the text of the PCA with Iraq, Article 107.

⁴⁵ Article 85 of the SAA with Albania reads as follows: 'Preventing and combating organised crime and other illegal activities: The Parties shall cooperate on fighting and preventing criminal and illegal activities, organised or otherwise, *such as*: smuggling and trafficking in human beings, illegal economic activities, and in particular counterfeiting of currencies, illegal transactions relating to products such as industrial waste, radioactive material and transactions involving illegal or counterfeit products, corruption, both in the private and public sector, in particular linked to non-transparent administrative practices, fiscal fraud, illicit trafficking in drugs and psychotropic substances, smuggling, illicit arms trafficking, -forging documents, illicit car trafficking, cyber-crime. Regional cooperation and compliance with recognised international standards in combating organised crime shall be promoted' (emphasis added).

tion of clauses pertaining to police and judicial cooperation. Especially if one takes into consideration that while the Euromed agreement with Algeria contains a provision seeking to strengthen existing mutual assistance or extradition arrangements and develop the exchange of best practices in relation to criminal judicial cooperation⁴⁶ - including the protection of individual rights and freedoms, other agreements lack such clauses: this is the case of the agreements with Egypt, Morocco and Tajikistan.⁴⁷

Table 2 sought to present an overview of how counter-terrorism objectives have been introduced in the framework of association and partnership agreements that the EU concludes with third countries. To do so, seven different agreements were selected: two recent SAAS, two Euromed Agreements, two PCAs and one Political Dialogue and Cooperation Agreement. The table summarises the different ways in which the counter-terrorism objectives have permeated general instruments of EU external relations, not only with the inclusion of express counter-terrorism clauses, but also by inserting other provisions on policing and judicial cooperation that could complement counter-terrorism cooperation, especially in relation to the fight against money laundering.

However, the analysis also evidenced how the programmatic and habilitating clauses are not always complemented by other provisions dealing with the regulation of concrete cooperation mechanisms, thus leaving the risk that these provisions on combating terrorism could remain only on paper. However, the reality is more nuanced than this and one should not ignore that, for instance, the EU has been able to successfully cooperate on counter-terrorism with the Association of South-east Asian Nations (ASEAN) on the basis of PCAs containing clauses similar, if not identical, to the ones reproduced in Table 2.⁴⁸ Secondly, taking into consideration the scope of broad agreements such as the ones reproduced in Table 2, it could be argued that the provisions on countering terrorism and the complementary measures on police and judicial cooperation should be read for what they are meant to provide: a platform upon which specific and subsequent agreements based on the provisions of the AFSJ of the TFEU could be concluded.

The next section of this contribution will thus present the reader with an overview of sector specific agreements concluded based on Part III Title V TFEU on the AFSJ that contribute to the fight against terrorism.

⁴⁶ Article 85(4) of the Euromed Agreement with Algeria

⁴⁷ The agreement with Morocco is not included in the table, *OJ* [2006] 29.12.2006 L 386/57. Similarly to this agreement also other Euromed agreements lack such provisions. For an analysis of AFSJ cooperation with Euromed countries see S. Wolff, *The Mediterranean Dimension of the European Union's Internal Security*, (Palgrave Macmillan, 2012).

⁴⁸ For an analysis see C. Chevallier-Govers, *Antiterrorism Cooperation between the EU and ASEAN*, *EFARev*, 2012:133-156.

4. THE USE OF AFSJ PROVISIONS TO CONCLUDE AGREEMENTS WITH THIRD COUNTRIES TO IMPLEMENT COUNTER-TERRORISM OBJECTIVES.

The Treaties' provisions on the AFSJ mention the fight against terrorism only in relation to the adoption of administrative sanctions (Article 75 TFEU), the adoption of minimum rules concerning the definition of criminal offences (Article 83 TFEU) and the mission of Europol (Article 88 TFEU). However, it cannot be disputed that other AFSJ provisions such as Article 82 TFEU on judicial cooperation in criminal matters and Article 85 TFEU on Eurojust also empower the EU to fight against terrorism. Furthermore, none of these provisions expressly envisage the conclusion of international agreements; however, this does not mean that the EU cannot conclude AFSJ-based agreements on counter-terrorism.

Prior to the entry into force of the Lisbon Treaty the possibility to combine AFSJ provisions and the fight against terrorism for the purpose of concluding an international agreement was expressly envisaged by former Article 38 of the TEU.⁴⁹ That provision was repealed and today the EU has the competence to conclude agreements in these domains on the basis of the implied powers doctrine codified in Article 216 TFEU. The shift from an express external competence to an implied one demands the institutions justify their decision on the basis of the parameters contained in Article 216 TFEU:

'the EU may conclude an international agreement with one or more third countries or international organisations ... where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'.

Since the entry into force of the Lisbon Treaty, the shift from the express legal competence on former Article 38 TEU to the new regime based on Article 216 TFEU has had an impact on a specific type of agreement which has counter-terrorism relevance: agreements pertaining to the exchange of classified information. The definition and use of classified information in the EU have been recently addressed by Council Decision 2011/292/EU⁵⁰; in this document the EU has adopted a very broad definition of what constitutes 'classified information' so as to cover '*any information or material designated by an EU security classification, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the European Union or of one or more of the Member States*'.⁵¹ In spite of the tautological definition provided by the Council, it is possible to argue that the Decision wishes to cover any type of information stemming from any agency or office within

⁴⁹ For an analysis Wessel, R. A., Marin, L. and Matera, C., 'The External Dimension of the EU's Area of Freedom, Security and Justice', in C. Eckes and Th. Konstantinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge: Cambridge University Press, 2011), at 272–300.

⁵⁰ Council Decision of 31 March 2011 on the security rules for protecting EU classified information (2011/292/EU), *OJ* [2011] L141/17, 27.05.2011.

⁵¹ *Idem*, Article 2(1).

the EU and its member states: thus including military, police and judicial information.⁵²

Indeed prior to the entry into force of the Lisbon Treaty the EU concluded, with some ambiguities,⁵³ this type of agreement in the form of mixed agreements based on both Article 38 TEU on police and judicial cooperation in criminal matters (PJCCM) and Article 24 TEU on the CFSP pillar.⁵⁴ However, since the adoption of the Lisbon Treaty, the praxis of the Council has shifted and these agreements are now concluded on the sole basis of Article 37 TEU, i.e., the provision that has replaced Article 24 TEU and that solely concerns the conclusion of CFSP agreements.⁵⁵ Because the content of the agreements has not changed, it is difficult to individuate a legal reason for this shift. While the CFSP link cannot be questioned, it is equally true that this shift on the legal basis allows the Council to circumvent the obstacles linked to post-Lisbon cross-pillar mixity.⁵⁶ Furthermore, since the content of this type of agreement has not changed, the extent to which the abolition of the AFSJ legal basis is completely justified remains to be seen.

Apart from agreements on classified information that are no longer based on AFSJ provisions, the EU has concluded a number of agreements that are based on AFSJ provisions on policing and criminal law that pursue counter-terrorism objectives.⁵⁷ From a strategic perspective, the priority of the EU has been on the establishment of cooperation mechanisms with the USA. Indeed with this country alone the EU has concluded a number of agreements: on mutual legal assistance⁵⁸, on extradition⁵⁹, on the transfer of Passenger Name Records⁶⁰, on classified information and on the transfer of Financial Messaging Data from the EU to the USA for the purposes of the Terrorist Finance tracking Programme⁶¹ (SWIFT Agreement).⁶²

⁵² This reading is confirmed, *a contrario*, by looking at the list of authorities taken into consideration by the Decision. For a similar opinion on the scope of classified information treaties and their dual, ambivalent nature see R.A. Wessel, *Cross-pillar mixity: Combining Competences in the Conclusion of the EU International Agreements*, in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements revisited. The EU and its member States in the World.*, (Portland: Hart 2010), 30-55.

⁵³ R.A. Wessel, *ibid*, at 36-37.

⁵⁴ See for example Council Decision 2005/296/CFSP, JHA OJ [2005] L94/38 on the conclusion of the Agreement with the Former Yugoslav Republic of Macedonia on classified information.

⁵⁵ See agreement on Classified information with Australia, OJ [2010] L 26/31, 30.01.2010.

⁵⁶ On post-Lisbon mixity and the entry into force of Article 40 TEU see P. van Elsuwege, *EU External Action After the Collapse of the Pillar Structure: in Search of a New balance Between Delimitation and Consistency*, CMLRev 47: 987-1019 and S. Blockmans and M. Spornbauer, *Legal obstacles to comprehensive EU External security action*, in EFARev, 2013, Special issue, 7-24.

⁵⁷ See the SECILE/Statewatch report: Taking Stock of EU Counter-terrorism policy and review mechanisms: Summary of Statewatch's findings for SECILE project, pp. 19-20 <http://www.statewatch.org/news/2013/dec/SECILE-sw-summary.pdf> (accessed March 2014)

⁵⁸ Agreement on mutual legal assistance in criminal matters between the European Union and the United States of America of 25 June 2003, OJ [2003] L 181/34, 19.07..2003.

⁵⁹ Agreement on extradition between the European Union and the United States of America of 25 June 2003, OJ [2003] L 181/27, 19.07.2003.

⁶⁰ The last one entered into force in 2012 OJ [2012] L215/5 11.08.2012.

⁶¹ Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ [2010] L 195/5, 28.06.2010.

⁶² The EU has also concluded with the US an agreement broadening the Agreement on customs cooperation and mutual assistance in customs matters to include cooperation on con-

While initially the Council of the European Union was of the opinion that agreements such as the PNR could be concluded on the basis of a treaty provision outside the scope of the AFSJ⁶³, all these agreements now have to be concluded on the basis of a treaty provision belonging to the AFSJ: thus, PNR and SWIFT agreements are now concluded on the basis of either TFEU provisions on judicial cooperation or on the basis of Article 87 TFEU on police cooperation. Moreover, on the basis of the experience gained from the conclusion of the first agreements with the US, the EU has concluded PNR agreements with other strategic partners such as Australia⁶⁴ and Canada⁶⁵ and one agreement on mutual legal assistance with Japan.⁶⁶ However, none of these agreements can be linked to pre-existing agreements that contained habilitating clauses in the AFSJ and counter-terrorism domains.

In the previous section it was argued that many counter-terrorism clauses present in agreements that the EU concludes with third countries should be read as habilitating clauses; i.e., provisions that mark the first step towards the establishment of future means of cooperation. However, to this date the EU has not yet concluded separate agreements pertaining to either the AFSJ or counter-terrorism with any of the countries mentioned in Table 2. What has happened instead is that the EU agencies working in AFSJ fields have concluded a number of international agreements that also touch upon countering terrorism. Since the international activities of Eurojust on counter-terrorism are discussed at length by Coninx in this volume, only the activities of Europol will be taken into consideration here.⁶⁷

Europol was the first AFSJ agency to be established and, according to the Europol Decision,⁶⁸ the Agency is given a number of principal tasks that include: i) the collection, storage, analysis and exchange of information and intelligence, ii) the exchange of information concerning Member States about criminal offences, iii) investigative aid to Member States, iv) the composition of threat assessment reports and other strategic analysis documents, v) the initiation of investigations and suggest the setting up of joint investigation teams, vi) the provision of intelligence work and support in relation to international events.⁶⁹ Moreover, the agency possesses

tainer security and related matters so to address counter-terrorism aspects, *OJ* [2004] L 304/24, 30.09.2004.

⁶³ See as an example Council Decision 2006/230/EC on the conclusion of the EU-Canada PNR agreement, *OJ* [2006] 82/14 21.3.2006. On legal implications concerning the choice of the proper legal basis for the PNR agreements see V. Mitsilegas, *EU Criminal Law*, Hart, 2009, pp.291-307.

⁶⁴ Council Decision of 13 December 2011 on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service (2012/381/EU), *OJ* [2012] L186/4 14.07.2012.

⁶⁵ *OJ* [2006] L82/15 21.03.2006.

⁶⁶ *OJ* [2010] L39/20 12.02.2010.

⁶⁷ See contribution by Coninx

⁶⁸ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), *OJ* [2009] L 121/37.

⁶⁹ *Ibid*, Article 5 on the Tasks of the Agency is an elaborated provisions divided in a number of sections. The first paragraph deals with the principal tasks summarised in the text above. Paragraph 2 calls the Agency to support Member States to gather information from the internet in order to identify criminal activities committed through the internet. Paragraphs 3 and 4 confer upon the Agency some additional tasks related to intelligence services and investigative know-how and the

legal personality and has had an express competence to conclude agreements with third countries and international organisations conferred upon it *'in so far as it is necessary for the performance of its tasks'*.⁷⁰

From a substantive perspective counter-terrorism figures prominently in Article 3 of the Europol Decision:

'The objective of Europol shall be to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States'.

Consequently counter-terrorism objectives play an important role in the agreements that this agency concludes. Thus, not only countering terrorism usually figures as one of the reasons that have pushed for the conclusion of a given agreement⁷¹, but it also figures at the heart of specific substantive provisions.⁷² However, while the main structure of the agreements concluded by Europol is generally the same, the scope of each agreement, the intensity of the cooperation that each agreement establishes will depend on the type of agreement that the Agency has concluded.

Indeed Europol can conclude two types of agreements with third countries: strategic agreements and operational agreements. Under the first type of agreement Europol is given the power to establish stable mechanisms in order to work together with external partners. For instance the Europol – Russia agreement of 2003 creates a platform for cooperation in order to allow the parties to '1) exchange technical and strategic information such as crime situations and development reports, threat assessments; 2) exchange of law enforcement experience including the organisation of scientific and practice-oriented conferences, internships, consultations and seminars; 3) exchange of legislation, manuals, technical literature and other law enforcement materials; and 4) training'.⁷³ In order to give effect to its provisions, a strategic agreement usually identifies contact points for each party so as to facilitate direct contact cooperation and coordination.

training of national police forces, whereas paragraph 5 confers upon the Agency the function of Central Office for combating euro counterfeiting.

⁷⁰ Ibid, Article 23 of the Europol Decision.

⁷¹ See for instance the preamble of the Europol- Switzerland Agreement 24.09.2004: *"The Swiss Confederation, hereafter referred to as Switzerland, and the European Police Office, hereafter referred to as Europol, aware of the urgent problems arising from international organised crime, especially terrorism, trade in human beings and illegal immigrant smuggling, unlawful drug trafficking and other serious forms of international crime; (...)"*

⁷² See Article 3 of the Europol-Norway Agreement: '1. The co-operation as established in this Agreement shall, in line with Europol's co-operation interest in the particular case, relate to: crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property; (...) as well as to illegal money laundering activities in connection with these forms of crime or specific manifestations thereof and related criminal offences. 2. Related criminal offences shall be the criminal offences committed in order to procure the means for perpetrating the criminal acts mentioned in paragraph 1, criminal offences committed in order to facilitate or carry out such acts, and criminal offences to ensure the impunity of such acts.'

⁷³ Article 5 Europol –Russia Agreement of 6 November 2003, available at < <https://www.europol.europa.eu/sites/default/files/publications/russia.pdf>>

Operational agreements are distinguished from cooperation agreements for two related reasons: the first substantial, the second procedural. Substantially, operational agreements are those agreements concluded by Europol that include mechanism to share personal data between the parties and/or that foresee concrete operational cooperation. Procedurally, in order to conclude an agreement that envisages the exchange of personal data the Agency will have to go through a number of authorizations. Thus for instance Article 23 of the Europol Regulation affirms that the agency can conclude an agreement containing provisions on the exchange of personal data: '*after the approval by the Council, which shall previously have consulted the Management Board and, as far as it concerns the exchange of personal data, obtained the opinion of the Joint Supervisory Body (an independent body that monitors the use of personal data by the Agency) via the Management Board*' for the purpose of assessing the existence of an adequate level of data protection by that entity. It appears, therefore, that operational agreements, because of their material scope, require a thorough scrutiny of the envisaged agreements and an assessment of the international partner with which the agency wants to conclude it so as to make sure, at least in principle, that EU standards on rights protection and rule of law are respected.⁷⁴

To this date Europol has concluded a number of operational agreements including with Australia, Canada, Norway, Switzerland, FYROM, and the USA while it has concluded strategic agreements (no exchange of personal data) with countries of the Western Balkans, Turkey, Russia and Ukraine.⁷⁵ While the publication of regular reports such as the EU Terrorism Situation and Trend Report⁷⁶ helps understanding the scope of the activities of the Agency on counter-terrorism also in relation to external affairs, it is difficult to evaluate the implementation of Europol's agreements in relation to effectiveness and respect for the rule of law since the Agency is not obliged to grant access of its data and information to the European Parliament.⁷⁷ Therefore, since the Agency does not confer access to the this type of data to the European Parliament, the Agency is not accountable for the use it makes of this data -exception being made for the general duty to inform Parliament that the Agency has by virtue of Article 48 of its founding instrument.⁷⁸

⁷⁴ Research conducted in this respect, however, shows a very fragmented picture where in the past the EU has been asked to adopt its system to the requirements of third parties while imposing its own standards with other partners. See D. Curtin, *Official Secrets and the Negotiation of international Agreements: Is the EU Executive Unbound?*, CMLRev 50: 423-458, V. Mitsilegas, *supra* note 58, and C. Matera, *The Influence of International Organisations on the EU's Area of Freedom, Security and Justice: A First Inquiry*, in R. A. Wessel and S. Blockmans (eds.) *Between Autonomy and Dependence: The EU Legal Order Under the influence of International Organisations*, (The Hague: Springer/TMC Asser Press 2013), 269-296.

⁷⁵ The list and the texts of the different agreements are available on the web portal of the Agency at <<https://www.europol.europa.eu/content/page/external-cooperation-31>>.

⁷⁶ EU Terrorism Situation and Trend Report (25 April 2013) available at <<https://www.europol.europa.eu/content/te-sat-2013-eu-terrorism-situation-and-trend-report>>

⁷⁷ See D. Curtin, *supra* note 74, at 453.

⁷⁸ Council Decision 2009/371/JHA, *supra* note, 68. Article 48 The Presidency of the Council, the Chairperson of the Management Board and the Director shall appear before the European Parliament at its request to discuss matters relating to Europol taking into account the obligations of discretion and confidentiality.

5. CONCLUSION

This contribution sought to provide the reader of this volume with an overview of the main ways in which the EU exercises its external powers to combat terrorism with partner countries. In the section dedicated to the CFSP and the CSDP, it emerged that the specific objective of countering terrorism is at the centre of a number of missions that envisage activities that vary from the training of police forces to military assistance. In the subsequent sections of the paper it was shown that the EU now considers counter-terrorism cooperation as an essential element for the establishment of closer means of cooperation such as Association Agreements. However, this section also evidenced that counter-terrorism clauses are only habilitating clauses and do not have executive force. Unsurprisingly, the last section of this paper then revealed that the operative agreements pertaining or related to counter-terrorism are the ones concluded on the basis of AFSJ provisions and not multidisciplinary agreements such as the ones analysed in section three. Moreover, the different agreements taken into consideration in this paper reveal that the EU's strategy on counter-terrorism is firmly anchored to the exchange of (classified) information, the exchange of other personal data such as in the case of the PNR agreements and the exchange of data to tackle money laundering, i.e., policing activities.

In the new programme for the AFSJ that the EU will adopt by the end of 2014, counter-terrorism will still maintain a prominent position. However, the new programme will only cover one dimension of the EU's counter-terrorism strategy: the one linked to the AFSJ. Therefore, one of the biggest challenges for the future of the EU's external action in counter-terrorism will probably be linked to ensure coherence and consistency of the different dimensions in which it is executed: CFSP, CSDP, AFSJ and other external policies of the EU. Moreover, since the implementation of the counter-terrorism strategy is divided between EU centralised institutions, EU agencies and Member States, the future of the EU's external counter-terrorism action will require a governance effort to maintain its coherence. Yet, the rulings of the ECJ as well as the criticisms against counter-terrorism and complementary instruments adopted in the past thirteen years such as in the cases of data surveillance and targeted sanctions suggest that the biggest challenge ahead for the EU is linked to human rights and democratic legitimacy, along with accountability rather than governance.⁷⁹

⁷⁹ See contribution by O'Neill in this volume.

EU COUNTER-TERRORISM AND THE 'STRICT OBSERVANCE OF INTERNATIONAL LAW': SEWING THE SEAMLESS COAT OF COMPLIANCE

Joris Larik*

1. INTRODUCTION: *KADI* AND THE CONUNDRUM OF COMPLIANCE

What makes the *external* dimension of EU counter-terrorism policy such an intriguing legal issue is that next to constitutional questions for the Union, it shines the spotlight on the question of the '*tormented*'¹ relationship between the EU and international law, in particular the United Nations. In his by now famous Opinion on the 2008 *Kadi* judgment, Advocate General Poiares Maduro noted that the legal orders of the EU and international law do not '*pass by each other like ships in the night*.'² He continued by asserting that, to the contrary, the EU '*traditionally played an active and constructive part on the international stage*.'³ Indeed, after the entry into force of the Treaty of Lisbon, the '*strict observance and the development of international law, including respect for the principles of the United Nations Charter*'⁴ is now one of the constitutionally codified objectives of the Union. And indeed, the UN Charter deserves 'respect' given that it situates itself at the apex of all international agreements, stipulating that whenever states face a conflict between their obligations '*under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*.'⁵

The entire *Kadi* saga, which has preoccupied the EU, the UN and legal scholarship for more than a decade, has become emblematic of the EU being torn between being compliant with international law, on the one hand, and upholding fundamental rights as enshrined in its own legal order, on the other. This saga was – finally – concluded in July 2013, when the ECJ handed down its appeals judgment, commonly known as *Kadi II*. But already in October 2012, Mr Kadi had been taken off the UN 'blacklist', which was followed suit by the EU shortly thereafter by taking him off its respective list. With Mr Kadi de-listed and the *Kadi* cases off the docket

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¹ J. Wouters, 'The Tormented Relationship between International Law and EU Law', in P. Bekker, R. Dolzer and M. Waibel (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge: Cambridge University Press 2010), 198-221.

² ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council and Commission*, Opinion of Advocate General Poiares Maduro [2008] ECR I-06351, para. 22.

³ *Ibid.*

⁴ Art. 3(5) TEU; note also Arts. 21(1), first subpara., TEU; which highlights '*respect for the principles of the United Nations Charter and international law*' as founding principles of the EU and guidance for its external action; and Art. 21(2)(b) and (c) TEU, according to which the EU shall '*consolidate and support democracy, the rule of law, human rights and the principles of international law*' and '*preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, [...]*', respectively.

⁵ Art. 103 UN Charter. Note in this respect also Art. 30(1) VCLT; Art. 30(6) VCLTIO.

in Luxembourg, this piece revisits this seminal string of case law in the light of one straightforward question: All rhetoric aside,⁶ did the EU at any point violate its, or its Member States', international obligations towards the United Nations? Despite causing all this scholarly stir, instead of passing by each other *'like ships in the night'*, did EU and international law actually graze each other at any point? The answer provided here is, for all practical purposes, 'no'. Even though the discourse has come to celebrate the ECJ's judgments as a valiant defence of fundamental rights and the rule of law through judicial review, within the Union, it is argued that for the past twelve years, the EU was in fact living up to its objective of observing its international legal obligations, thus sewing a seamless coat of compliance with international law.

In order to elaborate on this answer, this paper first sketches out the mainstream discourse regarding *Kadi* and the EU's compliance with international law. It subsequently confronts these sentiments with the incontrovertible fact, as retraced here, that the EU did actually comply with its international duties. It concludes with a note of caution as to rhetoric and reality, as well as about the real winner of the *Kadi* saga.

2. DISCERNING DISCOURSES: THE PAROCHIAL SAVIOUR OF UNIVERSAL RIGHTS

Ever since the ECJ was charged with Mr Kadi's legal challenges against the sanctions imposed against him the UN Security Council Resolution, and implemented faithfully by the EU, the Court was very closely followed by scholarship as well as by the UN itself.

The Monitoring Team set up under the UN target sanctions regime has always kept a close watch on the *Kadi* cases. For instance, in reaction to the Opinion of Advocate General Maduro in early 2008, it noted in its report to the relevant Security Council Committee that if the ECJ were to follow him in its judgment *'there is a real possibility that the regulation used by the 27 member States of the European Union to implement the sanctions will be held invalid'*⁷ and that, furthermore, this would in all likelihood *'trigger similar challenges that could quickly erode enforcement.'*⁸ Even beyond Europe, the Monitoring Team perceived the risk that *'the precedent of a decision that invalidated the sanctions, especially one affecting so many States, might lead to similar problems in other States outside the European Union.'*⁹ In awaiting the final appeals judgment in *Kadi II*, the Monitoring Team continued to refer to the ruling of the ECJ as one of the *'outside factors [which]*

⁶ As Bruno Simma remarked en passant on the *Kadi* judgment of 2008: *'I cannot avoid the impression that, maybe, once the dust has settled, the decision will share the reputation of quite a few ECJ leading cases of being grandiose on principles without being of much help to the individual claimant.'* B. Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *European Journal of International Law* 2009, 265-297, at 294 (footnote 122).

⁷ UN Security Council, Letter dated 13 May 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), eighth report of the Monitoring Team, 14 May 2008, S/2008/324, at 17 (para. 40).

⁸ *Ibid.* (footnote omitted).

⁹ *Ibid.*

might upset the 'stable, if temporary, equilibrium with respect to due process issues' which the sanction regime was said to have reached after its latest reforms.¹⁰

In terms of scholarly appraisal, the *Kadi* saga has spawned a sizeable amount of literature.¹¹ This is not least due to the fact that it places itself at the intersection of both the relationship of EU and international law as well as the balance between pursuing international security and safeguarding individual rights and due process. Each stage of this case law was extensively scrutinized and commented upon by academic observers.

Overall, the 2005 judgment of the Court of First Instance (after Lisbon renamed General Court) '*has been considered disappointing since the Court has chosen to defend fundamental rights as being protected by jus cogens rather than applying the higher standard of protection guaranteed within the EC legal order*'.¹² Moreover, the assertion of the Court that the (then) Community was bound by the UN Charter because it had succeeded into the obligations of the Member States much in the same way as it happened with the GATT, was met with fierce criticism.¹³ The scorn this judgment received from a human rights perspective was not compensated for by praise from public international lawyers. To the contrary, given the rather strange manner in which the Court construed the notion of *jus cogens*, the judgment was deemed to '*add to the argument that national and regional courts are in fact not the proper place for the review of Security Council measures*'.¹⁴ The fact the CFI had introduced a standard of review according to which it deemed itself competent to rule on the lawfulness of the contested measures was considered to have the potential of '*undermining the system of collective security*',¹⁵ as it gave domestic courts the power of '*ordering the state to act contrary to the sanctions committee's lists*'.¹⁶ In this way, it really did combine the worst of both worlds: Throwing overboard the protection of individual rights guaranteed in the EU legal order as well as the supremacy of the UN Charter. As I argued in an earlier piece, by trying to please all, the CFI ended up becoming a '*false friend*' of international law.¹⁷

¹⁰ UN Security Council, Letter dated 31 December 2012 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), thirteenth report of the Monitoring Team, 31 December 2012, S/2012/968, 9 (para. 17).

¹¹ See S. Poli and M. Tzanou, 'The *Kadi* Rulings: A Survey of the Literature', 28 *Yearbook of European Law* 2009, 533-558; and the collection of references in R. Streinz, 'Does the European Court of Justice keep the Balance between Individual and Community Interest in *Kadi*?', in U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press 2011), 1118-1131, at 1121 (footnote 21).

¹² Poli and Tzanou, *supra* note 11, at 548. Note also J. D'Aspremont and F. Dopagne, '*Kadi*: The ECJ's Reminder of the Elementary Divide between Legal Orders', 5 *International Organizations Law Review* 2008, 371-379, at 378 (calling the judges' application of international law in this case '*adventurous*').

¹³ Poli and Tzanou, *supra* note 11, at 548-49.

¹⁴ L. van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual', 20 *Leiden Journal of International Law* 2007, 797-807, at 801 (emphasis in the original).

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at 799.

¹⁷ J. Larik, 'Two Ships in the Night or in the Same Boat Together: How the CJEU Squared the Circle and Foreshadowed Lisbon in its *Kadi* Judgement', 13 *Yearbook of Polish European Studies* 2010, 149-73, at 152.

In 2008, in contrast, it was the moment for those emphasising the importance of human rights as well as the autonomy of the EU legal order to rejoice. It has been observed that ‘overall positive assessments were more conspicuous than those on the CFI’s ruling.’¹⁸ Some commentators, such as Martin Scheinin, argued, there was in fact support in the judgment also from an international law perspective: ‘On the whole, and also in respect of institutional United Nations law, the ECJ did the right thing in *Kadi*.’¹⁹ Praise came even from the European Court of Human Rights in Strasbourg, most vocally in the form of a Concurring Opinion by Judge Malinverni in the *Nada v. Switzerland* case.²⁰ The Judge described the judgment ‘as historic, as it made the point that respect for human rights formed the constitutional foundation of the European Union, with which it was required to ensure compliance, including when examining acts implementing Security Council resolutions.’²¹ For him, the ECJ is clearly the trailblazer, raising the question of whether the ECtHR ‘as guarantor of respect for human rights in Europe, [should] not be more audacious than the European Court of Justice [...] when it comes to addressing and settling the sensitive issue of conflict of norms that underlies the present case?’²² Faced with such conflict and charged with upholding human rights, according to Malinverni, requires the recasting of the primacy of the UN Charter, or at least the Security Council Resolutions adopted under its authority, ‘in relative terms’.²³

Others, however, abhorred that the ECJ had arrogated itself the power to question the full implementation of the resolutions by the EU. Most vocally, Gráinne de Búrca criticized the ECJ for what she called the ‘*chauvinist and parochial tones*’ of its judgment.²⁴ According to De Búrca, the Court adopted ‘a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC’s legal order from the international domain’, and went on to compare the judgment to that of the US Supreme Court in *Medellin*.²⁵ In doing so, the ECJ not only provided

‘a striking example for other states and legal systems that may be inclined to assert their local constitutional norms as a barrier to the enforcement of international law,

¹⁸ Poli and Tzanou, *supra* note 11, at 540.

¹⁹ M. Scheinin, ‘Is the ECJ ruling in *Kadi* incompatible with international law?’, 28 *Yearbook of European Law* 2009, 637-653, at 650.

²⁰ Note that the ECtHR also quoted from *Kadi* approvingly in the judgment, in ECtHR, *Nada v. Switzerland*, Appl. No. 10593/08, 12 September 2012, para. 212. Further on the interaction between the two European courts in matters of targeted sanctions, F. Fabbrini and J. Larik, ‘Dialoguing for Due Process: *Kadi*, *Nada*, and the Accession of the EU to the ECHR’, *Leuven Centre for Global Governance Working Paper No. 125* (November 2013), available at <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp125-larik-fabbrini.pdf>.

²¹ ECtHR, *Nada v. Switzerland*, Appl. No. 10593/08, 12 September 2012, Concurring Opinion of Judge Malinverni, para. 18.

²² *Ibid.*, para. 20.

²³ *Ibid.*, para. 22.

²⁴ G. de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’, 51 *Harvard International Law Journal* 2010, 1-49, at 4.

²⁵ Supreme Court of the United States, *Medellin v. Texas*, 552 U.S. 491 (2008). This case concerned a death row inmate, his consular rights under the Vienna Convention of Consular Relations and the application of that convention in the U.S. legal order.

*but more importantly it suggests a significant paradox at the heart of the EU's relationship with the international legal order, the implications of which have not begun to be addressed.*²⁶

The 2010 judgment, in which Mr Kadi challenged the follow-up measures adopted against him in the wake of the *Kadi I* judgment, can be seen as a judicial endorsement of the General Court (the former CFI) of the approach adopted by the Court of Justice. Even though the Court did not fail to highlight that its reasoning had arguably received some support elsewhere,²⁷ it did align itself with the '*in principle full review*' standard of the Court of Justice.²⁸ Even if, according to one observer, '*an international legal meltdown is not immanent*',²⁹ he concludes that the General Court put the Court of Justice under pressure to find a '*balanced approach that does not escalate the conflict with the UN but also does not backpedal its commitment to fundamental rights too much, or too visibly*'.³⁰ One commentator lauded the '*clear and welcome presumption in favour of a broad, entitlements-based conception of liberty over deference to considerations of security in the judgment of the General Court*'.³¹ This not least since, in the eyes of this commentator, '*[a] ccording to the General Court, what made the case of "smart sanctions" exceptional within the hierarchy of international law, was the fact that the sanctions impact upon fundamental rights*'.³² Overall, one could say that the 2010 judgment is seen as cementing a victory of human rights, protected by the EU, over international security, as pursued by the UN Security Council.

In the 2013 *Kadi II* judgment, which concludes the judicial saga, the ECJ confirmed the annulment of the measures due to persisting violations of fundamental rights.³³ In essence, as Niamh Nic Shuibhne comments, '*while the Court rejected aspects of the reasoning applied by the General Court, it upheld the annulment of the contested Regulation on the grounds that the rights of the defence protected under EU law had not been adequately respected*'.³⁴

²⁶ G. de Búrca, *supra* note 24, at 49. Less outspoken, but raising the concern of fragmentation of international law, K. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights', 9 *Human Rights Law Review* 2009, 288-305.

²⁷ GC, Case T-85/09, *Kadi v. Commission* [2010] ECR II-05177, paras 112-22.

²⁸ *Ibid.*, para. 126. See further A. Cuyvers, 'The *Kadi II* judgment of the General Court: the ECJ's predicament and the consequences for Member States', 7 *European Constitutional Law Review* 2011, 481-510, at 509.

²⁹ Cuyvers, *supra* note 28, at 501.

³⁰ *Ibid.*, at 510.

³¹ H.J. Hooper, 'Liberty before Security: Case T-85/09 *Yassin Abdullah Kadi v. Commission* (No. 2) [2010] ECR 00000 (30 September 2010)', 18 *European Public Law* 2012, 457-470, at 469.

³² *Ibid.*, at 465.

³³ ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi (Kadi II)* [2013] ECR, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0584:EN:HTML>>.

³⁴ N. Nic Shuibhne, 'Being Bound' [Editorial], 38 *European Law Review* 2013, 435-436, at 436. See extensively on the *Kadi II* judgment, further M. Avbelj, F. Fontanelli and G. Martinico (eds.), *Kadi on Trial: a Multifaceted Analysis of the Kadi Judgment* (London: Routledge, forthcoming 2014).

In sum, an overarching and prevalent theme of the *Kadi* saga was the disruptive potential of the decisions of the EU Courts regarding the compliance with international law, more particularly obedience with resolutions of the UN Security Council, adopted under the UN Charter as the supreme document of the international legal order. Consequently, in the various scholarly assessments of this case law, criticisms were directed at the ECJ for disrespecting obligations under international law, while praise was framed in terms of standing up for human rights and judicial review in the face of the UN. Such defiance was then acknowledged as an act of non-compliance, but cast as a worthwhile cause. Observance with international law, it seems both supporters and detractors agree, was sacrificed for the sake of this 'higher end'. Yet others then try to justify the ECJ's reasoning by reference to breaches by the UN Security Council of its own obligations under international law.³⁵ There is, however, another way to look at this case law, which corresponds to the actual compliance of the EU and its Member States with international law.

3. RETRACING REALITY: 'STRICT OBSERVANCE' ALL THE WAY

Compliance with international law is a highly valued good in the EU. There is long standing case law of the ECJ on the Union being bound by general international law and on giving preference to interpretations of its own laws that are consistent with international law.³⁶ After the Lisbon reform, the '*strict observance of international law*' has been enshrined as a general objective of the EU in the primary law.³⁷ The ECJ, subsequently, took cognizance of this textual foundation to bolster its pre-existing finding that the EU was indeed bound by international law in general.³⁸ Nevertheless, the EU's preparedness to abide by international law is not boundless.³⁹ As a matter of principle, the *Kadi* case law clarified that while the EU is '*beholden to*'⁴⁰ international law, within its autonomous legal order, '*structural principles*'⁴¹ such as effective fundamental rights protection through judicial review

³⁵ Scheinin, *supra* note 19, at 650-53; for an elaborate framing of non-compliance with such resolutions as legitimate countermeasures against the UN Security Council see A. Tzakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford: Oxford University Press 2011).

³⁶ See e.g., ECJ, Case C-286/90, *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9; ECJ, Case 104/81, *Kupferberg* [1982] ECR 3641; and ECJ, Case 181-73, *Haegeman* [1974] ECR 449; and reiterated in *Kadi*, ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission* [2008] ECR I-6351, para. 291. See further extensively E. Cannizzaro, P. Palchetti and R. Wessel (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff 2012).

³⁷ Art. 3(5) TEU.

³⁸ ECJ, Case C-366/10, *The Air Transport Association of America and Others* [2011] ECR, para. 101, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0366:EN:HTML>>.

³⁹ See J. Klabbers, '*Völkerrechtsfreundlich?* International Law and the Union Legal Order', in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar 2011), 115-144.

⁴⁰ *Kadi v. Council and Commission*, Opinion of Advocate General Poiares Maduro, *supra* note 2, para. 21.

⁴¹ I borrow this term from the German legal discourse (*Strukturprinzipien*), see e.g., K.-P. Sommermann, *Staatsziele und Staatszielbestimmungen* (Tübingen: Mohr Siebeck 1997), 372-373.

trump compliance with international law. This is after all what prompted the general tenor of scholarly commentary above: The ECJ drew the line of where compliance with international law should end and beyond which it would defend human rights as part of EU law against such outside threats.⁴² Even in times of global emergencies such as international terrorism, the narrative of Luxembourg spoke up for individual rights, the rule of law and judicial review.

But now that the *Kadi* saga has been concluded, it is worthwhile to take a step back and ask: Did the ECJ at any point put the EU or its Member States in a real state of non-compliance with international law? By carefully retracing this case law and the institutional responses to it, the answer must and can only be: *No*.

Yes, the ECJ asserted the autonomy of the EU legal order and its constitutional credentials; it avowed itself as the guarantor of fundamental rights and the rule of law, standing up against the '*Kafkaesque*'⁴³ sanctions machinery at the UN. What it carefully avoided, though, for more than a decade was to violate international law, i.e., not to practice the '*strict observance of international law*', as Article 3(5) TEU now puts it. Even though Mr Kadi had been successful three times in a row with his judicial challenges at the EU Courts ever since his first appeal (in 2008, 2010 and 2013), the measures deemed unlawful by the ECJ were only effectively annulled *after* he had been delisted by the UN, and subsequently by the European Commission as far as implementation of these sanctions in the EU is concerned. His assets, therefore, were unfrozen by virtue of a political decision, and with the help of the Office of the Ombudsperson at the UN '1267 Sanctions Committee'. They were not undone by judicial intervention, which took place only after that fact.

Let us rewind the story and start at the beginning. On 17 October 2001, the United Nations Security Council added Mr Kadi to a so-called 'blacklist', requiring his financial assets to be frozen in view of his suspected involvement in the financing of international terrorism.⁴⁴ On 19 October, the EU followed suit in implementing the UN Security Council resolutions by adding Mr Kadi to its own list and thus subjecting him to restrictive measures within the EU.⁴⁵ Mr Kadi subsequently lodged an action for annulment of these measures before the EU courts on grounds of violation of his fundamental rights, as well as lack of competence of the Union.⁴⁶

⁴² See also N. Lavranos, 'Protecting European law from international law', 15 *European Foreign Affairs Review* 2010, 265-282. J. Wouters, *supra* note 1, at 221 notes that in *Kadi*, 'the ECJ adopted a strongly dualist vision of the relationship between EC/EU law and international law, emphasising the autonomy, authority and separateness of the EC legal order.'

⁴³ I. Ley, 'Legal Protection Against the UN-Security Council Between European and International Law: A Kafkaesque Situation?', 8 *German Law Journal* 2007, 279-294.

⁴⁴ UN, 'Security Council Committee concerning Afghanistan issues a further addendum', Press Release SC/7180 (19 October 2001), available at <<http://www.un.org/News/Press/docs/2001/sc7180.doc.htm>>.

⁴⁵ Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000 OJ [2001] L 277/25, 20.10.2001.

⁴⁶ On the intricate question of (pre-Lisbon) EU competence to adopt such targeted restrictive measures, see M. Cremona, 'EC Competence, "Smart Sanctions", and the *Kadi* Case', 28 *Yearbook of European Law* 2009, 559-592.

Four years later, in its 2005 judgment, the General Court ‘discovered’ a *jus cogens* standard which allowed it to review the EU implementing measures as well as, vicariously, the UN measures. It concluded, however, that against such a standard, no fundamental rights breaches could be detected and rejected Mr Kadi’s challenge. In view of this dismissal, the measures, of course, stayed in effect. As controversial as the reasoning of the CFI was, it certainly maintained the Union in a state of ‘*strict observance*’ with international law. While certainly the *jus cogens* argument was in conflict with mainstream international legal opinion, a conflict with the UN Charter was not created.

Subsequently, Advocate General Maduro, in his Opinion of January 2008, employed a very different approach by departing from the autonomy of the Union legal order and emphasizing the effective protection of fundamental rights. In the Opinion, he avows himself as fully aware that such an approach, if followed through to its logical conclusion, would lead to violating obligations under international law. This, however, would be international law’s problem, according to Maduro: ‘*To the extent that such a ruling would prevent the Community and its Member States from implementing Security Council resolutions, the legal consequences within the international legal order remain to be determined by the rules of public international law.*’⁴⁷ Even though, he continued, this may ‘*inconvenience the Community and its Member States in their dealings on the international stage, the application of these principles by the Court of Justice is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter.*’⁴⁸ Had the Court of Justice followed him all the way, this would have indeed led to the ‘zero hour’ of non-compliance with international law.

The Court of Justice in its landmark judgement of September 2008 followed the Advocate General in terms of reasoning, in particular with regard to the autonomy of the Union legal order, the paramountcy of fundamental rights and the necessity of judicial review. Recalling its ruling in *Les Verts*,⁴⁹ it underlined that the EU

*‘is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.’*⁵⁰

Consequently, it deemed it to be incumbent on itself to

*‘ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.’*⁵¹

⁴⁷ *Kadi v. Council and Commission*, Opinion of Advocate General Poiares Maduro, *supra* note 2, para. 39.

⁴⁸ *Ibid.*

⁴⁹ ECJ, Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339.

⁵⁰ *Kadi and Al Barakaat v. Council and Commission*, *supra* note 36, para. 281.

⁵¹ *Ibid.*, para. 326.

Crucially, however, it did not go as far as to invalidate the challenged EU measures right away. Even though it concluded that the measures ought to be annulled given their inconsistency with fundamental rights as protected within the Union legal order, the Court acknowledged that annulment with immediate effect '*would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures*'.⁵² In other words, since it did not know whether Mr Kadi actually deserved to be blacklisted as a financier of terrorism, unfreezing his funds was deemed unwise. Instead, it ruled that the effects of the contested measures be maintained '*for a period that may not exceed three months running from the date of delivery of this judgment*',⁵³ thus allowing the Commission to remedy the situation from the point of view of protecting fundamental rights. As the judgment was rendered on 3 September 2008, compliance with international law was thus assured until 3 December 2008.

Subsequently, the Commission sent Mr Kadi a letter containing a brief summary as to why it thought he should remain blacklisted. Having awaited a reply from Mr Kadi, in which the latter unsurprisingly again contested his listing, the Commission decided to re-list him by virtue of a new implementing measure.⁵⁴ This Commission Regulation stated that the latter would '*enter into force on 3 December 2008*',⁵⁵ i.e., exactly on the day the previous measures were effectively annulled in accordance with the judgment of the ECJ. Compliance, regardless of the Court's clamorous decision and thanks to the Commission's well-timed 'recycling' of implementing measures, remained intact.

Mr Kadi went on to challenge the new measure before the General Court, thus launching the *Kadi II* line of cases. By adopting the reasoning of the Court of Justice in its 2010 judgment, the General Court now found in favour of Mr Kadi, ruling that the Commission had only paid heed to fundamental rights considerations '*in the most formal and superficial sense*'.⁵⁶ It, too, now seemed to take his rights more seriously. It stressed that the UN level had nothing to offer in terms of judicial protection, given that even the newly established Office of the Ombudsperson '*cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee*'.⁵⁷ It furthermore acknowledged that by that point in time '*the applicant's funds and other assets have been indefinitely frozen for nearly 10 years*'.⁵⁸ This prompted the Court to openly doubt the Security Council, which had always emphasized the temporary and preventive, i.e., non-penal, nature of the sanctions.⁵⁹ Hence, it appears that as time had passed,

⁵² Ibid., para. 373.

⁵³ Ibid., para. 376.

⁵⁴ Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban OJ [2008] L 322/25, 02.12.2008.

⁵⁵ Ibid., Art. 2(1).

⁵⁶ *Kadi v. Commission*, *supra* note 27, para. 171.

⁵⁷ Ibid., para. 128.

⁵⁸ Ibid., para. 149.

⁵⁹ Ibid., para. 150. The GC refers here in particular to UN Security Council Resolution 1822(2008), S/RES/1822 (2008), 30 June 2008, in which one of the clauses from the preamble

the patience of this court to comply with international law at all cost had now run out. Therefore, it concluded that the new measures, too, should be annulled.

Did this create an actual state of non-compliance? The answer is still 'no'. Mr Kadi remained on the list, thanks to the timely appeal lodged by the Commission, Council and the United Kingdom against the judgment. According to the Statute of the ECJ, a decision of the General Court which declares a regulation void does not take effect if an appeal has been brought in time against that decision, until the dismissal of the appeal.⁶⁰ Hence, any violations of international law, any real conflict with the UN Charter, had to wait till the Court of Justice had held hearings, heard another Opinion of the Advocate General, deliberated and eventually delivered its judgment in *Kadi II*.

While these proceedings ran their course in '*the fairyland duchy of Luxembourg*',⁶¹ in far-away New York City, on 5 October 2012, i.e., almost eleven years after Mr Kadi's listing, the Security Council removed him from the UN list, '*after concluding its consideration of the delisting request submitted by this individual through the Ombudsperson*'.⁶² One week later, the EU followed suit once more and took Mr Kadi off its list as well.⁶³ For all practical purposes, this is the end of Mr Kadi's challenges against his sanctions as far as their implementation in the EU is concerned. The admittedly non-judicial procedure at the UN had finally yielded to his requests. With Mr Kadi's name disappearing from the UN 'blacklist', so vanished the obligation under international law – under the UN Charter – to apply the sanctions for the Member States and vicariously for the EU. After the two days it took the EU to implement the UN listing in 2001, there was no moment in time where Mr Kadi was off the EU's list while remaining on the UN list.

His de-listing in early October notwithstanding, the hearings for the *Kadi II* appeal took place at the ECJ in mid-October 2012. Subsequently, Advocate General Bot delivered his Opinion in spring 2013,⁶⁴ in which he highlighted the progress made at the UN level, in particular the establishment of the Office of the Ombudsperson, which he attributed to none other than the judicial pressure exerted by the ECJ through its *Kadi* case law. These developments at the UN prompted him

states that such sanctions 'are preventative in nature and are not reliant upon criminal standards set out under national law'.

⁶⁰ Art. 60(2), Protocol No. 3 on the statute of the Court of Justice of the European Union. See also GC, *The General Court annuls the regulation freezing Yassin Abdullah Kadi's funds*, Press Release No 95/10 (30 September 2010), available at <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-09/cp100095en.pdf>>, which notes this rule at the end of the document; and Cuyvers, *supra* note 28, at 496.

⁶¹ E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *American Journal of International Law* 1981, 1-27, at 1.

⁶² UN Security Council, 'Security Council Al-Qaida Sanctions Committee deletes entry of Yasin Abdullah Ezzedine Qadi from its list', Press Release SC/10785 (5 October 2012), available at <<http://www.un.org/News/Press/docs//2012/sc10785.doc.htm>>.

⁶³ Commission Implementing Regulation (EU) No 933/2012 of 11 October 2012 amending for the 180th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al Qaida network OJ [2012] L 278/11, 12.10.2012.

⁶⁴ ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi (Kadi II)*, Opinion of Advocate General Bot [2013] ECR, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0584:EN:HTML>>.

to argue for more self-restraint of the Court in the intensity of its judicial review, noting also the importance of pursuing effectively international security and the need to respect international law. He referred explicitly to the provisions in the TEU urging the EU to comply with international law and contribute to international security.⁶⁵ While he did not dispute the ECJ's dictum that no acts of the EU enjoy immunity from jurisdiction simply because they were adopted with a view to implementing UN Security Council resolutions, this particular context should nonetheless lead to '*an adaptation of the judicial review conducted*' by the Court.⁶⁶ Applying such a 'security sensitive' and 'international law friendly' approach to the case at hand, he advised the Court to set aside the General Court's judgment and dismiss Mr Kadi's challenge.

The judgment of the Court of Justice, delivered in July 2013, however, did not follow the Advocate General. Instead, it clarified the ways in which the Court will handle classified information. In essence, it endorsed the principle of 'disclose or delist',⁶⁷ which puts the onus of furnishing the Court with probative information to the institutions that implemented the restrictive measures at issue.⁶⁸ Thus, on top of its assertion of fundamental rights and the autonomy of the EU legal order, in this final judicial episode of the *Kadi* saga, the Court elaborated on the procedures to be followed which are to safeguard such rights in practice in judicial proceedings. In the case at hand, after correcting the General Court on points of law concerning this aspect, it confirmed its conclusion, i.e., the annulment of the measures.⁶⁹ Hence, the annulment already issued by the General Court, given that the appeal was dismissed, became effective on the day of the judgment.

The annulment itself thus had no practical legal impact. Of course, clarifying issues pertaining to the treatment of classified information is of general relevance and useful to future cases. As Advocate General Bot rightly pointed out, the fact that Mr Kadi had been de-listed '*after the present appeals were lodged, does not [...] remove the interest in bringing proceedings on the part of the Commission, the Council and the United Kingdom or that of Mr Kadi in the context of his application for annulment.*'⁷⁰ For future sanctions related cases, it will certainly be interesting to observe how the EU institutions will manage to provide sensitive information to the courts. This remains a quintessentially multilevel problem, as such information will need to be obtained from the UN Security Council, which in turn relies on classified information furnished by UN members.⁷¹

⁶⁵ *Ibid.*, para. 73.

⁶⁶ *Ibid.*, para. 52.

⁶⁷ See for a more in depth explanation of the operation of this rule, F. Fabbrini, 'Global Sanctions, State Secrets and Supranational Review: Seeking Due Process in an Interconnected World', in David Cole *et al.* (eds.), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham: Edward Elgar 2013), 284-301, at 299-300.

⁶⁸ *Commission, Council and United Kingdom v. Kadi (Kadi II)* *supra* note 33, paras 111 et seq.

⁶⁹ *Ibid.*, para. 164.

⁷⁰ *Commission, Council and United Kingdom v. Kadi (Kadi II)*, Opinion of Advocate General Bot, *supra* note 64, para. 42.

⁷¹ The Court stressed in *Kadi II* the need to for EU authorities to cooperate with the UN Sanctions Committee and UN members in this respect, *Commission, Council and United Kingdom v. Kadi (Kadi II)* *supra* note 33, para. 115.

With regard to Mr Kadi, however, the annulment came too late in terms of serving as an 'effective remedy' to unfreeze his assets, which had been unlawfully frozen for all these years. The right to an effective legal remedy is a general principle of EU law,⁷² and now finds expression in the Charter of Fundamental Rights of the EU.⁷³ It is inspired by Article 13 of the ECHR. In the words of the European Court of Human Rights, effectiveness signifies '*not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive*'.⁷⁴ Of course, Mr Kadi could avail himself – repeatedly – of the remedies offered in the Union legal order. Eventually, he prevailed over the Commission and the Council and he successfully had the measures imposed against him annulled. However, his successive victories in court were all theoretical in the end. As was shown in this section, in 2008 and 2010, the annulments did not have the result of effectively delisting him. In 2013, the effects of the measures had already ceased to apply by the time the Court of Justice intervened. In this way, the judgment was not the climax of the saga, but rather an epilogue, a post-script. For the institutions, on the contrary, the avenues of judicial recourse offered in EU law (especially their appeal against the 2010 judgment of the General Court) were quite useful, as they kept Mr Kadi on the EU blacklist, not as a matter of theory but of practice. In doing so, they effectively maintained compliance with international law.

4. CONCLUSION: THE TRIUMPHANT TRIBUNAL

After having, firstly, sketched out the general sentiments in the scholarly discourse on the *Kadi* saga as the legal epitome of the EU's implementation of targeted sanctions mandated by the UN Security Council, and, secondly, having retraced this string of cases from the point of view of actual compliance with international law, the following conclusions emerge. All the clamour on the autonomy of the Union legal order and the majesty of human rights aside, for all practical purposes, the EU and its Member States cloaked themselves in a seamless coat of compliance with their international obligations, woven from October 2001 till the very end. While vocally upholding human rights as constitutional, structural principles of the EU legal order, also against attacks hailing from the UN bolstered by the supremacy of the UN Charter, what the EU and its institutions achieved in fact was living up, all this time, to the objective of strictly observing international law as stipulated in Article 3(5) TEU.

By the same token, a conflict with the UN Charter was avoided. At no point in time did the Member States face opposing obligations, with the UN demanding one thing and the EU requiring the opposite. Only in a rather unworldly, retrospective sense, with the annulment of the 2008 Regulation being effective thanks to the

⁷² Starting with ECJ, Case 222/84, *Johnston* [1986] ECR 1651; and reiterated later in, among others, ECJ, Case C-50/00 P, *Union de Pequenos Agricultores* [2002] ECR I-6677.

⁷³ Art. 47 Charter of Fundamental Rights of the EU.

⁷⁴ ECtHR, *Artico v. Italy*, Appl. No. 6694/74, 13 May 1980, para. 33.

dismissal of the appeal in the 2013 *Kadi II* judgment, Mr Kadi could be deemed not to have been on the EU's list, while he was on the UN's. To use the Court's words, '*the contested measure is retroactively erased from the legal order and is deemed never to have existed*'.⁷⁵ However, bearing in mind the preventive nature of the sanctions regime, the historical fact remains that Mr Kadi's assets were frozen during this entire period (even though we now know in hindsight that they should not have been, according to EU law). While this spawns a retroactive, abstract conflict between obligations, for all practical purposes, the EU, including its courts, did cover this period in this seamless coat of compliance with international law, which was only lifted once the obligation under international law had lapsed.

This begs the final question as to the real winner in this legal marathon. For Mr Kadi, certainly, his repeated victories in court retain a Pyrrhic character. He had to wait almost twelve years before he could 'cash in' on his judicial successes. Now that the dust has indeed settled, Bruno Simma's prescient words could not ring truer in that *Kadi* is among the ECJ cases which are '*grandiose on principles without being of much help to the individual claimant*'.⁷⁶

For the Council and Commission, as well as the Member States, the end of the *Kadi* saga may well be the beginning of new legal challenges. While a conflict between the EU Treaties and the UN Charter was avoided in this particular series of cases, the principles established by the Court of Justice therein are prone to place them in a difficult situation in the future. According to the Court of Justice in *Kadi II*, the burden of proof unequivocally rests on the responsible institutions of the EU to furnish the information justifying the blacklisting of targeted individuals in EU courts. Justifications based solely on 'the Security Council said so' and 'the UN Charter *über alles*' are clearly not good enough in a Union '*based on the rule of law*'.⁷⁷ In order to avoid future conflicts, the EU and the Member States (not least France and the UK as permanent members of the Security Council) will have to do their utmost to obtain such information, its sensitive and classified nature notwithstanding.

A less obvious winner, but still a winner as argued here, is the UN Security Council. Despite all the judicial questioning and second-guessing from Luxembourg, it saw its targeted sanctions applied to Mr Kadi throughout until, through its '1267 Committee', it decided to de-list him. Instead of creating an immediate conflict, the judgments from Luxembourg, together with other vocal criticisms of the UN sanctions machinery, gave the UN time to adapt. Even though a judicial remedy at UN level remains wanting for blacklisted individuals, as the case of Mr Kadi shows, the Ombudsperson can contribute to an effective delisting. However, if the Security Council wants to remain on the winning side in the future, it should strongly consider facilitating the provision of information justifying the sanctions to its members, lest courts in the EU and beyond put a spoke in the wheels of its sanctions machinery after all.

The most unequivocal winner, however, can only be the Court of Justice of the EU. While being celebrated as the brave and ultimate guardian of fundamental

⁷⁵ *Commission, Council and United Kingdom v. Kadi (Kadi II)* *supra* note 33, para. 134.

⁷⁶ Simma, *supra* note 6, at 294 (footnote 122).

⁷⁷ *Kadi and Al Barakaat v. Council and Commission*, *supra* note 36, para. 281.

rights, in *Kadi*, it asserted the autonomy of the EU legal order, over which it looms as the supreme judicial body. Remarkably, it achieved this feat while successfully *avoiding* a breach of the kind of law from which it sets EU law apart so ferociously – international law.

THE DEVELOPMENT OF A SINGLE COUNTER-TERRORISM POLICY IN THE EXTERNAL ACTION OF THE EU: THE ROLE OF THE COUNCIL – SOME LEGAL ASPECTS AFTER LISBON

Jenő Czuczai^{1*}

1. INTRODUCTION

Since the entry into force of the Lisbon Treaty there have been many scholarly books, academic articles, speeches, policy papers, and other experts' writings of a more comprehensive nature published, which explore the development of EU counter-terrorism policy after Lisbon from a political, institutional or even legal point of view.² In this contribution that is why I would like to address only two, maybe not yet so elaborated, specific legal aspects of the post-Lisbon EU counter-terrorism policy-making, namely: (i) the legal novelties, introduced by the Lisbon Treaty in relation to the external dimension of the EU concrete actions aiming at fighting against international terrorism; and (ii) the legal aspects of the democratic control of and the legal influence on the Council decision-making process, pursued by the European Parliament, as far as the practical implementation of this part of the EU Common Foreign and Security Policy (EU CFSP) or current EU external action is concerned. The latter aspect is in particular a topical issue after the judgment of the European Court of Justice in Case C-130/10 *European Parliament v Council*, handed down on 19 July 2012,³ since it is, indeed, a scientific concern to see how much democratic legitimacy is ensured in legal practice when Council decisions are made in the context of the external dimension of the EU counter-terrorism

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² See for example, C. Beaucillon, 'Comment choisir ses mesures restrictives? Guide pratique des sanctions de l'UE', *ISS, Occasional Paper No. 100*, Paris, 2012; or Council of the European Union, 'EU Counter-Terrorism Strategy-Discussion paper', Brussels, 23 May 2012, Council doc 9990/12; or Council of the EU, 'EU Action Plan on combating terrorism', Brussels, 9 December 2011, Council doc 17594/1/11 REV1; or the most recent speeches of the EU Counter Terrorism Coordinator available at <<http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-counter-terrorism-co-ordinator/speeches?lang=fr>>. From a legal doctrine point of view see still, for example, T. Gazzini and E Herlin-Karnell, 'Restrictive Measures, adopted by the EU from the standpoint of International and EU law', 36(6), *European Law Review* 2011, pp. 789-817; or C. C. Murphy, *EU Counter-Terrorism Law* (Oxford: Hart Publishing 2012).

³ See, for example, A. Ott, 'Case note on Case C-130/10, *European Parliament v. Council of the European Union*, not yet reported', 19(4) *Maastricht Journal* 2012, pp. 589-594 or J. Czuczai, 'The powers of the Council concerning the emergency of international terrorism after the judgment in Case C-130/10 *Parliament v. Council*' in I. Govaere and S. Poli (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises*, Conference proceedings of 22-23 October 2012, organised by the University of Ghent and Pisa, Leiden, Brill-Martinus Nijhoff Publishers, 2014 (forthcoming).

policy and what are the concrete legal and institutional guarantees for that. It goes without saying that this contribution can and will concentrate only on the purely legal considerations of the chosen two issues (without the ESDF aspects), putting them, however, in the context of their historical development.

2. A BRIEF HISTORICAL OVERVIEW CONCERNING THE MAIN CORNERSTONES OF THE LEGAL DEVELOPMENTS OF THE EXTERNAL DIMENSION OF EU COUNTER-TERRORISM POLICY-MAKING

In order to properly address the two main points pursued by this contribution, it is necessary to explore in a nutshell the main legal cornerstones of the development of the EU counter-terrorism policy within the historical context of the EU CFSP, as built upon since the Maastricht Treaty. This means that I will briefly sum up the EU legal framework concerning the fight against international terrorism *before* Lisbon, in particular by examining the main legal and institutional elements of the EU reaction mechanisms as defined by the Maastricht, Amsterdam and Nice Treaties. Secondly, I will compare it with the current legal framework, introduced *-and practically unified-* by the Lisbon Treaty *after* 1 December 2009.

After September 11, 2011 and the terrorist attack on the US World Trade Centre, it was clear that the EU had to face international terrorism as a global emergency, since terrorist threats have become globalised and, therefore, the EU had to react on it in a multilateral context, rapidly and efficiently in the closest possible cooperation with all those international and regional stakeholders concerned. Of course, the EU could do that only within the existing legal and institutional framework at that time, the main elements of which were in particular:

- the EU three pillars system, introduced by the Maastricht Treaty, namely the CFSP (former second pillar) based on the ex Title V of the TEU, which was an intergovernmental pillar, with limited role for the Commission and the High Representative for CFSP, based as a rule on the key principle of 'unanimity' decision-making in the Council and practically without judicial control; then the former third pillar (ex 'police and judicial cooperation in criminal matters', also intergovernmental pillar, based on ex Title VI of the TEU) and finally the so-called Community pillar, based on the ex TEC, with strong powers for the Commission and under the full control of the ECJ;
- under the CFSP pillar there was a strong role for the rotating Presidency, we still had the GAERC, chaired by the rotating Presidency;⁴
- the available legal bases for counter-terrorism actions were on the one hand ex Article 15 TEU (under the former second pillar), plus ex Articles 60 and 301 TEC for the adoption of the implementing Community Regulations. On the other hand,

⁴ See J. Czuczai, 'The role of the Presidency of the Council of the European Union after Lisbon. A legal appraisal' in I. Govaere and D. Hanf (eds.), *Les dimensions internes et externes du droit européen à l'épreuve*, Liber Amicorum P. Demaret, P.I.E. Peter Lang, Berlin-Brussels, 2013, pp. 169-182, in particular pp. 170-76.

the Community legal bases were incomplete when restrictive measures under the Community competences were imposed on individuals not linked to governmental functions of a State and that was the practical reason why ex Article 308 TEC had to be also included among the relevant legal bases;

- the role of the EP was very limited and did not go beyond the mere right to be informed about and to be consulted on the main EU counter-terrorism policy developments, based on ex Article 21 TEU;
- during this period one could point out the legal challenges, occurred as regards the practical conflicts between the security concerns of the Member States and the protection dimension of individual fundamental rights of terrorist-suspects, especially what concerned the direct implementation of UN Security Council Resolutions, adopted under Chapter VII of the UN Charter, as a matter of international law (Article 103 of the UN Charter) at EU level, while fully respecting the EU constitutional order.⁵

From the above elements of the pre-Lisbon legal framework regarding the development of the external dimension of a single EU counter-terrorism policy, today one may conclude that it was institutionally perhaps too fragmented (the former pillar-system), legally a bit complicated and to some extent incomplete (legal bases issue and judicial remedies questions). This should be explained by the fact that September 11, 2001 was totally unexpected for the whole world and that the EU legal order (like, e.g., the UN system) was not yet fully shaped to address such a global emergency.

As opposed to all this the Lisbon Treaty, based on previous experiences and lessons learned over the years in legal practice in the area of fighting against international terrorism at the EU level, and by making important policy-choices in 2007 in the course of the IGC negotiations (or even before during the negotiation of the Treaty establishing a Constitution for Europe), in my view, has introduced a *much more integrated legal approach* concerning the external dimension of the EU counter-terrorism policy by:

- providing more legal clarity in terms of distribution of competences (Article 2-6 TFEU), in relation to the choice of the appropriate legal bases issues as well as specifically underlining the significance of full respect for international law (e.g., Article 3(5) TEU, etc.);
- establishing a more coherent, better structured and more concentrated set of legal norms (also from a Treaty- drafting point of view, like, e.g., by clearer objectives-setting, by bridging provisions, cross-references, by having *expressis verbis* exclusion clause in which case a Treaty legal basis cannot apply, by clearer titles to the related Chapters and Parts of the Treaties, more unified legal terminology etc.);

⁵ See Armin Cuyvers, 'The Kadi II Judgement of the General Court: The ECJ's Predicament and the Consequences for Member States', 7 *European Constitutional Law Review* 2011, pp. 481-510 and the referred literature therein. See further J. Larik's contribution in this volume.

- defining better the powers, conferred on the EU (but also at the same time making absolutely self-evident what has, therefore, remained in the competence of the Member States - see new Article 4(1)-(2) TEU);
- underlining the related reformed role of the EU High Representative for the CFSP with the other characterising functions as President of the Foreign Affairs Council and as Vice-President of the Commission, thus providing practically better coordination and more consistency including between the interlinked policy areas);
- strengthening even more the role of the Council especially in designing and implementing the EU counter-terrorism policy within the context of EU external action thus assuring more consistency, efficiency and unity in institutional terms while at the same time increasing the powers of the European Parliament, both in terms of providing more legal guarantees for democratic control of EU external action decisions, as well as extending the ordinary legislative procedure in certain fields of EU external action policies (but not what concerns counter-terrorism related restrictive measures); and
- excluding the co-decision legislative procedure with the EP in relation to the adoption of concrete counter-terrorism instruments such as the targeted restrictive measures adopted based on Article 215⁶ TFEU, which also means that the role of the national Parliaments in this respect is limited with regard to the determination and the development of the EU counter-terrorism policy. At the same time it is to be noted that the Lisbon Treaty introduced in a coordinated manner full judicial control over all EU counter-terrorism related types of concrete restrictive measures against natural or legal persons (Article 275(2) TFEU).

3. SEVEN LEGAL NOVELTIES: THE POST LISBON LANDSCAPE AND LEGAL FRAMEWORK FOR A SINGLE COUNTER-TERRORISM POLICY IN EU EXTERNAL ACTION

As mentioned above, the Lisbon Treaty has established a more coherent, better structured and more focused set of legal rules on restrictive measures that provides a much more integrated legal approach concerning the external dimension of the EU counter-terrorism policy as well as giving much more legal clarity in terms of distribution of powers among EU institutions by better defining the applicable decision-making procedures. In order to demonstrate this the following seven elements of the new post-Lisbon EU legal and institutional settings can be highlighted.⁷

Firstly, the location of the *-in principle-* two possible legal bases for restrictive measures within the Lisbon Treaty clearly shows their different functional determination. Thus, Article 75(1)-(2) TFEU, for example, is located in Part III, Title V of the TFEU under the title of 'Union policies and *internal actions*, Area of freedom, security and justice', while Article 215 TFEU can be found in Part V, Title IV of the

⁶ See ECJ, Case C-130/10, *European Parliament v. Council*, 19 July 2012, not yet reported, paras 79-83.

⁷ See in more details still in J. Czuczai, *supra* note 3.

TFEU under the heading of '*External actions of the Union*'. It can therefore be seen that the Lisbon Treaty clearly distinguishes between internal and external actions of the EU when addressing a relevant Union policy area thus determining at the same time the main focus and the priorities of the related decision-making objectives and procedures.⁸

Secondly, it is important to stress that based on previous experiences and in order to make Article 215 TFEU the only legal basis which can be chosen for restrictive measures with an external dimension, the Lisbon Treaty now clearly excludes the possibility that Article 352 TFEU (ex Article 308 TEC) could be used in any way as a legal basis for CFSP purposes. This is clear from Article 352(4) TFEU, which provides that:

'This Article cannot serve as a basis for attaining objectives pertaining to the CFSP and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union [emphasis added]'.

Thirdly, the legal drafting technique for Article 215 TFEU - as opposed, for example, to that of Article 75 TFEU - clearly links that Article to Chapter 2 of Title V of the TEU in terms of a prior decision-making obligation under the CFSP, for the adoption of which EU foreign policy decision unanimity is required in the Council.⁹ This 'two stages decision-making procedure',¹⁰ whereby first there shall be a CFSP decision, adopted under Chapter 2 of Title V of the TEU, which defines the overall foreign policy objectives of the measure and, thereafter, the more detailed technical rules are already adopted in a Council legal act, based on Article 215 TFEU, shall apply to both types of restrictive measure, namely to those adopted against third countries, but also to those adopted against natural or legal persons and groups or non-state entities.

⁸ It should be noted that when the draft Treaty establishing a Constitution for Europe was drafted there was a clear intention to merge all provisions relating to EU external action and the related competences of the newly established office of the Union Minister for Foreign Affairs into one single Title in the Treaty, for more details see J-C. Piris, *The Constitution for Europe - a legal analysis*, (New York: Cambridge University Press 2006), in particular pp. 94, 108, 145-154.

⁹ Article 215 TFEU provides that: '(1) Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for an interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. (2) Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. (3) The acts referred to in this Article shall include necessary provisions on legal safeguards' [emphasis added].

¹⁰ See in more detail G. M. Zagel, 'Article 215 TFEU on Restrictive measures' in H. Smith and P. Herzog (eds.), *The Law of the European Union*, (Wien: LexisNexis 2010), pp. 215/1-215/25, in particular 215/3 et seq.

Fourthly, it should be noted that while Article 75 TFEU¹¹ clearly sets out its objectives and thus its scope of application,¹² Article 215 TFEU in this respect needs to be read together with Article 205 TFEU, which is a bridging provision in Part Five, Title I TFEU under the title of ‘General provisions on the Union’s external action’. It provides that:

‘The Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union’ [emphasis added].

In Chapter 1 of Title V TEU under Article 21(2) points (b)-(c) the Treaty-makers made it absolutely clear that one of the main objectives of EU external actions shall be a high degree of cooperation in all fields of international relations in order to preserve international peace and security *inter alia* in accordance with all the UN Charter requirements and with full respect for international law. While this is a bit of a complicated legal drafting solution, it is, nonetheless, coherent and makes it incontestable that Article 215 TFEU is an inherent part of a well-integrated and consistent common set of Treaty provisions on the EU external action framework.¹³

Fifthly, in order to make Article 215(2) TFEU, distinct and self-standing and the only appropriate and sufficient legal basis for the adoption of restrictive measures against natural or legal persons and groups and non-State entities in this context, the Treaty-makers opted for a decision-making procedure (merely requiring the informing of the Parliament as well as a prior CFSP decision by the Council acting unanimously), which is procedurally incompatible with Article 75 TFEU, which provides for the use of the ordinary legislative procedure. This means that these two Treaty legal bases cannot be used together for the adoption of any Union measure or legal act.¹⁴

Sixthly, another important legal drafting distinction, which should be noted, is that Article 215 TFEU uses the legal terms ‘necessary measures’ and ‘restrictive measures’, which are of a more operational and individual nature, as well as more reactive (or precautionary) to the emergency of a concrete terrorist threat at inter-

¹¹ It is interesting perhaps to note that when Article 3(2) TEU defines the Union’s aims in more general terms in relation to the area of freedom, security and justice, etc., it refers only to ‘the prevention and combating of crime’, without any specific reference to the fight against international terrorism.

¹² Article 75 TFEU provides that: ‘(1) *Where 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.* (2) *The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.* (3) *The acts referred to in this Article shall include necessary provisions on legal safeguards*’ [emphasis added].

¹³ For a full explanation of this sophisticated Treaty-drafting solution see J.-C. Piris, *The Lisbon Treaty - a legal and political analysis*, (New York: Cambridge University Press 2010), in particular pp. 242-243 as well as Article 21(3) TEU.

¹⁴ See *European Parliament v. Council*, *supra* note 6, paras. 48-49.

national level - when human lives are in danger and, therefore, quick and operative actions must be carried out. This is by contrast to the more general terminology, used in Article 75 TFEU with regard to the ordinary legislative procedure, namely 'definition of the framework for administrative measures'. This expression is rather about a legislative framework of general application, more of a preventive nature, while when concrete 'measures' shall be adopted in order to implement the established 'general administrative framework', then the Council already remains the only decision-maker even under Article 75 TFEU.¹⁵

Seventhly, a further important legal drafting specificity in the context of establishing a more coherent legal framework for the external dimension of EU counter-terrorism actions (or in more general terms concerning the integrated EU external action policy) is that the role of the High Representative of the Union for CFSP is consistently underlined in the relevant Treaty provisions when addressing the right to initiate the decision-making process. That is also the reason why in Article 215 TFEU the decision-making procedure shall be always based 'on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission',¹⁶ while in Article 75 TFEU the decision-making process is always initiated only 'on a proposal from the Commission'. This difference clearly shows that the later Treaty legal basis is not designed for serving EU external action purposes.

4. THE COUNCIL DECISION-MAKING PROCESS CONCERNING EXTERNAL ACTIONS OF THE EU IN THE CONTEXT OF A SINGLE EU COUNTER-TERRORISM POLICY AND THE DEMOCRATIC LEGITIMACY CONTROL OF IT BY THE EP

As was already mentioned briefly, under the former three-pillar system of the EU the powers of the EP were very limited in relation to the CFSP pillar: practically it only had the right to information and the right to be consulted on the main aspects and basic policy choices of the EU CFSP (including EU counter-terrorism policy-making).

From a legal point of view this meant that pursuant to ex Article 21 TEU: '*The Presidency shall consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and shall ensure that the views of the European Parliament are duly taken into consideration. The European Parliament shall be kept regularly informed by the Presidency and the Commission*

¹⁵ The Lisbon Treaty uses this legal drafting distinction between 'common framework measures' versus 'concrete implementing measures' when defining the powers of the EU institutions and the applicable decision-making procedures in other policy areas as well, for example: Article 43(2) versus Article 43(3) TFEU, Article 207(2) TFEU or 214(3) TFEU, etc. One could even submit, although in my view it still requires further research, that typically the more operational decision-making (adoption of measures of implementing, operational or individual nature), in particular, when there is an emergency, is conferred in the Treaty on the Council in the pre-Lisbon intergovernmental pillars' fields, so, for example, today in the fields of EU external actions or area of freedom, security and justice instead of having the time-consuming ordinary legislative procedure.

¹⁶ See *European Parliament v. Council*, *supra* note 6, paras. 104-105.

of the development of the Union's foreign and security policy. The European Parliament may ask questions of the Council or make recommendations to it. It shall hold an annual debate on progress in implementing the common foreign and security policy.'

As far as the typical legal bases are concerned, which were used before Lisbon for the adoption of Community counter-terrorism restrictive measures (namely: ex Articles 60, 301 and 308 TEC), one can still mention two aspects concerning the EP involvement in the Council decision-making at that time, namely: (i) ex Article 60 (2) TEC provided that in the case of its application '*The President of the Council shall inform the European Parliament of any decision taken by the Council*' and, (ii) ex Article 308 TEC required that before appropriate measures were taken based on that legal basis, the EP had to be consulted.

After Lisbon, however, one can see that the powers of the EP in connection with the former EU CFSP (now it is called 'EU external action' policy) have substantially increased¹⁷ as far as the development of a single EU counter-terrorism policy and the assurance of a better democratic legitimacy control of the related Council decision-making process is concerned. Such a statement can be proved by the following legal cornerstones in particular:¹⁸

(i) Article 36 TEU¹⁹, which provides that:

'The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special Representatives may be involved in briefing the European Parliament. The European Parliament may ask questions of the Council or make recommendations to it and to the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy' [emphasis added].

One can see from the underlined part that the wording of the 'EP clause' in Title V of the TEU has changed and made the reporting obligations of the High Representative much more intensive, both in terms of its regularity as well as of its content. Another interesting post-Lisbon development of the EP's EU foreign policy control

¹⁷ As a general reference article for the subject see E. Wisniewski, 'The Influence of the European Parliament on the European External Action Service', 18 *European Foreign Affairs Review*, no. 1, 2013, pp. 81-102, in particular from pp. 86 et seq. The author gives a much broader analysis of the topic with special regard to the EP budgetary powers in EU CFSP or the accountability control-related EP tool-box (e.g., the informal hearings of would-be Heads of Union Delegations (after their appointments) or other hearings (briefings, debriefings, etc.) of EEAS leaders at EP Committees' level, different platforms, annual debates, etc.) or other services, provided by the Union Delegations on the ground to EP missions, etc., which aspects, however, are not further dealt with in this contribution.

¹⁸ See I. Govaere, 'Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon' in *Cambridge Yearbook of European Legal Studies (2010-2011)* (CUP 2011), Chapter 5, pp. 87-111, in particular from p. 100 et seq.

¹⁹ Ex Article 21 TEU.

activity is the involvement of the EU Special Representatives in the briefing practice, which might have important aspects of EU counter-terrorism policy-making as well.

(ii) The substantial increase of the EP powers can also be seen in Part V of the TFEU (External Action by the Union) for example through the following legal developments:

- in relation to Article 215 TFEU, i.e. the legal basis on which the EU counter-terrorism restrictive measures with foreign policy objectives are adopted, it is required that the Council shall inform the European Parliament thereof. This is an increased power of the EP, since it provides more transparency towards the EP in relation to the Council decision-making practice about concrete counter-terrorism targeted sanctions;
- with regard to the newly introduced 'Solidarity clause' (which has implications for the EU's counter-terrorism policies), Article 222(3) TFEU also provides that the EP shall be informed about the Council decision defining the arrangements for the implementation by the Union of this clause;
- the EU Common commercial policy under Article 207(2) TFEU follows now the ordinary legislative procedure (trade-related sanctions), as does the cooperation with third countries and humanitarian aid policy fields (Article 209(1) and Article 212(2) TFEU, etc., (aid-related coercive measures)). Not speaking about the strong consent power of the EP in international Treaty-making (which might have also counter-terrorism aspects) or, for example, the right to information clause for the EP in international trade negotiations (Article 207(3) TFEU) or in more general terms (Article 218(10) TFEU).

In the last couple of years, however, one could submit that the EP claimed even more powers in exercising its democratic control over the measures, taken by the Council in the field of the fight against international terrorism within the context of EU external actions. In order to verify that tendency, one should look a bit more closely from this point of view at the related EP Resolutions and Recommendations, adopted after the Nice Treaty.

One of the most comprehensive EP Resolutions in this respect is the EP Resolution of 4 September 2008 *on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights*,²⁰ which specifically addressed, *inter alia*, the issue of the effectiveness of EU sanctions policy, and in this respect the need for setting up of clear decision-making processes, objectives, benchmarks and review mechanisms in order to have targeted sanctions as a more efficient tool, as well as the question of the better respect for human rights in applying targeted sanctions in the fight against terrorism with finally making some recommendations both to the EU institutions and the Member States. It should be also noted that the EP was critical at that time about the problems and the deficiencies regarding the full observance by the EU²¹ of the fundamental rights of terrorist-suspects

²⁰ See EP Resolution No A6-0309/2008 available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0405+0+DOC+XML+V0//EN&language=EN>> (last visited on 27 November 2013).

²¹ For the sake of completeness, it should be mentioned that the EP in 2008 was also critical about the UN Sanctions system and considered as a major guarantee for fighting against international terrorism the improvement of the effectiveness of the EU-UN cooperation in this

in the process of listing and delisting them and called on the Council and the Commission to improve their enforcement practices taking into account the related international law obligations of the EU as well as fully respecting the European Convention of Human Rights and Fundamental Freedoms.²²

This EP Resolution took a *maximalist approach* in relation to the role of the European Parliament in the decision-making process of fighting against international terrorism, when it underlined:

*'(while...the EP emphasises that the two-step procedure for the imposition of sanctions under the CFSP provides scope for an **urgent political reaction**...it also requests that Parliament **be associated in all the stages of a sanctions process**:²³ the decision-making process leading to sanctions, the selection of the sanctions most appropriate to the situation, and also the definition of benchmarks and the evaluation of their implementation within the framework of the review mechanism and the lifting of the sanctions;' (points 31., 37.) – [emphasis added].*

In addition:

'(the EP) considers that Article 75 of the TFEU would be an opportunity to be seized by Parliament in order to remedy the shortcomings in current practice as regards the inclusion of names on a blacklist, and supports all the current parliamentary work aimed at being included on the agenda for the 2009 legislative programme.' (point 56.)

Moreover, the EP, among the Recommendations' part of the subject 2008 Resolution, still concluded that:

*'(the EP) considers that **the legitimacy of the EU's sanctions policy, which constitutes a key and sensitive element of the CFSP, must be enhanced by involving Parliament at all stages of the procedure, in accordance with Article 21 TEU, in particular in the drafting and implementation of sanctions in the form of system-***

regard in practice. That is exactly why the EP among the EU priorities for the 63rd Session of the UN General Assembly *'called on the Council, and particularly on those EU Member States which are permanent members of the UN Security Council, to advocate a revision of the UN sanctions system (terrorists' blacklists) to bring it into line with the obligations of the UN Covenant on Civil and Political Rights, in particular via the establishment of appropriate notification and appeal procedures; welcomed in this respect, as a first step in the right direction, the adoption by the UN Security Council of Resolution 1730 (2006) which establishes a de-listing procedure and a focal point for de-listing requests within the UN Secretariat; Urged the EU Member States to make the necessary efforts to secure an international consensus that will enable the negotiations on the Comprehensive Convention on International Terrorism to be concluded.'* See EP Recommendation No. A6-0265/2008 of 9 July 2008 to the Council on the EU priorities for the 63rd Session of the UN General Assembly available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0339+0+DOC+XML+V0//EN&language=EN>>, p. 5 under the heading of 'Improving EU-UN cooperation in practice' (last visited on 27 November 2013).

²² See in particular points 53-59.

²³ It is interesting to draw attention here to the *'all the stages of the decision-making process'* wording, which is most probably borrowed from Article 218(10) TFEU, in relation to which Treaty provision the EP would like to have also a very extensive interpretation of the terms of (that the EP shall be) 'fully', 'immediately' and 'at all stages' (informed about the EU Treaty-making process) - see the pending case before the Court in this regard C-658/11 *European Parliament v. Council*.

atic consultation with, and reports from, the Council and the Commission; considers also that Parliament should be involved in overseeing the attainment of benchmarks by those who are subject to sanctions; instructs its Subcommittee on Human Rights to structure and supervise work in this area as regards any sanction the objectives and reference criteria of which relate to human rights.’ (point 72) – [emphasis added].

After all these political statements of the EP before mid-2009 it was logical that after the entry into force of the Lisbon Treaty the EP challenged the legality of the first Council Regulation, adopted in the field of EU external action policies (targeted ‘smart’ sanctions against international terrorism), based on Article 215 TFEU, with clearly a foreign policy objective submitting that the Council should have been following the ordinary legislative procedure for the adoption of the subject restrictive measures, as suggested by the EP in the above-quoted Resolution as well, namely based on Article 75 TFEU.

Following the related judgement of the Court of July 2012, in which the Court excluded the ordinary legislative procedure to be used for the adoption of targeted restrictive measures at EU level and in the context of EU external actions, aiming at implementing UN Security Council Resolutions,²⁴ the Parliament took a much more concentrated way of conducting its role in the EU international counter-terrorism decision-making and today it clearly focuses on broader policy control of the external dimension of the EU counter-terrorism policy and practice. Such a recently established practice can be seen via a number of examples from 2011-2013.²⁵ For instance:

- it is worth mentioning when the EP after a broader analysis of a third country’s human rights situation calls on the EU institutions to adopt also targeted restrictive measures;²⁶
- a relevant most recent Recommendation of the EP for the subject (specifically addressed to the Council) is about a consistent policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders. In this Recommendation the EP established, for example, bench-marks on how to build an efficient EU sanction policy, which are very detailed and focused;²⁷

²⁴ See the detailed case-analysis in J. Czuczai, *supra* note 3.

²⁵ See in more details G. Grieger, ‘Sanctions as an EU foreign policy instrument’, EP Library Briefing No. 130490REV1, 22 May 2013, Brussels available at <[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130490/LDM_BRI\(2013\)130490_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130490/LDM_BRI(2013)130490_REV1_EN.pdf)>.

²⁶ See, for example, EP Resolution of 17 January 2013 on the human rights situation in Bahrain (No. RC-B7-0029/2013) available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0029&language=ES>>, in particular points 10-12.

²⁷ See EP Recommendation to the Council of 2 February 2012 on a consistent policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders (No. A7-00007/2012) available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0018&language=EN>>, in particular pp. 3-5.

- finally, an important EP Resolution from 2011, which one could still mention, addresses the EU counter-terrorism policy: main achievements and future challenges.²⁸

Today, if somebody wanted to assess the relationship for the purpose of this contribution between the EP and the Council (and after Lisbon the High Representative for CFSP and the EEAS) from a legal and institutional point of view, it is suggested to base the legal evaluation on the one hand on the most recent Annual Report (2012) from the High Representative for CFSP to the European Parliament, presented based on Article 36 TEU²⁹ and, on the other hand, on the on-going EEAS review process.³⁰

Having analysed these documents, one can objectively submit that the democratic control by the EP over the EU external actions and the Council decision-making in the context of fighting against international terrorism is well established and works well.³¹ The EP can fully exercise and enjoy all rights provided by the Treaties in this field, and the smooth cooperation between the two institutions, in my view, from a legal point of view, clearly contributes to the development of a single EU counter-terrorism policy within the context of the current EU external action regulatory framework.

5. CONCLUSIONS

1. Based on the above analysis, it can be clearly concluded that the Lisbon Treaty has made the EU external action-related regulatory framework more coherent and consistent, legally more integrated and better structured, and institutionally more united (especially by strengthening the Council's powers) thus substantially contributing to the further development of a single EU counter-terrorism policy-making practice.

²⁸ See EP Resolution of 14 December 2011 on the EU Counter-Terrorism Policy: main achievements and future challenges (No. 2010/2311(INI)) available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0577+0+DOC+XML+V0//EN&language=EN>>.

²⁹ See Council doc. 13542/13, dated 12 September 2013 and adopted based on point G, paragraph 43 of the IIA of 17 May 2006, in which terrorism is addressed in Part I/B, (Addressing threats and global challenges), pp. 104-107. Annex II of the 2012 Annual Report to the EP contains also an overview of legal acts (from 2012), adopted in the CFSP area (sanctions), pp. 154-161.

³⁰ See for the EEAS review 2013, Council doc. 13977/13 as well as for the related Recommendations Council doc. 14458/13 with the title of 'EEAS Review-indications relating to the legal and institutional issues raised by the recommendations'.

³¹ See EEAS Review report 2013, *ibid.*, p. 9 (Relations with the European Parliament). There is nothing about that the EP wanted to have any powers or any sort of concrete involvement concerning terrorist listing-delisting. The only institutional recommendation is about that the EEAS Sanction Team should be strengthened as well as that the RELEX Council WG and the COTER (Counter-terrorism) Council WG should be put under permanent EEAS chairmanship instead of having the rotating Presidency as chairing them (see p. 16 of the EEAS Review report (short-term recommendations No.1 and No.5)).

2. At the same time, it can also be stated from a legal point of view that the Lisbon Treaty has significantly increased the powers of the EP in the field of EU external action policies in general thus providing more legal guarantees in practice for the EP to conduct a stronger democratic legitimacy control as well over the Council decision-making process in the course of further developing a single EU counter-terrorism policy.

THE FIGHT AGAINST TERRORISM AND THE ROLE OF EUROJUST: COOPERATION WITH THIRD STATES

Michèle Coninx¹

Terrorism is a borderless phenomenon. The prevention, protection and pursuit of international terrorism therefore require an international response, with an emphasis on effective intelligence sharing, joint law enforcement operations and cross-border judicial cooperation.

Eurojust's evolution and development have been closely related to the international nature of terrorism. With the attacks of 9/11 in the USA, the focus on the fight against terrorism moved from the regional or national sphere to its widest international context and served as a catalyst for the formalisation, by Council Decision in February 2002,² of the establishment of Eurojust, the European Union's Judicial Cooperation Unit.

The legal instruments on judicial cooperation in criminal matters that Eurojust applies in its daily work were negotiated by the EU institutions at a time when the institutions were under significant pressure to create new legal instruments effective enough to fight against international terrorism (e.g., mandatory exchange of information on terrorist offences, European Arrest Warrant (EAW)).

The urgent need for an appropriate legal framework, reinforcing cooperation and exchange of information between the law enforcement and judicial authorities of the Member States and third States, was confirmed by the attacks in Madrid in 2004 and London in 2005. These offences once again highlighted the international nature of terrorism. Committed on EU soil, their ramifications also reached third States.

Eurojust supports the national authorities of the EU Member States in the coordination of transnational investigations and prosecutions against terrorism and works closely with non-European countries and international organisations engaged in counter-terrorism efforts.

This paper explains how Eurojust contributes to countering international terrorism. The added-value of Eurojust's unique intergovernmental composition - presence at its headquarters in The Hague of one National Member seconded from each of the EU Member States and permanent secondment of liaison prosecutors from Norway and US - as well as its coordination tools and the procedures it employs to ensure a fruitful operational and strategic collaboration with third States and international counterparts will be analysed. The concrete case examples contained in text boxes illustrate this cooperation.³

¹ President of Eurojust and Chair of the Counter-Terrorism Team.

² Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

³ The case illustrations contained within this article stem from the Eurojust's Case Management System and aim to illustrate the role and the added-value of Eurojust in countering terrorism.

1. COUNTERING TERRORISM: ADDED VALUE OF EUROJUST

Eurojust is composed of a group of judges, prosecutors or police officers of equivalent competence, one from each of the 28 Member States. Besides representatives of the EU Member States, Eurojust hosts permanent liaison prosecutors from Norway and the USA.⁴ National Members are in permanent contact with their home authorities, creating a unique and valuable network of prosecutors, enhancing cooperation between Member States and third States.

On a daily basis, National Members assist national authorities in investigating and prosecuting serious cross-border crime, such as terrorism, drug trafficking, money laundering and trafficking in human beings. They do so by coordinating the activities of the national authorities responsible for a particular case and facilitating the collection of evidence under EU and international mutual legal assistance arrangements.

The fight against terrorism has been a priority in Eurojust's operational work since the organisation was established, as a provisional unit, on the 1st of March of 2001. Eurojust operates under rules of procedure approved by the Council of the European Union after having been approved by the College of Eurojust,⁵ its governing body (formed by the Eurojust National Members). The Eurojust's priorities agreed by the College are in line with the priorities defined by the EU Council.

In 2012, thirty-two terrorism-related cases, including cases of terrorism financing, were registered at Eurojust. The number of terrorism-related cases in 2012 was comparable to that in 2011, when there were twenty-seven cases. Three coordination meetings on terrorism-related cases were held at Eurojust in 2012, while in 2011 there was only one coordination meeting.

Membership in a terrorist organisation was the crime most frequently referred to in Eurojust terrorism cases. However, the cases referred to Eurojust in 2012 did not appear to be linked to any single crime category, but showed a large variety of crime types, including crimes against life, limb or personal freedom.

Eurojust's structure and composition can facilitate the ambitious task of countering international terrorism. The permanent representation of experts from all the Member States at Eurojust's premises and its multicultural staff allow a proactive development of specific and relevant professional and language skills to deal with international terrorism cases and phenomena, both within and beyond the EU's borders. Eurojust can offer facilities for secure meetings with interpretation. Third States may make use of this coordination tool to gather evidence from, or coordinate investigations with, more than one Member State.

In an Italian case, an investigation was carried out concerning the activities, starting in 2007, of an organised crime group, active in Afghanistan, Pakistan,

Eurojust's operational cases are confidential. Personal data and specific facts have been deliberately removed from the provided case illustrations.

⁴ See *infra* section 2.1.

⁵ Article 10 of the Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (referred to in this article as the 'Eurojust Decision'), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:138:0014:0032:EN:PDF>>.

Romania, Albania and Italy. The group had its headquarters in Rome and Milan, and was involved in illegal immigration and drug trafficking for the alleged purpose of financing radical Islamist terrorism. The group trafficked Afghani and Pakistani nationals with counterfeited documents to Italy via Iran, Turkey and Greece. After arrival in Italy, the victims were put in trucks bound for Germany, Sweden, Belgium, the UK and Norway. Eurojust facilitated the investigation, avoiding overlapping among national investigations and potential *ne bis in idem* conflicts, synchronised the execution of EAWs, was actively involved in the coordination of the final and very difficult synchronised police operations in three Member States and also facilitated the cooperation of the judicial authorities throughout the operation.

As part of its mandate, the work of Eurojust in the counter-terrorism field includes: facilitating the exchange of information between the judicial authorities of the Member States involved in terrorism-related investigations and prosecutions; supporting the judicial authorities of Member States in the issuance and execution of EAWs and facilitating investigative and evidence-gathering measures necessary for Member States to prosecute suspected terrorism offences (e.g., witness testimonies, scientific evidence, searches and seizures, and the interception of communications).

Eurojust also encourages and supports the establishment and work of Joint Investigation Teams (JITs) by providing information and advice to practitioners. These investigation teams are set up on the basis of an agreement between two or more Member States and other parties, for a specific purpose and limited duration. JITs, which aim to carry out criminal investigations in the Member States, are increasingly recognised as an effective instrument in the judicial response to cross-border crime and an adequate forum in which operational information on particular terrorism cases can be exchanged. They also allow the coordination of efforts on the spot and the direct exchange of information and specialised knowledge between JIT members without the need for formal requests.

Eurojust National Members can participate in JITs, acting either on behalf of Eurojust or in their capacity as national competent authorities for terrorism. Eurojust also provides financial and logistical assistance to the operations of JITs and hosts the JITs Network Secretariat. Since 2010 Eurojust financially support JITs through its JIT Funding Project (based on a grant received from the European Commission).

In 2010, a JIT was set up with the support of Eurojust between Belgium and Denmark in a terrorism case where one individual of Chechen origin, better known as the one-legged terrorist, attempted to carry out a bomb attack in Copenhagen. The attack failed and the suspect was arrested. This JIT received Commission funding via Eurojust.

2. OPERATIONAL COLLABORATION WITH THIRD STATES

Globalisation has affected many crime types in recent years, including terrorism. Terrorists use the Internet for recruitment, propaganda and fundraising, as this tool

allows them to reach a vast potential audience and provides a very fast flow of information. For an effective fight against terrorism, cooperation with third States is of vital importance.

In recent years, Eurojust has adapted its approach and its functions have evolved to combat the new threats by working closely with its EU counterparts, with the Member States, and also by building additional coalitions with third States and international organisations.

2.1 Liaison Prosecutors

Liaison prosecutors from third States may be seconded to Eurojust.⁶ Their role, to facilitate cooperation, is detailed in an Agreement between Eurojust and the third State.⁷ Permanent liaison prosecutors from US and Norway sit at Eurojust's premises in The Hague. The national authorities from these countries are to decide on the mandate of their permanent representatives and the duration of the secondment.

Eurojust's National Desks and the liaison prosecutors from Norway and US can open operational terrorism cases at Eurojust, upon request of their national authorities. By doing so, the requesting country calls for the cooperation and assistance of some of the Eurojust's National Desks, for the effective prosecution of a complex, multilateral terrorism case. Coordination meetings can be held, if pertinent, to support and strengthen coordination among national investigation and prosecution authorities on specific operational cases. Depending on the case and the type of assistance required from Eurojust, the need for the organisation of one or more coordination meetings is assessed. Operational cases can involve other Member States, third States, international bodies (e.g., Europol, OLAF, INTERPOL, IberRed), and, if a coordination meeting is organised, the relevant authorities will be invited to attend.

The objectives of the coordination meetings may include, *inter alia*, exchanging information; facilitating and/or coordinating the execution of mutual legal assistance requests; coordinating ongoing investigations, coercive measures (e.g., search warrants and arrest warrants), transfer of proceedings and solving *ne bis in idem*-related issues; facilitating the prevention of conflicts of jurisdiction; and identifying other legal and evidential problems.

Permanent liaison prosecutors effectively contribute to prevent possible terrorism threats, in their own countries and in the EU Member States, by providing Eurojust with a better overview of the activities carried out by terrorist groups in their territories. This creates awareness among all the informed States on possible future problems, provides an opportunity to reflect on ways to face them, and helps Eurojust to better support prosecutions on these matters within the EU.

Eurojust's coordination role has been further enhanced by the introduction of coordination centres since the beginning of 2011. This tool provides an increased

⁶ Article 26a (2) of the Eurojust Decision.

⁷ 'Eurojust Agreements with third States', available at <<http://eurojust.europa.eu/about/legal-framework/Pages/eurojust-legal-framework.aspx>>.

operational support during common action days in Member States and third States. The setting up of a coordination centre ensures a secure, real-time connection between Eurojust and the prosecutors, judges and police officers carrying out the operation. Coordination centres enable Eurojust to closely follow all developments, facilitate the swift exchange of information, advice on possible solutions to emerging issues and provide immediate assistance in drafting EAWs or other documents, as needed.

Coordination meetings and coordination centres are frequently used and valued by practitioners for streamlining operations, facilitating immediate judicial follow-up, and resolving legal and practical difficulties resulting from the differences in the 31 legal systems represented in the meetings. Some further information and examples of cases, including cases in which third States were involved, can be found in the Eurojust Annual Reports.⁸

2.2 Agreements on cooperation with third States

Eurojust has legal personality and can conclude formal agreements on cooperation with third States.⁹

Such agreements may, in particular, concern the exchange of information, including personal data, and the secondment of liaison officers or liaison magistrates to Eurojust. They can only be concluded after consultation by Eurojust with the Joint Supervisory Body concerning the provisions on data protection and after the approval by the Council, acting by qualified majority.

These agreements do not focus on counter-terrorism matters *per se*, but constitute a framework for further investigations and prosecutions in this area, as they enhance cooperation between both parties when combating serious forms of international crime and facilitate the exchange of information. Among other objectives, these agreements extend the possibilities for operational cooperation. Eurojust and the third States may exchange information on terrorism matters in accordance with the signed agreement. They may also use any evidence or information obtained under the agreement for the purpose of their criminal investigations and proceedings. Some of these countries specifically mention in the agreement of cooperation the appointment of a national contact point for terrorism matters.¹⁰

Eurojust has concluded cooperation agreements with Norway, Iceland, the USA, Croatia (pre-accession), Switzerland, the former Yugoslav Republic of Macedonia and Liechtenstein.¹¹ Negotiations with the Russian Federation and Ukraine are ongoing and Latin American countries (in particular Brazil, Colombia and Mexico) were added to the priority negotiation list.

The decision of opening negotiations with the view of concluding an agreement of cooperation with a third country is triggered by different *ad hoc* parameters, such as the casework load that Eurojust might share with a particular State, operational

⁸ The Eurojust Annual Reports are available on the Eurojust's website at <<http://www.eurojust.europa.eu/doclibrary/corporate/Pages/annual-reports.aspx>>.

⁹ Articles 1 and 26a (1) of the Eurojust Decision.

¹⁰ Agreement between the Kingdom of Norway and Eurojust, article 6, see *supra* note 7.

¹¹ See *supra* note 7.

needs or a particular interest to cooperate further shown by the law enforcement authorities from a third country. In accordance with Article 26a(2) last paragraph of the Eurojust Decision, Eurojust shall inform the Council of any plans it has for entering into negotiations with third countries and the Council may draw any conclusions it deems appropriate. Eurojust has issued an opinion on the practical implementation of this provision which was published in Council document 12479/10 of 22 July 2010.¹²

Successful cases of international coordination in terrorism matters show how, when several countries are involved - including third States - the coordination meetings organised by Eurojust allow for drafting adequately mutual legal assistance requests, as well as for planning harmonised, effective actions in the different countries concerned. The coordination meetings involving EU Member States and third countries benefit from Eurojust's expertise on effective ways of proceeding when facing complex matters such as the gathering of evidence or the execution of simultaneous arrests in several countries.

In November 2009, a coordination meeting on counter-terrorism was hosted by France. The case dealt with a militant separatist organisation based in northern Sri Lanka, known as the Tamil Tigers or Liberation Tigers of Tamil Eelam (LTTE). The meeting was attended by representatives from France, five other Member States and Switzerland. It resulted in the conviction of 21 members of the LTTE, with sentences of up to seven years for terrorism financing. The Court of Paris also ordered the dissolution of the Tamil Coordinating Committee in France.

In third States with which no cooperation agreement has been signed, Eurojust National Members may, acting in their capacity as competent national authorities and in conformity with the provisions of their national laws, by way of exception and with the sole objective of taking urgent measures to counter imminent serious danger threatening a person or public security, carry out an exchange of information involving personal data (Article 26a(9) of the Council Decision on Eurojust). Before Eurojust exchanges any information with third States and organisations, the National Member of the Member State that submitted the information must consent to the transfer of that information. In certain cases, the National Member shall consult the competent authorities of the Member States (Article 27(1) of the Eurojust Decision).

2.3 Eurojust's contact points in third States and posting of Eurojust liaison magistrates to third States

In addition to cooperation agreements and secondment of liaison magistrates, Eurojust maintains an informal worldwide network of contact points. The Eurojust's network of contact points in third States includes so far 29 third States. A simple exchange of letters – subsequent to the request of Eurojust or of the interested

¹² Council document 12479/10 of 22 July 2010, available at <<http://eurojust.europa.eu/about/Partners/Documents/Council-document-12479-10-EN.pdf>>.

country– is sufficient to agree on the establishment on a third State contact point for Eurojust. These contact points are appointed by the third countries in accordance with their national procedures in this respect. They facilitate the first contacts between Eurojust and the legal authorities of their respective countries and provide practical information on their national legal systems.

For the purpose of facilitating judicial cooperation with third States in cases in which Eurojust is providing assistance, Article 27a of the Eurojust Decision provides for the possible posting of Eurojust liaison magistrates to third States, subject to an agreement as referred to in Article 26a of the Eurojust Decision. Before negotiations are entered into with a third State, the Council, acting by qualified majority, shall give its approval. Posting liaison magistrates to third States could prove to be extremely valuable when dealing with transnational counter-terrorism cases. Eurojust is currently looking into the necessary implementing arrangements, in collaboration with the European Commission and the Member States. So far the College of Eurojust has not posted liaison magistrates to third States.

3. INTERNATIONAL COUNTERPARTS

Other instruments of third-party cooperation are the Memoranda of Understanding (MoUs), agreements or letters of cooperation signed or exchanged with an international organisation to improve judicial cooperation and intensify the fight against serious forms of transnational crime.¹³ These texts demonstrate the commitment of the signatories to enhance cooperation and exchange legal information, experiences and best practice. The MoUs also provide a basis for participation in each other's meetings when appropriate.

These diverse agreements and modes of collaboration between international bodies in the field of counter-terrorism promote and strengthen the rule of law – as there is a common desire to guarantee the accountability of everyone under law – and extend the possibilities of operational cooperation.¹⁴

Also, representatives of Eurojust participate regularly in relevant counter-terrorism international *fora*. In September 2011, upon the recommendation of the EU's Counter-Terrorism Coordinator, Eurojust became a member of the rule of law subgroup of the Global Counter-Terrorism Forum (GTF), created by the USA. Here, Eurojust provides examples of best practice in concrete investigations and prosecutions and of the use of various criminal justice tools. The Eurojust Counter-Terrorism Team participates in all Council of Europe Committee of Experts on Terrorism (CODEXTER) meetings.

Eurojust often drafts articles, published and disseminated worldwide, on its experiences in fighting terrorism. In the framework of the World Justice Project, an independent initiative to strengthen the rule of law worldwide, the Counter-Terrorism Team prepared an article, 'Strengthening Inter-State Cooperation – the Eurojust

¹³ In accordance with article 26a of the Eurojust Decision, Eurojust may conclude agreements with third States and international organisations.

¹⁴ 'List of the working arrangements undertaken between Eurojust and third parties', available at <<http://eurojust.europa.eu/doclibrary/Eurojust-framework/Pages/agreements-concluded-by-eurojust.aspx>>.

Experience', included in the book *Counter-Terrorism: International Law and Practice*¹⁵ as chapter 35 and published in January 2012. The article provides recommendations on how judicial cooperation should be conducted to ensure national and regional security imperatives while respecting the rule of law.

4. EUROJUST'S STRATEGIC APPROACH TO COUNTER-TERRORISM

Eurojust's fight against terrorism is not limited to operational meetings. The Counter-Terrorism Team regularly holds tactical and strategic meetings on terrorism trends. In these meetings, leading magistrates and experts on terrorism legislation within and outside the European Union share their expertise. In preparation for these meetings, a specific international terrorist issue is analysed by Eurojust, often by sending a questionnaire on the issue to national experts and analysing the replies.

Experts on terrorism discuss matters such as the financing of terrorism and the use of the Internet by terrorists. Eurojust's findings are shared with the meeting participants. Experienced practitioners from the countries dealing with the problem under investigation make presentations on the state of play in their countries, the obstacles encountered and best practice. Common issues are identified and resulting information is disseminated to EU decision makers, identifying possible ways to make counter-terrorism coordination more effective.

In March 2007 and in January 2013, Eurojust hosted tactical meetings on countering PKK terrorism. Participants included practitioners from all 27 Member States and the Eurojust contact point in Turkey. Presentations were given by representatives from the Member States as well as Turkey and Switzerland. Norway was represented at the meeting.

Eurojust supported a Danish case, following years of investigation in which the Danish-based Kurdish TV station, ROJ-TV, was prosecuted in 2010 for the promotion of terrorism. This case is the first in which a Danish media organisation was prosecuted on terrorism charges. Eurojust's assistance was needed to promote a common understanding among the involved countries of the specificity of the crime.

The case concerned two broadcasting companies that repeatedly sent out TV programmes via ROJ-TV containing interviews with Kurdistan Workers' Party (PKK) sympathisers and leaders. The PKK is listed as a terrorist organisation by the European Union. These TV programmes were broadcasted between June 2006 and September 2010. These programmes contained on-the-spot reports of fights between Kurds and Turkish authorities and of PKK training camps. ROJ-TV functioned as a mouthpiece for the PKK by calling for participation in terror actions, encouraging viewers to join the PKK and glorifying the PKK's

¹⁵ A. M. Salinas de Frías *et al.* (eds.), *Counter-Terrorism. International Law and Practice* (Oxford: Oxford University Press 2012), 965-989.

actions. The programmes shown on ROJ-TV were produced in Belgium, adding an international element to the case.

During the course of the investigation in June 2009, at the request of the Danish authorities, a coordination meeting was held at Eurojust, with the participation of seven Member States. In addition, to follow the money flow behind ROJ-TV, letters of request were sent to six Member States for information on bank transactions. At the request of Italian authorities, two further coordination meetings concerning this case and other PKK-related cases in other Member States were held in January and June 2012.

The companies were charged with violating article 114e in the Danish Criminal Code for having promoted the work of a group or an association – in this case the PKK/KONGRA-GEL, that commits or intends to commit actions covered by the provisions in the Danish Criminal Code that criminalises terrorism (sections 114, 114a, 114b, 114c and 114d). Both companies were convicted as charged and sentenced to pay 40 day fines (one day fine is equivalent to 65.000 DKK (EUR 8.713)).

Eurojust's annual Strategic Meetings on Terrorism gather each year the EU National Correspondents for Terrorism at Eurojust premises in The Hague. Article 2 of the Council Decision of 20 September 2005¹⁶ obliges these representatives to inform regularly Eurojust of all terrorist activities in their countries, from the first stages of interviewing suspects to the indictment stage. The 2012 Strategic Meeting on Terrorism focused on the phenomenon of the lone individual involved in terrorism ('lone wolf') and social networks in a terrorism context. The results of a questionnaire on this topic were shared and relevant case examples from several Member States and Norway were discussed and presented by practitioners.

In a combined bombing and mass shooting in Norway on 22 July 2011, a lone individual caused the death of 77 people. Investigations were launched into the first major terrorist attack in Europe perpetrated by a single individual and the fourth largest terrorist attack in Europe since World War II.

Eurojust provided valuable assistance with several aspects of this case during the investigation and trial phases. With the involvement of the Liaison Prosecutor for Norway at Eurojust and the Latvian and UK National Desks, banking information was swiftly obtained from Latvia, Antigua and Barbuda. The Polish National Desk made enquiries regarding a letter of request to hear a witness and the Spanish and UK National Desks willingly shared their expertise in handling such a large terrorism case.

¹⁶ Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:253:0022:0024:EN:PDF>>.

Direct contact between the French Desk and the Liaison Prosecutor for Norway contributed to the effective execution of two letters of request to France regarding the identification, location and hearing of a witness. In addition, the Liaison Prosecutor for the USA provided assistance in the execution of an urgent request for the hearing of a witness by videoconference in the USA.

The assistance provided by Eurojust, consisting of continuous facilitation of mutual legal assistance requests and direct personal contacts between Member States and third States through National Desks and Liaison Prosecutors at Eurojust, were valuable components of the international cooperation in this case. The efforts of Eurojust contributed to efficient, effective and time-saving judicial cooperation between competent national authorities.

Court hearings were held in Norway from April to June 2012. On 24 August 2012, the accused was found guilty and sentenced to the maximum prison sentence in Norway, preventive detention for 21 years, with a minimum sentence of 10 years.

The Counter-Terrorism Team's members organise and take part in seminars and workshops, gathering experts in counter-terrorism from Member States and third States. Below, some recent examples.

- The strategic seminar, 'Judicial Cooperation in Criminal Matters between the EU Member States and Southern Neighbours of the EU' (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority and Tunisia), was held in Limassol, Republic of Cyprus, on 4-5 October 2012. The seminar was jointly organised by Eurojust, the Cyprus Presidency of the Council of the European Union, the Attorney General of the Republic of Cyprus and the European Commission (DG Enlargement-TAIEX). The seminar focused on four main areas of judicial cooperation in criminal matters: extradition, mutual legal assistance, transfer of criminal proceedings and transfer of sentenced persons.
- On 11 and 12 December 2012, a practitioners' workshop, co-organised by Eurojust and Europol, reunited counter-terrorism specialists from India and from the European Union. The objective of the workshop was to promote judicial cooperation by defining common interests and reflecting on standards of cooperation. A full day was dedicated to judicial cooperation matters and common counter-terrorism cases. In an attempt to collect pertinent judicial information prior to the debates, Eurojust had disseminated a questionnaire on these matters to the Member States' counter-terrorism authorities.
- A TAIEX event on counter-terrorism, gathering counter-terrorism experts from the Western Balkan countries, took place in The Hague in June 2013. Hosted by Europol, one of its four workshops was chaired by Eurojust. The Counter-Terrorism Team's members presented Eurojust's counter-terrorism products and services.

5. EXCHANGE OF INFORMATION AND EUROJUST'S DELIVERABLES

As mentioned above, the EU National Correspondents for Terrorism are obliged to inform Eurojust of all relevant information concerning prosecutions and convictions for terrorist offences in their countries.¹⁷

Eurojust's Terrorism Convictions Monitor (TCM) was developed on the basis of the input and recommendations of the EU National Correspondents for Terrorism, as well as information extracted from open sources. Since 2008, the TCM provides an overview of terrorism-related judicial developments in Member States, as well as judicial analysis of selected cases. The TCM identifies cases of general interest in the European Union in terrorism matters and best practice through judicial case analyses, and disseminates information on legislative developments.

The TCM also provides practitioners with examples of national judgements that might prove to be useful in another Member State, especially with respect to interpreting EU legislation on terrorism. The TCM is published three times per year, and is available upon request.

Eurojust's Memorandum on Terrorism Financing provides an overview of existing international and EU instruments to counter terrorism financing and Eurojust's added-value in this field, including summaries of relevant Eurojust terrorism financing cases. This Memorandum is updated regularly by the Counter-Terrorism Team and is available upon request.

6. CURRENT CHALLENGES AND INITIATIVES

Eurojust carefully monitors the current security situation in the Sahel, where the interaction of factors such as poverty, social exclusion, economic need and radical preaching can lead to the development of extremism. In his November 2011 discussion paper, the EU Counter-Terrorism Coordinator expressed his concern about links between Al-Qaeda in the Islamic Maghreb (AQIM) and Nigeria's militant Muslim Boko Haram. At the Terrorism Working Party of 27 November 2012, where he presented his annual report on the implementation of the EU Counter-Terrorism Strategy, the EU Counter-Terrorism Coordinator underlined the need to consider the fight against terrorism in the Sahel region as a top priority, given the developments in Mali and the risk of the creation of a terrorist sanctuary.

European internal security is also under threat from jihadists travelling from Europe to Syria and other hotspots in great numbers.

Eurojust is to provide more leadership on the judicial dimension of the fight against terrorism in these regions by making an efficient use of the existing legislation and tools and by supporting and working more closely with third States. Eurojust's goal is to start posting Liaison Magistrates in these key geographic locations as soon as possible to rationalise the work of the Member States.¹⁸

Eurojust will present a report to the European Council by November 2013 on the outcome of its ongoing work on foreign fighters. It regularly holds tactical meet-

¹⁷ See *supra* note 16 (Article 2).

¹⁸ See *supra* section 2.3.

ings on the phenomenon of foreign fighters and returning jihadists. Eurojust's tactical meeting on (aspiring) foreign fighters in Syria took place in June 2013. Concrete and practical information was exchanged, such as experience concerning investigations and prosecutions related to cases on (aspiring) foreign fighters in Syria – and therefore potential returning jihadists to the European Union – and the obstacles encountered in international cooperation in this field. Pertinent input was provided by representatives from several Member States, the USA and Turkey.

In April 2008, to gain common understanding and exchange ideas on how best to proceed, Eurojust held a meeting of US and EU counter-terrorism prosecutors and criminal investigators, during which returning jihadist-related information was exchanged, including methods of operation, obstacles and best practice.

Operation 'KARI' is a successful case of international coordination by Eurojust regarding returning jihadists. The case dealt with a cell of individuals based in Brussels and suspected of terrorist activities related to armed jihad in Iraq, with targets in Belgium and Iraq. After being recruited, the jihadists would infiltrate Iraq. Their resources came from manufacturing and trade in false documents and other types of fraud. They also received financial support from a high-level international network. The organisation even created a 'social welfare' system for the families of wounded or dead jihadists.

The investigation started in July 2005 with two reports from the Belgian Intelligence Service, followed by a series of investigative measures: telephone interceptions, cross-border observations and financial investigations. At a very early stage, the need for international cooperation became clear, as sixteen countries were involved, several of them third States (Algeria, Morocco, India, Kenya, etc.).

In addition to the difficulty of coordinating a terrorism case with so many involved countries, the classification of documents from the US Army in Iraq posed additional challenges. Twenty-two requests for mutual legal assistance were issued by the involved countries. Eurojust held a coordination meeting for the purposes of drafting requests and fast tracking. Eurojust also facilitated cooperation with the involved Mediterranean countries (MEDA countries). During the judicial phase, Eurojust solved several problems related to evidence gathered abroad. These problems concerned requests to dismiss witness statements as evidence because torture was allegedly involved. In addition, results from MLA-requests were dismissed as evidence because the execution documents were not accompanied by an affidavit.

The successful outcome of the case resulted in a number of arrests being made, three jihadists extradited from Iraq and the organised group in Brussels, with high-level contacts in Turkey, Algeria and Tunisia, disrupted.

7. CONCLUSION

The diverse agreements and the ways of collaboration between Eurojust and third countries or international bodies in the field of counter-terrorism promote the rule of law at both the national and international level. By working together, the European Union and the third States underline their common desire to guarantee the accountability of everyone under the law.

As a key player in the global fight against terrorism, Eurojust also acts as an international interlocutor within the European Union and works closely with third party States.

Over the past ten years Eurojust, the European Union's Judicial Cooperation Unit, has unquestionably added value to international cooperation efforts by efficiently countering transnational terrorism on operational, tactical and strategic levels. Eurojust promotes the exchange of information on terrorism matters among the Member States and with third States and contributes to paving the way towards clear global policies by identifying loopholes and discrepancies and proposing solutions.

Aiming to reduce the complexity of the cooperation procedures and to empower the exchange of information on terrorism matters, Eurojust intends to continue building coalitions with non-European countries and international organisations. Continued efforts are to be made to establish agreements with other countries where potential terrorism risks are high.

The international nature of terrorism calls for an international response and Eurojust will maintain its efforts to ensure an effective, transnational and rule of law based response to terrorism.

THE PROTECTION OF FUNDAMENTAL RIGHTS AND THE EXTERNAL DIMENSION OF THE EU'S FIGHT AGAINST TERRORISM: CURRENT AND FUTURE CHALLENGES AHEAD OF THE EU ACCESSION TO THE ECHR

Maria O'Neill¹

1. INTRODUCTION

The European Union has a developing law enforcement legal framework, which, post 9/11, was adapted, and further developed to combat terrorism. Less well developed are the EU's provisions on fundamental rights. With the passing of the Lisbon Treaty in December 2009 the EU has put its policing and justice provisions on a more secure legal basis, and upgraded the legal status of the EU Charter of Fundamental Rights.² In addition, the EU was given authority by its member states to accede to the European Convention on Human Rights.³ The role of the now renamed Court of Justice of the EU (ECJ) was also extended to cover cross border law enforcement and criminal justice provisions, with the ECJ to gain its full adjudicative role at the end of a five year phase in period, which is to expire in December 2014.⁴ At the same time the EU sees internal and external security as being 'inseparable'.⁵

The EU will be seeking to develop further the external dimension of the EU's fight against terrorism. These anticipated developments will need to be progressed carefully, as the EU's constitutional structure, which reflects the level of sovereignty which has been transferred by its member states to the EU, has some built in rigidities. These rigidities will need to be negotiated carefully in order to develop a legally robust external counter-terrorism legal framework, which will not only address the needs of effective counter-terrorism provisions, but will also stand up to detailed legal examination in the context of due process and fundamental rights, when the suspected terrorist is brought to trial.

¹ University of Abertay Dundee.

² Article 6.1 TEU.

³ Article 6.2 TEU.

⁴ This phase in period is five years after the coming into force of the Lisbon Treaty, as provided in Protocol (No 36) on Transitional Provisions, Article 10.1 and 3 attached to the post Lisbon TEU and TFEU.

⁵ 'Europe in a globalised world – the external dimension of freedom, security and justice' in 'The Stockholm Programme – An open and secure Europe serving and protecting citizens', OJ [2010] C 115/01, 4.5.2010, section 7, third paragraph.

2. THE EU'S CONSTITUTIONAL STRUCTURE

It is important to point out, before examining the subject matter of this paper, that the EU operates only on the basis of conferral. Article 4.1 TEU expressly states that 'competences not conferred upon the Union in the Treaties remain with the Member States,' with Article 5 TEU post-Lisbon, and the long standing principle of subsidiarity, which national parliaments have a role in protecting,⁶ further elaborating on this principle. This is important, as counter-terrorism is an emotive issue. Even if a particular measure is seen as being the right thing, and a good thing to do, unless the EU actually has competence to deal with this matter, then the issue must be addressed by the individual member states of the EU, whether individually or collectively. This precise question has arisen before the ECJ, with AG Léger in *European Parliament v Council*⁷ referring to the General Court ruling in the *Kadi* 2010 judgment,⁸ pointing out that the suppression of 'international terrorism did not constitute an objective of the [then] EC.'⁹ The same applies post-Lisbon.

The EU also needs to remember that many individual EU member states maintain their own strategic and security networks, whether for historical reasons, or on the basis of current threat assessments. These would be based on the 'well-trodden path' concept favoured by law enforcement agencies, which take time to build up trust and mutual respect with their counterparts in another country. The EU needs to take the potential, but perhaps otherwise unpublished, existence of these bilateral relationships into account when developing its own initiatives. Equally the EU would need to develop some clarity as to whether the proposed measure is in fact a development policy matter, a CFSP matter, or a cross-border law enforcement matter, which would be properly covered under AFSJ provisions, and legislate accordingly. As stated in the *Kadi* 2008 ruling¹⁰ this decision 'must rest on objective factors which are amenable to judicial review.'¹¹ This approach was reaffirmed in the *Kadi* 2013 decision,¹² which stated that EU law required 'respect for fundamental rights and the guarantee of independent and impartial judicial review, including review of European Union measures based on international law.'¹³

Given these constitutional constraints, the difficulty in being able to 'clearly distinguish between internal, external and national security' becomes highly perti-

⁶ Protocol No 2 on the application of the principles of subsidiarity and proportionality attached to the post-Lisbon TEU and TFEU, Article 6.

⁷ ECJ, Case C-317/04 and C-318/04 *European Parliament v. Council* [2006] ECR I-472.

⁸ GCEU, Case T-85/09 *Yassin Abdullah Kadi v. Commission*, [2010] ECR 0000. See further J. Larik's contribution in this volume.

⁹ E. Herlin-Karnell, *The Constitutional dimension of European Criminal Law* (Oxford: Hart Publishing Ltd. 2012) p.76.

¹⁰ ECJ, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, [2008] ECR I-6351.

¹¹ *Ibid.* paragraph 182 of the ruling, relying on, *inter alia*, ECJ, Case C-440/05 *Commission v Council* (Ship Source Pollution) [2007] ECR I9097, para. 61.

¹² ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission, Council of the European Union, United Kingdom of Great Britain and Northern Ireland v. Yassin Abdullah Kadi*, [2013] ECR 000.

¹³ *Ibid.* at paragraph 88 of the ruling.

ment.¹⁴ While counter-terrorism specialists might be prepared to be inclusive in their threat assessment, the ECJ, which by the end of 2014 will have acquired its full adjudicative powers over ex. AFSJ matters, may well draw the line more narrowly. Court cases lost on the basis of internal EU constitutional issues jeopardising external counter-terrorism relations with third countries need to be avoided. These cases will be sufficiently problematic without being subject to challenges similar to those which arose in the pre-Lisbon SALW case.¹⁵

The SALW case¹⁶ arose in the context of the constitutional split between the then EC and the CFSP, with the pre Lisbon Article 47 TEU favouring the EC. The issue here was the dividing line between EC development policy in West Africa and a programme to deal with small arms and light weapons. Post-Lisbon this boundary line is policed by Article 40 EU, which requires a strict separation between TFEU policy areas, which now includes both development policy and ex. EU criminal law and police cooperation matters (with these two policy areas operating following different voting procedures), and the CFSP. This Article 40 EU boundary line has been described by Cremona as being a 'Chinese wall'.¹⁷ The increase in ECJ powers over ex. EU criminal law and police co-operation matters will add to the need to be careful in negotiating EU constitutional boundaries. In addition, Article 75 TFEU appears to form a '*lex specialis*' in the context of counter-terrorism financing provisions.¹⁸ A particular problem that is likely to arise is the definition of 'internal Member State Security' as opposed to EU 'internal' security.¹⁹ The same point could be made vis-à-vis EU 'internal' and 'external' security, and again in the distinction between EU 'external' security and the security of a third country, the latter, according to AG Léger,²⁰ not being an EU competence.

3. THE EU'S COUNTER-TERRORISM POLICY

The general discourse on counter-terrorism is shifting from 'the production of state security'²¹ to 'the provision of individual or human security'.²² This shift in emphasis will have an impact on the future developments of the EU to become even more focused on the protection of the individual. This change of focus of the security discourse will have an impact on the design and implementation of the EU's security framework. This focus on protecting individuals is reflected in international

¹⁴ E. Herlin-Karnell, *supra* note. 9, p. 85.

¹⁵ ECJ, Case C-91/05 *Commission v. Council* (SALW) [2008] ECR I-03651 (ECOWAS).

¹⁶ *Ibid.*

¹⁷ M. Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process,' in A. Dashwood and M. Maresceau, *Law and Practice of EU External Relations; Salient Features of a Changing Landscape*, (Cambridge: Cambridge University Press, 2008), p. 45.

¹⁸ C. Murphy, *EU Counter-terrorism law, pre-emption and the rule of law*, (Oxford and Portland, Oregon: Hart Publishing, 2012) p. 129.

¹⁹ E. Herlin-Karnell, *supra* note 9, p. 228.

²⁰ *Supra* note 7.

²¹ C. Hillebrand, *Counter-terrorism Networks in the European Union; Maintaining Democratic Legitimacy after 9/11* (Oxford: Oxford University Press, 2012), p. 23.

²² *Ibid.* p. 24.

human rights law, which places on states 'a right and a duty to protect individuals, both their citizens and others, from violence, including terrorist attack.'²³ There is therefore an obligation on states to 'take effective counter-terrorism measures.'²⁴ These measures must be taken while respecting human rights. Scheinin, has noted that 'in the fight against terrorism fair trial rights have not always been respected.'²⁵ The new role of the ECJ, the upgrade in status of the EU Charter of Fundamental Rights, and the accession of the EU to the ECHR all become highly relevant in this context. This role is clearly to be seen in the recent *Kadi* 2013 ruling,²⁶ and the earlier *ZZ* ruling.²⁷ Along with its member states, the EU has taken measures to develop cross-border, internal to the EU, counter-terrorism provisions. The EU is also an active external actor for the countering of terrorism. The EU also has, all be it to date undeveloped in this context, provisions on fundamental and human rights. The 1970 case of *Internationale Handelsgesellschaft*²⁸ made clear statements that the 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.' The *Nold*²⁹ case, in 1973, pointed out that the Court was 'bound to draw inspiration from constitutional traditions common to the Member States,' and 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.' This would include the European Convention on Human Rights (ECHR), which 'was specifically mentioned in *Rutili*³⁰ and the Court has attributed specific significance to it since.'³¹

The counter-terrorism policy of the EU, which provides a coherent framework for discussions in this area, as set out in the EU's Counter-terrorism strategy³² is comprised of four pillars; prevent, protect, pursue and respond. Following the life cycle of a potential terrorist act, 'prevent' focuses on issues such as radicalisation and recruitment to terrorist organisations. 'Protect' would be a traditional activity of the police and intelligence services, securing vulnerable assets, and disrupting a terrorist act which is being planned from taking place. After the terrorist incident 'pursue' focuses on the activity of police and investigating magistrates in collecting evidence and detaining suspects. 'Respond' would deal with the immediate aftermath of a terrorist incident when ambulances and fire brigades are deployed to deal with the dead and injured.

²³ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/61/267, 16 August 2006, Martin Scheinin, submitted in accordance with Commission on Human Rights resolution 2005/80, para. 10.

²⁴ *Ibid.*

²⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/63/223, 6 August 2008, Martin Scheinin.

²⁶ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Yassin Abdullah Kadi*, *supra* note 12.

²⁷ ECJ, C-300/11 *ZZ* [2013] *ECR* I-000.

²⁸ ECJ, Case 11/70, *Internationale Handelsgesellschaft* [1970] *ECR* 1125, para. 4.

²⁹ ECJ, Case 4/73, *Nold* [1974] *ECR* 491, para. 13.

³⁰ ECJ, Case 36/75 *Rutili* [1975] *ECR* 1219, para. 32.

³¹ J. J. Rijpma and M. Cremona, 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law', *EU Working Papers*, Law, Florence, 2007/01.

³² Council of the EU; The European Union Counter-Terrorism Strategy, Brussels, 30 November 2005, 14469/4/05.

Based in different EU policy areas and different parts of its legal framework, these all pose different types of challenges. The greater human and fundamental rights challenges are encountered under 'protect' and 'pursue' pillars, which would be the traditional areas of activities of the police, prosecutors and investigating magistrates, and other security personnel. In the context of counter-terrorism, these would usually be the task of law enforcement personnel, and where they exist, member states security or intelligence services. Counter-terrorism can also cover military actors. Different types of terrorist incidents and threats demand different types of responses.

The law enforcement and national security communities have two distinct roles with regard to counter-terrorism. One is the disruption of the crime or terrorist event, and the second is the detection, and eventual prosecution of the suspected criminal or terrorist. These two distinct activities have quite differing levels of engagement with the judicial systems of a member state, and would have distinct consequences for human and fundamental rights. This distinction could have a serious impact on the type of discourse to be developed with third states. The 'prevent' and 'pursue' aspects of the EU counter-terrorism policy are also restricted by the provisions of the Treaties, as neither full, nor shared sovereignty in either of these areas have been transferred by the individual EU member states to the EU.

While it is conceivable that the EU, with the consent of its member states, and deploying their resources, might want to activate a military response to a terrorist threat, as is the case with Operation Atlanta off the coast of Somalia, this type of activity remains, post Lisbon, intergovernmental, in the Common Foreign and Security Policy (CFSP), sometimes referred to as the European Security and Defence Identity (ESDI). This is not part of the supranational legal framework set out by the post-Lisbon Treaty on the Functioning of the European Union (TFEU), and is therefore not judiciable by the Court of Justice (ECJ). CFSP military activities, and the EU's Security Sector Reform (SSR)³³ programmes in third countries, are outside the scope of this paper.

The EU does have some limited competence in the context of counter-terrorism, such as the express reference to counter-terrorism in Article 75 TFEU in the context of its financing, and the freezing of assets which might be used for terrorism, and the more generally phrased provisions in Article 215 TFEU, which deals with the 'interruption or reduction.. of economic and financial measures' with non-EU member states. Any competence that the EU does have, either through these specific treaty provisions, or through other cross-border justice and law enforcement provisions, are circumscribed by a number of key treaty provisions, in particular Article 4.2 TEU,³⁴ which is reinforced by Article 72 TFEU, which provides that the EU will 'not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal secu-

³³ OECD, *DAC Guidelines and Reference Series*, 'Security System Reform and Governance', *A DAC Reference Document*, (Paris: OECD 2005) 20.

³⁴ Article 4.2 TEU provides that the Union will respect member's 'essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

rity.' Internal security would include the policing aspects of counter-terrorism. However, many national resources, such as security or intelligence services, are not at the disposal of the EU, under Article 73 TFEU. In the counter-terrorism *Kadi* 2010 judgment the General Court warned against excessive use of the EU's flexibility clause, post-Lisbon, now contained in Article 352 TFEU, as such use would be subject to judicial review.³⁵ Equally any interpretation of the treaties which would undermine the constitutional structure of the EU would fall foul of the Ship Source Pollution test,³⁶ which focused on the protection of the three pillar structure of the EU under Article 47 TEU, now Article 40 TEU, post-Lisbon.

4. THE EU INSTITUTIONAL ACTORS IN THE FRAMEWORK OF EU COUNTER TERRORISM AND THE EMERGING EXTERNAL DIMENSION

The EU's counter-terrorism strategy is spread across the EU institutional and agency framework, varying from anti-radicalisation education provisions, in its 'prevent' pillar, to military and quasi-military responses under the Common Foreign and Security Policy.³⁷ In the AFSJ legal framework, in addition to the usual legislative actors, which are more likely to use the special legislative procedure³⁸ than in other areas of EU law, the Committee on Internal Security (COSI committee),³⁹ Eurojust,⁴⁰ Europol⁴¹ and the European Judicial Network in Criminal Matters (EJN-Crime),⁴² are the key actors. The EU's counter-terrorism provisions have been rapidly developing, particularly internal to the EU, and with key strategic alliance partners, since 9/11. More recently the EU has sought to expand its external relations beyond its strategic alliance partners, in particular to its immediate geographic neighbours.

Underpinning the external relations of the EU, generally, has been the codification of the ERTA ruling,⁴³ that the community can 'establish contractual links with third countries over the whole field of objectives defined in ... the Treaty', in the new Article 216 TFEU. In addition the EU has long operated a doctrine of implied parallel powers when it comes to developing its internal policy areas through external activities. This is based on the World Trade Organisation ruling in *Opinion*

³⁵ GCEU, Case T-85/09, *Yassin Abdullah Kadi supra* note 8.

³⁶ ECJ, Case C-440/05 *Commission v. Council* (Ship Source Pollution) [2007] ECR 2007 I-09097, para. 50 et. seq.

³⁷ For a full analysis of these legal provisions see M. O'Neill, *The Evolving EU Counter-terrorism legal provisions*, (Routledge 2012).

³⁸ For example, under Article 89 TFEU.

³⁹ Article 71 TFEU.

⁴⁰ Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ [2009] L 138, 04/06/2009, p. 14.

⁴¹ Council Decision 2009/371/JHA establishing the European Police Office, OJ [2009] L121/37.

⁴² Council Decision 2008/976/JHA on the European Judicial Network, OJ [2008] L 348/130, repealing and replacing Joint Action 98/428/JHA, OJ [2008] L 191, 07/07/1998, p. 4.

⁴³ ECJ, Case 22/70 *Commission v. Council* [1971] ECR 263, para. 14.

1/94,⁴⁴ and states that whatever powers the EU has to operate internally, it can also exercise those powers, but only the extent of those internal powers, externally. The limitation on EU capacities with regard to counter-terrorism activities internally need to be observed when the EU seeks to act externally. It is to be expected that this doctrine of implied parallel powers will continue post-Lisbon, in the absence of any express Treaty provisions to the contrary. In addition, it would be expected that the EU's checks and balances include the respect of fundamental and due process rights in the externalisation of internal policing and justice EU policies, at least on the part of the EU and its institutional and agency actors. The view of the legal relationship between the UN and the EU in the *Kadi* 2013 ruling is indicative of how ECJ case law is likely to develop in the future. Here, while the ECJ reaffirmed that it was the role of the Security Council to 'determine what constitutes a threat to international peace and security' and to take the appropriate measures,⁴⁵ EU regulation based on the Security Council resolution was not immune from judicial review at EU level.⁴⁶ In fact, the EU implementation of the Security Council resolution required a robust examination.⁴⁷ If the EU implementation of actions of the Security Council are to be subject to judicial review in this way, then the EU's own external relations treaties will equally become subject to supervision by both the ECJ and member state's courts.

The above legal issues notwithstanding, there is an increasing need on the ground to develop external EU counter-terrorism provisions. The EU sees its security as being part of what den Boer refers to as 'a security continuum',⁴⁸ linking activity inside and outside the EU. The EU is seeking to engage with third countries, beyond its traditional strategic alliance partners, in solving its transnational problems, and addressing the objectives set in its internal security strategy.⁴⁹ The Strategy for the External Dimension of JHA (Justice and Home Affairs),⁵⁰ speaks of an increasingly interconnected world, with the need for the EU to make JHA issues a central priority in its dealing with third countries,⁵¹ particularly in order to 'respond to the security threats of terrorism, organised crime, corruption and drugs and to the challenge of managing migration flows.'⁵² This needs to be done in the context of 'strengthening the rule of law, and promoting the respect for human rights and international obligations.'⁵³ The external JHA strategy does say that JHA issues are

⁴⁴ ECJ, *Opinion 1/94* (World Trade Organisation) [1994] ECR 1994 I-05267, para. 72.

⁴⁵ ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Yassin Abdullah Kadi*, *supra* note 12, para. 104.

⁴⁶ *Ibid.* para. 68.

⁴⁷ *Ibid.* para. 119.

⁴⁸ M. Den Boer, 'Soft, Smart and Strategic. The International Dimension of EU Action in the Fight Against Terrorism', in M. Cremona, J. Monar and S. Poli, (eds.), *The External Dimension of the European Union's Area of Freedom, Security and Justice*, (Brussels: College of Europe studies, P.I. E. Peter Lang, 2011, vol.13), p. 341.

⁴⁹ B. Zeilinger, 'The EU's external policy towards Eastern Europe on migration issues', in E. Stadtmüller and K. Bachmann, *The EU's Shifting Borders; Theoretical approaches and policy implications in the new neighbourhood* (Abington: Routledge, 2012), p. 64.

⁵⁰ Council of the European Union, 'A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice', Brussels, 30 November 2005, 14366/3/05.

⁵¹ *Ibid.* para. 1.

⁵² *Ibid.*

⁵³ *Ibid.*

not 'dealt with as consistently as they might be.'⁵⁴ These developments will increasingly pose challenges for the maintenance of EU fundamental rights protection, at least to the extent of the activities of the EU through its institutions and agencies.

Counter-terrorism activity within the EU has increased rapidly in recent years. Despite some academics claiming that little is being done in the area of counter-terrorism at an EU level, Hillebrand is able to report that 'Europol's Serious Crimes Department hosts a permanent Counter-terrorism Unit, comprising fifty CT experts', with counter-terrorism spanning 'a wide field of activities.'⁵⁵ It has to be assumed, without gaining access to classified materials, that a substantial amount of work is in fact being done for that level of resourcing. It is to be expected that once the legal and operational frameworks are put in place, there will be a similar increase in volume of counter-terrorism activity in the EU's external relations with third countries. The EU's institutions and agencies have already started developing the external legal and operational framework in this area.

5. EXTERNAL RELATIONS AND DATA AND INTELLIGENCE ISSUES

In 2000, the Council authorised the Director of Europol to 'enter into negotiations on agreements with third States and non-EU related bodies.'⁵⁶ The EU also put in place in 2009 'rules governing Europol's relations with partners,' which includes not only third states and organisations, but also other EU bodies, with these rules also governing the 'exchange of personal data and classified information.'⁵⁷ However, actually entering such agreements is a problematic process. In addition the myriad of issues surrounding the handling of classified material,⁵⁸ data protection measures⁵⁹ and general security measures for data processing, will need to be addressed. The Stockholm Programme called for 'a framework model agreement consisting of commonly applicable core elements of data protection' to be

⁵⁴ Ibid. para. 13.

⁵⁵ C. Hillebrand, *supra* note 21, p. 77.

⁵⁶ Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU related bodies, *OJ* [2000] C 106/1, 13/04/2000.

⁵⁷ Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information *OJ* [2009] L 325/6, 11/12/2009.

⁵⁸ The EU's rules on data security are set out in Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, *OJ* [2011] L 141/17, 27/05/2011, while Europol continues to maintain its own, but very similar provisions in Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information, *OJ* [2009] L 332/17, 17/12/2009.

⁵⁹ For Europol, provided for by Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), *OJ* [2009] L 121/37, 15/05/2009, for Eurojust by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, *OJ* [2009] L 138/14, 4.6.2009, and for the balance of the AFSJ by Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, *OJ* [2008] L 350/60, 30.12.2008. See further on this M. O'Neill, 'The Issue of Data Protection and Data Security in the (Pre-Lisbon) EU Third Pillar,' 6(2) *Journal of Contemporary European Research* 2010, pp. 211-235.

created.⁶⁰ The lack of adequate data protection measures has already proven a stumbling block in the development of relations with Russia,⁶¹ with adequate data protection provisions being seen as a pre-condition for any external law enforcement developments. In addition, as Hillebrand points out, the SIS II legislation prohibits the transfer of intelligence 'to third countries'.⁶² The transfer to international organisations is also prohibited.⁶³ Perhaps more surprisingly, the Dutch submissions to a House of Lords enquiry were more concerned about the 'possibility of such information falling into the hands of [presumably their own] security services, because this meant losing control of how the information was used'.⁶⁴ The issue of the control over shared intelligence is a long standing one. While some would claim that there is a 'general principle or convention that intelligence information received ... will not be released... or otherwise used without the consent of the state supplying it',⁶⁵ and this general principle is written into EU cross border law enforcement documentation, for example Article 14.6 of the Europol Council Decision,⁶⁶ the actual legal status of this principle has been brought into question.

The recent UK case of *Binyam Mohamed*, at both the Queen's Bench Division level, and before the Court of Appeal, puts limits on the principle of control over intelligence in one EU member state. Dealing with evidence from the CIA about activities at Guantanamo Bay, the Court pointed out that '[c]hampioning the rule of law, not subordinating it, is the cornerstone of democracy'.⁶⁷ The court was prepared to limit the 'principle of control over intelligence', however none of the material to be released in this case would 'identify any agent, facility, secret means of intelligence gathering, or any other matter relating to intelligence.' The court went on to state that '[n]o court would contemplate putting a matter of that kind into the public domain'.⁶⁸ On appeal, the UK Court of Appeal held that it was for the court, and not the executive, to decide what material was to be redacted from a published court judgment, and that 'only in rare and extreme circumstances should the reasoning in the judgment which led the court to its conclusions be redacted'.⁶⁹ These

⁶⁰ The Stockholm Programme, *supra* note 5, section 7.4., 'Agreements with third countries', second paragraph, p. 35.

⁶¹ Commission staff working document accompanying the communication from the Commission to the Council - Review of EU-Russia relations pursuant to conclusions of the Extraordinary European Council of September 1, 2008 {COM(2008) 740 final}, SEC(2008) 2786, para. 73.

⁶² C. Hillebrand, *supra* note 21, p. 74.

⁶³ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ [2007] L 205/63, Article 54.

⁶⁴ C. Hillebrand, *supra* note 21, p. 74, citing House of Lords, *Schengen Information System II (SIS II) Report with Evidence, Report of Session 2006-07, 11 June 2008*, (London: House of Lords), 2008.

⁶⁵ *Ibid.*, p. 132.

⁶⁶ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ [2009] L 121/37, 15/5/2009.

⁶⁷ QBD UK, *Regina (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* (Guardian News and Media Ltd and others intervening) [2009] 1WLR 2653, Thomas LJ at para. 73.

⁶⁸ *Ibid.* Thomas LJ para. 74.

⁶⁹ CoA UK, *Regina (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* (Guardian News and Media Ltd and others intervening), [2011] QB 218, para. 1 of the summary to the judgment of the Court of Appeal, Lord Judge CJ, Lord Neuberger of Abbotsbury MR, Sir Anthony May P. presiding.

issues are highly relevant in the context of cross border counter-terrorism operations generally, and in particular with countries which may not share the same police practices, security classification systems, or have in place systems for effective judicial review of security agencies activities as exist, at least in some countries, within the EU.

A similar approach to the UK in *Binyam Mohamed* can be seen in the *Kadi* 2013 ruling by the ECJ, and the earlier *ZZ* ruling.⁷⁰ The *Kadi* 2013 ruling reaffirmed the *Kadi* 2005 ruling that 'the review of lawfulness should be a full review, extending, subject only to confidentiality requirements relating to public security, to the information and evidence relied on against' in that case, Mr Kadi.⁷¹ The *ZZ* ruling,⁷² which involved the application of Directive 2004/38⁷³ had made clear⁷⁴ that 'the mere fact that a decision concerns State security cannot result in European Union law being inapplicable.' *ZZ* held that it was up to the competent national authority to prove, before the national courts, that there were security concerns that prevented full disclosure, and that there was to be no presumption 'that the reasons invoked by the national authority exist and are valid.'⁷⁵ *ZZ* went on to say that⁷⁶ the accused must be informed of the grounds of the decision against him, in a way which takes into account 'the necessary confidentiality of the evidence'. In addition the national court can draw 'the appropriate conclusions from any failure to comply with that obligation to inform him.' As the EU internal security provisions grapple with the new reality of adjudication by the ECJ, in light of EU charter rights and the ECHR, the issue then arises as to how to address these issues from the perspective of the EU's external security provisions.

The developing of an external security dimension need to accommodate the evolving fundamental and due process rights which are being developed within the EU. The demand to develop these external relations are strong, and encompass a number of different regions. In the context of North Africa, Den Boer speaks about the EU being able to offer 'the exchange of strategic intelligence for anti-terrorism purposes,' particularly if the North African states adopt the Euro-Mediterranean Code of Conduct on Countering Terrorism, 'cooperation in the fight against illegal immigration and trafficking in human beings,' and the development of answers to deal with 'transit-migration from sub-Saharan Africa.'⁷⁷ These are clearly issues of relevance to the EU. The issue of fundamental/human rights and due process

⁷⁰ ECJ, C-300/11 ZZ [2013] ECR I-000.

⁷¹ ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Yassin Abdullah Kadi*, *supra* note 12, para. 85.

⁷² ECJ, C-300/11 ZZ, *supra* note 27.

⁷³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance)

OJ [2004] L 158, 30/04/2004, p. 77, which puts limits on the right of entry and residence on the grounds of public policy, public security and public health, at Chapter VI.

⁷⁴ ECJ, C-300/11 ZZ, *supra* note 27, para. 38.

⁷⁵ *Ibid.* paras 61 and 62.

⁷⁶ *Ibid.* para. 68.

⁷⁷ M. Den Boer, *supra* note 48, p. 355.

rights in third countries will be a key issue, separate from the concerns with the 'security' side of the intelligence gathering and law enforcement. As Wolff, writing in the context of the Euro-Mediterranean partners, pointed out, the lack of 'independent judiciaries and police forces which respect human rights' requires Euro-Mediterranean partners to 'put in place the necessary institutions' if the EU is to effectively externalise its JHA activities.⁷⁸ Cardwell refers to the 'double-edged nature of the EU's engagement with the Mediterranean partners, especially post 9/11,' with the drive to 'secure cooperation on crime and terrorism despite the Barcelona Process' emphasis on 'encouraging reform.'⁷⁹ It does have to be pointed out that the Barcelona signatories undertook, under the heading of 'political and security partnership' to 'refrain from interference in a partner's internal affairs,' while at the same time to 'strengthen co-operation in combating terrorism.'⁸⁰ The EU's Counter-Terrorism Strategy, for its part, states that it 'is based on respect for human rights and international law.'⁸¹ This leads to a dilemma for the EU, and not just in the context of Euro-Mediterranean countries, with which it wishes to pursue a strategy 'in which it seeks cooperation in the fight against terrorism with law enforcement agencies that do not enjoy full independence from executive power, and do not apply basic principles of justice.'⁸²

Some of the EU's likely counter-terrorism partner third countries are members of the Council of Europe (CoE)⁸³ and the Organisation for Security and Cooperation in Europe (OSCE).⁸⁴ Both of these organisations are key players in the development of crime control policies and protocols. Others, in particular the North African and Middle Eastern member of the ENP/ Euro-Med,⁸⁵ are not. An interesting development in the Euro-Med region, however, is that in addition to relations with the EU, Algeria, Egypt, Morocco and Tunisia,⁸⁶ have now obtained Partner for Cooperation status at the OSCE. The OSCE has had a significant impact in Eastern Europe and Western Asia, post the break-up of the USSR in the context of the modernisation of police forces and the role of armies in democratic states. However, while these relationships may assist jurisdictions in transition, that transition is not sufficiently far advanced to enable unproblematic cross border protect or pursue counter-terrorism operations. Again in the context of the Mediterranean, the EuroMed Justice III project, which is running from 2011-2014, is focusing on supporting the development of the partners' capacity and backing the modernisa-

⁷⁸ S. Wolff, *The Mediterranean Dimension of the European Union's Internal Security* (Basingstoke: Palgrave Macmillan 2012) p. 196.

⁷⁹ P. J. Cardwell, *EU external relations and systems of governance, the CFSP, Euro-Mediterranean partnership and migration* (Oxford, Routledge, 2009) p. 137.

⁸⁰ F.S. Hakura, 'The Euro-Mediterranean policy: the implications of the Barcelona declaration', 34 *Common Market Law Review* 1997, pp. 337-366, p. 343/4.

⁸¹ Report on the Implementation of the European Security Strategy - Providing Security in a Changing World - Brussels, 11 December 2008, S407/08, at I. *Global Challenges and Key Threats*, 'Terrorism and Organised Crime', p. 4.

⁸² S. Wolff, *supra* note 78, p. 150.

⁸³ See at <<http://www.coe.int>> Last accessed 1/8/13.

⁸⁴ See at <<http://www.osce.int>> Last accessed 1/8/13.

⁸⁵ In particular, Algeria is a member of the Euro-Med arrangements, but not those of the ENP.

⁸⁶ Along with Jordan and Israel.

tion of justice, to include improved access. The EuroMed Police III,⁸⁷ also running from 2011 to 2014,⁸⁸ is focusing on enhanced cooperation on counter-terrorism, trafficking in human beings, money laundering, drug trafficking, financial crimes, weapons trafficking, to include CBRN,⁸⁹ cyber-crime and new forms of criminal offences.⁹⁰ In this authors view, while these programmes are commendable, the current and short to mid-term future situation still poses challenges for cross border operations which would withstand judicial examination within the EU.

6. FUNDAMENTAL RIGHTS AND DUE PROCESSES

The issue of fundamental rights arose early in the EU's development. Once it had established the 'principle of primacy of Community law over Member State constitutions' it was obliged, largely as a consequence of pressure from the German Constitutional court 'to commit itself to protecting fundamental rights.'⁹¹ The actual quality of that protection may have been questionable in the early years. However there has been substantial jurisprudence, in policy areas other than AFSJ, on this topic. The ECJ is just beginning to adjudicate on the issues arising directly from the ex. PJCCM policy area. Once the ECJ obtains its full powers over the ex. AFSJ policy area it is to be expected that these EU standards will be applied to PJCCM activities, as a minimum. As Herlin-Karnell states, it is as yet 'too early to talk about an autonomous interpretation.. that fully respects defence rights and for the adequate protection of the individual' in the context of EU criminal law, this being 'work in progress for the EU for a considerable time.'⁹²

Prior to the Lisbon Treaty the EU Charter of Fundamental Rights did not have the same legal status as it does now, post Lisbon. Nevertheless it has already appeared in ECJ rulings. Articles 47 to 49 of the Charter,⁹³ have been said to have 'a huge influence and they set the framework for the EU's action' in the area of criminal law.⁹⁴ It is arguable, given the very poor behaviour in the context of some recent counter-terrorism operations that Articles 1 to 4 of the EU Charter⁹⁵ will also need to be pleaded. Hillebrand refers to trial in Milan, Italy, involving a CIA extraordinary rendition. Italian State Prosecutor Spatero in *Abu Omar* stated that not only is extraordinary rendition 'a serious crime against Italian sovereignty and human

⁸⁷ See at <<http://www.euromed-justice.eu/>>. Last accessed 1/8/13.

⁸⁸ The beneficiaries of Euromed Police III are the People's Democratic Republic of Algeria, the Arab Republic of Egypt, Israel, the Kingdom of Jordan, Lebanon, (suspended, the Syrian Arab Republic), the Kingdom of Morocco, the Palestinian Authority and the Republic of Tunisia.

⁸⁹ Chemical, Biological, Nuclear and Radiological attack.

⁹⁰ See at <http://enpi-info.eu/mainmed.php?id=392&id_type=10>. Last accessed 1/8/13.

⁹¹ G. Martinico and O. Pollicino, *The Interaction between Europe's Legal Systems; Judicial Dialogue and the Creation of Supranational Laws* (Northampton; Edward Elgar 2010) p. 150.

⁹² E. Herlin-Karnell, *supra* note. 9, p. 41.

⁹³ EU Charter of Fundamental Rights, Article 47 Right to an effective remedy and to a fair trial, Article 48 Presumption of innocence and right of defence, Article 49 Principles of legality and proportionality of criminal offences and penalties.

⁹⁴ E. Herlin-Karnell, *supra* note. 9, p. 38.

⁹⁵ EU Charter of Fundamental Rights, Article 1 Human dignity. Article 2 Right to life, Article 3 Right to the integrity of the person, and Article 4 Prohibition of torture and inhuman or degrading treatment or punishment.

rights' but that it also 'seriously damaged counter-terrorism efforts in Italy and Europe.' Had the rendition not taken place Abu Omar would have been 'in prison, subject to a regular trial, and we [the Italians] would have probably identified his other accomplices.'⁹⁶ This is not likely to be the last case of its type. The EU needs to be clear on the standards required when co-operating with the EU in cross border 'protect' or 'pursue' operations. From a law-enforcement/counter-terrorism perspective, a little more effort, in ensuring that an operation is conducted properly, will lead to greater benefits for all parties. Unilateral action by a third state would, of course, be a matter for the national law of the particular EU member state affected.

Also worth pointing out is Article 20 EU Charter of Fundamental Rights; Equality before the law. This, together with the line of cases including *Simutenkov*⁹⁷ and *Pokrzepowicz-Meyer*⁹⁸ will be key in this area. Here a Russian footballer and a Polish language translator (pre-accession) both benefited from EC external agreements on the basis of direct effect. Once a bi-lateral cross-border law enforcement or counter-terrorism agreement is signed with, for example, Algeria,⁹⁹ if the provisions are sufficiently precise then an Algerian national can claim the same rights of protection as an EU national. In the absence of such a bi-lateral agreement, it is highly doubtful that the EU courts would, in any event, tolerate any form of torture or degrading treatment on the basis of the shared constitutional traditions of the EU member states.

The key counter-terrorism case to date is the ECH ruling, in Grand Chamber, in the *Kadi* 2005 ruling.¹⁰⁰ Here Advocate General Maduro stated that 'extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions,' however 'where the risks to public security are believed to be extraordinarily high' there is a requirement on the courts to 'fulfil their duty to uphold the rule of law with increased vigilance.'¹⁰¹ This would be a clear indication as to the approach of the ECJ in post-Lisbon cross border law enforcement and counter-terrorism provisions. Guild is of the view that the *Kadi* 2005 ruling implied that the EU was changing its role as a security actor, from one which was 'unaccountable to the individual to one which must justify its actions where those actions harm the individual.'¹⁰² As stated by Herlin-Karnell, 'the right to judicial protection is one of the general principles of law stemming from the constitutional traditions of member states as is also clear from Article 19 TFEU.'¹⁰³ The recent *Kadi* 2013 ruling has stated that these due process rights include, under Article

⁹⁶ C. Hillebrand, *supra* note 21, p. 131, citing C. Whitlock, 'CIA ruse is said to have damaged probe in Milan', *Washington Post*, 6 December 2005.

⁹⁷ ECJ, Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] ECR 2005 I-02579.

⁹⁸ ECJ, Case C-162/00, *Land Nordrhein-Westfalen v. Beata Pokrzepowicz-Meyer*, [2002] ECR 2002 I-01049.

⁹⁹ A country in the news at the time of writing in the context of counter-terrorism.

¹⁰⁰ ECJ, Joined Case C-402/05 and C-415/05, *Yassin Abdullah Kadi*, *supra* note 10.

¹⁰¹ At para. 35 of his opinion.

¹⁰² C. Hillebrand, *supra* note 21, p. 168, referring to E. Guild, (2008) 'The Uses and Abuses of Counter-Terrorism Policies in Europe: the Case of the "Terrorist Lists"', 46(1) *Journal of Common Market Studies* 2008, pp. 173-193.

¹⁰³ C. Hillebrand, *supra* note 21, p. 47.

41(2) of the Charter 'the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality' such as in the interests of national/EU security. In addition Article 47 of the Charter requires the person concerned to 'be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons.'¹⁰⁴ This right however can be limited, under Article 52(1) of the Charter,¹⁰⁵ 'subject to the principle of proportionality' if it is necessary to do so to 'genuinely (meet) objectives of general interest recognised by the European Union' such as EU/state security. However, as can be seen by the *Kadi* 2013 ruling and the *ZZ* case, these state security exceptions are now very narrowly defined. The issue of whether there has been any 'infringement of the rights of the defence and of the right to effective judicial protection' must be examined in each particular case.¹⁰⁶

Adding to the complexity of this subject matter are the CoE provisions on the 'minimum standards which police officers from all European Countries have to respect when they cooperate.'¹⁰⁷ It would be expected that the European Court of Human Rights (ECtHR) would expect these standards, as a minimum, to operate in the context of any cases brought before it. In addition, the likely consequences of the *Simutenkov*¹⁰⁸ case law need to be addressed, from the outset, by the EU in its negotiations with third countries, not just as statements of best practice, but as legally binding principles. These principles will bind the EU member states, the EU institutions and agencies, and have an effect on any internal to the EU terrorism prosecutions, to include issues surrounding admissibility of evidence, etc. They could also give rise to damages actions against EU based security and law enforcement actors, to the extent that those actors come within the EU legal framework. Member state security actors not subject to the EU law enforcement framework, such as intelligence services, may well become subject to the ECHR provisions under national legal provisions.

There is much criticism of the EU's ability to protect individuals, and its due process rights to date, with many arguing that the security aspect of the Area of Freedom, Security and Justice is more highly developed than either the freedom or justice aspects. Hillebrand, in particular, has argued that there are 'some severe weaknesses concerning the judicial scrutiny of EU-wide CTP.'¹⁰⁹ She further argues that the increased Europeanisation of counter-terrorism policy, and its internationalisation, is leading to 'less stringent' judicial oversight at the EU level in comparison to the oversight being maintained at the member state level.¹¹⁰ This weakness will not go unnoticed at the ECJ level, and it is arguable that the ECJ has started

¹⁰⁴ ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Yassin Abdullah Kadi*, *supra* note 12, para. 100.

¹⁰⁵ *Ibid.* para. 101, referring to ECJ, Case C-300/11 *ZZ*, *supra* note 27, paras 51-53.

¹⁰⁶ *Ibid.* para. 102.

¹⁰⁷ C. Hillebrand, *supra* note 21, p. 163, relying on H. Aden, (2001), 'Convergence of Policing Policies and Transnational Policing in Europe', 9(2) *European Journal of Crime, Criminal Law and Criminal Justice*, pp. 99-112, p. 106.

¹⁰⁸ ECJ, Case C-265/03, *Igor Simutenkov*, *supra* note 97.

¹⁰⁹ C. Hillebrand, *supra* note 21, p. 184.

¹¹⁰ *Ibid.*

to close this gap with the *Kadi* 2013 and *ZZ* rulings. Herlin-Karnell does ask whether the Court's jurisdiction would 'only cover the establishment of enhanced cooperation or does it also cover the actual exercise of such cooperation' such as potential cross border counter-terrorism prevent and pursue operations.¹¹¹ She is of the view that the Court will also claim jurisdiction in the exercise of the cooperation 'as long as the cooperation in question is Treaty-based.'¹¹² Post the two 2013 rulings it is now clear that the ECJ will take the broader of these two options. With formal relations between the EU and third countries needing to be treaty based, and the ECJ anxious to close any perceived legislative gaps the area of law, both internally and externally, is about to undergo rapid development. The legislator has already begun this process post Lisbon, with the enactment of, *inter alia*, the directive on the right to information in criminal proceedings¹¹³ and the directive on victim's rights.¹¹⁴

7. ACCESSION TO THE ECHR

The actual impact of the EU's accession to the ECHR still has to be definitively ruled on by both senior courts, the ECJ and the ECtHR. While the EU's ECJ will be moving into ex. AFSJ matters, essentially for the first time, despite earlier judgments on tangential matters, the ECtHR has been seen to have changed its judicial attitude to the interpretation of the ECHR post its 2004 eastern enlargement. Martinico and Pollicino are of the view that the ECtHR saw itself as a 'school of democracy', and felt obliged to guide and direct those countries which 'were just starting down the road to democracy.'¹¹⁵ The ECtHR therefore became more aggressive in its rulings, requiring the addressee state to make structural adjustments to their national laws and practices, in order to ensure that the problem that had arisen in a particular case would not arise again. While the EU's current eastern neighbours may well be members of the ECHR, it should be noted that potential partner countries in North Africa are not. In the absence of internally motivated reforms, for example, in North Africa, this difference in legal alliances between the EU's potential third country partners will require some differentiation by the EU, its institutions and agencies, in its dealings with partner countries. The drafting of operational manuals, and model legal agreements in a way to address any potential gaps in partner countries legal and security frameworks, to include additional checks and safeguards that need to be put in place before either a strategic partnership or a joint operation is commenced might be a way of addressing some of these issues. These issues would need to be addressed at a Commission/fundamental rights and due process level in anticipation of future transnational counter-terrorism ac-

¹¹¹ E. Herlin-Karnell, *supra* note. 9, p.134.

¹¹² *Ibid.*

¹¹³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ* [2012] L 142/1, 1/6/12.

¹¹⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJ* [2012] L 315/57, 14/11/12.

¹¹⁵ G. Martinico and O. Pollicino, *supra* note 91, p. 164.

tivities. It would be unreasonable to expect operational law enforcement and security actors to deal with the drafting of technical legal documents at the beginning of every cross border operation, which can be put in place, when needed, with considerable speed.

The issue of counter-terrorism measures arose before the ECtHR in the *Branigan* case.¹¹⁶ Here the court ruled that an ECHR contracting state had 'responsibility for "the life of [its] nation",' and it was for that country 'to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency'. The ECtHR went on to say that 'by reason of their direct and continuous contact with the pressing needs of the moment', national courts were 'in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.'¹¹⁷ This line of reasoning would not appear to conflict with AG Maduro's opinion in the *Kadi* case, before the EU's ECJ in Grand Chamber, in his reference to 'extraordinary circumstances',¹¹⁸ discussed above. However, in the absence of these 'extraordinary circumstances', or if there are systemic issues in the legal and practice framework, both courts would be likely to take a dim view of breaches of fundamental/human rights.

It is clear from the study conducted by Martinico and Pollicino that the automatic supremacy of ECHR law is not guaranteed, in the same way as EU law is expressly granted supremacy over member state law. In addition, the ECtHR now appears to be recognising 'the constitutional domestic values of a single Member State,' even when not shared with the rest of the ECHR member states.¹¹⁹ Their study also points out that occasional problems continue to arise with regard to the automatic granting of supremacy to EU law at member state Constitutional Court level. Here the most senior judges of a particular country, who have been given the role, in most cases, of defending a written constitution, can be reluctant to overly defer to another court. Although efforts are made to accommodate EU law into national law there still appear to be judicial red lines¹²⁰ over which EU law will not be allowed to cross. It is likely that more of these judicial red lines will be encountered in ex. PJCCM matters than under the predominantly commercial context of the pre-Lisbon adjudication of the then ECJ.

Martinico and Pollicino have developed the 'impression that we are dealing with a sort of cooperative climate between judges,' particularly with the aim of protecting fundamental rights.¹²¹ They refer to public international law concepts of judicial comity, or respect of counterparts of equal standing in another, unconnected, jurisdiction, and judicial deference.¹²² They speak of the potential for the 'birth of a

¹¹⁶ ECtHR, *Branigan and McBride v. the United Kingdom*, app no 5/1992, 26-5-1993, para. 43.

¹¹⁷ *Ibid.*

¹¹⁸ ECJ, Joined Case C-402/05 and C-415/05, *Yassin Abdullah Kadi*, *supra* note 10, Opinion of Advocate General Maduro, at para. 35 of his opinion.

¹¹⁹ G. Martinico and O. Pollicino, *supra* note 91, p. 230.

¹²⁰ The only exceptions to this would appear to be Estonia, Belgium (but this is disputed), Luxembourg and the Netherlands. G. Martinico and O. Pollicino, *supra* note 90, p. 134.

¹²¹ G. Martinico and O. Pollicino, *supra* note 91, p. 16.

¹²² *Ibid.*

cooperative constitutionalism', being 'the outcome of a process of "integration through rights"'.¹²³ They envisage the ECJ/ECtHR relationship to develop in this manner. It is still to be established, however, whether the EU will consider itself to be in a monist or a dualist legal system vis-à-vis the ECHR. This issue arose in the context of the EC-WTO¹²⁴ relationship in *Portugal v. Council*,¹²⁵ where the ECJ ruled that the relationship was a dualist one. It is arguable that a similar approach will be taken by the ECJ to the ECHR should a direct conflict in the jurisprudence in the two courts arise. It is quite likely, therefore, that there will be some divergence between the ECtHR and ECJ jurisprudence in counter-terrorism cases in the future. It is to be anticipated that the 28 Member States of the EU will eventually develop more robust checks and balances when it comes to fundamental and due process rights in the context of counter-terrorism operations and the operations of its police and other law enforcement services. In addition the ECJ will need to tackle the EU external treaty relations with third countries, and ensuring that at least the EU, through its institutions and agencies, complies with the minimum EU standards which are currently developing for internal EU security relationships. The broader membership of the ECHR will probably be reflected in the development of general principles of human rights, while the ECJ is more likely to be focusing on detailed provisions and mechanisms, based on an evolving EU, internal and external legal framework. This should, eventually, be to the advantage of individuals living in, or interacting with the EU's institutions and agencies.

8. CONCLUSION

The EU has both inter pillar/policy and EU-member state limits and restraints set on its ability to act, both internally and externally in counter-terrorism matters. Nevertheless it sees internal and external security as being linked. There is a need on the ground for the EU to pursue its plans for an external counter-terrorism policy. In addition, the EU's internal security provisions are increasingly being tempered by due process and fundamental/human rights case law and legal provisions. While all four pillars of the EU counter-terrorism strategy¹²⁶ have fundamental/ human rights aspects, the most problematic will be protect and pursue. The actual legal capacity of the EU to act in the area of counter-terrorism, together with the internal constitutional structure of the EU, will be highly problematic.

In addition the increase in the legal capacity of the ECJ to adjudicate in AFSJ and thereby EU counter-terrorism matters is not to be underestimated. The development of this rights framework started before the Lisbon Treaty. It has increased, not only with the change in underpinning legal framework for the ex. PJCCM legal provisions under the Lisbon Treaty, and the upgrade in legal status of the ex. PJCCM policy areas. While the ECJ has started ruling directly on counter-terrorism provisions, in particular in *Kadi* 2013 ruling and the *ZZ* ruling, the pace of change

¹²³ Ibid., p. 17.

¹²⁴ World Trade Organization.

¹²⁵ ECJ, Case C-149/96, *Portugal v. Council* OJ [2000] C 47/8, 19/2/2000.

¹²⁶ Prevent, protect, pursue and respond.

in this area is likely to quicken once the ECJ gains its full adjudicative powers, after the end of the 5 year phase in period of the Lisbon Treaty, and the anticipated accession of the EU to the ECHR. Under the principle of implied parallel powers individuals can gain directly effective rights under the external treaties of the EU, vis-à-vis the EU, its institutions and agencies, and its member states under external counter-terrorism treaties.

Separate from the issues of the allocation of competence, and the internal structure of the EU, fundamental/human rights will be very important in developing relationships with third countries. While the EU intends in due course, to accede to the ECHR, the Convention has already had substantial impact, either directly or indirectly, through the shared constitutional traditions of the EU member states on EU/ex EC jurisprudence. As Martinico and Pollicino have pointed out '[m]any fundamental judgments of the ECJ are very rich in references to the judgments of the ECtHR or to the provisions of the ECHR.'¹²⁷ In addition the recent upgrade in the provisions of the EU Charter, together with its pre-Lisbon influence on EC jurisprudence, needs to be taken into account. While not currently envisaged, it is possible that there might be a potential role for the EU's Fundamental Rights Agency¹²⁸ in this area.

In addition, when developing relations with third countries, regardless of which EU department or agency is doing the negotiating, the EU needs to be very clear, whether a matter is properly covered by the development policy, the ex. PJCCM provisions, or the CFSP. In addition, some very clear statements as to EU due process and fundamental/human rights need to be written into agreements with third countries. Article 51 of the Charter 'makes it clear that the Charter is directed at the Union's institutions and to Member States when they are implementing EU law.'¹²⁹ The internal problems of the AFSJ policy area when developing its external dimensions, referred to by Wolff, need to be resolved.¹³⁰ Wolff has stated that it is 'a crowded policy field with multiple actors present in the policy-making process.'¹³¹ The EU will be seeking to engage beyond its traditional of strategic alliance partners, with, *inter alia*, North Africa and Eastern Europe and Western Asian countries. A clear contribution that could be made by the counter-terrorism co-ordinator, would be in setting down clear demarcations between the EU's development policy, EU criminal law policy and the CFSP policy in the context of counter-terrorism cooperation with third countries. This would be useful for EU actors who might not be as familiar as they should be, with the case law of the ECJ to date.

In addition, many potential partner countries are, and will be, going forward, at different levels of development, despite many of them engaging with police and justice reform programmes. Law enforcement professionals need to react very quickly to problems as they arise on the ground. The EU's counter-terrorism coordinator, in conjunction with the Commission and the EU's Fundamental Rights

¹²⁷ G. Martinico and O. Pollicino, *supra* note 91, p. 7.

¹²⁸ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, *OJ* [2007] L 53/1, 22/2/07.

¹²⁹ E. Herlin-Karnell, *supra* note. 9, p. 38.

¹³⁰ S. Wolff, *supra* note 78, p. 91.

¹³¹ *Ibid.*

Agency, need to plan ahead for these operations, and develop model treaty provisions, model agreements for use in joint investigation teams, and inserts for practice manuals dealing with issues which arise in cross-border law enforcement and counter-terrorism operations, in order to ensure that any case coming before an EU member state court meets the necessary due process and fundamental/human rights standards necessary in order to be able to secure a safe terrorist conviction in appropriate cases.

