

The fight against terrorism. The lists and the gaps

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1. Introduction

The recent international fight against terrorism is an illustrative example of how the citizen - used here in the broad sense of natural and legal persons, but also of entities without a specific legal status - can be confronted with sanctions at the international level because the individual is blacklisted as a terrorist and thus as a threat to international peace and security. In 1999 sanctions were announced against the Taliban in Afghanistan, and not long after this they were extended to Osama Bin Laden and Al-Qaida. After 11 September 2001, sanctions came into force against a motley collection of terrorists. Often the reason why the person concerned has been included on such a list is not clear and where he can successfully contest his inclusion on the list is even less so. The fact is that present international cooperation against terrorism takes place at various levels. The start of the chain of measures is usually a binding Resolution by the Security Council of the United Nations (SC-UN) adopted under Chapter VII¹ of the UN Charter (UNC). States are obliged to implement these Resolutions on the grounds of Articles 25 and 48 and, moreover, on the basis of Article 103 UNC, with priority over other international obligations not based on the UNC.² Consequently the European Union (EU) feels obliged to implement the UN Resolutions. To do this, it uses a mix of legal instruments that in their turn oblige its member states to implement them. The member states then ensure that there is concrete implementation with regard to the citizen in question who has been included on one list or another, if need be by amending or implementing national legislation.

While further considering the mechanism of this form of combating terrorism with the weapon of targeted sanctions which are directed against individuals, the question arises whether or not this is in conflict with a number of fundamental rights. To mention a few as examples: are property rights infringed when all financial assets are frozen on the basis of such a listing? Are individuals not being hampered in the expression of their right to freedom of expression and of meeting? And what about the *presumptio innocentiae* if an international list published on the internet describes people

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¹ Chapter VII of the UN Charter is entitled 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'.

² Article 103 UN Charter reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail.'

as terrorists who should be punished? And what is the relationship of such a public list to the right of privacy and the protection of personal information? There will be no further discussion of these questions³ here, but there is one possible preliminary question. Is there a possibility of contesting inclusion on a list of terrorists? Is there a court that can check the legitimacy of inclusion on the lists or compatibility with fundamental rights? Is there any form of legal procedure or remedy available to those on the lists?

A description of the layered mechanism of rules in the recent fight against terrorism will follow, from the moment that the Taliban and Al-Qaida entered the spotlight and in particular from 11 September 2001. This means that an overview of the Resolutions of the UN Security Council is provided, followed by the measures to implement these resolutions which have been taken at the EU level and then by national measures. Finally, there is a discussion of the overall position of the citizen listed on one or more of the lists in any attempt to contest the listing. On the basis of the regrettably still scarce case law, we will see that problems within the sphere of legal protection arise on this point. In conclusion, I will attempt to put forward a number of possible suggestions to tackle this problem.

2. Combating terrorism

The fight against terrorism is not new: the first UN treaties saw the light of day in the 1960s and 1970s, in particular in connection with the then fashionable phenomenon of hijacking⁴ and hostage-taking, including diplomats⁵. In Europe the phenomenon was also known: many countries which are now members of the European Union have known the phenomenon of terrorism for decades. In the 1970s and even up to today, they had to contend with terrorist organisations. Great Britain had the *Irish Republican Army* (IRA), Germany the *Rote Armee Fraktion* (RAF), Italy the *Brigate Rosse* and Spain the *Euskadi ta Askatasuna* (ETA), to quote only the best known examples. At the national level, these countries have taken certain measures, usually by implementing special anti-terrorism legislation in an attempt to cope with the problem. There was also some form of European cooperation. In this connection, it is very much with a view to the fight against terrorism that the forerunner of the third pillar of the European Union was set up, cooperation in the field of justice and home affairs: the TREVI group set up in 1975. The ministers of home affairs of the EC member states regularly came together in this forum in an intergovernmental connection. Within the Council of Europe terrorism was also an issue and in 1977 an anti-

³ Over these questions see the contribution to the International Conference of Jurists held in Paris on 10 November 2004 by Bowring B., Korff D., *Terrorist Designation with regard to European and International law: the case of the PMOI*, <http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf> (10 May 2005)

⁴ For example: Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971. See for a complete list: <http://untreaty.un.org/English/Terrorism.asp> (10 May 2005).

⁵ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; International Convention against the Taking of Hostages, New York, 17 December 1979. <http://untreaty.un.org/English/Terrorism.asp> (10 May 2005).

terrorism treaty was signed.⁶ Other bodies were (and are still?) involved in combating terrorism in an intergovernmental way, such as the Berne Club, the Kilowatt group and the Vienna group.⁷

Since the activities of Al-Qaida became a problem, in particular for the United States (US), a great deal of activity has been taking place worldwide in the field of the fight against terrorism. The US is taking a lead here and in a not too modest way: it is the *war on terrorism*. In its own country, legislation was sharpened in relation to crimes of terrorism, the most noticeable of which was the introduction of the Patriot Act⁸ which will no doubt be followed by an even more restrictive Patriot Act II⁹, but this is certainly not a unique example.¹⁰ The Americans are equally not shy of 'stimulating' anti-terrorism measures in other countries. The European Union is a popular partner in the war against terrorism and, certainly under American pressure, the passport with biometric information¹¹ and the exchange of information on air passengers have been introduced.¹² The stamp of the US may also be discerned in the shift from imposing sanctions on States to imposing sanctions on organisations. This had already been started by President Clinton, who undertook this extension in 1995 by issuing a presidential decree (*executive order*) within the framework of the implementation of the International Emergency Economic Powers Act (IEEPA).¹³ During Clinton's administration, lists of terrorist organisations were also drawn up in the implementation of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.¹⁴ Apparently it has also become policy that organisations under international public law, besides against States, may also order sanctions against individuals and private organisations.¹⁵ It is nevertheless still the question whether this is an exception concerned exclusively with the fight against terrorism, because the measure has also been used to prevent civil war. A recent example is Resolution 1572 (2004) of the UN Security

⁶ European Convention on the Suppression of Terrorism, concluded at Strasbourg on 27 January 1977, ETS no. 90, <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>

To strengthen the treaty there is a recent Protocol: Protocol amending the European Convention on the Suppression of Terrorism, Strasbourg 15 May 2003, ETS no. 190, <http://conventions.coe.int/Treaty/en/Treaties/Html/190.htm> (10 May 2005).

⁷ See Bunyan T., *Statewatching the new Europe. A handbook on the European State*, Statewatch, 1993, pp. 173-181.

⁸ The USA PATRIOT Act is an acronym of 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'. <http://www.epic.org/privacy/terrorism/hr3162.html>. (10 May 2005). This is of course not the only anti-terrorism act in the USA. After September 11, however, this is the most comprehensive act that amends, in an anti-terrorist sense, a great deal of other existing legislation.

⁹ Domestic Security Enhancement Act. It is called Patriot Act II because it amends the Patriot Act.

¹⁰ See on the anti-terrorist legislation in American history: Vervaele J.A.E., *De anti-terroriswettgeving in de VS: inter arma silent leges?*, *Tijdschrift voor Onderneming en Strafrecht*, 2004, pp. 120-143. (The Anti-terrorist legislation in the US: inter arma silent leges?).

¹¹ Document 15152/04 VISA 209 COMIX 716, Council Regulation on standards for security features and biometrics in passports and travel documents issued by Member States (not yet published in the *OJ* at the time of writing). That this has been done under American pressure emerges, for example, from the report of Article 29 Data Protection Working Party, *Working document on biometrics*, 12168/02/EN, WP 80, p. 2, but also from the *Proposal for a Council Regulation on standards for security features and biometrics in EU citizens' passports*, COM (2004) 116 def., pp. 3-5.

¹² (2004/496/EG) Council Decision of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, *OJ* 2004, L 183/83 and Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, *OJ* 2004, L 183/84.

¹³ See: Vervaele J.A.E., 2004, *supra* note 10.

¹⁴ See: Vervaele J.A.E., 2004, *supra* note 10.

¹⁵ The first targeted UN sanctions were directed against officials of the Unita in Angola and their family members, Resolution 1127 (1997) Adopted by the Security Council at its 3814th meeting, on 28 August 1997, <http://daccessdds.un.org/doc/UNDOC/GEN/N97/226/93/PDF/N9722693.pdf?OpenElement> (July 2005).

Council¹⁶ and the EU Council Common Position 2004/852/CFSP,¹⁷ drawn up for its implementation, and the proposal for a EC Regulation for the implementation of this in connection with the situation in the Ivory Coast¹⁸ in which, besides arms embargoes, measures were also proposed which are comparable to those against the Taliban, Osama Bin Laden and Al-Qaida, namely a freezing of all financial assets of certain individuals.¹⁹ In the definitive EC Regulation, an Annex with a list of names will be included which shall correspond to the list drawn up by the (Ivory Coast) *1572 Committee* of the UN. This is the same pattern as in the fight against terrorism; sanctions are imposed by the Security Council of the UN by means of resolutions under the effect of Chapter VII of the Charter. These are then translated into Common Positions of the EU Council for Common Foreign and Security Policy (CFSP second pillar), which further instructs the European Communities (first pillar) to recast the measures as Regulations which are then enforced against individual citizens or organisations by the EU member states.

3. The UN measures

At the coming into being of the recent sanctions against terrorists and in particular the freezing of financial resources, there stand, apart from an UN Treaty,²⁰ a number of important Resolutions of the UN Security Council accepted under Chapter VII of the UN Charter and directed towards the Afghan Taliban, on the one hand, and, on the other, Osama Bin Laden and Al-Qaida who are under their protection.

3.1. Resolutions

First, the so-called *Taliban Resolution*, Resolution 1267 (1999)²¹ on the freezing of the financial assets of the Taliban and economic sanctions imposed on them because of their stubborn hospitality to Osama Bin Laden in Afghanistan. This Resolution set up a committee, the *1267 Committee*²² or the *Taliban Sanction Committee* that moni-

¹⁶ Resolution 1572 (2004) Adopted by the Security Council at its 5078th meeting, on 15 November 2004, <http://daccessdds.un.org/doc/UNDOC/GEN/N04/607/37/PDF/N0460737.pdf?OpenElement> (10 May 2005). Article 14 of the Resolution also establishes the creation of the Sanction Committee: Security Council Committee established pursuant to Resolution 1572 (2004) concerning Côte d'Ivoire. This Committee has the task (art. 14 under a): 'to designate the individuals and entities subject to the measures imposed by paragraphs 9 and 11 above, and to update this list regularly.'

¹⁷ Council Common Position 2004/852/CFSP of 13 December 2004 concerning restrictive measures against Côte d'Ivoire, *OJ* 2004, L 368/50.

¹⁸ Proposal for a Council Regulation imposing certain specific restrictive measures directed against certain persons and entities in view of the situation in Côte d'Ivoire, COM/2004/0842 def.

¹⁹ See in COM/2004/0842 def., point 4 of the explanatory memorandum, p. 2. In accordance with Art. 9 of Resolution 1572 (2004) and Common Position 2004/852/CFSP the second recital of the proposed Regulation (p.3) states that to be subjected to the sanctions are: '...persons ... designated who constitute a threat to the peace and national reconciliation process in Côte d'Ivoire, in particular those who block implementation of the Linas-Marcoussis and the Accra III Agreements, any other person determined as responsible for serious violations of human rights and international humanitarian law in Côte d'Ivoire on the basis of relevant information, any other person who incites public hatred and violence, and any other person determined by the Committee to be in violation of the arms embargo also imposed by Resolution 1572 (2004) on funds and economic resources of persons who constitute a threat to the peace and national reconciliation process in Côte d'Ivoire, as designated by the Committee established by UNSCR 1572 (2004).'

²⁰ International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999, <http://untreaty.un.org/English/Terrorism.asp> (10 May 2005).

²¹ Resolution 1267 (1999) Adopted by the Security Council at its 4051st meeting on 15 October 1999. <http://daccessdds.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement> (10 May 2005). See for the Resolutions of the SC-UN the website <http://www.un.org/Docs/sc/> under: 'Resolutions'.

²² Security Council Committee established pursuant to Resolution 1267 (1999).

tors the implementation of the resolution and at the same time draws up an up to date list of the persons and entities attached to the Taliban and Al-Qaida whose financial assets should be frozen.²³

Then Resolution 1333 (2000)²⁴ on the freezing of all financial assets of Osama Bin Laden himself and persons and entities associated with him, namely Al-Qaida.

Finally, Resolutions 1390 (2002) and 1455 (2003) which stipulate that the freezing of the assets of the Taliban, Osama Bin Laden and Al-Qaida, as required under Article 8 under c of Resolution 1333 (2000) must be continued.²⁵

When the United States was hit by the attacks of 11 September 2001, the Security Council adopted an important Resolution on 28 September 2001: the so-called *11 September Resolution*, UN Resolution 1373 (2001).²⁶ This obliges States to freeze all assets and other economic and financial resources of those who commit acts of terrorism or attempt to commit them or who take part in them or who facilitate the carrying out of these acts. Furthermore, States have to take steps which both forbid assets and other economic and financial resources being made available to these persons as well as other financial and allied services being provided to them. This Resolution also set up a committee, the *Counter-Terrorism Committee* (CTC), which supervises compliance with the resolution, but does not itself compile lists of terrorist persons and organisations.²⁷

3.2. The ‘1267 Committee lists’

On the basis of Article 6 of Resolution 1267 (1999) - the so-called *Taliban Resolution* - a committee was set up - the *1267 Committee* (or the *Taliban Committee*) - consisting of all the members of the Security Council which carries out certain tasks in connection with compliance with the Resolution. The Committee works closely with the *Counter-Terrorism Committee* which was set up by the UN *11 September 1373 Resolution* (2001).²⁸ UN Resolution 1333 (2000) gives the *1267 Committee* the power to draw up a list of persons and entities associated with Osama Bin Laden ‘based on information provided by States and regional organisations’ (Article 16 sub. b) and to keep this list up to date. This is not an exceptionally precise description of the procedure. On the basis of Article 2 of Resolution 1390 (2002) the Committee keeps the list

²³ See the most recent list (updated on 5 May 2005) at the time of writing: The new consolidated list of individuals and entities belonging to or associated with the Taliban and Al-Qaida organisations as established and maintained by the 1267 Committee. <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm> (5 May 2005).

²⁴ Resolution 1333 (2000) Adopted by the Security Council at its 4251st meeting on 19 December 2000. <http://daccessdds.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement> (10 May 2005).

²⁵ Resolution 1390 (2002) Adopted by the Security Council at its 4452nd meeting, on 16 January 2002; Resolution 1455 (2003) Adopted by the Security Council at its 4686th meeting, on 17 January 2003. <http://www.un.org/Docs/sc/> (10 May 2005).

²⁶ Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001. <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement> (10 May 2005).

²⁷ ‘Resolution 1373 established the Counter-Terrorism Committee (known by its acronym: the CTC), made up of all 15 members of the Security Council. The CTC monitors the implementation of resolution 1373 by all States and tries to increase the capability of States to fight terrorism. (...)The CTC is not a sanctions committee and does not have a list of terrorist organisations or individuals.’ <http://www.un.org/Docs/sc/committees/1373/>

²⁸ See art. 3 Resolution 1455 (2003). Resolution 1455 (2003) Adopted by the Security Council at its 4686th meeting, on 17 January 2003, <http://daccessdds.un.org/doc/UNDOC/GEN/N03/214/07/PDF/N0321407.pdf?OpenElement> (10 May 2005).

up to date.²⁹ Of importance is that the Committee has drawn up its own Guideline.³⁰ The Guideline includes rules on inclusion on the list (Article 5), revising the list (Article 6), but also on the delisting of persons or entities so that a possible wrongful inclusion can be rectified (Article 7). This delisting procedure can be initiated by a State whose nationality the person involved possesses or where he is resident. Names are placed on the list on the basis of *relevant information* (Article 4b, 5a and 5d). If possible, this should be accompanied by a description of the information which justifies the imposition of a sanction on the basis of the Resolutions (Article 5b), together with relevant and specific information which simplifies the identification of those involved by the authorised authorities (Article 5c). Decision-making within the Committee is by consensus (Article 9a) and where the Committee is unanimous, the decision-making takes place in writing during which the members of the Committee may raise objections. Despite this in itself clear procedure, it is in the nature of things that the body's actual method of working is not particularly transparent to the outside world; one may only speculate on how inclusion on the list does in fact come about. It is not implausible that the greater part of the information is supplied by the American authorities, including the President himself, who obtain the information in their turn from the intelligence and security services or allied organisations.³¹

4. The EU measures

The European Union has not stood still and has on each occasion implemented the above UN Resolutions by, in its turn, itself taking decisions which then oblige the EU member states to take and implement measures.³² Here the EU has been availing itself of the various legal instruments available to it under the EC Treaty and the Treaty on the European Union (TEU).

²⁹ The list is accessible to the public, see: The new consolidated list of individuals and entities belonging to or associated with the Taliban and Al-Qaida organisations as established and maintained by the 1267 Committee:

<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm> (10 May 2005). See for the Committees of the SC-UN the website <http://www.un.org/Docs/sc/> under: 'Subsidiary Bodies'.

³⁰ Security Council Committee established pursuant to Resolution 1267 (1999). Guidelines of the Committee for the conduct of its work (Adopted on 7 November 2002 and amended on 10 April 2003),

http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf (10 May 2005).

³¹ A hint in this direction is to be found in the interim relief order in *Aden and others* where the president of the CFI refers to the fact that applicants were placed on the list of the *1276 Committee* because of information given by American authorities. President of the Court of First Instance 7 May 2002, Case T-306/01 R *Aden and others* (§ 90). The sanctions against Mr. Sison, for example, were applied by the Dutch authorities before Mr. Sison's name was put on the lists of the *1267 Committee* and the EU list because his name first appeared on the list of the executive order of the American President of 12 August 2002 (See: *Sancie-regeling terrorisme 2002 III, Ster.* 2002, no. 153/6, p. 2).

See also: Executive Order 13224 Blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism, 23 September 2001, <http://www.treas.gov/offices/enforcement/ofac/sanctions/t11ter.pdf> (10 May 2005). This presidential executive order, regularly updated, contains a very impressive list (91 pages long) of persons and organizations.

³² For measures, including EU measures, see also: Peers S., EU Responses to Terrorism, *International and Comparative Law Quarterly* 2003, no. 1, pp. 227-243; Bowring B., Korff D., Terrorist Designation with regard to European and International law: the case of the PMOI, <http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf> (10 May 2005); Jimeno-Bulnes M., After September 11th: the Fight Against Terrorism in National and European Law. Substantive and procedural rules: Some examples, *European Law Journal* 2004, no. 2, pp. 235-253; I. Cameron, European Union Anti-Terrorist Blacklisting, *Human Rights Law Review*, 2003, nr. 2, pp 225-256.

4.1 Second pillar: Council common positions

A series of common positions came into being in the second pillar on common foreign and security policy (CFSP)³³ on the basis of Article 15 TEU - which sets out the Union's approach with regard to a certain matter of a geographic or thematic nature by which the member states must ensure that their national policy is in line therewith.

To implement Resolution 1267 (1999), the Council adopted Common Position 1999/727/CFSP on 15 November 1999 concerning restrictive measures against the Taliban.³⁴

Common Position 2001/154/CFSP was adopted for the implementation of UN Resolution 1333 (2000).³⁵ It concerns the freezing of all financial assets of Osama Bin Laden himself and the persons and entities associated with him, namely Al-Qaida.

After UN Resolution 1390 (2002) on maintaining the freezing measures, the amendments were incorporated in Common Position 2002/402/CFSP.³⁶

On 27 December 2001 Common Position 2001/930/CFSP³⁷ (CFSP Common Position 930) and Common Position 2001/931/CFSP³⁸ (CFSP Common Position 931) were introduced for the implementation of the *11 September* UN Resolution 1373 (2001).³⁹ The first Common Position makes consciously making assets available or collecting them for use in terrorist acts criminal offences, freezes assets, makes all passive or active support of terrorists punishable, refuses shelter to terrorists and those who support them, advocates effective border checks and measures against the abuse of asylum status. It may be noted here that certain aspects of this CFSP Common Position 930 are more far-reaching than UN Resolution 1373: the measures recommended in the Resolution (point 3) became compulsory under CFSP Common Position 930, and the obligation imposed on States in the Resolution to provide no form of support to terrorism (point 2 a) at all has become an obligation on individuals in CFSP Common Position 930 (Article 4).

In the context of this article, CFSP Common Position 931 is interesting in that it determines that the European Community (EC) shall order the freezing of funds, financial assets or other financial resources of the persons, groups and entities listed in the Annex (Article 2).⁴⁰ The preamble makes it clear that the persons and entities mentioned on the list of the *1267 Committee* of the UN, a list which, incidentally, also ap-

³³ Title V of the Treaty on the European Union (TEU).

³⁴ Council Common Position 1999/727/CFSP of 15 November 1999 concerning restrictive measures against the Taliban, *OJ* 1999, L 294/1.

³⁵ Council Common Position 2001/154/CFSP of 26 February 2001 concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP, *OJ* 2001, L 57/1.

³⁶ Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Osama bin Laden, the members of Al-Qaida and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, *OJ* 2002, L 139/4.

³⁷ Council Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism, *OJ* 2001, L 344/90.

³⁸ Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, *OJ* 2001, L 344/93.

³⁹ All these are the first acts meant to implement the UN Resolutions. Many more will regularly follow in order to supplement and update the 'original' ones.

⁴⁰ As will be clear later, the freezing of the financial assets will not be the sanction imposed on all the persons or entities placed on this list.

plies to the implementation of Resolution 1333 (2001), may also fall within the scope of the Common Position. The list included as an Annex to the Common Position therefore contains names of terrorists from the UN List, of other terrorists and of European terrorists, which will be discussed later. The List, the Annex to CFSP Common Position 931, is regularly revised (Article 1 paragraph 6), each time by means of new Common Positions of the CFSP Council.⁴¹

4.2. First Pillar: Regulations

The Common Positions of the CFSP Council in their turn contain instructions to the EC on the implementation of the obligations which were originally laid down in the UN Resolutions.

In the implementation of Common Position 1999/727/ CFSP, the Council adopted Regulation EC 337/2000 (*Taliban Regulation*).⁴²

This was replaced by Regulation (EC) 467/2001, as a result of UN Resolution 1333 (2000) and the Common Position 2001/154/ CFSP adapted to this.⁴³ The latter includes an Annex with a list of the persons, organisations and entities, with connections with the Taliban, on which sanctions are to be imposed. This list is revised each time that there are new updates from the *1267 Committee*.

Following UN Resolution 1390 (2002), Common Position 2002/402/CFSP came into being, followed by Regulation (EC) 881/2002 of the Council,⁴⁴ which replaces Regulation EC 467/2001.

Subsequently, Regulation (EC) 2580/2001 of the Council⁴⁵ came into effect to implement Article 2 of CFSP Common Position 931 which is an implementation of the *11 September* UN Resolution 1373 (2001).⁴⁶

EC Regulation 2580 is very interesting in connection with CFSP Common Position 931. In Article 2 paragraph 1, it orders 'the freezing of all funds, financial assets and financial resources which are in the possession of, which are the property of or which are held by a natural person or a legal person, group or entity as referred to in the list in Article 2(3).' It is stated under b that resources may not be made available either directly or indirectly. The Council determines the list of persons, groups and entities

⁴¹ See the Official Journal of the European Union. As an example see the most recent at the time of writing: Common Position 2004/427/CFSP of 6 June 2005, updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2004/220/CFSP, *OJ* 2005, L 144/54.

⁴² Council Regulation (EC) 337/2000 14 February 2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *OJ* 2000, L 43/1.

⁴³ Council Regulation (EC) 467/2001 of 6 March 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) 337/2000, *OJ* 2001, L 67/1.

⁴⁴ Council Regulation (EC) 881/2002 of 27 May 2002 imposing certain specific restrictive measures against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, and repealing Regulation (EC) 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, *OJ* 2002, L. 139/9.

⁴⁵ Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism, *OJ* 2001, L 344/70. This regulation has recently been amended by Commission Regulation (EC) 745/2003 of 28 April 2003 amending Council Regulation (EC) 2580/2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism, *OJ* 2003 L 106/22.

⁴⁶ For the implementation of UN Resolutions 1267 (1999) and 1333 (2000) Regulation (EC) 476/2001, *OJ* 2001, L 67/1 was already adopted.

for which this regulation or freezing measure is applicable (Article 2, paragraph 3). Moreover, the Council evaluates and assesses the list by unanimous vote in conformity with Article 1 paragraphs 4, 5 and 6 of CFSP Common Position 931. In the implementation of Art. 2(3) of the Regulation, regularly revised lists are embodied in separate Decisions of the Council.⁴⁷

4.3 Third Pillar: Decisions and framework decisions

In the third pillar on police and judicial cooperation in criminal matters (PJCC),⁴⁸ decisions and framework decisions (Article 3(2) under b and c TEU), both binding on the member states, have been employed against terrorism, such as the important Framework Decision 2002/475/JHA on combating terrorism⁴⁹ which gives the definition of terrorist crimes and of terrorist group(s) which is almost identical to that embodied in CFSP Common Position 931. This framework decision also indicates the minimum sanctions including extradition, and arrangements are included on the protection of and assistance to victims of terrorist crimes.

Decision 2002/996/JHA⁵⁰ provides for an assessment mechanism to monitor the implementation of anti-terrorist measures by the Member States in which an assessment team of two experts appointed by each member country is established to assess each member state apart from their own member state.

Finally, there is Decision 2003/48/JHA of 19 December 2002⁵¹ which provides for the implementation of Article 4 CFSP Common Position 931, and therefore, as we shall see, against European terrorists.

Although not exclusively intended to combat terrorism, but still useful in this respect, are the Framework Decision on the European arrest warrant⁵² and the Framework Decision on joint investigation teams.⁵³

4.4. The EU lists

A pressing question is how a person, group or entity comes to be on the list of the common positions and the decisions of the Council. On the basis of Article 1(4) of CFSP Common Position 931 this will occur:

‘On the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of which the persons, groups and entities concerned, irrespective of whether it

⁴⁷ The first one was: Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *OJ* 2001, L 344/83 and the last one at the time of writing was: Council Decision 2005/428/CFSP of 6 June 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/221/CFSP, *OJ* 2005, L 144/59.

⁴⁸ Title VI of the Treaty of the European Union. Since the Treaty of Amsterdam the name of title VI is officially: ‘Provisions on police and judicial cooperation in criminal matters’ although the ‘old’ name of ‘Justice and Home Affairs’ (JHA) from the Treaty of Maastricht is still used.

⁴⁹ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 2002, L 164/3.

⁵⁰ Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, *OJ* 2002, L 349/1.

⁵¹ Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP, *OJ* 2003, L16/68.

⁵² Council Framework Decision 2003/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ* 2002, L 190/1.

⁵³ Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, *OJ* 2002, L 162/1. The seventh recital of the preamble makes it clear that this measure is meant to combat terrorism.

concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.

For the purposes of this paragraph "competent authority" shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.'

This provision does not provide for a specific procedure for the member states and the Council to put certain names on the list. It only sets criteria. These are broad and cryptic. This provision creates the impression that there is always a court decision as a basis, although this does not need to be exclusively a conviction. The fact that a court is involved could give some guarantee of a judicial check. Unfortunately there is no certainty of this: the Dutch government thinks, for example, that: 'the information (...) need not necessarily come from a judicial authority; information from the sphere of intelligence or investigation may be a reason for placing an organisation on the list.'⁵⁴ Again no procedure has been laid down in CFSP Common Position 931. This leaves many questions open. How are the national lists supplied to Brussels? And by whom? Is a supporting file mandatory which shows there are well-founded reasons for placing X or Y on the list? Is there an internal procedure of checks under which 'the lists of wishes' and the files of the member states are checked? Who compiles the lists for the Council? According to information provided by the Dutch government, it appears that the latter is carried out by a *clearing house*: a confidential ad hoc forum that decides unanimously and which is made up of officials from the Ministries for Foreign Affairs and, for some member states, of representatives from the intelligence services. In this body, the member states examine whether a person and organisation is involved in terrorist activities.⁵⁵ There are no public documents which make known which procedure or procedures or which set of objective criteria is used to check the contributions of the member states⁵⁶ - should a certain procedure and criteria in fact exist. It is therefore clear that there is no guideline - at least made accessible to the public - at EU level, such as the *Guidelines for the 1276 Committee*, on how the clearing house operates. It is noticeable here that neither on the basis of CFSP Common Position 931 nor on the basis of EC Regulation 2580 is there any provision for a complaints or a delisting procedure in case of erroneous listing. Moreover, the EU lists may also contain the same persons, groups and entities as the list of the *1276 Commit-*

⁵⁴ TK 2002-2003, 28 666, no. 1, p. 5. What this means precisely is not clear, but it can refer, for example, to information available from the Algemene Inlichtingen- en Veiligheids Dienst (Dutch Intelligence and Security Service) or an exploratory inquiry under Art. 126gg WvSv (Dutch Code of Criminal Procedure).

⁵⁵ From the documentation of the Dutch Lower House (Tweede Kamer, TK): TK 2002-2003, 28 666, no. 1, p. 5 and TK 2001-2002, 23 490, no. 229, p. 9. In TK 2001-2002, 28 251, no. 5, p. 9, the minister explains that the list has been unanimously adopted by the Council and that a decision-making in a confidential ad hoc European body is autonomous i.e. that there is no coercion from the United Nations.

⁵⁶ It is likely that the member states put forward their own lists of terrorists whom they gladly want to see on the European lists. This is especially so for the European terrorists. In this sense the comment given by the leader of the Partido Popular Mariano Rajoy on the verdict of the court of Madrid that Segi is not a terrorist organisation part of the ETA is exemplar: "It is a terrorist organisation because the European list says so". *El País*, 20 June 2005. But who put Segi on the European list if not a Spanish competent authority, one might wonder? See also: Cameron, I., 2003, *supra* note 32, pp. 234-238.

tee (Article 1 paragraph 4 CFSP Common Position 931). They are often, in their turn, derived from the list of the executive order of the President of the United States. It is not known whether the names are indiscriminately copied or whether they are subjected to some form of review on the part of the EU. Probably the names are simply reproduced.⁵⁷ It is noticeable that the Court of First Instance considers every Decision implementing Article 2(3) of Regulation 2580/2001 with the updated list as a new decision because the list should be reviewed in the sense that ‘in a community governed by the rule of law, it cannot be accepted that an act establishing continuing restrictive measures in respect of persons or entities could be applicable without limitation unless the institution which has promulgated them readopts them regularly following a review.’⁵⁸ But very little is known on how the lists are drawn up and reviewed. In this sense, Sison’s appeals to the Court of First Instance (CFI) against the refusal of the Council to allow access to the documents which led to his inclusion on one of the EU’s list could have been of great significance. But the CFI ruled that the Council was entitled on basis of Article 4(1) of Regulation 1049/2001 to refuse the disclosure, also partly, of the documents in question, including the identity of their authors or the third countries involved. The Council did not make a manifest error of assessments in refusing access to documents for reason of public security, the Court ruled. This is justified even if the requested information is necessary in order to secure Sison’s right to a fair trial⁵⁹ because ‘that circumstance is not relevant for the purpose of assessing the validity of the ... decision refusing access.’⁶⁰

4.5. Different lists, different terrorists?

Several lists of persons, organisations and entities are now in circulation in the EU, against whom or against which States should impose sanctions, depending on the UN Resolutions that the EU measures are implementing. There is one list that is very significant and should therefore be examined in greater detail. It is the list attached to CFSP Common Position 931 as an Annex. CFSP Common Position 931 gives instructions for the implementation of *11 September* Resolution 1373 (2001) against those on the list, in principle the financial sanctions as laid down in EC Regulation 2580. A number of persons, organisations and entities on the CFSP Common Position 931 list are however marked with an asterisk. A very minor note provides an explanation: those marked with this asterisk ‘shall be the subject of Article 4 *only*’⁶¹. This means that they are subject to the effects of article 4 of CFSP Common Position 931. This also means that they are not - at any rate not on the basis of CFSP Common Position 931 - subject to the effect of EC Regulation 2580 which provides for financial sanctions. Article 4 of CFSP Common Position 931 refers to the obligation of the member

⁵⁷ See note 31.

⁵⁸ Order CFI 15 February 2005, Case T-229/02 *PKK-KNK* (§44): ‘Article 2(3) of Regulation No 2580/2001 provides that the Council is to establish, review and amend the list of persons, groups and entities to which that regulation applies. It follows that the Council, in each new act, reviews the disputed list. Secondly, such a review cannot be limited to the inclusion of new persons or entities or the removal of certain persons or entities since, in a community governed by the rule of law, it cannot be accepted that an act establishing continuing restrictive measures in respect of persons or entities could be applicable without limitation unless the institution which has promulgated them readopts them regularly following a review.’

⁵⁹ Meant is Case T-47/03 where Sison challenges EC Regulation 2580 and the decisions linked thereto with the lists on which his name is repeatedly mentioned.

⁶⁰ CFI 26 April 2005, Joint Cases T-110/03; T-150/03 and T-405/03, *Sison*.

⁶¹ Emphasis added (IT). In other languages this has the same meaning: ‘vallen *uitsluitend*’; ‘fallen *nur* unter Artikel 4.’; ‘sono soggette al *solo* articolo 4.’; ‘estarán *sólo* sujetas a lo dispuesto en el artículo 4.’; ‘sont *uniquement* soumises à l’article 4.’

states ‘to afford each other the widest possible assistance in preventing and combating terrorist acts’,⁶² within the framework of police and judicial cooperation - the third pillar of the EU.⁶³ This explains the double legal basis of CFSP Common Position 931: Article 15 and Article 34 TEU. CFSP Common Position 931 is in fact a double Common Position: one on the grounds of the second pillar (CFSP, Article 15 TEU) and one on the grounds of the third pillar (PJCC/JHA, Article 34 TEU) of the EU.

The alleged terrorists who are marked with an asterisk, and therefore not subject to the effect of EC Regulation 2580 but of article 4 of CFSP Common Position 931, are terrorists ‘made in the European Union’. They are all persons, organisations and entities who or which are subjects of member states of the European Union, such as Basque and Irish citizens or ETA and the IRA and various other kinds of organisations which have been qualified as ‘being part of...’ On one of the most recent lists, organisations have been listed whose names one would more likely expect to find in a comic book rather than on a serious list from the intelligence services.⁶⁴ By differentiating between terrorists who are subject to the effect of EC Regulation 2580 - and who are therefore included in the lists of the EC Decisions which determine to whom the Regulation applies - and between those who are only subject to the effect of Article 4 of CFSP Common Position 931, the Council creates different legal regimes for different terrorists: an EC regime (EC Regulation 2580) that provides for the freezing of the financial assets of non-EU subjects and an EU/third pillar regime (Article 4 of CFSP Common Position 931) that demands stronger cooperation between Member States when acting in criminal matters. The Dutch Minister for Foreign Affairs has explained the differentiation as follows:

*Regulation 2580/2001 provides for the freezing of assets of persons, groups and entities mentioned on the list, in so far as persons, groups and entities are concerned who are predominantly active outside the EU (so-called “external” terrorists). This is not a criminal measure but a measure under administrative law of a preventive nature. For persons, groups and entities who are also on the list, but who are predominantly active within the EU (the so-called “internal” terrorists, for example ETA members), the Member States are only bound to employ “stronger” police and judicial cooperation in the fight against terrorism.*⁶⁵

The intriguing question is why this arrangement has been chosen or why EU terrorists may not be subject to EC Regulation 2580. The Dutch government has provided the

⁶² Article 4 of CFSP Common Position 931 reads: ‘Member States shall, through police and judicial cooperation in criminal matters (...) afford each other the widest possible assistance (...) in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by authorities in respect of any of the persons, groups or entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.’

⁶³ Title VI TEU.

⁶⁴ For example: ‘* Cooperativa Artigiana Fuoco ed Affini - Occasionalmente Spettacolare (Artisans’ Cooperative Fire and Similar - Occasionally Spectacular)’ and ‘* CCCCC — Cellula Contro Capitale, Carcere i suoi Carcerieri e le sue Celle (Cell Against Capital, Prisons, Prison Warders and Prison Cells)’. From: Common Position 2004/427/CFSP of 6 June 2005, *OJ* 2005, L 144/54.

⁶⁵ *Wijziging van de Sanctiewet*, TK 2001-2002, 28251, (Amendment of the Sanctions Act) no. 5 (Note after Report), pp. 9-10. This description by the minister is not entirely correct because where the terrorists are active, inside or outside the EU, is not the decisive issue, but whether they are citizens of a EU member state or not.

information that this is because, according to the Legal Service of the Council, ‘internal’ terrorists are not subject ‘to the scope of the CFSP by definition.’⁶⁶ Apparently the Legal Service regards the imposition of financial sanctions on EU subjects as ‘internal policy’ so that it could indeed be defended that Article 11 TEU⁶⁷ is not applicable and that the CFSP Council is therefore not authorised.⁶⁸ The Service could have reasoned differently, namely that the imposition of financial sanctions, made mandatory under UN Resolution 1373 (2001), is an obligation under international law on the grounds of Chapter VII of the UN Charter and is therefore foreign policy ‘by definition’, since it concerns the threat to world peace and security. Moreover, the second pillar also covers security policy and terrorism falls under this as well.⁶⁹ Whatever the case may be, because of the differentiation between terrorists, all kinds of measures to combat terrorism are applied against Europeans in a regime of stronger cooperation in criminal matters and not ‘just’ the - in the words of the Minister - freezing of financial assets under administrative law in accordance with EC Regulation 2580, which is in itself not a soft measure, and one may very well wonder if it is not punitive in character and is then subject to the effect of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The way in which ‘Article 4 cooperation’ must be given shape is partly determined by a separate decision of the JHA Council, Decision 2003/48/JHA.⁷⁰ This decision provides in particular for the exchange of information in the broadest sense (including files and evidence which has been seized) between the Member States among themselves, on the one hand, and between the Member States and Europol and Eurojust, on the other.⁷¹ Moreover, in accordance with this Decision, joint investigation teams should also be set up.⁷²

CFSP Common Position 931 has created a distinction between European and non-European terrorists: they are affected by other sanctions and are subject to different legal regimes, with different outcomes where legal protection is concerned, as will be shown. In practice the distinction is not that black and white. According to international law there is nothing to stop States, apart from their membership of the EU and therefore apart from being bound by EU rules, from implementing the UN Resolutions which provide for the freezing of financial assets. Even more so, they are bound

⁶⁶ *Wijziging van de Sanctiewet*, TK 2001-2002, 28251, no. 5 p. 10 (Amendment of the Sanctions Act).

⁶⁷ Article 11 (1) paragraph 1 TEU begins with: ‘The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be: ...’

⁶⁸ See also Bulterman, M., *De financiële strijd tegen het terrorisme en de mensenrechten*, *NJCM-Bulletin* 2002, no. 7, pp. 834-848; and especially p. 837. She considers the objectives of Art. 11 TEU to be so broad that the narrow view held by the legal service is difficult to understand.

⁶⁹ According to Cameron the reason for the distinction between EU and not-EU terrorists lies in the wording of Article 301 TEC: ‘Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures...’ The term ‘third countries’ might’, according to Cameron, ‘be stretched to cover the freezing of the property of individuals who are not EU nationals, but not that it is going too far to let this cover even EU nationals.’ Cameron, I., 2003, p. 233, *supra* note 32.

⁷⁰ Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP, *OJ* 2003, L16/68)

⁷¹ On the exchange of information between investigation services and intelligence services regarding the fight against terrorism, see: Vervaele J.A.E., *Gegevensuitwisseling en terrorismebestrijding: discretionair strafrecht sub rosa?* In: Boone M. et al (ed.), *Discretie in het strafrecht*, The Hague: Boom Juridische Uitgevers, 2004, pp. 47-75.

⁷² Further regulation on the investigation teams is to be found in a specific framework decision: Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams *OJ* 2002 L 162/1.

to do this by the UN Charter. This means that the ‘Article 4 CFSP Common Position 931-EU-terrorists’ can also be the subject of financial freezing. In addition, there is nothing to stop the Member States, here again apart from their membership of the EU, from dealing with persons, organisations and entities who or which they regard as terrorists under criminal law, so that the ‘Regulation 2580-non-EU-terrorists’ applies, and who have been subject to financial freezing, so that they may also be subject to criminal prosecution. And even within the EU context, the strict division imposed by CFSP Common Position 931 may be put into perspective, so that EU Member States may also instigate criminal prosecutions against ‘Regulation 2580-non-EU-terrorists’ who are subject to the freezing of financial assets, since the CFSP does not exclude this. Inversely, that is allowing EC Regulation 2580 to be also applicable to the *only* ‘Article 4 CFSP-931-EU terrorists’ seems more difficult to defend in my view, although the Netherlands, for example, has done this. By ministerial regulation,⁷³ the Regulation has been declared for the greater part applicable to EU terrorists as far as the imposition of financial sanctions (Article 1 paragraph a *Sanctieregeling* [Sanction Regulations]) is concerned. In the explanatory memorandum, the Minister however indicates that he does this in implementation of *11 September* UN Resolution 1373:

‘starting from the desirability of implementing Resolution 1373, the present sanction regulations have been laid down in order to be also able to take measures and freezing measures as proposed in Regulation (EC) 2580/2001, against EU subjects or against legal persons/entities who originate or have their registered office in the EU.’

There would be nothing wrong in the implementation of the UN Resolution but to declare the EC Regulation applicable to persons, organisations and entities from which in my opinion they are explicitly excluded - on the grounds of CFSP Common Position 931 and the Decisions with lists annexed to EC Regulation 2580 - and with this extending the scope of the Regulation is a power which in my view a national minister does not possess. From Article 2 in conjunction with Article 1 paragraph 6 CFSP Common Position 931 and Article 2(3) EC Regulation 2580 it cannot otherwise be deduced, in my opinion, than that only the Council is authorised to compile the lists and in doing so to determine to whom the measures apply.⁷⁴

5. The national measures

The UN Member States are bound to implement the decisions of the UN Security Council taken under Chapter VII. In addition, these same states, being at the same time Member States of the EU, are also bound to implement the appropriate regulations and to implement the JHA decisions and framework decisions.⁷⁵ The Common Positions adopted in the second CFSP pillar are also not without obligations, since

⁷³ *Sanctieregeling terrorisme 2002 II, Stct 2002, 138/7* (Sanction regulations on terrorism). The juridical basis for this regulation is Article 2 of the *Sanctiewet 1977* (Sanction Act 1977) amended in 2002.

⁷⁴ See also Order CFI 15 February 2005, Case T 229/02 *PKK-KNK*, § 44.

⁷⁵ Both are binding on the member states respectively on the basis of Art. 249 EC and Art. 34 paragraph 2 under c TEU.

Article 15 TEU instructs the Member States to ensure national compliance with the policy laid down in the common positions in relation to a specific subject.

5.1. Financial sanctions

In order to fulfil the above international obligations, the Member States had either to implement national legislation or to amend already existing national legislation or to apply regulations.⁷⁶ In the Netherlands in 2000, in the implementation of various UN Resolutions on sanctions and EC Regulations concerned with these that do not in themselves relate to terrorism, the Sanctions Act (*Sanctiewet*), the Import and Export Act (*In- en uitvoerwet* [IUW]) and the Economic Offences Act (*Wet op de economische delicten* [WED]) were amended.⁷⁷ The Sanctions Act was again amended in 2002 after the UN Resolutions and the ditto EC Regulations which arrange for the freezing of the financial assets of the Taliban, Osama Bin Laden and Al-Qaida and in implementation of the 11 September Resolution 1373 (2001) and the matching EU measures.⁷⁸ Orders in council and numerous ministerial regulations have been repeatedly attached to the law; they adapt the implementation to changing circumstances and they are moreover applicable to new terrorists who are added to the various international lists on each occasion.⁷⁹

5.2. Sanctions under criminal law

Within the framework of combating terrorism under criminal law, numerous harmonising third-pillar measures have been implemented. On the basis of the JHA Framework Decision on combating terrorism⁸⁰ as implemented in the Terrorist Criminal Offences Act [*Wet terroristische misdrijven*],⁸¹ the ‘terrorist intent’ has been added to the description of the crime in a number of criminal offences, increasing the punishment by a half in many cases. The JHA Framework Decision on the European arrest warrant⁸² has been implemented in the Act on Surrender Procedures [*Overleveringswet*].⁸³ This makes the extradition of suspects, including those suspected of terrorism, somewhat easier. The Framework Decision on joint investigation teams⁸⁴ has

⁷⁶ According to the Dutch government, since 2001 ‘at least fifteen acts’ have been adopted or proposed while many more are being prepared, among which is a ‘far-reaching adaptation of our Code of Criminal Procedure’, TK 2004-2005, 27925, no. 157 (Report of general discussion), p. 14. All these new laws and proposals were adopted not only in order to comply with specific obligations of public international public law and, therefore, they will not be discussed further here.

⁷⁷ Act of 13 April 2000 amending the 1977 Sanctions Act and of the *In- en uitvoerwet* (Import and Export Act) for the simplification of the implementation of international obligations, *Stb.* 2000, 196.

⁷⁸ Act of 16 May 2002 amending the 1977 Sanctions Act with a view to the implementation of international obligations directed at combating terrorism and extending the monitoring of compliance with financial sanction measures, *Stb.* 2002, 270.

⁷⁹ Some examples are: Decision of 13 July 2002 for the implementation of Article 10f of the 1977 Sanctions Act (Transfer decision 1977 Sanctions Act 1977), *Stb.* 2002, 403 Decision of 11 October 2002 on the basis of the 1977 Sanctions Act, concerning notifying transactions which could indicate the financing of terrorism, *Stb.* 2002, 553; Sanction mechanism concerning terrorism 2002, *Stcr.* 2002, 104/11; Sanction mechanism concerning terrorism 2003, *Stcr.* 2003, 68/11; Sanction mechanism concerning terrorism 2004, *Stcr.* 2004, 153/6.

⁸⁰ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 2002, L 164/3.

⁸¹ Act of 24 June 2004 amending and supplementing the Dutch Criminal Code and several other acts in connection with crimes of terrorism (*Wet terroristische misdrijven* [Terrorist Criminal Offences Act]) *Stb.* 2004, 290.

⁸² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ* 2002, L 190/1.

⁸³ Act of 29 April 2004 for the implementation of the Framework Decision of the Council of the European Union concerning the European arrest warrant and the surrender procedures between Member States, (*Overleveringswet* [Act on surrender procedures]), *Stb.* 2004, 195.

⁸⁴ Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, *OJ* 2002, L 162/1.

been incorporated in the Dutch Criminal Code for the implementation of the EU Treaty on mutual assistance in criminal matters.⁸⁵

6. The citizen

Since many kinds of lists have been compiled both by UN Committees and by the European Union, many people and organisations run the risk of being affected by measures because they have been listed as terrorists. From the fact that cases are being brought before the Community courts, we know that a number of those involved have started legal proceedings against the sanctions as well as their inclusion on EU lists of terrorists. Unfortunately, at the moment of writing, most cases are still pending before the Court of First Instance, so that the judgment of the court is not known concerning, in particular, the legitimacy of inclusion on the lists.

6.1. Legal proceedings

A number of registered alleged terrorists have applied to the CFI primarily to apply for the annulment of a number of regulations and decisions. *Aden and others*⁸⁶ have first requested the annulment of EC Regulation 2199/2001⁸⁷ (the fourth amendment of EC Regulation 467 which serves as the implementation of UN Resolution 1267 - the Taliban Resolution - and the latter extending Resolution 1333) and then to declare that Regulation EC 467/2001 is not applicable to them. On 9 November 2001, the *1267 Committee* of the UN placed Aden, with two other natural persons and one organisation, on the list of people and entities against whom financial sanctions were to be ordered. As a result of this, they were also placed on the list of EC Regulation 2199 and then, on the basis of this, their financial assets were frozen by the Swedish authorities. Aden et al pleaded that the Council had exceeded the limits of its allotted powers under Arts. 60 and 301 EC and was acting in contravention of Article 249 EC because the Council is not authorised to order sanctions against private individuals. They complain about a lack of legal protection; infringement of the legal principle of the right to a fair and equitable hearing and express their doubts as to the soundness of the imposition of the sanctions.⁸⁸ Moreover, in the meantime, two of the three people who were taking legal action in Aden et al have been scrapped from the *1267 Committee* list due to an application for delisting by the Swedish state, which has apparently been honoured.

⁸⁵ Act of 18 March 2004 amending certain provisions in the Dutch Code of Criminal Procedure and the *Wet politieregisters* (Police Files Act) and supplementing the Dutch Criminal Code with a view to the implementation of the Convention established on 29 May 2000 in Brussels, in accordance with Article 34 of the Treaty on the European Union, approved by the Council, concerning Mutual Assistance in Criminal Matters between the Member States of the European Union, *Stb.* 2004, 107.

⁸⁶ Case T-306/01, still pending. See for the content communication in *OJ* 2002, C 44/27.

⁸⁷ Commission Regulation (EC) 2199/2001 of 12 November 2001 amending, for the fourth time, Council Regulation (EC) 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) 337/2000, *OJ* 2001, L 295/16.

⁸⁸ Aden and others applied for the application of interim relief at the Court of First Instance, for suspending the operation of EC Regulation 467/2001 and EC Regulation 2199/2001 (freezing regulations) with annexed lists containing their names. They asked for the suspension in order to meet their day to day needs because all their financial assets were frozen. The president of the Court dismissed the application for interim relief because of lack of urgency for the reason that the Swedish authorities still granted the applicants some basic social benefits. This made it possible for the applicants to await the judgment on the substance, according to the President. Pres. CFI 7 May 2002, Case T-306/01 R, *Aden and others*.

*Kadi*⁸⁹ and *Othman*⁹⁰ have requested the annulment of EC Regulation 2062/2001⁹¹ (the third amendment of EC Regulation 467) and of EC Regulation 467/2001. Because *Kadi*'s financial assets have been frozen by the British authorities, he is presenting an infringement of property rights as an argument before the court. He argues, moreover, that he has not been given the opportunity to defend himself against inclusion on the list of terrorists and that no means of recourse are available to him. *Othman* also alleges an abuse of the powers under Arts. 60 and 301 by the Council; the infringement of Articles 3 (prohibition of degrading treatment) and 8 (protection of private life) of the ECHR; and, finally, that the measures violate the principle of subsidiarity because of their excessive nature.

The *Organisation des Modjahedines du Peuple d'Iran*⁹² demands primarily that Decision 2002/460/EC of the Council for the implementation of Article 2, paragraph 3, of EC Regulation 2580/2001 be partly annulled and then it requests the court to partly annul the various common positions which bring the list of CFSP Common Position 931 up to date and finally to declare that all these acts do not apply to its organisation. The organisation puts forward the argument that it is suffering damage by the stigmatisation which is a result of its being listed as a terrorist organisation while it is in fact dedicated to promoting democracy in Iran. In the view of the organisation, being put on the list without being heard is in conflict with the rights of defence and is a violation of the right to resist tyranny and oppression, as a higher legal rule.

The *Kurdistan National Congress (KNK)* an umbrella organisation made up of different Kurdish organisations brought two actions. In the first⁹³ they demanded annulment of Council Decision 2002/334/EC implementing Article 2(3) of Regulation 2580/2001 because the list included in that decision the Kurdistan Workers' Party (PKK) was named. The PKK was a member of the KNK until the Congress of the PKK announced the disbanding of the party in April 2002; that is before the PKK was put on the list of Decision 334 taken on 2 May 2002 and on the following updated lists. The KNK is seeking annulment because the inclusion of the PKK on the 'terrorist' lists discredits the struggle of the KNK 'to strengthen the unity and cooperation of the Kurds.' Because the PKK was already disbanded when it was listed it is the KNK that challenges the listing. The Court dismissed the application as inadmissible because the contested decision is not addressed to the applicant since the KNK itself is not named on the list. Furthermore, the court stated, according to the case-law an association formed for the promotion of collective interests of a category of persons, as is the case with the KNK, cannot be considered to be individually concerned and is therefore not entitled to bring an action for annulment. In the second action⁹⁴ the KNK and the PKK demanded annulment of Decision 2002/334 and 2002/460 (implementation of Article 2(3) of Regulation 2580/2001) where the PKK was named. The application of the PKK was dismissed as inadmissible because its representative could not

⁸⁹ Case T-315/01, still pending. See for the content the communication in *OJ* 2002, C 56/16.

⁹⁰ Case T-318/01, still pending. See for the content the communication in *OJ* 2002, C 68/13.

⁹¹ Commission Regulation (EC) 2062/2001 of the Commission of 19 October 2001 amending, for the third time, Council Regulation (EC) 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) 337/2000, *OJ* 2001, L 277/25.

⁹² Case T-228/02, still pending. See for the content the communication in *OJ* 2002, C 247/20.

⁹³ Order CFI, 15 February 2005, Case T-206/02 *KNK*.

⁹⁴ Order CFI, 15 February 2005, Case T-229/02 *PKK-KNK*.

validly demonstrate to be the representative of the organisation since the organisation does not exist anymore.⁹⁵ As regards the KNK the action against Decision 2002/334 is inadmissible by virtue of *lis pendens* (namely case T-206/02) and against Decision 2002/460 because, in brief, KNK is not individually concerned. But, the Court added, the fact that the applicant is not entitled to bring an action for annulment does not mean that any other person to whom the Decision is addressed or who is directly and individually concerned can bring such an action.⁹⁶

And indeed there is such a case: *Aydar and others* on behalf of Kongra-Gel and 10 others.⁹⁷ The applicants claim that the Court should annul the part of the Council Decision 2004/306/EC of 2 April 2004 proscribing Kongra-Gel as an alias of the PKK and annul Regulation 2580/2001 alternatively declare Regulation 2580/2001 illegal in respect of its application to the applicants. The applicants submit that the Council breached the EC Treaty because it failed to apply accessible, objective criteria to the correct facts; failed to give the applicants an opportunity to make representations prior to the proscription and/or to provide the applicants a fair hearing and/or an effective remedy by which to challenge the factual assertions relied upon by the Council; failed to provide accurate or adequate reasons as to the legal and factual basis of its decision; failed to respect fundamental rights as Articles 10 and 11 and Articles 6 and 13 of the ECHR; breached the principles of Community law such as proportionality, certainty, equality and the right to a fair hearing and that it misuses power.

Sison has instituted a number of legal proceedings⁹⁸ but they amount to the fact that he is contesting EC Regulation 2580/2001, on the one hand, and the decisions linked thereto with the lists on which his name is repeatedly mentioned, because he is included on these lists⁹⁹ and, on the other hand, a number of decisions of the Council in which he is denied access to the documents which underlie these decisions, or in other words, the files which form the basis for his inclusion on the lists.¹⁰⁰

All these people and organisations have been affected by the sanctions against the Taliban and the later ones against the Taliban, Osama Bin Laden and Al-Qaida. Only *Sison*, the Organisation des Modjahedines du Peuple d'Iran, KNK and *Aydar* are contesting the 11 September measures, but not as EU terrorists. Concerning the EU terrorists, two organisations - *Segi* and *Gestoras pro Amnistía* - have appealed to the Court to challenge the package of EU measures of 27 December 2001¹⁰¹ in the implementation of the 11 September UN Resolution 1373 as being unlawful and, in particular, their inclusion on the list of CFSP Common Position 931. Because, on the ba-

⁹⁵ 'It cannot be accepted that a legal person who had ceased to exist, assuming that is so, may validly appoint a representative.' (Order CFI, Case T-229/02, § 37).

⁹⁶ It is worthy to mention that in this regard the Court established explicitly that a person, organisation or entity named on the lists of the Decisions implementing art. 2(3) of Regulation 2580 is to be regarded as being directly and individually concerned, Order CFI, Case T-229/02, § 27. That means that the action for annulment of the regulation brought by someone named on this lists cannot be considered inadmissible for not fulfilling that criterion.

⁹⁷ Case T-253/04, still pending. See for the content communication in *OJ* 2004, C 262/28.

⁹⁸ Among which an application for interim relief that was dismissed because of lack of urgency principally because *Sison* did not ask the Dutch authorities for the application of Article 5 of EC Regulation 2580 (exemption from the freezing). Pres. CFI, 15 May 2003, Case T-47/03 R *Sison*.

⁹⁹ Case T-47/03, still pending. See for the content communication in: *OJ* 2003, C 101/41.

¹⁰⁰ Cases T-110/03; T-150/03 and T-405/03. In the meantime a judgement by the CFI has been delivered on 26 April 2005 on these three joint cases. Mr. *Sison* remains empty-handed because the Court ruled that 'the Council was fully entitled to refuse to disclose the documents in question'.

¹⁰¹ The '27 December package' consists of: Common Position 2001/930/CFSP, Common Position 2001/931/CFSP, EC Regulation 2580/2001 and Decision 2001/927/EG.

sis of CFSP Common Position 931, they are not subject to the effect of EC Regulation 2580, they cannot appeal to have the regulation annulled on the basis of Article 230 EC. They seized the opportunity of commencing proceedings for damages on the basis of Article 225 paragraph 1, in conjunction with Article 235, in conjunction with Article 288 second paragraph EC.

6.2. Segi

Segi and Gestoras pro Amnistía are two Spanish Basque youth organisations which are described on the list of CFSP Common Position 931 as ‘being part of’ the ETA and marked as EU-terrorists. In February 2002, when they already appeared on the list, they were declared illegal by a judicial order and twelve of their committee members were put behind bars for being part of ETA and because of other terrorist activities. Both organisations have commenced an action for damages at the Court of First Instance against their inclusion on the CFSP Common Position 931 list and have lodged a complaint with the European Court of Human Rights (ECtHR).

6.2.1 The judgment of the Court of First Instance

The Court has delivered its judgment in the *Gestoras pro Amnistía*¹⁰² and *Segi*¹⁰³ cases. Segi’s action for damages is directed at CFSP Common Position 931 and the following updated common positions because the lists keep including its name and therefore they are the basis for the damage it has suffered. The Court regards itself as being incompetent to deliver a judgment on this because it has no jurisdiction over the second pillar and therefore it is not in a position to consider CFSP Common Position 931 and its updates. Neither has it, on the basis of Article 35 TEU, any jurisdiction within the third pillar to determine the legality of a common position under Article 34 TEU that forms the legal basis of Article 4 of CFSP Common Position 931 which Segi falls under. Neither can the Court rule on a claim for damages because Article 35 TEU provides for no such possibility, according to the Court. Segi suspected all this and indeed argues that the Council has exceeded its Community powers by taking measures on the basis of the CFSP and JHA pillars so that as much as possible could be arranged outside the democratic control and jurisdiction of the Community courts since: just as the Court is not competent to rule, neither is the European Parliament authorised to express its view concerning the second pillar nor concerning common positions in the third pillar. Segi describes the choice of juristic acts in the ‘27 December package’ as fraudulent. According to the Court, this is not the case because the procedure followed by the Council and the choice of legal instruments fits within the system of the division of powers. It must be admitted that the Court is right here, although Segi’s suspicion is understandable. Whether the Council has intentionally chosen the construction and, specifically, the CFSP/JHA construction against European terrorists cannot be proven, partly because of the lack of documents and preparatory documents available to the public. But the construction makes it painfully clear how the pillar system offers the possibility of taking stringent measures against citizens without democratic legitimacy and without the possibility of scrutiny by a Community court. And this is in particularly sensitive areas - terrorism, crime fighting, po-

¹⁰² Order CFI, 7 June 2004, Case T-333/02 *Gestoras pro Amnistía and others*. Not published.

¹⁰³ Order CFI, 7 June 2004, Case T-338/02 *Segi and others*.

lice cooperation - where the rights of citizens can be substantially affected so that gaps in legal protection and in democratic legitimacy become all the more problematic.

The Court also argues that Segi has no chance of success with an action for damages in the national courts: 'it would not be to its advantage to invoke the individual responsibility of every Member State for the measures adopted for the implementation of CFSP Common Position 931.' It would be just as pointless, in the opinion of the Court, to bring such an action because of the responsibility of each member state on account of its part in EU decision-making. Moreover, the Court continues, and correctly, the route to the Community courts via the national courts is also closed because the latter cannot ask for preliminary rulings in this case (Article 234 EC). It is not able to do this on account of Article 46 TEU concerning the second pillar and is also not able to do this on account of Article 35(1) TEU concerning the common positions in the third pillar. The Court draws the conclusion that applicants very probably do not have any effective legal protection: nor at the Community Courts nor at the national courts regarding the listing.¹⁰⁴

The Court provides no grounds as to why the action for compensation in the national court would stand no chance of succeeding. Regarding Segi, the court in Madrid dismissed the charges against members of Segi (and other organisations) accused of membership of ETA.¹⁰⁵ The court found that those organisations, although found guilty of many illegal activities, are not, according to the criteria established by the Spanish High Court, terrorist groups nor part of ETA. The case is not definitively decided because the prosecution has announced to appeal the verdict.¹⁰⁶ If up to the last instance the result should be the same, i.e. that Segi is not considered a terrorist organisation nor part of ETA while it is listed as such, what then? Couldn't Segi start an action for compensation of damage against the Spanish State – if, of course, such an action is possible according to the Spanish juridical system - for his responsibility in the Council's decision to place Segi on the EU-list on which it is mentioned and described as being 'part of the terrorist group ETA'?¹⁰⁷ How can the organisation then challenge this wrongful listing? Or will there rise a problem about the definitions of 'terrorist'? These are difficult questions. The cause of all problems is the fact that an individual is included on a list of terrorists and that on account of this listing he is subject to concrete measures. It is the very inclusion on the lists that sets off the sanction mechanism against the individual. This is where the wrongfulness lies according to Segi and this is what causes it damage. The reasoning of the Court of First Instance for ascertaining a lack of national legal protection, at any rate in so far as damages are concerned, is possibly based on the fact that the Court of Justice of the EC (ECJ) as-

¹⁰⁴ 'S'agissant de l'absence de recours effectif invoquée par les requérants, force est de constater que ces derniers ne disposent probablement d'aucun recours juridictionnel effectif, que ce soit devant les juridictions communautaires ou devant les juridictions nationales à l'encontre de l'inscription de Segi sur la liste des personnes, groupes ou entités impliqués dans des actes de terrorisme.' § 38.

¹⁰⁵ Sección IV de la Sala de lo Penal de la Audiencia Nacional, Madrid, 20 June 2005, sentencia 27/05, <http://www.ehwatch.org/docs/sent20050620.pdf>. See also *El País*, 20 June 2005, La Audiencia impone penas mínimas a los miembros de Segi y dice que no son de ETA. See also Statewatch <http://www.statewatch.org/news/2005/jun/08spain-terr-charges-dismissed.htm>

¹⁰⁶ See *El País*, 21 June 2005, El fiscal anuncia el recurso contra la sentencia que considera que Jarrai no es ETA.

¹⁰⁷ See Common Position 2004/427/CFSP of 6 June 2005, *OJ* 2005, L 144/54.

sumes that the national courts are not competent to make pronouncements on the validity or the legality of acts of EC institutions (*Foto-Frost*).¹⁰⁸ This is what the courts would have to do if they wish to pronounce on the liability of the implementing Member State; after all, the claimant's inclusion on the list is said to be unlawful and this is an act of the Council. Should this be the reasoning followed by the CFI, then the question arises whether it also applies in this case. The reasoning in *Foto-Frost*, that the ECJ has exclusive jurisdiction to deliver a judgment on the legitimacy of acts of EC institutions, is particularly inapplicable in this case. The Council's decisions are based on the second and third pillar and the CFI, after all, does not have the competence for the above-mentioned reasons.

If EU terrorists were hit by criminal measures because of their inclusion on the CFSP Common Position 931 list, the situation would be no different. The national courts might also not determine the legitimacy of the second and third pillar acts of the Council - that is, including the person or persons concerned on the list - which forms the basis of the steps taken under criminal law. Neither may the criminal courts put preliminary questions to the Community courts. Moreover the Council takes unanimous decisions to get someone on the list so all member states are responsible. It is therefore not completely clear what the role of the national courts is in this complicated context. In the meanwhile Segi appealed at the ECJ against the order of the CFI¹⁰⁹ so we have to wait for the view of the ECJ which hopefully will clarify some points.

6.2.2. *The decision of the European Court of Human Rights*

Moreover, *Segi* and *Gestoras pro Amnistía* have also lodged a complaint with the ECtHR against the 15 EU member states that have put them on the CFSP Common Position 931 list.¹¹⁰ They argue that Articles 6 (fair trial), 10 (freedom of expression), 11 (freedom of assembly and association) and 13 (right to an effective remedy) of the ECHR have been violated. The Court considered the complaint to be inadmissible because, in short, Segi is not entitled to the status of a victim solely on the basis of the fact that it has been included on the list of terrorists: there has to be a concrete violation of human rights; it is not possible to lodge a complaint *in abstracto* or an *actio popularis*. This listing 'may be embarrassing' (*peut être gênant*), but it is not contrary to the ECHR, in the view of the Court. Article 4 of CFSP Common Position 931, under which Segi falls, creates no new powers for the member states, according to the Court, but only obliges them to intensify their international cooperation, which is also provided for in other treaties and agreements, without creating legal obligations to the disadvantage of the applicants. In other words, inclusion on the list has no legal effects. According to the Court, any measures taken against Segi, whether by the EC or

¹⁰⁸ ECJ, 22 October 1987, Case 314/85, *Foto-Frost*: 'On the other hand, those courts do not have the power to declare acts of the community institutions invalid (...) the main purpose of the powers accorded to the court by Article 177 is to ensure that community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a community act is in question. Divergences between courts in the member states as to the validity of community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirement of legal certainty.' (§ 15). And further: 'The answer to the first question must therefore be that the national courts have no jurisdiction themselves to declare that acts of community institutions are invalid...' (§20).

¹⁰⁹ Case C-355/04 (*Segi*) and Case C-354/04 (*Gestoras pro Amnistía*) still pending. See for the content the communications in OJ 2004 C 251/10 and OJ 2004 C 251/9.

¹¹⁰ ECtHR, 23 May 2001, Appl. No. 6422/02 and 9916/02, joint cases *Segi* and *Gestoras Pro Amnistía*.

by the national authorities, are subject to scrutiny by the courts. The Court pointed out the possibility of successful legal action in the Community courts, partly in the light of *Jégo-Quéré*. This was a mistaken assessment, as appeared from the *Segi* judgment of the CFI itself.¹¹¹ Because of this, the ECtHR did not examine the matter which *Segi* put forward: that no legal remedies were available to it to contest its inclusion on the list.

And this is where the shoe pinches, as appears from the judgment of the CFI. It is certainly the case that inclusion on the list is ‘embarrassing’ but whether it has no legal effects is still the question. After all, measures are taken against a certain individual because of her very inclusion on the list: it is the specific intention that the State imposes sanctions on this particular individual and not on someone else. In my view, the Member States are most certainly obliged to act against those who have been included on the list. The imposition of the measures in themselves, for example being arrested for committing terrorist crimes, may indeed be subject to scrutiny by the national courts, but it is disputable whether the fact that they have been imposed on the person concerned because this person has been included on the list, which therefore implies a judgment concerning the placing on the list, could be examined by the national courts. It is the case, however, that should national legal remedies be exhausted in, for example, a criminal procedure on account of terrorism, *Segi* could yet complain in Strasbourg on account of the violation of a number of fundamental rights if that should be the case. The inclusion on the list can then once again be raised as an alleged violation in itself. This possibility is not merely theoretical if the ruling of the Spanish court in first instance that *Segi* is not a terrorist organisations nor part of ETA would be held also by the highest court.

6.3. Is there sufficient legal protection?

From the *Segi* judgments it appears that, at any rate for EU terrorists, problems concerning legal protection arise insofar as inclusion on the list is concerned. The ECtHR regards the applicants as having no cause of action; the national courts are not competent in the eyes of the CFI, like the Community courts themselves. The CFI in *Segi* does not rectify this gap and appeals to case law¹¹² to state that a lack of legal protection does not in itself grant autonomous power; there is no reason to tamper with the division of power such as that which is laid down in the legal system of the Community. The Court does not examine a possible solution for the shortcoming which has been ascertained. Apparently the Court remains true to the *UPA* line¹¹³ in the sense that it is the task of the Member States to find a solution here. It is however the question whether this reasoning holds true in this case, because a *Catch 22 situa-*

¹¹¹ ‘The Court does not consider it necessary to rule on the question whether the applicants exhausted the remedies which the European Union could offer them, such as a compensation claim or even an application for annulment, in the light of the judgment of 3 May 2002 given by the Court of First Instance in *Jégo-Quéré et Cie S.A. v. Commission of the European Communities* (case T-177/01).’ A rather peculiar reference by the Court because *Jégo-Quéré* was an Art. 230 EC procedure, a procedure *Segi* is not entitled to. *Segi* cannot apply for annulment simply because it does not fall within the scope of any EC-regulation as the Court further on stated itself.

¹¹² In *Segi* (§ 38) the CFI refers to: ECJ 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores (UPA)*.

¹¹³ ECJ 25 July 2002, Case C-50/00 P, *UPA*. On individual legal protection see: Schwarze J., The Legal Protection of the Individual against Regulations in European Union Law, *European Public Law*, 2004, no. 2, pp. 285-303; Craig P., Standing, Rights, and the Structure of legal Argument, *European Public Law* 2003, no. 4, pp. 493-508; Eilmansberger T., The Relationship between Rights and Remedies in EC Law: in Search of the Missing Link, *Common Market Law Review*, 2004, pp. 1199-1246.

tion in the legal protection has developed here exactly because of the interaction of EC law (first pillar) and EU law (second and third pillar), and therefore precisely because the entire EC-EU system concerning the court's jurisdiction has created this gap and not so much the possible shortcomings in national procedural laws. The question which then arises is whether making skilful use of the powers in the first, second and third pillar, with the result that scrutiny by the courts, including that of the national courts, is not possible, may result in citizens not having legal protection concerning their inclusion on the lists.

Is it not defensible to argue that in such a situation the national courts must fill this gap and determine the lawfulness of being placed on the list?¹¹⁴ There are more reasons for advocating a role for the national courts in this matter, apart from that of the lack of legal protection. First, because citizens are being severely affected in their fundamental rights and the Court of First Instance, as is apparent from the Segi judgment, is not competent to examine the fundamental rights on the basis of Article 6 paragraph 2 EU because, again, acts of the second and third pillar are excluded from this scrutiny. Second, because the legal instruments applied by the Council have hardly been subject to democratic checks and approval.¹¹⁵ Third, because CFSP Common Position 931 (and also EC Regulation 2580 and the annexes with Decisions with lists) provide for no form of internal legal procedure at all. For example, there is no delisting procedure provided which would make it possible for the person or organisation concerned to submit a request to the Council for removal from the list. Such a procedure does exist, for example, in connection with the list of terrorists drawn up by the UN *1276 Committee*.¹¹⁶ This kind of procedure is not a replacement for full and effective legal protection by an impartial and independent court, but at least it offers the person involved the possibility of defending himself and of having any mistakes rectified.

The Segi decision has also made it clear that the information given by the Dutch government to Parliament is only a half-truth. When the Minister for Foreign Affairs soothes the members of parliament as follows: 'persons involved can always defend themselves against being placed on the list by the court in (sic) first instance'¹¹⁷, according to the Court itself, this does not apply in any case to the European terrorists who are listed on the CFSP Common Position 931 list and its updates.

For non-European terrorists, there is another legal regime - at any rate on the basis of the system elaborated in CFSP Common Position 931 - that offers more rays of hope from the point of view of legal protection. Because they fall within the scope of EC Regulation 2580, they can - and as we have seen some of them have already done so - appeal for the nullification of this regulation at the Community courts. How these

¹¹⁴ See also: Claes M., *The National Courts' Mandate in the European Constitution*, dissertation Maastricht, pp. 499 and 578-579.

¹¹⁵ Because of the chosen kinds of acts and the legal basis of the '27 December set' only EC Regulation 2580 had to be submitted to the European Parliament for consultation. The latter expressed concern about the spreading of measures among the three pillars, but this did not influence the decision-making at all.

¹¹⁶ On the delisting procedure: Guidelines of the Committee for the conduct of its work (Adopted on 7 November 2002 and amended on 10 April 2003, http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf (10 may 2005). Actually some persons have been removed from the list including some applicants in the case *Aden and others*. (This is an interesting issue for the CFI where the case is still pending).

¹¹⁷ Handelingen TK 24 April 2002, p. 72-4720 (Debate in the Dutch Lower House).

courts will judge on admissibility and on the application would require a crystal ball, not in the last place because of the political sensitivity of the subject of terrorism. On the basis of EC Regulation 2580, the financial assets of these persons or of these organisations must be frozen by the national authorities. Lifting or ‘defreezing’ can be applied for on the basis of Articles 5 and 6 of the regulation, respectively. This is, in any case in the Netherlands, an administrative law procedure to which an objection and an appeal are open if there is a rejection.¹¹⁸ Here again the question remains whether the national administrative courts can decide on the legitimacy of inclusion on the list of EC decisions which are linked to the regulation, if the applicant contests this listing.¹¹⁹ In this case the *Foto-Frost* formula would certainly hold true, since the ECJ or the CFI has the exclusive power to determine this, and the national courts would not be allowed to do so. But this court can put preliminary questions to the European Court of Justice.

7. UN, EU and human rights

In the question of the fight against terrorism, a particular factor plays an important but also a complicating role, namely that of the tension between complying with obligations under public international law such as implementing UN Resolutions of the Security Council adopted under Chapter VII and at the same time respecting human rights as embedded in national constitutions and other international treaties, for example the International Covenant on Civil and Political Rights (ICCPR) and the ECHR.¹²⁰ This tension occurs in particular when the UN imposes sanctions not on States but on persons and organisations and when the UN also indicates on certain lists the persons against whom the sanctions should be imposed. The courts can examine whether the sanctions in themselves may contain a violation of human rights or whether they are to be applied in conformity with the requirements of human rights. But the question of whether placing persons on the list could in itself imply a violation is a more complicated matter. Access to the courts to contest such resolutions or lists by the Security Council of the UN, for example, is impossible for private individuals. The International Court of Justice (ICJ) is only open to States (Article 35 Statute ICJ). There are, however, internal procedures where those concerned can present their defence such as the delisting procedure of the *1276 Committee*.

The European Court of Justice is reserved where the examination of UN sanctions on human rights is concerned. In the *Bosphorus* case,¹²¹ the Court deemed the objective of the sanctions imposed by the UN Resolutions of the Security Council to be of such

¹¹⁸ See the procedures concerning Mr. Sison: at the District Court of Utrecht: Rb Utrecht 15 July 2003, LJN AH9931, Case no. SBR 03/1408 VV; Rb Utrecht 26 November 2004, LJN AR6627, Case no. SBR 03/1359 and Rb Utrecht 26 November 2004, LJN AR6624, Case no. SBR 03/1637.

¹¹⁹ Unfortunately the court could not express itself on this point because the applicant did not raise this point in the procedure, Rb Utrecht, 26 November 2004, LJN AR6627, Case no. SBR 03/1359.

¹²⁰ More extensively on this issue: Cameron, I., UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights, *Nordic Journal of International Law*, 72, 2003, pp. 159-214; Bulterman, M. De financiële strijd tegen het terrorisme en de mensenrechten, *NJCM-Bulletin* 2002, no. 7, pp. 834-848 and Bultermann, M., Lawson R., Oude dilemma's in nieuwe vormen. De rechten van de mens en internationale organisaties. Contribution to the Open Day on Human Rights, 15 November 2002.

¹²¹ ECJ 30 July 1996, Case C-84/95 *Bosphorus*.

fundamental public interest for the international community that restrictions on individual fundamental freedoms may be justified. It here concerned the seizure by the Irish authorities - on account of sanctions against Serbia during the Balkan war - of an aircraft which was the property of an Yugoslavian airline company. This aircraft had been leased to and used by a Turkish charter company before the sanctions were announced; this charter company had been acting entirely in good faith. In the same case now the ECtHR ruled on account of the stated violation of Article 1 of the First Protocol of the ECHR (protection of property).¹²² The ECtHR is equally prudent when it comes to relations under public international law but at the same time makes clear that compliance with legal obligations flowing from international organisations is justified as long as the organisation is considered to protect fundamental rights in a manner which can be considered 'at least equivalent to that for which the Convention provides.' Equivalent does not mean identical but comparable, because require an identical standard could run counter to the interest of the international co-operation pursued. Equivalent protection relates to the means of control and not to its result. If equivalent protection is considered to be provided by the organisation, the presumption will be that a State complies with the Convention when it does no more than implement legal obligations flowing from its membership of the organisation, 'however, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.' If this should be the case than 'the Convention's role as a "constitutional instrument of European public order" in the field of human rights will outweigh the interest of international cooperation.'¹²³ The Court established in this specific case that the EC was presumed to give equivalent, not manifestly deficient protection. Important is that again the ECtHR emphasises that member states must comply with the rights protected by the Convention and that the control on respecting them is essential. This implies that member states must also protect the right of access to court. In this respect the ECtHR held in *Waite and Kennedy*,¹²⁴ that this right is not an absolute one and that limitations are possible, in particular in relations under public international law where the immunity of States and international law organisations play a role. The right of access to the courts yields when the international organisation in question has an adequate internal procedure which offers the applicant the possibility to defend his rights.¹²⁵ But at the same time the ECtHR has also stated:

The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity

¹²² ECtHR 30 June 2005, Appl. No. 45036/98, *Bosphorus v. Ireland*.

¹²³ *Bosphorus v. Ireland* (§156).

¹²⁴ ECtHR 18 February 1999, Appl.no. 26083/94, *Waite & Kennedy v. Germany*.

¹²⁵ '...Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention.' (§ 73).

covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (§. 67)

The same appears in the *Matthews* case:¹²⁶ States must comply with their obligations on human rights in accordance with ECHR - thus also the right to an effective legal remedy (Article 13) or fair trial (Article 6) - even when they have transferred certain powers to organisations under public international law such as by the EC Treaty.

This fits in very well with the situation that EU bodies implement UN Resolutions, the member states have to implement both and the citizen is affected. UN Resolution 1373 (2001), which CFSP Common Position 931 is intended to implement, has no remedy procedure simply because no list of terrorists is attached to UN Resolution 1373 (2001), unlike Resolution 1267 (1999). In this case, it is left to the States to decide against whom the financial sanctions will be imposed and this offers the member states a discretionary scope to compose the list. This is also true when the States work together in the EU context. Then the Member States in a EU connection assess, it is hoped, the balance of the general security interest and of individual fundamental rights. But that is not enough in my view. This same discretionary power offers in my view sufficient scope to develop legal procedures at both the national level as well as in a EU connection where those involved can put forward their defence. In the light of the case law this would not be excessive.

Since 11 September 2001, alertness to terrorist activities has not diminished and at all levels from the UN to regional organisations to individual States, all kinds of measures have been taken to prevent and to punish terrorism. One can wonder here whether there is still a balance between security and the observance of human rights.¹²⁷ It is difficult to avoid the impression that security at this moment takes great priority, and rightly so, but that human rights objections are being brushed aside as bothersome.¹²⁸ That terrorism and terrorists must be combated is beyond dispute, and it is evident that the right of the individual might sometimes have to give way to the interest in the security of the many. This must not lead, however, to the idea taking hold that without human rights, security is guaranteed, because even the most atrocious of police states where human rights and independent and impartial courts are non-existent can offer its citizens total security.

¹²⁶ ECtHR 18 February 1999, Appl.no. 24833/94 *Matthews v. the UK* (§ 34-35).

¹²⁷ Concerned about the balance between national security and human rights, the Council of Europe designed specific guidelines: Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, *NJCM-Bulletin* 2002, no. 7, pp. 940-943 and/or http://www.coe.int/T/E/Com/Files/Themes/terrorism/CM_Guidelines_20020628.asp#TopOfPage (10 May 2005).

¹²⁸ On the practices of fighting terrorism in Great Britain see the recent judgment in the case of nine foreigners detained without charge or trial under emergency anti-terrorist powers for around three years. This breaks European human rights legislation, the Law Lords ruled. House of Lords, 16 December 2004, session 2004-05 [2004] ukhl 56 on appeal from: [2002] EWCA Civ 1502, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, <http://www.statewatch.org/news/2004/dec/belmarsh-appeal.pdf> (10 May 2005). In the Netherlands a chief superintendent of police commented that 'the right of privacy is a hideout for the evil' (het recht op privacy is schuilplaats voor het kwaad), *NRC-Handelsblad*, 20 November 2003, www.nrc.nl/scholieren/artikel/1069653628701.html. Guantanamo Bay is already a symbol of the tension between the fight against terrorism and the respect for human rights.

Fortunately the ECtHR warns about the danger of the argument of national security in *Al-Nashif*.¹²⁹

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

In the *Tinnelly* case¹³⁰ also, where the Northern Ireland electricity company excluded certain companies from work for reasons of national security and where there was no possibility of contesting the exclusion, the Court has made it clear that the right of access to the courts may not be completely eroded for reasons of security.

'On that understanding, and having regard to the above-mentioned statement of principles (see paragraph 72 above), the Court will assess whether there existed a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal.'

Conclusions

As it would appear, it is a complicated matter for the citizen who is known worldwide as a terrorist to contest the possible wrongfulness of inclusion on the list. For persons, organisations and entities included on the list of the *1276 Committee* of the UN (and who incidentally may also appear on other lists) there is the possibility in any case of using a delisting procedure.

No delisting procedure is available for individuals included on the EU lists (and who are not also on the UN list of the *1276 Committee*), and in fact no single internal access to justice seems to exist. In addition, it is not clear which court - the national, the supranational or no single one - has the power to deliver judgment on the legitimacy of the listing. There is still the anticipation of further case law from the Court of First Instance where a number of cases are pending, possibly from the European Court of Justice and from national judge-made law to provide a better picture of this complex

¹²⁹ ECtHR 20 June 2002, Appl. no. 50963/99, *Al-Nashif v. Bulgaria*.

¹³⁰ ECtHR 10 July 1998, Appl. no. 62/1997/846/1052-1053, *Tinnelly v. UK*.

subject-matter. A preliminary careful conclusion based on the present state of affairs is that there is a gap in Community legal protection concerning a certain category of terrorists, that is the EU subjects if one assumes the three-pillar construction that the Council has chosen to impose measures against them. This category also emerged empty-handed from the ECtHR with their complaint that inclusion on the EU list of CFSP Common Position 931 could in itself be said to imply a violation of a number of fundamental rights.

No matter what the case may be, juridical problems occur with this layered structure of targeted sanctions directed at individuals giving, for the very reason that the sanctions are directed at persons/organisations, an extra dimension to the problematic nature of the commitment of organisations under public international law to respect human rights.

At the EU level, part of the solution lies with the Council itself. As a first step, the Council could bring about a change in the obscure way in which persons, organisations and entities are placed on the lists. Its own internal guideline, which of course would also be public, would be of help here. This could also be useful for the body that decides who is put on the list so that they can check the 'wish lists' of the Member States or of other bodies. The guideline must include as many objective criteria as possible for the assessment, in order to prevent as much arbitrariness as possible on the part of the member states and a too enthusiastic trust in the soft information from the intelligence services. Insofar as this is the case, there must be a restriction on the unquestioning adoption of names from the lists of the US presidential executive orders and from the lists of the *1276 Committee*.

As a second step, a delisting procedure should be introduced at the Union level. The member states and the Council are not infallible and certainly not where soft and very soft information from the intelligence services is concerned. Stringent requirements may also be made concerning the delisting procedure, considering the important public interest which is at stake here. That terrorism must be fought is not disputed, in fact, but this does not release international organisations and national authorities from their responsibility towards respecting the right to a form of legal proceeding or of access to the courts. It seems that the Council is slowly beginning to realise that one or two matters in connection with the lists are legally not entirely flawless:

*'...freezing as a preventive measure, targeting terrorist individuals and groups, has led to a series of legal questions. These questions range from the criteria which should be applied and the evidence which is needed for administrative freezing, the relation of administrative freezing to judicial freezing, seizure and confiscation, to matters of due process, availability of delisting procedures and the role of intelligence in the designation process. These questions need to be further studied, including the question as to the limits of the powers of the Community and the Union to act in these areas. Further improvements to the designation process will be considered.'*¹³¹

¹³¹ Document 14180/3/04 REV 3, JAI 417, ECOFIN 351, EF 45, RELEX 489, COTER 73, The fight against terrorist financing, p. 4.

If it were to appear definite that there was no legal procedure and also no legal examination possible at both EU level and national level because of the mutual demarcation of competences, then a plea for a place for the national courts is justified. The national courts would have to look for openings in order to make pronouncements in a procedure on the legitimacy of including the litigant concerned on a terrorist list. The national courts will be inclined to exercise extreme restraint when confronted with both UN decisions and EU decisions and certainly on such a delicate subject-matter. It may be admitted that it is not an easy task, but the not unimaginable possibility that people who are listed worldwide on public lists as a terrorist danger with the intention of inflicting heavy sanctions on them, without their having a possibility of defending themselves against this inclusion, is even less of an attractive option. Not attractive because the danger of arbitrariness on the part of states is approaching too closely.