The Interrelation between the European Union Law and the International Law

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In a number of recent judgements, the European Court of Justice and the Court of First Instance have considered issues connected with the interrelation between the EU law and the public international law. Such areas of interrelation are the concluding of international agreements by the EU, some problems of the institute of the European citizenship, and the possible protection on a European level against the EU acts adopted in the implementation of counter-terrorism measures of the United Nations Security Council.

Keywords: European citizenship, EU external competence, PNR agreement, counter-terrorism measures

In today's globalised world interaction between the European Union law and 'good old' international law is unavoidable. This issue is beyond any doubt important to Bulgaria, being since January 1st 2007 a Member State of the European Union. Not accidentally the European Court of Justice (ECJ) defines that 'unlike any ordinary international treaties, the Treaty establishing the European Community creates its own legal system'[1]. This article examines the scope and content of the interrelation between EU law and public international law. It also discusses to what extent the counter-terrorism measures involve the attention of different international organizations and different jurisdictions. Making no claim to be exhaustive, this article aims to review the spheres where the European and international law intersect.

The European Union and international agreements

Just like any other international organization the European Union has the powers to enter into international agreements with third parties or other international organizations. The most general regulations include the UN Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986[2] as well as the provisions of the Community Law. Of fundamental importance among the latter is the wording of Article 218 of Treaty on the Functioning of the European Union (ex Article 300 TEC) stipulating the procedure of concluding an international agreement:

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

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6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.Except where agreements relate exclusively to the common foreign and security policy, the Councilshall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

[1] Case C-S/64 Flaminio Costa v. ENEL [1964] ECR 585, 593.

[2] Promulgated, State Gazette, issue 87 of 10 November, 1987.

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

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11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Negotiations on conclusion of an international agreement are usually conducted by the Commission. The Council decides to open negotiations by a qualified majority except for agreements on association and in fields where decisions to be made within the framework of the Community require unanimity. Where the Council gives a mandate for negotiations, it may also issue guidelines to the Commission about how to conduct the negotiations.

Upon conclusion of the negotiations the Council is to adopt a decision on signature of the international agreement. The signing itself is to be effected either by the Council or the Commission, or jointly by the Commission and the Council's Presidency. Pursuant to Article 218 of Treaty on the Functioning of the European Union (ex Article 300 TEC) the European Parliament should be consulted prior to the conclusion of an international agreement with the exception of agreements related to the European Community Common trade policy.

Under the hypothesis of the so-called mixed agreements concerning fields of shared competences (where both the Union and Member States have competence) international agreements with third parties are concluded by both the European Community and the Member States. Usually negotiations are held in close cooperation with the Member States. Under the said hypothesis it is possible for Member States to authorise the Commission to conduct negotiations on their behalf.

In some cases in fields of shared competence it is only Member States that are formally a party to an international agreement but the Court nevertheless treats it as a 'mixed agreement'[3]. Where the Community cannot be involved in a certain agreement because of its specific nature - such is the case of the International Labour Organization conventions of which the Community is not a member - it participates through the mediation of Member States and in that case too close cooperation is needed between the Community and the Member States. O'Keeffe and Schermers (1983) found that mixed agreements are known for their legal and political complexity, they may dilute the international identity and role of the Community and its institutions but at the same time they are an important characteristic of the Community's external relations. In cases where the European Community has no exclusive competences the ECJ Member States may act collectively in signing international agreements or joining a convention.

The European Court of Justice may be approached to interfere prior to the conclusion of an agreement in order to assess its compatibility with the Founding Treaties of the European Union. In this case allowing the conclusion of such an international agreement would be tantamount indirectly to altering the primary law by way of an agreement with third parties. With a view to avoiding such a situation Article 218, paragraph 11 of Treaty on the Functioning of the European Union (TFEU) entitles the Council, the Commission or a Member State and subsequently the European Parliament to make an inquiry to the ECJ about the compatibility of an agreement that the Community intends to enter into with the Founding Treaties. In case of an adverse opinion of the Court the said international agreement may not take effect unless the conflict with the primary law is eliminated or amendments

[3] Case C-3, 4 u 6*176* [1976] ECR 1279.

are introduced to the Founding Treaties. That procedure of *a priori* control is 'preferable to the option of declaring the decision on making the said agreement null and void after the signature of an international agreement (Article 263 TFEU, ex Article 230 TEC) which in any event would lead to difficulties in the relations with third parties' (Jacque 2007, p.389).

It should be borne in mind that approaching the Court pursuant to Article 218 TFEU is about an international draft agreement. Therefore the ECJ may be approached as of the moment when the possible content of an international agreement is specified to a sufficient extent to warrant an opinion. No a priori control can be exercised after an agreement has been signed (see Opinion 3/94). In that case the only possibility would be proceedings to reverse the decision on conclusion of the international agreement. That understanding has been disputed in the doctrine on the ground that when an *a priori* opinion is requested, the procedure of concluding the agreement should be suspended until the ECJ pronounces its judgement. In Opinion 3/94, the Court stated 'In any event, the State or the Community institution requesting an a priori opinion has also the right to request that a decision of the Council on conclusion of the international agreement be declared null and void'.

Any contestation *a posteriori* is in keeping with the provision of Article 263 TFEU (ex Article 230 TEC) reading that it is possible to request that an act of the European institutions be declared null and void.

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

In a case known as *ERTA*[4] the issue of international agreements was brought up. In its decision of 31 March, 1970, the Court treated a decision of the Council relating to the negotiation process on and signature by Member States of an agreement on road transport within the framework of the United Nations. The ECJ was to pronounce itself on whether it was admissible to contest the act. The Court ruled that the subject of the said agreement, i.e. the subject matter of road transport, was within the Community competence and the Council might not act in any way other than as an institution of the European Community. The ECJ found the action admissible as it was not the international agreement that was contested but the decision of the institution on conclusion of the agreement. The action was found admissible although by contesting the decision of the Council control was in fact exercised over the agreement itself. An extremely bold ruling of the Court bearing on international law too because if the ECJ had found that the act was contrary to law that would have led to its revocation and the said international agreement was signed and might have taken effect and bound the Community vis-a-vis third parties. Nevertheless the ECJ did not hesitate to reaffirm its jurisdiction in such cases.

In the ERTA case the ECJ deduced the implied external competence theory by ruling that beside its exclusive powers the Community, in addition to its internal competences, has also external competences in the respective field insofar that is instrumental to the objectives of the Founding Treaties. This is the so-called 'parallel approach' which means that to any external competence of the Community corresponds a common internal policy. Since the Community may regulate relations between the Member States in a given field, it should also be able to regulate relations between Member States and third parties. Where the Community acts in implementation of a common policy in accordance with the Treaties, the competency of Member States to undertake external acts in the context of that particular policy is precluded.

Originally the Court accepted that in order to exercise its implied external competence the Community should have already exercised its internal competence. With its decision on the *Kramer* case[5] related to biological marine resources, the ECJ departed from its own requirement. Although as of that moment no internal measures were undertaken by the Community in the respective field,

[4] Case 22/70, Commission v. Council [1971] ECR 263.
[5] Case C-3,4 u 6*176* [1976] ECR 1279.

external competence might be exercised without any internal measures in effect if in the opinion of the Court that was resorted to with a view to attaining the objectives of the Founding Treaties or the Community objectives were jeopardized by an external action of a Member State[6]. Until the Community exercises its competence Member States retain their temporary competence to initiate acts and conclude agreements with third parties insofar they do not put the realization of the Community objectives in jeopardy.

In its original practice the ECJ gave a latitudinarian interpretation of the Community powers including its external powers. Since the adoption of the Treaty on European Union (TEU) the Court has tried to take a neutral stand and has become extremely cautious with regard to distribution of powers between the national and the European level but at the same time it has abided by the conception of implied external competence established in the previous judicial practice. That is evident in Opinion 1/94 with the Court pronouncing itself on the possibility for the European Community to join the European Convention on Human Rights and Fundamental Freedoms. Although it has been criticised for not completely upholding the exclusive Community competences the Court has kept in full the purport of its previous practice and has not infringed the external powers doctrine.

In November 2002 the ECJ pronounced itself on the so-called 'Open skies' cases[7] where the European Commission questioned bilateral air transport agreements concluded by Austria, Belgium, Denmark, Luxembourg, Finland and Sweden with the United States and prosecuted a claim against those states. The Commission's argument was that as a number of measures had been adopted on a Community level in the sphere of air transport since 1988, the Commission, being a Community institution, should be given a mandate to negotiate new agreements with third parties. The Commission saw the legal ground for that in Article 113 (new Article 207 TFEU) of the EEC Treaty as air transport agreements fell within the scope of the common trade policy. The ECJ claimed that the said bilateral agreements infringed some aspects of the primary and the secondary law and that in three fields of air transport the Community had exclusive powers while in the remaining fields - shared competence with the Member States. The Court followed the implied external competence logic of the ERTA case. Such implied external competence is at hand not only where the internal competence has been exercised in the process of development of the common policies but where internal Community measures are needed only for conclusion of an international agreement. Obligations of the Community vis-a-vis third parties may arise from provisions of the Founding Treaties related to the Community competence if the participation of the Community in an international agreement is required for attaining the Community objectives. Although the International Civil Aviation Organization (ICAO) membership is reserved for states, by analogy with GATT and the World Trade Organization (WTO) the EU Member States retain their membership in those organizations but it is the European Community that plays a decisive role. A later decision of the ECJ deemed that the Member States might not enter into international agreements outside the framework of the Community institutions even where there was no conflict between those agreements and the Community norms[8].

The latest wording concerning the EU right to conclude international agreements is in the Lisbon Treaty - Article 3 of the Treaty on the Functioning of the European Union (TFEU):

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Relatively recently the ECJ pronounced itself on an agreement between the EU and the United States regarding the provision of personal data of air passengers (PNR). The term PNR (Passenger Name Record) covers data related to names and destinations of passengers; details of plane ticket

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[6] Opinion 1/76 on the Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels [1977] ECR 741.

[7] Commission v Belgium C-471/ 98 - similar decisions were also rendered against Denmark C-467, Sweden C-468, Finland C- 469, Luxembourg C- 472, Austria C- 475, FRG C- 477. The case against the United Kingdom C- 466 was disposed of on other grounds based on differences in the UK agreement.

[8] Case 476/98 Commission v. Germany.

purchase; the agency through which the ticket is purchased; the person/company making the reservation. Originally the International Air Transport Association (IATA) defined the limits and contents of those data and they were provided for air travel only. Subsequently the PNR data came to be used for hotel booking, rent-a-car and other activities. Since the events of 11 September, 2001 the PNR data have included the full names of travellers (until then the practice was to use surnames and initials of the first name, passport details (nationality, passport number and date of expiry) as well as the date and place of birth. The expansion of the PNR data scope causes concern with a number of nongovernmental organizations in respect of personal privacy as the data may contain home and business address, telephone numbers, credit card details, disability records - i.e. data of a medical or financial nature which, according to European standards, should be subject to protection to a certain extent. In the United States the collection, transfer and protection of data is responsibility of a special structure – US Customs and Border Protection under the newly established Department of Homeland Security. In 2004 the US administration took up negotiations with the European Commission on an agreement on transfer of PNR data (US-EU PNR Agreement)[9].

The European Commission believes that the level of protection of PNR data transfer will meet the requirements of the Directive 95/46 EEC[10] as the data will be collected and used solely with a view to preventing and countering terrorism and related crimes, other grave crimes including organized crime, which are transnational in their substance, etc. Under that agreement European air companies should within 15 minutes after take-off of the aircraft provide the PNR data to the competent US authorities; in case of failure to comply with their obligations they shall pay a fine of US 5 000 for the information on each traveller. The European Parliament initiated legal proceedings against the ECJ in the belief that the decision[11] was adopted by the Commission *ultra vires* and violated fundamental principles laid down in the Directive 95/46 EEC such as personal privacy and personal data protection. By a decision rendered on 30 May, 2006[12] the ECJ declared illegal the decision of the Council[13] on conclusion of an agreement between the EU and the United States on transfer of PNR data as well as the decision of the European Commission on adequate protection of transferred data[14]. The Court's decision began with a reference to Article 8 of the European Convention on Human Rights bearing on private and family life[15]. The ECJ deemed that the agreement in question should be concluded not on the basis of the common transport policy of the Union (pertaining to the Community pillar); the transfer of PNR data should be effected in view of activities pertaining to the Second and Third Pillars, i.e. public security, defence and criminal law cooperation; therefore the Directive 95/46 EEC was unenforceable as Article 3, paragraph 2 explicitly ruled out its application with regard to the Second and Third Pillar and limited the data transfer to the Community pillar. In the opinion of the ECJ the EU-US Agreement was not based on the correct legal ground which in turn posed the question of prompt dismantling of the Union's Pillar Architecture expected to take place upon the entry of the Lisbon Treaty in force.

The European Council resumed the negotiations before the deadline set by the Court, 30 September, 2006 and in July, 2007 the United States and the European Union signed a new agreement on PRN data with the EU agreeing to provide data in nineteen categories to the US authorities. In February, 2008 Jonathan Faull, at that time Director General of the Justice and Home Affairs Directorate General and also former EU Commissioner Franco Frattini voiced their concern over the signature of bilateral memorandums of understanding by some of the new EU Member States (the Czech Republic, Latvia and Estonia) with the United States in exchange of abolishment of the visa regime. The Memorandums of understanding envisage additional, harder requirements of the US side with regard to providing data (biometrical data, details of stolen or lost passports) and ensuring so-called sheriffs on board of trans-oceanic flights. Before that Jonathan Faull qualified the new

[9] http://ec.europa.eu/idabc/en/document/2596/362.
[10] Directive 95/46 EC.
[11] Commission Decision 2004/535/EC of 14 May 2004.
[12] Decision rendered in joint lawsuits Case C-317/04 and Case C-318/04.
[13] Council Decision 2004/496/EC of 17 May 2004
[14] Commission Decision 2004/535/EC of 14 May 2004
[15] It should be borne in mind that the EU is still not a party to the ECHR.

requirements of the US side as unacceptable and going too far. The compromise version proposed by Slovenia with a view to shaping a common European position was not adopted.

All the above said shows the close connection between international law and European law in terms of the characteristics of the EU competences as a supranational organization to enter into international agreements with third parties.

The EU institute of citizenship and national identity

The institute of citizenship is of great importance both to each national legislation and international law. As per the well established practice nationality is exclusively governed by the domestic law of each State. It is the State itself that determines through the mechanisms of its legislation the procedure and way of acquisition, loss, reinstatement and content of nationality. As early as in 1930 The Hague hosted an international conference ending with the signature of a convention recognizing the right of each State to regulate itself its nationality.

It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international customs and the principles of law generally recognized with regard to nationality[16].

Citizenship is a field of law where international law has a very limited effect reduced mostly to seeking a decrease of the number of stateless persons in the world, to granting them a status equal to that of aliens, to defining the status of refugees, etc. As it is known the Treaty on European Union has introduced the institute of European citizenship which does not replace but complements the national citizenship. Every person holding the nationality of a Member State shall be a citizen of the Union stipulates the Treaty and further on citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed hereby. The fundamental rights of European citizens include the right to move freely and reside in the territory of the European Union, the right to diplomatic and consular protection, the right of petitions and appeal to the European ombudsman, active and passive right of suffrage in local elections and elections for the European Parliament etc.

Lately, with reference to citizenship, the ECJ rendered a very interesting decision on 12 September, 2006 on the case *Spain v. United Kingdom* known also as the "Gibraltar case". The background of that case was connected with another case[17], tried in 1998 by the European Court of Human Rights by virtue of which the United Kingdom received a sentence for not taking any action to ensure that people of Gibraltar who are British citizens take part in the elections for European Parliament. The European Court of Human Rights found the United Kingdom responsible for the discrepancy between the act on election of representatives to the European Parliament by direct universal suffrage and the European Convention on Human Rights.

In compliance with a decision of the European Court of Human Rights the United Kingdom passed regulations under which citizens of the Union residing in Gibraltar were entitled to take part in elections for the European Parliament but spread out that right to citizens of the Commonwealth states residing in Gibraltar. Thus, the right to vote in elections for the European Parliament was conferred on persons who were not European citizens[18]. Spain disputed the right of persons who were not citizens of a Member State (neither of the United Kingdom nor any other Members State) and consequently of the European Union too to vote in elections for the European Parliament. The United Kingdom explained the adopted regulations by its specific constitutional traditions and special relations existing between the UK and the Commonwealth States. The European Commission supported the arguments of the UK referring to the EU's obligation to respect the Member States' national identity. The ECJ dismissed Spain's arguments and ruled that the United Kingdom, due to its traditions and constitutional set-up, was entitled to let persons who were not citizens of the European Union take part in the elections for the European Parliament.

What is interesting in this case though is that pronouncing itself in another case[19] the Court denied the claim of two Dutch citizens, residents in the Aruba Island, who insisted that their names be included in the electoral register so that they could vote in the elections for the European Parliament.

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[16] Article 1, the Hague Convention of 1930 adopted under the aegis of the Assembly of the League of Nations.
[17] The Matthews case, decision of the European Court of Human Rights of 18 February, 1999.
[18] EPRA - European Parliament (Representation) Act 2003 was adopted.
[19] Case C-300/04 Eman & Sevinger v. College van Burgemeester en Wethouders van Den Haag.

However their claim was dismissed because the Dutch electoral law guaranteed participation in parliamentary elections and elections for the European Parliament to Dutch citizens who were residents in the European territory of the country only. Thus the Court's different approach to the two cases was solely based on the EU obligation to respect the Member States national identity which - according to the Court - concerned the UK only. By all means however the two cases open up a discussion on citizenship and a future uniform electoral procedure would greatly forestall similar situations.

The *Lechouritou* case and public international law

Lately we have been witnessing increasing interaction between the EC/EU law and international public law including the differentiation between the public and private nature of legal relations. An example to that effect would be one of the latest ECJ decisions in case C—292/05[20]. The instituted prejudicial proceedings concerned 676 civilians killed by the German armed forces on 13 December, 1943 in Kalavrita Municipality (Greece). As early as 1995 Mrs. Lechouritou along with other successors of the victims asked Greek courts to sentence the German state to pay indemnity for property and non-property damages inflicted on them by the German armed forces. The Greek courts dismissed the claim on the ground that they were not competent to pronounce themselves in so far that the defendant Federal Republic of Germany, being a sovereign state, had immunity. Before Efeteio Patron (Appelate Court, city of Patras), the plaintiffs referred to the Brussels Convention with regard to the competence and implementation of court decisions in civil and commercial cases. They pointed to a provision which in their opinion derogated the immunity granted to States in all cases of tort committed in the territory of the State of the approached court. The Appellate Court of Patras referred the matter to the Court of Justice of the European Communities: was the claim for indemnity for damages inflicted by the said acts within the sphere of application of the above mentioned Convention?

In its decision of 15 February, 2007 the Court of Justice of the European Communities recalled that although the Brussels Convention applied to "civil and commercial cases" it did not provide a definition of the contents of that concept. As per the Court's practice the concept of "civil and commercial cases" should be viewed as an autonomous concept (in the context of the internal law of States). On the one hand, it should be interpreted in terms of the objectives and system of that Convention but on the other hand - in terms of the basic principles ensuing from the totality of the national legal systems, Thus some claims and court decisions are excluded form the category of "civil cases" due to the nature of legal relations between the parties to the litigation or because of the subject of that litigation.

Further on the Court noted that although some litigations between public bodies and private legal subjects may fall within the scope of application of the Brussels Convention, that did not apply to actions or inaction of the State (respectively public bodies or representatives of the State) related to exercise of public power - *acta jure imperii*. Consequently where a claim is based on a demand arising form an act of the public power, the claim should be excluded from the scope of application of the Convention. Any operations carried out by the armed forces of a given state are among the characteristic manifestations of state sovereignty, particularly in view of the circumstance that the decision to carry them out is mandatory and is made unilaterally by the competent public authorities, and they are inseparably connected with the foreign policy and security of the State concerned[21]. Proceeding from the above argumentation the ECJ deemed that the legal action instituted by natural persons in a Contracting State versus another Contracting State which demands indemnity for damages suffered by successors of victims of acts committed by armed forces during military operations in the territory of the first State, did not fall in the scope of application of the Brussels Convention.

Obviously the ECJ decision was very disappointing to the plaintiffs in the case who, being successors of Greek civilians cruelly killed in mass numbers during the Second World War indisputably had the moral and political right to indemnity. As Gaertner (2007) justly pointed out in the concluding part of her review on the pages of German Law Journal, the Brussels Convention as an instrument to facilitate and assist the internal market by way of mutual recognition and

[20] C-292/05 Eirini Lechouritou and others v. Federal Republic of Germany of 15 February, 2007.
[21] See par. 37 of the ECJ decision.

implementation of court decisions in civil and commercial cases, was hardly the right instrument in claiming indemnity for damages inflicted during an armed conflict. The categorical conclusion from the ECJ decision is that any consequences of acts caused during war or occupation may solely be judged in the light of international public law.

The EU and counter-terrorism measures

The main problem raised recently is whether and to what extent any protection on a European level is possible with regard to EU acts adopted in implementation of counter-terrorism measures of the UN Security Council. Along that line is the analysis of the latest decisions of the Court of First Instance (CFI) and the ECJ.

The measures to combat terrorism adopted by the UN Security Council after the events of 11 September, 2001 include preparation of lists of individuals or organizations connected with or assisting terrorist acts. Those measures are exclusively focused on freezing financial assets of such individuals with a view to diminishing the possibility of financing new terrorist acts but are often linked to travel restrictions and other prohibitions. Within the framework of the United Nations a Sanctions Committee was set up to monitor their application by Member States. It is the sole body that may take an individual or an organization off that list.

The European Union which is not a member of the United Nations applies the sanctions adopted by the UN Security Council by means of a two-tier procedure. First, the Union adopts a so-called common position within the framework of the Intergovernmental Second Pillar - Common Foreign and Security Policy[22] whereupon within the framework of the Community Pillar legally binding acts - regulations[23] are adopted which are directly applicable in the territory of ail Member States. The implementation of the regulations is supervised by the European Commission which, in particular, updates the lists in keeping with the changes[24] introduced by the Sanctions Committee. Thus the United Nations sanctions become part of the Community law having supremacy over national law. This however automatically brings up the question whether subjects on the UN Sanctions Committee's lists may approach the European Court and seek protection (Lavranos 2007). That question is subject to discussion in theory but it acquired a practical dimension in the decisions rendered by the Court of First Instance in the *Kadi, Yusuf, Ayadi and Hassan* cases[25]. The first two cases attacked Regulation 881/2002 adopted in implementation of Resolution 1267 of the UN Security Council of 1999 which provides for measures vi-a-vis the Taliban regime in Afghanistan as well as Security Council Resolution 1390 of 2002 which expands both the scope of measures (freezing of bank accounts, travel restrictions and arms embargo) and their application to Al-Kaida or other individuals, groups, enterprises and structures connected with it, Annex I to Regulation 881/2002 reproduces the UN Sanctions Committee's list of individuals subject to measures including freezing of bank accounts. The plaintiffs before the CFI were residents in Ireland, Sweden, United Kingdom and Saudi Arabia who considered that their right to ownership, protection and fair trial was infringed.

Practically in its almost identical decisions in the *Yusuf* and *Kadi* cases of 21 September, 2005 the CFI deemed that it was not competent to indirectly pronounce itself about the legality of sanctions adopted in the framework of the United Nations[26]. If it rendered a decision regarding Regulation 881/2002 that would mean that the CFI would indirectly commit itself to reviewing the Security Council resolutions. The CFI examined only the inter-relation between the Security Council resolutions and the Community law and ruled that the resolutions prevail including vis-a-vis human

[22] Usually pursuant to Article 11, Article 15 and Article 29 of the TEU. See e.g. Common position 2005/440/CFSP of 13 June, 2005 concerning restrictive measures against DR Congo.

[23] See e.g. Council Regulation (EC) No 1183/2005. The Community acts were adopted pursuant to the provisions of Article 60, Article 301 and Article 308 of the EEC Treaty which caused justifiable objections in the theory.

[24] See e.g. Commission Regulation (EC) No 84/2006.

[25] Case T-306/01, Yusuf, [2005] ECR, II-3533; Case T-315/01, *Kadi* [2005] ECR, II-3649; and Case T-253/02 *Ayadi* v. *Council*, judgment of the CFI of 12 July 2006; Case T-49/04 Hassan *v. Council.*

[26] Yusuf, Case T-306/01 [2005] ECR, II-3533, par. 339

rights. Referring to the provisions of Article 25, Article 48, paragraphs 2 and Article 103 of the United Nations Charter, the CFI deemed that obligations arising from the Charter prevail over any other obligation arising from an international agreement including that ensuing from the Community law to respect human rights. Only in case of infringement of *jus cogens* the CFI would be prone to pronounce itself on a Resolution of the United Nations Security Council but in that particular case the CFI deemed that there was no such infringement. The concept of *jus cogens* was defined by the CFI as "a body of higher rules of international public law from which there could be no derogation and they are binding on all subjects including United Nations structures"[27]. The self-limitation imposed by the CFI with regard to examining the validity of the Community acts adopted in implementation of resolutions of the Security Council is seriously criticized because of the fact that it does not support the Community standard of protection of human rights. Obviously the CFI cannot examine common positions as it has no jurisdiction with regard to the Second Pillar but with regard to the Community acts the Court could pronounce itself. In the opinion of a number of authors the CFI ought to appraise those acts in the light of the standards of the Community and the European Court of Human Rights and not in the light of *jus cogens* which is a much broader concept and undoubtedly covers the human rights problems but is still debatable in international judicial practice and doctrine (Bulterman 2006). Generally, the very idea of a regional court pronouncing itself on the legality of resolutions of the Security Council in the light of *jus cogens* has become a subject of a wide academic discussion.

Besides the CFI stated that the European Union was legally bound by the UN Security Council resolutions **in the same way** as the Member States and that caused serious objections in the theory (Lavranos 2007). The Court deemed that the Member States were obligated to cooperate with the UN Sanctions Committee. If effective legal protection on an international or European level (to attack the lists} was lacking, there was always a possibility for the Member States to ask that a certain individual/s be taken off the Sanctions Committee lists. Thus the individuals concerned may approach national courts and seek protection through the internal mechanisms in the respective Member State[28].

Unquestionably the EU Member States are required to implement the measures provided for in the United Nations framework but is the EU required to do that to the same extent? If we try to leave aside political argumentation and the importance of the efforts to combat terrorism, the legal analysis will in fact lead us to Article 25, Article 48, paragraph 2 and Article 103 of the United Nations Charter as well as to Article 30, paragraph 6 of the Vienna Convention 1986[29]. Article 25 of the UN Charter stipulates that Member States shall accept and implement the Security Council decisions in compliance with the Charter. As per Article 48, par. 2 of the UN Charter the decisions for safeguarding international peace and security shall be carried out by the Members of the Organization directly and through their action in the appropriate international agencies of which they are members. Article 103 of the UN Charter stipulates prevalence of the obligations of Members of the Organization under the Charter over their obligations under any other international agreement (such as e.g. the EU Founding Treaties and the Statute of the Council of Europe) which is also reaffirmed in Article 30, paragraph 6 of the Vienna Convention 1986. However whether that prevalence under the UN Charter applies also to the EU law is a rather sensitive matter. As it is known the Community law constitutes an independent legal system other than that of international law and has its own internal hierarchy of norms with primary law having a leading position. According to some authors the next to come are international agreements and resolutions of international organizations which have become an integral part of the Community legal order. Consequently even if we accept that the United Nations measures have become part of the Community legal order, they will hardly enjoy any prevalence over the EC/EU Treaties (Lavranos 2007). In this sense the conclusion reached by the CFI to the effect that the

[27] Yusuf, Case T-306/01 [2005] ECR, II-3533, par. 277. Of interest is the fact that the wording in the German language version is "international public order". For the sake of comparison the definition of jus cogens in Article 53 of the Vienna Convention on the Law of Treaties is a norm which is universally acknowledged and recognized by the international community of States as a norm any deviation from which is inadmissible and which may be modified by a subsequent norm of general international law of the same nature only

[28] Ayadi, Case T-253/02, par. 150

[29] The Vienna Convention of 1986 was opened for signature on 21 March, 1986; according to data available as of 31 August, 2006, 40 subjects had signed the Convention of which only 28 were States while for its entry into force Article 85 requires deposition of the ratification instruments of 35 States.

Union is bound to implement the sanctions provided for in SC Resolutions to the same extent as the Member States, sets off a discussion on the interrelation of national, European and international law. Some researchers believe that with its decision the CFI rejected the arguments of the plaintiffs that Community legal order is autonomous in relation to the international legal order (Lehnardt 2007).

The interrelation between primary law and international agreements concluded by Member States is regulated by both international law and Article 351 TFEU (ex Article 307 TEC). International agreements made after the entry of the EEC Treaty into force (January 1 1958) may not prevail over the Community law. By the way it is hard to imagine how e.g. Member States would enter in international agreements in spheres where they no longer have any competence. That fact is highlighted by the ECJ in its Opinion 1/75. "*To accept such a competence would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest"*[30]. By all means any conflict between the Founding Treaties and subsequent international agreement should be of a temporary nature only. Article 351 TFEU (ex Article 307 TEC) obligates Member States to use any possible means to terminate such a situation. They may denounce, modify or refuse to renew the said agreement, i.e. the problem shall be solved by methods which are customary under international law.

Article 351 TFEU (ex Article 307 TEC) allows Member States to continue to fulfil their obligations under agreements concluded before the Founding Treaties have taken effect but that, according to Professor Jean-Paul Jacquet, does not mean that those international agreements become part of the Community law (Jacque 2007). The ECJ envisages an exception when all Member States are parties to the respective international agreement and wish to bind the Community by the commitments ensuing from that agreement as in the case of GATT which is already of historical significance only as the European Community is a member of the World Trade Organization, successor of GATT. In the *Yusuf case* the CFI referred to the GATT precedent too in order to substantiate the statement that the EU is bound by the obligations ensuing from the UN Charter.

However it should be borne in mind that the CFI was not approached to take the respective individuals off the lists but to ascertain that the absence of an effective system of revising the lists in the Member States is not up to the standards of protection of human rights guaranteed by the Community law and the European Convention on Human Rights.

A year later in its decisions in the *Ayadi* u *Hassan* cases of 12 July, 2006 the CFI, although not finding any infringement of human rights in that specific case, ruled that the Member States were obligated to respect the fundamental human rights of the individuals concerned and, insofar as is possible, to ensure that those individuals present their point of view to the competent national authorities.

The actual turn in the CFI approach occurred with its decision in the *OMRI* case (*Organisation des Modjanedines du people d'lran*)[31] of 12 December, 2006. Unlike the limited approach to the measures related to Resolution 1267 the CFI declared null and void a decision adopted on the basis of Regulation 2580/2001 which on its part was in implementation of Resolution 1373 of the Security Council of 2001. The said Resolution bound States to freeze financial assets and undertake further measures with a view to preventing terrorist acts but unlike the regime provided for in Resolution 1267 it left the identification of individuals (with the exception of those falling in the scope of Resolution 1267) and the freezing procedure within the States' prerogatives. Thus Regulation 2580/2001 enabled the Council to compile itself the lists of individuals to whom measures shall be applicable "on the basis of precise information and a decision made by a competent authority"[32]. It should be borne in mind that the European Parliament took the opportunity to voice its position against the manner in which the lists' content was determined.

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[30] Opinion 1/75 of 11 November, 1975.

[31] T-228/02 *OMRI* [2006], ECR. II 4665. To a great extent the way in which the CFI pronounced itself in favour of the plaintiff might have also been influenced by the fact that OMRI was not on the original UN/EU lists but was added on 2 May, 2002.

[32] Article 2, paragraph 3 of Regulation 2580/2001

A few months before the CFI judgements in the *Yusuf* and *Kadi* cases the European Court of Human Rights in Strasbourg pronounced itself on acts of Ireland's Government in connection with the United Nations sanctions against the Former Republic of Yugoslavia introduced into the Community legal order. In the *Bosphorous* case[33] a Turkish air company leased an aircraft from the State Yugoslav Airlines. The aircraft was apprehended by the Irish authorities in compliance with the sanctions imposed by the United Nations encompassing any services related to air transport. The Turkish air company contested the apprehension before an Irish court and at the last instance the Supreme Court of Ireland addressed a prejudicial inquiry to the ECJ about the legality of the acts of the Irish authorities. The ECJ ruled that in the exercise of fundamental human rights and freedoms guaranteed by the Community law as the right of ownership and the right to engage in economic activities, one should take into consideration essential limitations of those rights imposed in connection with the UN sanctions. Thus the ECJ practically declined the Bosphorous claim in favour of the UN sanctions. Subsequently however Bosphorous instituted a lawsuit versus Ireland before the European Court of Human Rights in Strasbourg for violation of Article 1 of Protocol No.1 of the European Convention on Human Rights. In June, 2005 the Grand Chamber of the European Court of Human Rights concluded that the level of protection of fundamental human rights within the European Union was 'comparable although not identical' (Birkhauser 2005) [34] with the protection under the European Convention on Human Rights due to which the Court in Strasbourg reaffirmed its competence to pronounce itself on Community acts in cases where the protection of fundamental human rights within the framework of the European Union was "evidently insufficient"[35], i.e. in exceptional cases.

On 29 November, 2006 the UN Sanctions Committee modified its instructions obligating States to provide detailed information on specific motives for including individuals and organizations in the lists as well as a mechanism of reconsidering names which had been on the lists for at least four years. Since December, 2006 a possibility has been provided for the individuals concerned, irrespective of their governments, to file a complaint/petition for revision of the lists which does not entitle them however to participate in the proceedings, i.e. striking a name off the list is solely possible with the consent of representatives of all States sitting on the Sanctions Committee[36].

In the meantime the plaintiffs in all four lawsuits, *Kadi, Yusuf, Ayadi* u *Hassan,* appealed against the CFI decisions before the ECJ. On 16 January, 2008 Advocate General M. Maduro's conclusion in the *Kadi* case[37] was published and it considerably differed from the CFI approach by favouring a higher level of protection of human rights guaranteed both within the framework of the European Union and by the European Convention on Human Rights (Raducu 2008). The question whether there is a possibility for protection against UN Security Council Resolutions and whether European courts are competent to judge acts of the Security Council is according to Advocate General Maduro extremely sensitive and is related to the place of obligations of the United Nations Member States within the framework of the Community legal order.

The Advocate General expressly emphasized that 'the interrelations between international law and the Community legal order is determined by the Community legal order itself'[38]. At the same time Advocate General Maduro voiced his doubts as to whether the European Court of Human Rights would limit its jurisdiction with regard to implementation of the United Nations measures as such action would call in question the autonomous Community legal order and human rights protection.

On 3 September, 2008 the ECJ annulled the CFI judgement on blocking the assets of the Saudi businessman Yassin Abdullah Kadi and the Al Barakaat Foundation seated in Sweden[39]. As mentioned above both Kadi and the Al Barakaat organization are on the UN blacklist due to suspicions that they

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[33] *Bosphorous v. lreland,* Decision of 30 June, 2005.
[34] *Bospfiorous v. Ireland,* par. 155.
[35] *Bosphorous v. Ireland,* par.156.
[36] It should be borne in mind that the measures under Resolution 1267 include 143 individuals and 1 organization suspected of having contacts with the Taliban regime in Afghanistan as well as 179 individuals and 114 organizations connected with Al Kaida. Only 5 persons have successfully gone through the procedure of being struck off the blacklist.

[37] Advocate General's Opinion in Case C-402/05
[38] Opinion, Case C-402/05, par 24.
[39] Decision rendered by the ECJ in joint cases C-402/05 and C-415/05 on 3 September, 2008.

have been financing Al Kaida. As per the Court's decision the Member States infringed the rights of the two plaintiffs by freezing their financial assets without notifying them of the grounds of that act. Besides, according to the ECJ, the right of legal defence was not guaranteed to Yassin Kadi and Al Barakaat. As pointed out by some researchers (Wessel 2008) that decision might seriously influence the traditional monist approach to international law as well as the entire international legal order. In paragraph 298 the ECJ stressed that the United Nations Charter did not impose any choice of a priori model of application of resolutions adopted by the Security Council on the basis of Chapter VII of the Charter as those resolutions should be applied in accordance with the conditions and procedure provided for by the internal legislation of each UN Member State applicable to the respective case. In fact the United Nations Charter left in principle to UN Member States the freedom to choose among different possible models of implementing such resolutions in their internal legal order. The EU Member States have established their own ways of implementing the UN Security Council resolutions through the mechanisms of the European legislation. Thus the Court has shifted the emphasis from the discussion about the validity of international legal norms to acts by way of which the EC/EU implements the Security Council resolutions and which beyond any doubt are subject to supervision by the ECJ. Moreover, the Court of the European Communities will be obliged by all means to examine the EC/EU implementing acts referred to the Court in the light of the established Community legal order and standards of human rights and freedoms protection.

On the one hand, under the United Nations Charter, States are required to apply the measures provided for in the Security Council resolutions but on the other hand States are required by the Community law and the European Court of Human Rights practices to guarantee that blacklisting individuals or organizations may be appealed against before an independent instance - the CFI, ECJ or another justice administering body. Any future development is also largely connected with the Lisbon Treaty which recognizes the rights, freedoms and principles underlying the Charter of Fundamental Rights and imparts a binding legal force to them (with the exception of the United Kingdom, Poland and Czech Republic). At the same time however, in the process of doing away with the Pillar Architecture of the Union the specifics of the jurisdiction of the ECJ (which is to be named Court of the European Union in relation to the Common Foreign and Security Policy) still exist.

The question in the case is not whether States are obligated to implement the measures adopted with the United Nations framework - autonomously or through the European Union - but how, fulfilling their obligations, they can ensure that human rights are protected in compliance with the EU/ECHR standards . In that sense we could hardly speak of a conflict between the States' obligations under international law and European law.

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Summary

In today's globalised world interaction between the European Union law and 'good old' international law is unavoidable. This issue is beyond any doubt important to Bulgaria, being since January 1st 2007 a Member State of the European Union. Such areas of interrelation are the conclusion of international agreements by the EU, lately the EU-US PNR Agreement, data protection problems and some other issues connected with the European citizenship. In a number of recent judgements, the European Court of Justice and the Court of First Instance have considered issues connected with the interaction between the EU law and the public international law. The main question is whether and to what extent any protection on a European level is possible with regard to EU acts adopted in the implementation of counter-terrorism measures of the UN Security Council. In its *Kadi* decision the CFI stated that the European Union was legally bound by the UN Security Council resolutions in the same way as the Member States and that caused serious objections in the theory. The conclusion reached by the CFI to the effect that the Union is bound to implement the sanctions provided for in SC Resolutions to the same extent as the Member States, sets off a discussion on the interrelation of national, European and international law. Some researchers believe that with its decision the CFI rejected the arguments of the plaintiffs that Community legal order is autonomous in relation to the international legal order. After the CFI decision the Advocate General Maduro made the statement that 'the interrelations between international law and the Community legal order is determined by the Community legal order itself'. On 3 September, 2008 the ECJ annulled the CFI judgement on blocking the assets of Mr. Kadi and the Al Barakaat Foundation seated in Sweden. The decision might seriously influence the traditional approach to international law as well as the entire international legal order. The ECJ conclusions considerably differed from the CFI approach by favouring a higher level of protection of human rights.

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