PILLAR TALK: FUNDAMENTAL RIGHTS PROTECTION IN THE EUROPEAN UNION

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INTRODUCTION

The three parts of the Treaty on European Union (TEU) are frequently, and perhaps misleadingly, dubbed "the three pillars". Within each of these three pillars, however, the European Union is committed to respecting individual fundamental rights: a commitment that is heavily dependent on both national and Community judges for its effective achievement. This was not always the case; indeed, the original Treaties were wholly unconcerned with fundamental rights. Through judicial development in the Community courts, however, a corpus of law acknowledging fundamental rights and the role of community courts in protecting them was developed, and fundamental rights eventually achieved treaty status in Article F(2) of the TEU, which provided: "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

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* Judge of the Supreme Court. This article is based on a paper presented to the Bilateral Conference on 7 December 2007. It was prepared prior to the decision of Advocate General Poiares Maduro of 16 January 2008 in Case C-402/05, *Kadi v. Council,* which found that that the Community Courts have jurisdiction to review measures enacted to give effect to United Nations Security Council Resolutions. The prior case law relating to this issue is considered in Part II of the paper below, which also includes a short note on the Advocate General's decision. The decision of the European Court of Justice in relation to this case is awaited.

Article F thus performed the dual function of unambiguously asserting the Union's concern with fundamental rights, and tracing the pedigree of those rights: like a thoroughbred racehorse, it is by "European Convention" out of "national constitutions". This treaty provision was, however, yet another example of the Member States catching up with the court, which had already established an *acquis communautaire* and had established respect for fundamental rights as an essential component of the general principles of Community law.

This article traces the development of the theory and practice of rights-protection within the Union, with a particular focus on the role of the judicial institutions of the Union and the member states in this respect. The article also considers the challenges to this fundamental rights guarantee posed by actions taken in the second and third pillars, with a particular focus on two issues of contemporary concern; actions (in the second pillar) taken to implement United Nations (UN) Security Council Resolutions relating to sanctions against individuals, and the introduction and implementation (within the third pillar) of the European Arrest Warrant.

The article considers firstly the development of the rights-related jurisprudence in the first pillar and its eventual enshrinement in the TEU. Part II of the article speaks to the second pillar and the conundrum posed by occasional conflicts between Member States' obligations to implement Security Council Resolutions under Article 103 of the Charter of the United Nations and their obligations under the European Convention on Human Rights. Part III of the article considers one of the most profound modern challenges to the Union's commitment to fundamental rights: the European Arrest Warrant. Throughout, the article is concerned with whether the European Union does in fact feature a complete set of judicial remedies, at national and supra-national levels, where individuals can assert and vindicate their fundamental rights.

I. FUNDAMENTAL RIGHTS IN THE FIRST PILLAR

Although the historical antecedents of modern human rights law stretch back to the late 1700s[1] and, indeed, fundamental rights protections feature prominently in domestic constitutions (such as Ireland's) that pre-date the founding of the Union, two developments that share a temporal space with the founding of the Union are worthy of mention at this point, namely the adoption by the UN General Assembly of the Universal Declaration on Human Rights in 1948 and the ensuing adoption of the European Convention on Human Rights and Fundamental Rights and Fundamental Freedoms (ECHR) in 1950. At around the same time an event that was to have profound effects on the European Court of Justice was taking place in the Federal Republic of Germany: the adoption of the Basic Law on 23 May 1949. By this Basic Law, the German people acknowledged inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.[2]

The Basic Law listed an extensive catalogue of rights and established the Federal Constitutional Court with jurisdiction extending to complaints from individuals, to rule on the compatibility of federal law with the basic law. Although the original treaties did not have a fundamental rights provision, complaints of incompatibility with German constitutional law began to arise and, originally, met with the reaction from the European Court of Justice that it had no power to examine such a complaint.[3] However, as Federico Mancini – a late member of the court – has written, a different approach to rights-related litigation "was forced on the Court from the outside, by the German and, later, the Italian Constitutional Courts"[4] and soon claims of

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[1] For a brief sketch of the development of human rights law see, *e.g.*, Steiner, Alston & Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (Oxford; New York: Oxford University Press, 2008), ch 2.

[2] Article 1(2), Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) (1949).

[3] Case 1/58, *Stork v High Authority* [1959] E.C.R. 17 at 26.

[4] Mancini, "A Constitution for Europe" (1989) 26 *Common Market Law Review* 595, at 611.

incompatibility with fundamental rights provisions could no longer be ignored.

The story of judicial protection of fundamental rights within the European Court of Justice begins with Mr. Stauder,[5] a war victim and pensioner who resided in the city of Ulm. In 1969 the Commission devised a scheme permitting Member States to supply surplus butter at subsidised prices to certain categories of social welfare recipients. The devil was in the detail: Member States were to ensure that the beneficiaries would "only receive butter in exchange for a coupon issued in their names". Mr. Stauder considered that forcing him to reveal his name would infringe his German constitutional rights. He brought a complaint both before the Federal Constitutional Court and the Administrative Court in Stuttgart. The latter court sympathised with Mr. Stauder. It referred a question to the European Court of Justice as to the compatibility of the rule, not with German constitutional law, but with Community law. The European Court of Justice resolved the matter by finding that the German text of the Commission Decision was at variance with those in French and Italian, which did not require the recipients to be named. Thus, the Court ruled: "[i]nterpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental rights enshrined in the general principles of Community law and protected by the Court".

The court thus implied, without expressly so ruling, that fundamental rights were enshrined in general principles of Community law and were protected by the court. It gave Mr. Stauder what he wanted, but avoided invalidating the Community measure. The German court's reference was cleverly drawn. That court drew its concerns to the attention of the European Court of Justice. It did not ask the court to examine the matter by reference to German constitutional law. By the form of the question, it offered a way out, which the European Court of Justice gladly accepted. Thus, in *Stauder v. Ulm* the Court signalled its willingness to take on the duty of ensuring respect for fundamental rights.

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[5] Case 26/69, *Stauder v. Ulm* [1969] E.C.R. 419, [1970] C.M.L.R. 112.

It was becoming apparent that the German courts would not permit their new-found freedoms to be undermined. A year later, in *Internationale Handellsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*[6] the court maintained the primacy of Community law, by ruling that the validity of Community measures could not be assessed by reference "to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure".[7] It held, however, for the first time, that respect for "fundamental rights forms an integral part of the general principles of law protected by the European Court of Justice".[8] According to the court, these rights were inspired by the "constitutional traditions common to the Member States".[9] By rooting these rights in domestic law, the Court was endeavouring to preserve the important principle of the coherence and uniform application of Community law.

In *Nold v. Commission*[10] in 1974, the court took a further cautious step. A German coal wholesaler complained that the Commission infringed property and trading freedoms guaranteed by the German Basic Law. The court reiterated its statement from *Internationale Handellsgesellschaft*, adding that it was "bound to draw inspiration from the constitutional traditions of the Member State, and that it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of the Member States".[11]

Nold is regarded as important as it represents the first appearance of "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories" as a source of rights-protection within the

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[6] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125, [1972] C.M.L.R. 255.

[7] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125, at para. 4.

[8] Case 11/70, *Internationale Handelsgesellschaft* (note 7), at para. 4.

[9] Case 11/70, *Internationale Handelsgesellschaft* (note 7), at para. 4.

[10] Case 4/73, *Nold v. Commission* [1974] E.C.R. 491, 2 C.M.L.R. 338.

[11] Case 4/73, *Nold v. Commission* [1974] E.C.R. 491, at para. 13.

Union, which may be related to the fact that the decision coincided closely with the accession of France to the European Convention on Human Rights. Nonetheless, the court found that, in the instant case, there was no basis for the complaint. The applicant was looking for protection against "uncertainties which are the very essence of economic activity".

Thus, by the time the court had to decide the case of *Hauer* in 1979[12] the Advocate General was able to maintain in his Opinion that there was a well-established jurisprudence and that "the protection of fundamental rights constitutes an integral part of the general legal principles, respect for which is guaranteed by the Court".[13] Mrs. Hauer's complaint was that Community rules prohibiting the cultivation of new areas for wine production infringed her property rights. The court provided its most comprehensive justification to date for holding that the right to property is guaranteed by the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first protocol to the European Convention for the Protection of Human Rights.[14] From among the constitutions of the then nine Member States, it referred to those of Germany, Italy and Ireland, for the proposition that those states' "rules and practices permit the legislature to control the use of private property in accordance with the general interest".[15] Unsurprisingly, Mrs. Hauer was not successful.

I make two points with regard to the status of respect for fundamental rights as part of the general principles of Community law at this point. Firstly, in the absence of any catalogue of actual rights, the European Convention on Human Rights was, in practice, the only realistic point of reference. The occasional references made by the court to inspiration from national constitutions were, in reality, perfunctory rather than scientific, and were in any event incomplete. Secondly, the court proclaimed the principle that Community measures were subject to scrutiny

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[12] Case 44/79, *Hauer v. Rheinland Pfalz* [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.
[13] Case 44/79, *Hauer v. Rheinland Pfalz* [1979] E.C.R. 3759, at para. 7.
[14] Case 44/79, *Hauer v. Rheinland Pfalz* [1979] E.C.R. 3727, at para. 17.
[15] Case 44/79, *Hauer v. Rheinland Pfalz* [1979] E.C.R. 3727, at para. 20.

for compliance with fundamental rights standards but rarely, if ever, annulled a measure (such as a regulation or a directive) adopted by any of the institutions. On the other hand, in a parallel line of case-law, it also insisted that respect for fundamental rights was incumbent on the Member States, acting within the scope of Community law.

Bosphorus v. Ireland[16] provides an opportunity to compare the exercise of the power of judicial review by a national court with that of the European Court of Justice. The acts considered in *Bosphorous* gave rise to two separate actions in the Irish High Court,[17] a reference (in the second of those cases) to the European Court of Justice,[18] and an action against Ireland in the European Court of Human Rights.[19]

The case involved the impounding of an aircraft by Ireland, pursuant to United Nations Security Council Resolution.[20] A Turkish airline charter company had leased a plane (dry lease without crew) from JAT, the national airline of the former Yugoslavia. The UN Security Council had imposed sanctions, taking the form of a complete trade embargo, pursuant to Chapter VII of the UN Charter, against Yugoslavia in the context of the war in Bosnia. These were implemented by a European Community Council Regulation[21] and, in Ireland, by a statutory

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[16] *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* (Application no. 45036/98) (European Court of Human Rights (Grand Chamber) unreported, 30 June 2005).

[17] *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications* [1994] 2 I.L.R.M. 551; *Bosphorous Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications (No. 2)* (High Court, unreported, 22 January 1996).

[18] Case 84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] E.C.R. I-3953.

[19] *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* (Application no. 45036/98) (European Court of Human Rights (Grand Chamber) unreported, 30 June 2005).

[20] UN Security Council Resolution No. 820/1993.

[21] Council Regulation [1993] O.J. L102, 990/93/EEC.

instrument made under the European Communities Act, 1972.[22] The Turkish company sent the plane to Team Aer Lingus at Dublin airport for servicing. The plane was seized by the Irish government acting on the direction of the Security Council (given after a degree of temporisation). The aircraft was stopped while it was awaiting air traffic control clearance to take off following completion of the work.

Mr. Justice Murphy, in the High Court,[23] was asked to decide whether the Minister for Transport was bound, as he claimed, by a European Council Regulation[24] to impound the aircraft. Article 8 of that Regulation obliged Member States to impound aircraft where "a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia". Murphy J. considered that:

> [T]he degree or extent of the interest referred to in the Article must have been intended to identify a situation in which the person in or operating from Yugoslavia could exercise a decision-making function in relation to the use on a day to day basis of the asset in question. Any other construction would seem to be both unreal and unjust. To impound an asset for the possession and enjoyment of which a wholly innocent party has a theoretical right to receive a nominal rent must be absurd.

He held that the Minister had not had the power to impound the aircraft. Unfortunately for Bosphorus, this was to be the high point of the litigation. The Minister continued to detain the aircraft, resorting to a power under Article 9 of the same Council Regulation. Bosphorus succeeded in a second action before Barr J. in the High Court.[25] On appeal to the Supreme Court, questions were referred to the European Court of Justice where a

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[22] European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations (S.I. No. 144 of 1993).

[23] *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications* [1994] 2 I.L.R.M. 551.

[24] Council Regulation [1993] O.J. L102, 990/93/EEC.

[25] *Bosphorous Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications (No. 2)* (High Court, unreported, Barr J., 22 January 1996).

very different approach to interpretation was adopted.[26] Firstly, the Court held that Article 8 clearly applied in this case as JAT was the owner of the aircraft notwithstanding the fact that it had leased it to Bosphorus. Citing *Hauer*,[27] it held that "the fundamental rights invoked by Bosphorus Airways are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community".[28] The court considered that "the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators",[29] and concluded:

> As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.[30]

Bosphorus also brought its complaint against Ireland to the European Court of Human Rights.[31] Bosphorus failed in its claim because the court, in a decision of the first importance, adopted the entirely novel doctrine of "equivalent protection". There the European Court of Human Rights held that the review of the contested act by the European Court of Justice offered

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[26] Case 84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] E.C.R. I-3953.

[27] Case 44/79, *Hauer v. Rheinland Pfalz* [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.

[28] Case 84/95, *Bosphorus Hava Yollari Turizm* (note 26) at para. 21.

[29] Case 84/95, *Bosphorus Hava Yollari Turizm* (note 26) at para. 21.

[30] Case 84/95, *Bosphorus Hava Yollari Turizm* (note 26) at para. 26.

[31] *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* (Application no. 45036/98) (European Court of Human Rights (Grand Chamber) unreported, 30 June 2005).

"equivalent protection" to that available before the European Court of Human Rights. Equivalent protection was defined as follows:

> In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides … By 'equivalent' the Court means 'comparable': any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued … However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
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> If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.[32]

The TEU represented an important departure from the unitary structure of the Community. The Community method was replaced by forms of action based intergovernmental rather than Community initiative; power, in the new areas of competence, was to reside in the Member States, and the Union was to function at a greater distance from the individual than the Community had done. These changes begged the question of whether the Union, as had consistently been held in relation to the Community, would represent "a new legal order… the subjects of which comprise not only the Member States but also their nationals"[33] whose fundamental rights would be protected by the Union's institutions. The answer was at least partially provided

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[32] *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* (Application no. 45036/98) (European Court of Human Rights (Grand Chamber) unreported, 30 June 2005), at paras. 155-156.

[33] See, for example, Case 1/91, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty* [1991] E.C.R. 1-6079, at para. 21.

by Article F(2), in which the Member States proclaimed that respect for fundamental rights would form an indispensable component of the new structures of the Union.

Following the Amsterdam and Nice Treaties, the second and, more particularly, the third pillars have approximated progressively to the Community model. The Framework Decision resembles the Community directive and has largely replaced the purely intergovernmental and ineffective convention, originally envisaged by the TEU. Article F has become Article 6, which says that: "[t]he Union is founded on the principles of liberty, democracy, *respect for human rights and fundamental freedoms*, and the rule of law, principles which are common to the Member States".[34]

The "rule of law" is the key phrase in Article 6(1). Protection of fundamental rights is a legal notion; purely political guarantees have no teeth and are, to quote an Irish judge, a "political shibboleth".[35] The Court of First Instance has recognised that mere "diplomatic protection" represents a "lacuna in… judicial protection."[36] According to the principle of separation of powers, the judicial arm of government is independent. It must have jurisdiction to review exercise of executive power and the compliance of legislative acts with fundamental rights. Guarantees to protect fundamental rights are meaningless without effective judicial power of review of governmental action.

In *Johnston v. Chief Constable of the RUC*[37] the Court stated that persons aggrieved by actions of national authorities impinging on their rights under Community law are entitled to "an effective remedy in a competent court", and that Member States are bound to ensure "effective judicial controls as regards compliance with the applicable provisions of Community law".

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[34] Article 6(1) of the Treaty of Amsterdam, 1997 (emphasis added).
[35] Per O'Dalaigh C.J. in *Re Haughey* [1971] 1 I.R. 217.
[36] Case C-315/01, *Kadi v. Council* [2005] E.C.R. II-3649, at paras. 267 and 286 respectively. Judgment on the appeal is awaited; see the Opinion of Advocate General Poiares Maduro, Case C-402/05.
[37] Case 222/84, *Johnston v. Chief Constable of the RUC* [1986] E.C.R. 165, [1986] 3 C.M.L.R. 240.

Effectiveness of remedy depends on both the general scope of judicial review of the powers exercised by the institutions of the European Union pursuant to the second and third pillars, and on the effectiveness of the guarantee of respect for fundamental rights proclaimed by Article 6.

II. JUDICIAL FUNCTION AND RIGHTS PROTECTION IN THE SECOND PILLAR

Title V of the TEU is entitled "Provisions on a Common Foreign and Security Policy". Matters so described would normally, in any polity, be beyond the reach of the judicial arm of government. Judges exercise particular restraint in respect of the exercise by the executive arm of its functions in the field of international relations. Constitutions may contain provisions regulating declarations of war, but normally foreign relations fall outside the purview of the courts. Moreover, the matters covered by the common foreign and security policy are generally inter-governmental. They concern relations between states. They do not *directly* engage individuals; they do not impose obligations or confer rights on them.

Article 11 of the TEU defines the matter covered by the common foreign and security policy, under five headings, including safeguarding the interests of the Union "in conformity with the principles of the United Nations Charter", the preservation of peace, the strengthening of international security and the promotion of international security. Article 12 sets out the means by which the Union is to pursue its objectives as defined in Article 11, although they are expressed at a high level of generality. The most concrete form of action is the "common position", which is to be adopted by the Council. None of the powers conferred on the Council entail direct impact on individuals.

Hence, Article 46 of the TEU omits any mention of Title V from the "*powers of the Court of Justice*" which it lists exhaustively, by using the word "*only*". Article 46(1) confers jurisdiction in respect of "[a]rticle 6(2) with regard to actions of the institutions, in so far as the court has jurisdiction under the Treaties and under this Treaty". As a result, the court has no

jurisdiction in respect of Article 6(2), as none is expressly conferred.[38] The general principle, therefore, is that no court has jurisdiction to review the legality of decisions adopted pursuant to the second pillar.[39] Common positions do not enjoy any of the obligatory legal power of either directives or regulations: they do not impose obligations on Member States and they are not directly applicable.

Common positions may, however, have an indirect effect on individuals. A special and exceptional problem has arisen in the context of the enforcement of sanctions imposed by resolutions of the Security Council of the United Nations. The Court of First Instance has acknowledged that there is a "lacuna in the judicial protection"[40] in this respect. In a series of cases,[41] that court has rejected actions for annulment of Community acts,[42] which give effect within the Community to Chapter VII Security Council Resolutions.[43] These are resolutions which, without hearing or notice, in effect place named individuals or bodies on "black lists" and oblige Member States of the United Nations to freeze their existing financial assets as well and to deprive them of access to any funds.

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[38] By way of contrast, the court's powers in respect of Title VI, though severely limited, are delineated in Article 35. There is a possibility of indirect jurisdiction. Article 41 applies to Title V a number of articles of the EC Treaty. One example is Article 255 on access to documents. See Case T-174/95, *Svenska Journalistförbundet v. Council* [1998] E.C.R. II-2289; Case C-353/99, *Council v. Hautala* [2001] E.C.R. I-9565.

[39] Case T-228/02, *Organisation des Modjahedines du people d'Iran v. Council* [2006] E.C.R. II-0000.

[40] Case C-315/01, *Kadi v. Council* [2005] E.C.R. II-3649, paras. 267 and 286 respectively. Judgment on the appeal is awaited; see the Opinion of Advocate General Poiares Maduro, Case C-402/05.

[41] The decisions of 21st September 2005 in Case C-315/01, *Kadi v. Council,* already cited, and Case T-306/01, *Yusuf v. Council* [2005] E.C.R. II-3533. See also: Case T-253/02, *Ayadi v. Council* [2006] E.C.R. II-2139.

[42] Council Common Position [2002] O.J. L139/4, 2002/402/CFSP, 27 May 2002; Council Common Position [2002] O.J. L3093, 2003/140/CFSP, 27 February 2003; Council Regulation [2004] O.J. L139/9, 881/2002/EC, 27 May 2002; Council Regulation [2003] O.J. L82/1 561/2003/EC 27 March 2003.

[43] UN Security Council Resolutions 1390/2002 and 1453/2002.

The Council exercised its powers under the EC Treaty[44] so as to give effect to Common Positions of the Council, and in turn implement sanctions resolutions of the United Nations Security Council. The result is that a "common position," though not directly applicable to individuals and not in itself subject to judicial review, may have real indirect effects on individuals when implemented by directly applicable Community measures. As a result, a number of annulment actions were taken by affected individuals, claiming incompatibility with their individual rights. In rejecting these claims, the Court of First Instance held that "the resolutions of the Security Council at issue [fell], in principle, outside the ambit of the Court's judicial review and that the Court [had] no authority to call in question, even indirectly, their lawfulness in the light of Community law".[45]

This followed from that court's view that the Council, in adopting the contested regulation, had "acted under circumscribed powers, with the result that they had no autonomous discretion".[46] The court held that a limitation of its jurisdiction was a necessary corollary to its analysis of "the relationship between the international legal order under the United Nations and the Community legal order". Relying on Article 103 of the UN Charter, the court held that this Charter took priority over the European Treaties and, presumably, by implication, the European Convention on Human Rights. Consequently, it dismissed any attempt to invoke principles of Community law with regard to respect for fundamental rights: "[a]ny review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those [Security Council] resolutions".[47]

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[44] Articles 60, 301 and 308, Treaty Establishing the European Economic Community, 1958.

[45] Case T-253/02, *Ayadi v. Council,* [2006] E.C.R. II-2139, at para. 116.

[46] Case C-315/01, *Kadi v. Council* [2005] E.C.R. II-3649, at para. 214; Case T-306/01, *Yusuf v. Council* [2005] E.C.R. II-3533, at para. 265.

[47] Case T-306/01, *Yusuf v. Council* [2005] E.C.R. II-3533, at para. 266.

One of these cases had an important Irish connection.[48] *Ayadi v. Council*[49] concerned an applicant based in Ireland. Ayadi contested the effectiveness of the derogations from the freezing of funds, permitting the payment of living expenses. The court pointed out that the term "basic expenses" employed in the Regulation was not defined and that its application was left to the assessment of the competent national authorities.[50] Literal interpretation of the Resolutions did not even permit the State to make emergency social assistance available without approval of the Sanctions Committee.

Ireland had secured the agreement of the Sanctions Committee to the payment (and later increase) in social welfare payments to the applicant. The court, nonetheless, acknowledged that "the freezing of the applicant's funds, subject only to the exemptions and derogations provided for by Article 2a of the contested regulation, constitutes a particularly drastic measure with respect to him, which is capable even of preventing him from leading a normal social life and of making him wholly dependent on the public assistance granted by the Irish authorities".[51]

In the special situation of enforcement of UN Sanctions, therefore, Article 6 of the TEU is entirely without effect, according to the Court of First Instance, not only in respect of action under the second pillar (Title V) but even under the Community Treaty. It must be emphasized that the recent opinion of Advocate General Poiares Maduro in the *Kadi* case suggests a radically different approach.[52] According to the Advocate General, the Court of First Instance erred in finding that it did not have jurisdiction to consider the relationship between international and community law. In his view this relationship is governed by the community legal order itself,[53] which has as a

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[48] For more on this see Murphy, "*Ayadi v. Council*: Competence and Justice in the 'War on Terrorism'" (2007) D.U.L.J. 426.
[49] Case T-253/02, *Ayadi v. Council,* [2006] E.C.R. II-2139.
[50] Case T-253/02, *Ayadi v. Council,* [2006] E.C.R. II-2139, at para. 119
[51] Case T-253/02, *Ayadi v. Council,* [2006] E.C.R. II-2139, at para. 121.
[52] Case C-402/05, Opinion of Advocate General Poiares Maduro.
[53] Case C-402/05, Opinion of Advocate General Poiares Maduro, at para. 24.

foremost principle the protection of fundamental rights and the rule of law.[54] In his view, the Community cannot dispense with proper judicial review of actions done pursuant to Security Council Resolutions as to do so would preclude the possibility of an individual asserting that individual rights are infringed by such community actions; a situation that he found to be incompatible with the rule of law and particularly troublesome in times of terrorism or emergency.[55] The Advocate General and the Court of First Instance thus come to vastly different conclusions on the capacity of community courts to consider the rights-implications of measures necessitated by member states' obligations under the Charter of the United Nations. As a result, the decision of the European Court of Justice in this case is awaited with particular interest.

In addition to the question of the applicability of Community law to actions pursuant to UN Security Council Resolutions, this line of case law prompts another speculation. The Court of First Instance has held that a Regulation adopted by the Council in pursuance of a Security Council Resolution is not reviewable by reference to European Community or Union principles, even if incompatibility can be demonstrated. Does that mean that the Community and, by extension, the Member States are in breach of the European Convention on Human Rights? Could a Member State answer an individual petition before the European Court of Human Rights in Strasbourg by relying on the principle of equivalent protection accepted by that court in *Bosphorus*?[56] Perhaps the answer is that the Convention too is subordinate to the United Nations Charter, at least to an extent. Certainly this seems to be the thrust of the conclusion reached by the UK House of Lords in the case of *R. (Al-Jeddah) v. Secretary of State for Defence* in 2007.[57] This case concerned the implications for the applicant of his detention in Iraq, which was

[54] Case C-402/05, Opinion of Advocate General Poiares Maduiro, at para. 31.
[55] Case C-402/05, Opinion of Advocate General Poiares Maduiro, at paras. 45, 49 and 52.
[56] *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* (Application no. 45036/98) (European Court of Human Rights (Grand Chamber) unreported, 30 June 2005).
[57] *R. (Al-Jeddah) v. Secretary of State for Defence* [2007] U.K.H.L. 58.

mandated by UN Security Council Resolutions[58] but which infringed his rights under Article 5 of the ECHR. Reflecting on the appropriate relationship between Article 103 of the Charter of the United Nations and the provisions of the ECHR, Lord Bingham held "the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention".[59] This suggests, at least, that ECHR rights may be subject to violation on the basis of a mandatory Security Council resolution, but that the acting state (and, by implication, the EU where appropriate) must ensure that the individual right is infringed to the slightest degree possible.

I have been informed that Ireland relied on Article 103 of the Charter before the European Court of Human Rights in *Bosphorus,* although the judgment makes no mention of it. These fundamental questions go to the heart of the community courts' capacity to protect fundamental rights, and it is to be hoped that the European Court of Justice's decision in *Kadi* will shed more light on the current situation.

III. JUDICIAL POWER AND RIGHTS PROTECTION IN THE THIRD PILLAR

Title VI is entitled: "Provisions on Police and Judicial Cooperation in Criminal Matters". Article 29 of the TEU expands on this by stating: "[w]ithout prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in

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[58] UN Security Council Resolutions 1511 (2003), 1546 (2004), 1637 (2005) and 1723 (2006).

[59] *R. (Al-Jeddah) v. Secretary of State for Defence* [2007] U.K.H.L. 58, at para 39.

criminal matters and by preventing and combating racism and xenophobia".

The legal instruments envisaged as the means of carrying the general objectives into effect are set out in Article 34 and include common positions, framework decisions, decisions and conventions. The question which immediately arises is the extent of judicial remedy available to individuals who may be affected by measures adopted pursuant to Title VI. Article 46 of the TEU provides that the powers of the European Court of Justice are to apply, inter alia, to "provisions of Title VI, under the conditions provided for by Article 35". Article 35, in turn, limits the interpretative powers of the court. The court has power "to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them". However, the courts of a Member State will have the right to refer questions of interpretation only if that Member State has made a declaration to that effect at the time of signature of the Treaty of Amsterdam or at any time thereafter. Moreover, such a declaration may specify whether questions may be referred either by all courts in that state or only a "court or tribunal of that State against whose decisions there is no judicial remedy under national law". Even a Member State which has not made a declaration may, nonetheless, submit written observations to the court in cases which have been referred.

In these circumstances, one asks whether it can be said that there exists in the framework of the European Union what the court famously described in its judgment in *Les Verts*[60] as a "complete system of legal remedies". It there stated:[61] "[b]y Article [230] and Article [241], on the one hand, and by Article [234], on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial

[60] Case 294/83, *Les Verts v. Parliament* [1986] E.C.R. 1339, at para. 23.
[61] Case C-50/00 P, *Unión de Pequeños Agricultores v. Council* [2002] E.C.R. I-6677.

review of the legality of acts of the institutions, and has entrusted such review to the Community Courts".[62]

The court appears to have accepted in *Pupino* that "there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI".[63] The two essential components of that complete system are: the annulment action, open to individuals directly and individually concerned by a measure, and the reference for preliminary ruling pursuant to Article 234 of the EC Treaty.

The first is not present in the TEU. Only a Member State or the Commission may, pursuant to Article 35(6), apply to the European Court of Justice for annulment of a Framework Decision or a Decision. The practical implications of this omission are probably limited. Neither Framework Decisions nor Decisions are, as is clearly provided, to have "direct effect." Hence, they could never satisfy the test of direct and individual concern, required by Article 230 of the EC Treaty. The second route towards individual judicial protection is via the reference for preliminary ruling. This envisages a combination of action by the national and Community courts. In the case of *Foto-Frost v. Hauptzollamt Luebeck-Ost*[64] the court held that, although the courts of the Member States have no power to declare Community acts to be invalid, where a national court considers such a claim to be possibly well-founded it may refer the question to the European Court of Justice pursuant to Article 234 since that Article constitutes a way of "reviewing the legality of acts of the Community institutions".[65] The European Court of Justice has consistently reiterated that the Article 234 procedure constitutes a protection for the rights of individuals. For example, in

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[62] Case C-50/00 P, *Unión de Pequeños Agricultores v. Council* [2002] E.C.R. I-6677, at para. 40.

[63] Case C-105/03, *Criminal Proceedings against Maria Pupino* [2005] E.C.R. I-05285, at para. 35.

[64] Case 314/85, *Foto-Frost v. Hauptzollamt Luebeck-Ost* [1987] E.C.R. 4199.

[65] Case 314/85, *Foto-Frost v. Hauptzollamt Luebeck-Ost* [1987] E.C.R. 4199, at para. 16.

Greenpeace International v. Commission[66] the court held that "those rights [of individuals] are fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under Article 177 of the Treaty".[67]

Article 35 of the TEU replicates the language of Article 234 of the EC Treaty. It confers on the court power to give rulings, not only on the interpretation, but also on the validity of Framework Decisions and Decisions (although not common positions). This clearly implies that, in spite of the absence of any annulment action, an individual may indeed bring a challenge to the validity of either of these types of measure in the national court. That court has, of course, no jurisdiction to declare the measure invalid. On the *Foto-Frost* theory it may dismiss the claim, but if it considers that the claim may possibly be well founded, it must refer the matter to the European Court of Justice.

The court has, in *Advocaten voor de Wereld v. Leden van de Ministerraad*[68] implicitly, rather than explicitly, extended the *Foto-Frost* principle to Title VI matters. The matter was not discussed either in the Opinion of the Advocate General or in the judgment of the court. No objection to admissibility of the reference was made by the Council. The language of Article 35 of the TEU powerfully supports the existence, by analogy with *Foto-Frost,* of the jurisdiction to refer questions of validity. In the result, individuals appear to have to have the right to challenge the validity of Union measures, not in the European Court of Justice, but in the national court, and to rely on his or her persuasive power to have that question referred. It is obvious, nonetheless, that the largest gap in such judicial protection as is provided by Article 35 of the TEU is the simple fact that barely half of the twenty seven Member States have made declarations conferring jurisdiction on the court.

In reality, the possibility of challenge of Union legislative acts at the suit of individuals would be remote and rare.

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[66] Case 321/95 P, *Greenpeace International v. Commission* [1998] E.C.R. I-1651.

[67] Case 321/95 P, *Greenpeace International v. Commission* [1998] E.C.R. I-1651, at para 33.

[68] Case C-303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad* [2007] E.C.R. I-03633.

Framework Decisions are general legislative measures addressed to the Member States. It is not easy to envisage circumstances in which an individual would be able to persuade the court that these are invalid. It is intrinsic, however, to the very nature of third pillar matters that individuals will be affected, as the objective is to establish police and judicial mechanisms. A number of Framework Decisions have already been adopted. Where individuals are affected by specific mechanisms or procedures, they will have the right to raise questions of interpretation of national implementing laws before the national courts. It is at this point that these measures have an impact on the fundamental rights of individuals. Thus, it is here that an assessment must be made with regard to the effectiveness of the protection of those rights. With this in mind it is appropriate to consider whether the European Union in fact fulfils the promise of Article 6(2) of the TEU to "respect fundamental rights".

Having regard to the constitutional and judicial structure of the TEU, it seems clear that the responsibility to ensure that respect will fall, in the first instance, on the courts of the Member States. Enormous numbers of criminal proceedings are in being at all times in all the Member States. References to the European Court of Justice will, in practice, be very rare. Delay alone would undermine their utility. Hence, the national court must undertake the burden of protecting the fundamental rights of those appearing before them. It is probably most useful to examine the level of respect for fundamental rights in its practical operation rather than in the abstract.

By far the most significant measure so far adopted by the Council within the framework of the TEU is the Framework Decision on the European Arrest Warrant.[69] From start to finish the Arrest Warrant involves a decision which directly and intimately affects a named person. Article 1(1) of the Framework Decision provides: "[t]he European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the

[69] Council Framework Decision on the European Arrest Warrant, [2002] O.J. L 190.

purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".

The "requested person," here anonymously identified is, in every case, a human person. His rights are profoundly affected by the arrest warrant. He is, of course, suspected of having committed an offence in another Member State, which cannot be ignored. He may, as such suspect, be taken from his home, family and employment. All these actions may flow from arrest and charge in his home state. In his own jurisdiction, however, he might well be able to preserve his freedom pending trial. He will normally be granted bail (pre-trial release). The very fact of his being a resident of another country may be a reason for refusing bail in the state in which he is to be tried.

Article 1(3) of the Framework Decision provides: "[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union". The court also referred to Article 6 of the TEU in its judgment in *Advocaten voor de Wereld*[70] as follows:

> It must be noted at the outset that, by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union.[71]

Article 1(3) of the Framework Decision is supplemented in the recitals. Recital 12 notes that the rights guaranteed by Article 6 of the TEU are "reflected in the Charter of Fundamental Rights of the European Union". It also acknowledges the power of the

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[70] Case C-303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad* [2007] E.C.R. I-03633.

[71] Case C-303/05, *Advocaten voor de Wereld* (note 70) at para. 45.

court of an executing state to refuse surrender, where it is established "on the basis of objective elements" that the warrant has been "issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons". These would all appear to represent remote contingencies, unlikely to arise in practice.

Further, a Member State is not prevented "from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media". Again, it is difficult to envisage a practical context for the application of these exceptions.

Recital 13 acknowledges that surrender of a person might be refused "where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment". Refusal of surrender on such far-reaching grounds would imply that the very basis for mutual recognition has been seriously undermined. There is, it may be noted, some precedent for refusal of extradition on grounds of fear of ill-treatment in the requesting state. In 1990, the Irish Supreme Court refused extradition of a suspect to Northern Ireland, when it had formed the "conclusion that there [was] a probable risk, if the applicant were returned to… [a particular prison] in Northern Ireland, that he would be assaulted or injured by the illegal actions of the prison staff".[72] The correct approach to a complaint based on likely inhuman or degrading treatment should probably be that adopted by an Irish judge: "[i]t would require very clear, uncontroverted and cogent evidence of the probability that such would occur to the respondent before this Court would be satisfied that the sovereign government of the United Kingdom would intend to breach its international obligations in this regard".[73]

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[72] *Finucane v. McMahon* [1990] 1 I.R. 165, per Finlay C.J. at 206.

[73] Per Peart J. in *Minister for Justice Equality and Law Reform v. Stapleton* (High Court, unreported, Peart J., 21st February 2006); [2006] I.E.H.C. 43.

Although they reiterate vital fundamental rights provisions, the practical import of the recitals remains obscure. They do not correspond to any substantive provision in the Framework Decision. They should probably, however, be regarded as amplifying the terms of Article 1(3).

A person resisting surrender may raise, before the courts of the executing state, a range of concerns with regard to his likely treatment, following surrender, in the issuing state. Delay in commencing a prosecution is one practical possibility. Article 6 of the European Convention on Human Rights provides that "[i]n the determination of... any criminal charge against him, everyone is entitled to a... hearing within a reasonable time by [a]... tribunal ...". The European Court of Human Rights has elaborated this right in a large number of decisions. According to that court, "the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities".[74]

The right of an accused person to a speedy trial is recognised in the laws of the Member States. The European Court of Human Rights does not hold that delay is a ground for preventing a trial; rather it provides monetary compensation. In the law of some states, long delay combined with other circumstances of unfairness may constitute grounds for prohibiting a trial. Unreasonable delay in criminal proceedings constitutes an infringement of the fundamental rights of the accused person. The question of how to apply these principles in the application of the European arrest warrant has recently been considered by the Irish Supreme Court in *Minister for Justice, Equality and Law Reform v. Stapleton*.[75]

The United Kingdom authorities sought the surrender of the respondent for trial on fraud charges in respect of events alleged to have occurred more than twenty years earlier. The Supreme Court judgment cited the statement of the European Court of

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[74] *Barry v. Ireland* (Application no. 18273/04) (European Court of Human Rights, unreported, 15 December 2005), at para. 36.

[75] *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] I.E.S.C. 30.

Justice in *Advocaten voor de Wereld*[76] that the issuing Member State, as is "stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU…". The judgment continued:

> [T]he courts of the executing Member State, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing Member State will, as is required by Article 6.1 of the Treaty on European Union, 'respect … human rights and fundamental freedoms'. Article 6.2 provides that the Union is itself to 'respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms … and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.[77]

In an earlier decision,[78] the Supreme Court, having dismissed an argument based on differences in criminal law and procedure, nonetheless added:

> That is not by any means to say that a Court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights.

In the result, the courts of both the issuing and the executing state have a role to play in protecting the fundamental rights of the person whose surrender is sought, the latter presuming, until the contrary is clearly established, that the courts of the former will sufficiently protect them. A corollary would appear to be that the

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[76] Case C-303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad* [2007] E.C.R. I-03633.
[77] *Minister for Justice, Equality and Law Reform v. Stapleton* (note 75).
[78] *Minister for Justice Equality and Law Reform v. Brennan* [2007] I.E.S.C. 21.

issuing Member State is obliged to comply with Article 6 of the European Convention on Human Rights, and may be answerable to that court in respect of any breaches.

CONCLUSION

Article 6 of the TEU discloses the intention of the Union to respect fundamental rights. Both the structure and the subject-matter of the second and third pillars tend to reduce the effectiveness of this guarantee. Common foreign and security policy matters are, of their nature, likely to fall outside the scope of the application of fundamental rights. There is, however, an anomalous situation, where a Community measure, implementing a Common Foreign and Security Policy common position and, thereby, a Security Council sanctions resolution, has been held to fall entirely outside the scope of Community principles of respect for fundamental rights. Justice and Home Affairs, on the other hand, are intensely related to the affairs of individuals. The Framework Decision is the principal legislative instrument. It is addressed to the Member States. Individuals have no right to seek annulment of third pillar acts. It is, however, possible for individuals to use the preliminary ruling mechanism, as an indirect means of seeking annulment.

In practice, the protection of individual fundamental rights must take place within the context of the particular measure. The Framework Decision on the European Arrest Warrant is by far the most important legislative measure to date. Its provisions with regard to fundamental rights are unclear, and there is very little case law. The only significant decision of the European Court of Justice to date, *Advocaten voor de Wereld*,[79] proposes that responsibility falls primarily on the courts of the issuing Member State. The courts of the executing Member State will normally, respecting the principle of mutual recognition, presume that the fundamental rights of the suspect will be respected following surrender. There may, however, be egregious cases, where, on the basis of clear and objective proof, surrender may be refused by reason of feared failure to respect those rights.

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[79] Case C-303/05, *Advocaten voor de Wereld* (note 76).