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QUO VADIS EUROPE? THE EU TREATY REFORMS, HUMAN RIGHTS, RULE OF LAW AND THE FIGHT AGAINST TERRORISM

ABSTRACT

This article looks at the recent European treaty reforms culminating in the *Lisbon Treaty* and, in particular, focuses on human rights issues flowing from the *Treaty*. The fight against terrorism is used as an illustrative example of how the clash of interests — of security concerns with fundamental human rights parameters — is dealt with at the international and European levels. In Part I of the article, a brief outline of events leading up to the *Lisbon Treaty* after the Draft European Constitution had failed is followed by an analysis highlighting some of the key issues of changes brought about by the *Lisbon Treaty*, especially the new voting modalities and enhanced role of the European Parliament. An attempt ensues to solve the subsidiarity question of how a balance is to be struck between the 'centralist' European approach and the 'decentralised' domestic law approach to the structure of EU powers. This article maintains that the *Subsidiarity Protocol* under the *Lisbon Treaty* has not fully resolved the fundamental questions on who ultimately should have competency to regulate: the European institutions or national authorities.

Part II looks at the debate on the *Charter of Fundamental Rights of the European Union* and its status under the *Lisbon Treaty* and presents an overview of its limited applicability. In this context, this article looks at the issue of a possible clash between the European Court of Justice and the European Court of Human Rights, and discusses several conflict solutions models. Next, the politically controversial question of economic, social and cultural rights protection under the *Charter* and the legal status of the 'Solidarity' Chapter (IV) of the *Charter* are reviewed.

Part III discusses the hotly disputed issue of the 'de-listing' procedure in anti-terrorism measures taken at the United Nations Security Council and European Union levels, by reference, in particular, to the

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recent judicial pronouncements at the European Union and Council of Europe levels. While the Security Council under the *UN Charter* mandate focuses on security concerns, the European approaches place more emphasis on striking a balance between security interests and rule of law and human rights guarantees, which impedes quick executive action. The article concludes by stating that legitimate security concerns cannot override elementary habeas corpus rights, which were won in a protracted struggle lasting for centuries. The recent institution of the Office of the Ombudsperson mechanism under the relevant Security Council Sanctions Committee as a response to heavy criticism of the de-listing procedure does not, however, fully meet the strict 'due process' requirements developed, inter alia, at the European level, but goes some way towards mitigating glaring lacunae in due process at the universal level.

The *Lisbon Treaty* consolidates the functional reforms started at Maastricht, Amsterdam and Nice, but also shows clearly that further structural constitutional reforms of the European Union will be much more difficult to achieve in the foreseeable future.

INTRODUCTION

This article raises a number of political and legal issues arising under the recently ratified *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*.[1] Part I of the article discusses the events leading up to the adoption of the *Lisbon Treaty*, followed by an analysis of some key problem areas for which solutions had to be found. Amongst others, the enhanced role of the European Parliament ('EP') is looked at and assessed: voting modalities which proved to be stumbling blocks of an early ratification process, and the issue of subsidiarity — whether decisions ought to be taken at the European or at the national level — are singled out as important problems for which solutions had to be found. Part II deals with the debate on the *Charter of Fundamental Rights of the European Union*,[2] and the issue of the mode of incorporation of the *Charter* in the text of the *Lisbon Treaty*. The problem of a possible clash of jurisdiction between the European Court of Justice ('ECJ') and the European Court of Human Rights ('ECtHR') is then discussed and four possible conflict solutions are offered. Part II concludes with remarks on the 'Solidarity' Chapter (IV) of the *EU Charter*. Part III takes a closer look at the European system of judicial regulation of human rights issues and contrasts this with general international law of peacekeeping parameters. The disputed and different approaches to counter-terrorism measures, at the international and European levels, for striking a balance between legitimate security needs and human rights protection, are used as an example. In the conclusion, the question of '*quo vadis*

1 Opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('*Lisbon Treaty*').

2 [2002] OJ C 364/01 ('*EU Charter*').

Europe?' is answered in the light of the previous remarks on the *Lisbon Treaty* and its human rights components.

I THE EU TREATY REFORMS

Whoever raises the question '*quo vadis Europe*?' usually does so with critical intent. 'Where is your path leading you to?' sounds critical from the start. Basically, two positions vie with each other: that of so-called 'Euromantics' and that of 'Eurosceptics'. Needless to say, intermittent positions are also found.

A *Events Leading to the* Lisbon Treaty

The Euromantics aspire to a most intensive, integrated and soon to be achieved full political union, as exemplified in the preambles to the treaties of Maastricht,[3] Amsterdam,[4] and Nice.[5] From this perspective the results of the *Lisbon Treaty* are disappointing: there will be no comprehensive constitutional treaty and the *EU Charter* is not embraced in the text. The *Charter* is merely referred to, thus enabling individual Member States to reserve exceptions for themselves in separate protocols, even though the reference in the treaty text gives full legal effect to the *Charter* for all other Member States. There will be no European statutes and framework statutes, as originally planned, to replace European Union ('EU') regulations and directives — even though no substantial differences remain. There will be no European foreign minister, as originally planned, and the use of the word 'high representative' is not just diplomatic jargon, but signals insistence on the *domaine réservé* of Member States.

The Eurosceptics undoubtedly will not give up their fundamental opposition against any form of a far-reaching political European union at the expense of national sovereignty and supremacy of their national parliaments. At the negotiation stage, the United Kingdom and Poland tried hard to limit the effects of the *Lisbon Treaty*, paying particular attention to the philosophy of primarily strengthening market economy concerns of an internal market, and to strengthen aspects of a European zone of free trade — much like the United Kingdom had tried to achieve with the European Free Trade Association in the 1960s while still outside the Common Market. Although, on becoming Member States, this free trade agreement can no longer be upheld legally, these Member States continue to endeavour keeping policy-oriented provisions of the EU as limited as possible

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3 *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) ('*Maastricht Treaty*').

4 *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999) ('*Amsterdam Treaty*').

5 *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 26 February 2001, [2001] OJ C 80/1 (entered into force 1 February 2003) ('*Nice Treaty*').

if such policy choices do not squarely coincide with their own national policy priorities.

As the fundamental positions of romantics and sceptics have not changed, the Draft Lisbon Treaty had to steer a middle course, full of compromises, and it was by no means clear that all Member States would actually ratify the 'Reform Treaty' — note that the term 'Constitutional Treaty' was dropped by way of such compromise. The sceptics were meant to be soothed by the fact that the *Lisbon Treaty* in effect just continues the piecemeal social engineering and patchwork treaty amendment procedure adopted in all previous EU treaties. Core constitutional competencies, such as foreign policy, tax law and police powers, ultimately belong to the *domaine réservé* of Member States. This is so even if the *Maastricht-Amsterdam-Nice Treaties* elaborated the second and third pillars of EU activities as fundamentally intergovernmental activities (ranging from foreign policies to justice and internal matters) however with the possibility of further integration steps at a future date. The process of ratification in each Member State consequently was not a quiet affair — in some states, anyway. Some critical issues, on which consensus was reached only at the last moment, were raised again at the national level. In addition, in some countries with highly Eurosceptic media, the killer argument 'let's have a referendum' on the treaty was repeated. The unexpected defeats of referenda in France and in the Netherlands in 2004 effectively postponed the adoption of the EU treaty reforms for several years. As it is, in Britain and Poland, which had raised most objections to certain treaty provisions, no such referendum was held.

Other Member States, which did not raise objections in the negotiation stages, had made similar reservations upon ratification. Some states out of the 27 had problems with ratification for a wide variety of reasons.[6] In Germany, for example, a case before the Federal Constitutional Court produced a very restrictive reading of certain treaty provisions, mainly affecting the residual powers of the Federation upon ratification of the *Lisbon Treaty*.[7] Most commentators expected a ruling allowing Germany to ratify, but stressing the dictum of the *Maastricht Decision* of 1994,[8] which had determined that EU law trumps national law (including national constitutional law) unless the Basic Law provisions on the rule of law and the federal principle are affected. And this is, in fact, how the Court decided.

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6 Most notably, Ireland's refusal to ratify the *Lisbon Treaty* necessitated protracted subsequent negotiations with the EU Member States. Ireland then ratified the *Lisbon Treaty* in October 2009, after a compromise was reached to allow it to maintain its position, inter alia, on the question of abortion and taxation matters.

7 *Lisbon Treaty Decision,* Bundesverfassungsgericht [German Constitutional Court], joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009. An English translation is available at <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>.

8 Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2134/92, 12 October 1993 reported in (1993) 89 BVerfGE 155.

In the *Lisbon Treaty Decision*,[9] the German Constitutional Court boldly stated that, in its opinion, a limit of giving up national sovereignty has been reached. The Court in fact stated, in the head note: 'European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions'. The head note of the decision goes on to state that:

> This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics ... In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.[10]

While upholding the *Lisbon Treaty* architecture, the Court laid down stringent conditions with which the Federal Republic of Germany had to comply by legislative means before ratification of that treaty could take place. The accompanying statutes to ratification ('*Begleitgesetze*') thus had to strengthen participation rights of the constituent states of the Federation ('*Länder*'), which may render decisions at the European level even more complicated and time consuming than at present.

Competency shifts at the European level by reference to the internal market requirements that so often involved a creeping competency shift to the European level, according to the German Constitutional Court, will in future need much more careful prior scrutiny at the national parliamentary level, and the voice of the *Länder* will have to be given greater weight in that regard. Strengthening the role of the democratically elected bodies is a good thing per se, but whether the Federal Diet and the Federal Council will have the time and expertise necessary to carry out their control of the executive branch of government — which deserves its own sphere of legitimate exercise of power — is an open question. It is doubtful whether the Federal Diet and Federal Council will be able to deal effectively and in a timely manner with the numerous and often highly technical issues of EU legislation. Some commentators predict that the new *Begleitgesetze*, enacted as a result of the Constitutional Court's dictum, will in theory involve greater parliamentary participation, but that, in practice, the existing modalities of participation will prevail on account of the greater expertise of government departments.[11]

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9 *Lisbon Treaty Decision*, Bundesverfassungsgericht [German Constitutional Court], joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009.

10 Ibid.

11 See generally Klaus-Dieter Borchardt, *Die rechtlichen Grundlagen der Europäischen Union* (4th ed, 2010) 49.

How this will work in practice remains an open question, but a quickly negotiated compromise between the *Länder* and the Federation was found before the second Irish referendum on the *Lisbon Treaty* in October 2009, which resulted in a clear positive vote. Other Member States that had, under *Solange I*,[12] criticised the German Constitutional Court, now seem to like the new *Lisbon Treaty Decision*,[13] which entrenches the position of nation states as the masters of the EU and almost completely ignores the fully integrated common market provisions of all treaties since the *Single European Act*.[14] The Court even said that, under the existing German constitution, no further integration steps can be undertaken, implying that a future European political union does not seem possible under the existing constitutional parameters in Germany. In the Court's view, this means that Germany could only give up its sovereignty to a full political union of, say, the United States of Europe, by giving up its sovereignty under the Basic Law beforehand, by adopting a new constitution under art 146 of the Basic Law. Here the Court may well have gone too far.

The Czech Republic was the last of the 27 Member States to ratify the *Lisbon Treaty*, and did so only after the European Council agreed on 29 October 2009 to allow the Czech Republic to append a footnote to the *Treaty*. The footnote has the effect that the limitation clauses of the *EU Charter* will leave untouched the *Beneš expropriation decrees*, which were implemented following the expulsion of 2 million Sudeten Germans with Czech passports after the Second World War. The footnote will also affect property rights of several hundred thousand Hungarians similarly expropriated and expelled. As the *EU Charter* primarily addresses violations by EU institutions, not violations by Member States vis-à-vis their citizens, it is submitted that the footnote will not have much relevance, but serves as a political face-saver. Yet it contributed to overcoming the resistance of the Czech President, Vaclav Klaus, even after the Czech Parliament had adopted the *Lisbon Treaty*. Klaus even brought the issue once more to the Constitutional Court of the Czech Republic, which only a year earlier had cleared the way for ratification.

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12 *Solange I*, Bundesverfassungsgericht [German Constitutional Court], 2 BvL 52/71, 29 May 1974 reported in (1974) 37 BVerfGE 271. In this decision, the Court held, in the head note:

> As long as [('*solange*')] the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference to a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the *Treaty*, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights of the Basic Law.

13 Bundesverfassungsgericht [German Constitutional Court], joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009.

14 Opened for signature 28 February 1986, [1987] OJ L 169/1 (entered into force 1 July 1987). See *Frankfurter Allgemeine Zeitung* (Germany), 8 August 2009, 7.

The Constitutional Court did not, however, change its position at the last minute, faced with essentially identical issues, so that the *Lisbon Treaty* finally came into operation on 1 December 2009.

A former Attorney-General of the EU, Carl Otto Lenz, in a very harsh critique of the *Lisbon Treaty Decision*,[15] holds that the decision of the German Constitutional Court is completely one-sided and unbalanced.[16] For instance, the Court mentions the remaining competencies of the EU Member States as acts of sovereignty 33 times, while the Basic Law does not even mention sovereignty once. In an unprecedented act of judicial activism the German Constitutional Court has the Federal Diet, the Federal Council and the EU on a short leash. It postulates far-reaching limitations in areas of competencies that can be transferred to the EU, to which Germany as a Member State agreed in the *Maastricht*, *Amsterdam*, *Nice* and now *Lisbon Treaties*. It refers to the text of the Basic Law, which does not contain such limitations. The restrictive reading of art 23 of the Basic Law is quite astonishing. By allowing constitutional complaints of every citizen — quite against its own decision in *Solange II*[17] — the Court has opened a way for dealing with European political matters, and may well open up judicial avenues against the new *Begleitgesetze*, which the Court required of the Federation before ratification of the *Lisbon Treaty*. One such constitutional complaint has since, however, been declined. Lenz sees the *Lisbon Treaty Decision* as a potential blockade of German European policy and a shift away from the democratically elected and publicly debating Federal Diet and Federal Council to the Constitutional Court,[18] which sits in private and with this decision clearly assumes a political role for which it was not established. While this critique goes very far indeed, the decision of the German Constitutional Court has once more opened a large debate on the separation of

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15 Bundesverfassungsgericht [German Constitutional Court], joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009.

16 *Frankfurter Allgemeine Zeitung* (Germany), 8 August 2009, 7.

17 Bundesverfassungsgericht [German Constitutional Court], 2 BvR 197/83, 22 October 1986 reported in (1986) 73 BVerfGE 339. In this case, the Court nearly made a volte-face, by holding in para 2(b) of the head note:

> As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100(1) Basic Law for those purposes are therefore inadmissible.

18 Bundesverfassungsgericht [German Constitutional Court], joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009.

powers under the Basic Law. The notion of 'inter-organ respect', requiring the respect of the core area of the exercise of political power accorded to each of the three branches of government, may need further reflection.

There had been hopes that the *Lisbon Treaty* would enter into force in 2009 before the EP elections in June 2009, but this proved to be illusory. The way to such a treaty acceptance, as in the past, will be paved with individual declarations and exception protocols. Whether this will affect the integrity and substance of the *Lisbon Treaty* is at least an open question. However, judging by previous experience with EU treaties, such declarations and exception protocols did not fundamentally affect the integrity of EU treaties — they merely allowed for exceptions for a few countries. In fact, some of those protocols were later rescinded, such as the protocol allowing the United Kingdom not to join the social chapter of the *Amsterdam Treaty*. Following a change of the United Kingdom's government to the Labour Party, the *Nice Treaty* integrated the full application of the social chapter and Britain gave up its protocol exception.

But would the ultimate failure of the *Lisbon Treaty* — now a moot question, since the *Treaty* entered into force on 1 December 2009 — be a catastrophe for European integration, as decried by Euromantics? Probably not. If the *Lisbon Treaty* failed, by at least one national Parliament refusing to ratify, the EU would not automatically have fallen into a bottomless pit, but would have fallen relatively softly into the treaty net of the *Nice Treaty* continuing to operate until replaced by a reform treaty or something else. Luckily, that no longer is a likely development, because the *Lisbon Treaty* has now been ratified by all 27 Member States of the EU. Needless to say, the cumbersome decision-making processes designed long ago for far fewer Member States would have been a hindrance and would ultimately have forced Member States to renew negotiations, at least on those procedural provisions. However, the '*acquis communautaire*' — the common acquired European Community ('EC') standards — developed over the last 50 years would, in essence, stay intact.

Thomas Oppermann, during the debates on ratification of the *Maastricht Treaty*, convincingly pointed out that perhaps it would not be so detrimental if the pace of integration were to slow, so that European citizens would gain more time to grasp and to become accustomed to the benefits of the EU.[19] A slower pace of integration would have the added advantage that not every negative national development could be attributed offhand to the EU. After all, particularly during periods of economic and social problems in times of weakened economies, Brussels and its presumed bureaucracy are always declared to be the real culprits of mismanagement and alleged wrong policy choices, even if insiders know very well that usually the

[19] Thomas Oppermann, *Europarecht* (1991) 16–22. Oppermann highlights the attributes of classical foreign policy and internal law elements of the EU, and stresses the gradualist tendencies rather than 'grand designs' since the *Single European Act*. While representing more than pragmatic minimalism on the way to a European union, the final accomplishment of such a political union still remains unachieved. As will be seen, the *Lisbon Treaty* also does not bridge that interpretation gap.

policy choices are heavily influenced by national governments putting pressure on EU institutions to adopt certain measures. As soon as such policies create difficulties in practice, such governments dissociate themselves from those choices. As a result, the giving up of national sovereign rights will usually be questioned anew. Thus, a longer period of getting used to the Maastricht-Amsterdam-Nice, and now Lisbon, architecture and common set of achievements probably would not be counter-productive. The renewed discussion on the principle of subsidiarity, emphasising the respect of Member State primary competencies in all areas but market freedoms, bears witness to that.[20] But this cannot easily be conveyed to fervent young Europeans, for whom the whole process seems much too slow and cumbersome.

B *Key Issues of the* Lisbon Treaty

A brief survey of the results of the *Lisbon Treaty* follows before a few points of European human rights protection will be raised.

Perhaps the most notable junction was the renunciation of the term 'Constitutional Treaty'.[21] The EU, in fact, is not a complete political, state-like institutional setup, but a supranational legal union, unique in many ways, where an umbrella of legal norms spans over European states and citizens. The attributes of statehood still remain with the Member States, despite the fact that in the first pillar of the EU certain national competencies have been given up — 'europeanised' — thus representing a partial giving up of full national sovereignty.

The *Lisbon Treaty*, now named 'Reform Treaty', is meant to highlight the fact that nothing totally or qualitatively new is emerging, and is not a constitution as such for the political union of Europe. No qualitative jump is taking place, to use the terminology of Karl Marx. Only content amendments, additions to existing provisions, and the necessities caused by enlarging the EU from 15 to 27 Member States are raised, particularly in relation to the EU institutional working methods. All the really important issues remain with the Member States, subject to their hallowed *domaine réservé*. Thus, only quantitative changes to the existing treaty obligations are laid down in the *Lisbon Treaty*, and little more.

The most important consequence of this changed approach, deviating from the more logical and more integrated approach of the failed EU Constitutional Treaty, was that the existing cumbersome treaty amendment procedure was reinstated to allay the criticisms of France and the Netherlands. However, those two countries had very different national debates and issues which led to the rejection of the Constitutional Treaty. Still, the Lisbon formula, as elaborated under the German EU presidency in 2008, enabled those two states to agree to continue with the treaty amendment procedures without loss of face. The compromise also had to

20 For a discussion on subsidiarity, see Part I B 3 below.

21 Stefaan van den Bogaert, 'The Treaty of Lisbon: The European Union's Own Judgment of Solomon?' (2008) 15 *Maastricht Journal of European and Comparative Law* 7.

cope with the 18 of 27 states that had already ratified the Constitutional Treaty. In order to salvage the whole operation, the changed *Lisbon Treaty* had to maintain most of the components of the Constitutional Treaty, so that these 18 states could readily accept the changes. The exercise was like squaring a circle. Technically, this was done in the course of diplomatic negotiation processes by finding very fine and meticulously chosen formulations. The *Treaty on European Union* retains its name,[22] and the *Treaty Establishing the European Community*[23] becomes the *Treaty on the Functioning of the European Union*.[24] The *Lisbon Treaty* will thus represent the roof on top of that construction. The European Community will change its name — but not its contents — to the European Union.

Under the Constitutional Treaty, legal acts of the EU would have had to be spelled out in greater detail; under the *Lisbon Treaty*, the old 'sources quintet' (regulations, directives, decisions, recommendations and opinions) will continue to exist.[25]

In the new articles, the legal acts of the EU are categorised according to whether they have been adopted in a legislative process, or whether they represent delegated legal acts or subordinate legal acts. As far as regulations are concerned, the *Lisbon Treaty* now clarifies that, from a contents point of view, they are real legislative acts. From this involved debate it can already be seen that the *Lisbon Treaty* had to find treaty formula compromises, to keep all Member States in the boat. Unlike private contract law — where full consensus is required on all parts of the bargain for a contract to be valid — under international treaty law, the parties to a treaty may agree to disagree on some provisions, but accept the rest of the treaty, because the advantages of being bound by a treaty framework outweigh the disadvantages of dissent. Moreover, under such a treaty formula compromise, the parties to that treaty are reminded in writing of their points of dissent.

1 *Voting Modalities*

The most difficult and controversial issue turned out to be the voting modalities of the *Lisbon Treaty*.[26] Somewhat shrill and irrational debates overshadowed the negotiation process until the very last moment. The Constitutional Treaty had foreseen clear corrections of voting rights in favour of the larger Member States, particularly Germany which had received only two more votes than Poland under

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22 Opened for signature 7 February 1992, [2010] OJ C 83/13 (entered into force 1 November 1993) ('*EU Treaty*').

23 Opened for signature 7 February 1992, [2006] OJ C 321/37 (entered into force 1 November 1993) ('*EC Treaty*').

24 Opened for signature 7 February 1992, [2010] OJ C 83/47 (entered into force 1 November 1993) ('*TFEU*'). The change in name was brought about under *Lisbon Treaty* art 2(1). For a table of equivalences on the numbering of treaty provisions, see *Tables of Equivalences* [2010] OJ C 83/361.

25 *TFEU* ,above n 24, art 288 (formerly *EC Treaty* art 249). For an excellent overview of all changes since the *Nice Treaty*, see Jürgen Schwarze (ed), *EU Kommentar* (2nd ed, 2009) 40–54.

26 Van den Bogaert, above n 21, 14.

the *Nice Treaty*, until agreement on a fairer seat distribution in the EP would be reached. The head of state and the then government of Poland, tried to maintain the Nice formula[27] whereby Poland with less than half the population of reunited Germany would retain all its voting gains, which all other EU states considered as unjustified and as creating an imbalance. In the end, Poland was accorded an exception, whereby it could retain its Nice allotment until 2014 or 2017 at the latest.[28] Poland used all the political arguments of a past era, even comparing Germany with the Hitler past, and stressed that Germany would otherwise become a hegemonic state in Europe. Only after protracted interventions by France, the United Kingdom, other Member States and the then European Commission President, Romano Prodi, did Poland agree to a compromise, gaining the exceptions until 2014, and with complicated interim provisions even until 2017.[29]

While the European media lavishly reported on these disputes, the reality of the EU looks quite different: in the past, whenever a potential veto arose, it hardly ever became obstructive. In 1966, France managed to negotiate the so-called Luxembourg compromise, whereby only France would be entitled to claim a different reading of EC treaty provisions. However, the other Member States insisted on their own and differing opinions, which in practice led to a situation where France did not rely on its exceptions. It just remained a theoretical proviso on questions affecting the life of the nation.[30] Lady Margaret Thatcher subsequently tried to utilise the French proviso for British agricultural interests, but all other Member States insisted that only France could rely on the proviso 'according to its opinion', leaving it an open question whether in the case of conflict the treaty provisions might not be read quite differently altogether. The United Kingdom had to accept the *acquis communautaire* like all other Member States. The prediction, therefore, is that practice will follow similar lines under the *Lisbon Treaty*. Usually, diplomats negotiate until consensus is reached, and the undertaking of formal voting procedures under the new provisions will most likely be rare occurrences. That might make Europe-friendly commentators, who would have hailed the full application of simple majority decisions, unhappy considering that the *Nice Treaty* contained more than 40 such simple majority decision situations. The old Joannina formula of double weighting was also retained,[31] even though after 1994 it never played a significant role.

Another innovation is the introduction of a High Representative of the Union for Foreign Affairs and Security Policy in lieu of a Foreign Secretary.[32] Consistent with British policy-coolness in European matters, this change of title was agreed upon at the suggestion of the United Kingdom. Basically, two offices existing

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27 *EC*, above n 23, *Treaty* art 205(2).

28 Tim Corthaut, 'Plus ça change, plus c'est la même chose? A Comparison with the Constitutional Treaty' (2008) 15 *Maastricht Journal of European and Comparative Law* 21, 28.

29 *Protocol (No 36) on Transitional Provisions* [2008] OJ C 115/322, art 3(2).

30 On the Luxembourg agreement, see Borchardt, above n 11, 165–6.

31 Cf Schwarze, above n 25, 46.

32 *TFEU*, above n 24, art 26(3).

under the *Nice Treaty* are merged into one. The High Representative for the Common Foreign and Security Policy,[33] currently Javier Solana, negotiates on common positions regarding foreign policy between the Member States, speaks in the name of Europe on behalf of the Member States, and co-ordinates the work of Special Representatives, who are in fact emissaries of the EU. The Commissioner for External Relations, currently Benita Ferrero-Waldner, is responsible for foreign affairs inside the European Commission. The provisions under the *Nice Treaty* about a unified diplomatic service and intensified forms of cooperation between the national diplomatic missions will be kept.[34] The High Representative will become a Vice-President of the Commission, but, other than that, the foreign policy proper will remain firmly rooted at the national level. Only intergovernmental cooperation as before will take place, as under the Common Foreign and Security Policies.[35]

The President of the European Council will henceforth preside for a period of two and a half years, with the possibility of re-election. Under the *Nice Treaty*, the presidency of the European Council rotates every half year, as does the presidency in the Council of Ministers,[36] which may have impeded quicker developments in the past. The presidency of the Council of Ministers will continue to rotate, once every eighteen months in a team of three Member States (so-called 'Team Presidency').[37] However, the Troica model, which had combined the incoming, acting and outgoing presidencies, will be abolished. Whether this will be an improvement remains to be seen.

2 *Powers of the European Parliament*

The powers of the EP will be further strengthened. Its role alongside the Council of Ministers will be increased. Under the *Nice Treaty*, in many areas, legislation can be made and rules can be set by the European Council and the European Commission alone.[38] In certain areas, the Council and the Commission decide, but they must consult the EP first, although the opinion of the EP is not binding.

Very few specifically enumerated areas underlie the cooperation procedure.[39] The procedure works as follows. After the Commission has made a proposal, the EP is consulted. The Council can then adopt a 'common position' on the Commission's plan. The EP can accept the common position, in which case the measure can

33 *EC Treaty*, above n 23, art 18(3).

34 *EC Treaty* art 20; *TFEU*, above n 24, art 35.

35 Schwarze, above n 25, 52.

36 *EC Treaty*, above n 23, art 203(2).

37 *Declaration on Article 16(9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council* [2008] OJ C 115/341.

38 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (4th ed, 2008) 110; Derrick Wyatt et al, *Wyatt and Dashwood's European Union Law* (5th ed, 2006) 57–9 [3-003].

39 *EC Treaty* art 252; Craig and de Búrca, above n 38, 111–12; Wyatt et al, above n 38, 66–8 [3-008].

be decided on by the Council, which can also change or repudiate it. When the common position has been repudiated, the Council can override the EP's decision, but only by unanimous vote. In changing the common position, the EP forces the Commission to review its proposal once more to decide which amendments to accept and which to refuse. After having decided, the Commission submits the amended common position to the Council. The Council then accepts it with a qualified majority, or amends it on its own — but again, only by unanimous vote. The cooperation procedure was historically the first to give the EP a real say on the EC's legislation, but has lost most of its importance since.

Other areas, mostly freedom of movement for workers and the right to establishment, are legislated using the co-decision procedure.[40] After the Commission has submitted a proposal, the EP renders its opinion. The Council can either approve the amendments made by the EP, and thereby adopt the proposed Act, or adopt a common position. The EP can accept or repudiate that common position, ending the legislative process, or it may propose amendments. The Council can, after consulting the Commission, approve the amendments made by the EP, or submit the text to the Conciliation Committee. The Committee's duty is to find a 'joint text'. For the Act to be adopted, the joint text needs to be approved by both the EP and the Council. If the Committee fails to produce a joint text, or the text is repudiated by either the Council or the EP, the Act has been declined. Under the *Lisbon Treaty*, the co-decision procedure will become the normal legislative model.[41] Wide areas of the so-called third pillar, the justice and internal affairs matters, will no longer require unanimous decisions, but will be decided according to the Nice formula. Thus, the co-decision competencies of the EP will be increased considerably.

The impact of the EP on legislation under the *Nice Treaty* had been shallow in a number of aspects. Since the EP is the only directly elected organ of the EC, criticism of its limited role in legislation had been fierce prior to the elaboration of the *Lisbon Treaty*.[42] The EP has basically persisted under the term 'deficit of democracy' ever since direct election of the EP began in 1979. One of the most important goals of the treaty amendment procedure was to improve the democratic legitimisation of EU legislation. In the *Lisbon Treaty Decision*,[43] the German Constitutional Court went one step further and even questioned the democratic

40 *EC Treaty*, above n 23, art 251; *TFEU*, above n 24, art 294. For further information on the process, see Wyatt et al, above n 38, 61–6 [3-006–3-007].

41 Schwarze, above n 25, 45. New areas of Community competencies will involve sport (*TFEU* art 165), space law (*TFEU* art 189), energy policy (*TFEU* art 194), tourism (*TFEU* art 195), protection against catastrophes (*TFEU* art 196), and administrative cooperation (*TFEU* art 197). Neighbour policy of the EU is addressed for the first time in the *EU Treaty* (art 8), as is the recognition of regionalism and constituent states in federal states (art 4(2)), stressing the principle of limited attribution and subsidiarity.

42 See, eg, Craig and de Búrca, above n 38, 111.

43 Bundesverfassungsgericht [German Constitutional Court], joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009.

legitimacy of the EP because the number of representatives is not proportional to the population of the Member States. Under the *Lisbon Treaty*, every state has a minimum of six and a maximum of 96 seats.[44]

3 *Subsidiarity*

As a result of the complex subsidiarity debate, the role of national parliaments will be increased. Subsidiarity became a big issue when Member States complained that the European Commission, prior to the *Maastricht Treaty*, had over-emphasised the EC competencies, gradually slicing away national competencies by regularly referring to the internal market community competencies.[45] In this way, the Commission gradually increased its claims to priority action over domestic law regulation, even if in many policy areas Member States had priority, and the Commission only subsidiary competencies. Following major disputes on this issue, the Edinburgh and Lisbon European Councils (in 1992 and 1997 respectively) demanded that the Commission provide an outline of all existing EC competencies where EU law would trump national law. Furthermore, the Commission was required to declare concurrent competency areas where, according to the subsidiarity principle, matters could be left to the Member States. The Commission reluctantly produced a survey which showed that all the disputed areas of competency were to be left to the EC law level. The heads of state at the Lisbon European Council then agreed on *Protocol (No 30) on the Application of the Principles of Subsidiarity and Proportionality*,[46] which stressed the principle that EC competency should only apply when matters could not be dealt with adequately at the domestic law level, or the issue was one where competency was clearly better left to the EC level than to the national level.

As the Commission had stressed throughout the debate, the subsidiarity principle could only apply to areas of concurrent jurisdiction of the Member States and the EC. In areas of exclusive EC jurisdiction, such as common market regulations and directives geared to ensure uniform market conditions, there would be no room for the subsidiarity principle.[47] In national political debates this correct reading by the Commission was conveniently overlooked for domestic political purposes, and subsidiarity was acclaimed as an overriding principle, leaving more matters to domestic definition and application. Under the *Lisbon Treaty* it was therefore decided that while the competencies of the EP would be increased considerably, the role of national parliaments would correspondingly be enhanced: every parliament may now contradict proposals for new EU Acts within eight weeks if of the opinion

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44 *EU Treaty*, above n 22, art 14(2).

45 For a brief overview of the problems involved, see Thomas Oppermann, Claus Dieter Classen and Martin Nettesheim, *Europarecht* (4th ed, 2009) 218; Schwarze, above n 25, 280, 285.

46 [1997] OJ C 340/105 ('*Subsidiarity Protocol*'). Note that now, under the *Lisbon Treaty*, there is *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality* [2010] OJ C 83/206.

47 Craig and de Búrca, above n 38, 101.

that national competencies have been unduly curtailed.[48] If at least 50 per cent of Member State parliaments utter such misgivings, then the Commission has to respond in writing, but is still not required to change the proposal. Even though this does not seem to change the negotiation setting all that much, it will at least necessitate prior and careful scanning of intended new EU law to avoid political controversies.[49]

Under this new model, the Commission will pass that information on to the Council of Ministers and to the EP, if it is of the view that the whole matter fully conforms to the precepts of the subsidiarity principle as understood by the Commission. If 55 per cent of the Council of Ministers and of the EP are of the opinion that the Commission proposal contravenes the subsidiarity principle, then the intended Act is no longer reviewed.[50] The *Subsidiarity Protocol* and a reference to the principle of proportionality are consequently altered accordingly.[51]

Much more could be said about subsidiarity, and the abounding debate fairly mirrors the controversies surrounding allocation of powers in federal states. In fact, metres of books have been filled with this issue, and academics love the topic. The temptation is resisted here, and thus, only a few parameters will be mentioned, necessary for understanding the changes that the *Lisbon Treaty* will bring about. The main idea, as mentioned before, is quite simple: alongside the four market freedoms (free trade of goods, services, traffic, competition rules and creation and maintenance of the European Internal Market), the *EC Treaty* and now the new *Lisbon Treaty* contain further EU policy areas where the EU has only a subsidiary role to play. This applies to such areas as environmental protection, energy law, Trans-European Networks, health policies and education. Here the EU may act, but has to have due regard to subsidiarity requirements. As mentioned before, the EU may only act if the matter cannot adequately be dealt with at the national level, or if EU action appears to be imperative on account of the transnational effects of such measures.

Subsidiarity, as borrowed from the Encyclical, *Quadragesimo Anno*, of 1931 in the Roman Catholic social philosophy context,[52] means no more than that decisions for legislative steps should always be taken at the lowest possible level to facilitate a citizen-friendly, consensual and plausible decision. The European Commission, up until fairly recently, has always opted for the second limb of the subsidiarity clause: namely that the matter can better be solved at the European level, thus undercutting the subsidiarity argument. The ECJ has continually supported

48 Schwarze, above n 25, 49.

49 See Anatole Abaquesne de Parfouru, ' "See No Evil, Hear No Evil, Speak No Evil": The Irish Referendum and Ratification of the Lisbon Treaty' (2008) 15 *Maastricht Journal of European and Comparative Law* 493, 501.

50 Schwarze, above n 25, 292.

51 Oppermann, Classen and Nettesheim, above n 25, 218–9.

52 Pope Pius XI, *Quadragesimo Anno* (Encyclical, 15 May 1931). See Oswald von Nell-Breuning and Johannes Schasching, *Texte zur katholischen Soziallehre: Die sozialen Rundschreiben der Päpste und andere kirchliche Dokumente* (1992).

this position by 'dynamic-evolutionary' interpretations, thereby leading to the situation that the distinction between EC policies and other policies of the EU has gradually been eroded, to which Member States took strong objection. The fact that policy issues — primary responsibility resting with Member States — almost always touch also upon internal market rules has contributed to the phenomenon that almost everything is part and parcel of the EU, thereby precluding different approaches in national law.

Thus, when the Edinburgh European Council requested from the Commission a careful analysis of the application of the subsidiarity principle, paying particular attention to the idea of subsidiarity, the result was predictable but disappointing: the Commission meticulously argued why in most cases a harmonised common approach of the EU would be necessary and could not possibly be managed effectively at the national level. Another European Council meeting, the Lisbon European Council, then formulated the *Subsidiarity Protocol* (also including the proportionality principle), which was intended to resolve the conflict and tried to emphasise further the notion of subsidiarity.[53] It would seem that the EU will continue to exercise its powers not restrictively and not statically. Instead, there is a natural tendency to extend its powers and to read existing powers as widely as possible, as all central governments in federal states will tend to do vis-à-vis their constituent states.

The *Lisbon Treaty*, as expected, did not resolve that controversy between necessary large thinking and individual state prerogatives of preserving national identity, as exemplified by the holy cow of parliamentary sovereignty. Thus, in at least the foreseeable future, much controversy will rage amongst politicians, European lawyers and academics alike, and no-one can predict in which direction the pendulum will swing. It seems probable that with 27, soon 28 — or 29, counting Iceland — Member States, pressure will be put on individual states to accept EU measures, in order to avoid steps back and ill feelings amongst all Member States.

II The Debate on the European Fundamental Rights Charter

A *A Place for the EU Charter*

One reform proposal for the failed Constitutional Treaty was the acceptance into its text of the *EU Charter*.[54] The *EU Charter* was adopted in 2000 and was meant to be integrated into the *Nice Treaty*, which failed on account of British resistance. As a compromise, the text of the *EU Charter* was merely 'proclaimed' ceremoniously, but without becoming an integral part of the *Nice Treaty*. One consequence was that the ECJ, when reaching its decisions, could rely directly on only the *Convention for the Protection of Human Rights and Fundamental Freedoms*,[55] and on the common

53 See Schwarze, above n 25, 2675.

54 See generally Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union* (2nd ed, 2006).

55 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953 ('*ECHR*').

constitutional traditions of Member States, as general principles of EU law.[56] The Advocates-General since the *Nice Treaty* have referred to provisions of the *EU Charter* without specifically basing their opinion on it. The ECJ, however, has so far not directly applied the *Charter* in any of its decisions. But it is only a question of time before that will happen. The ECJ may well decide to take a more activist position, if clear violations of fundamental rights are at stake. Since the *Solange* cases and *Maastricht Decision* of the German Constitutional Court,[57] the ECJ takes great care not to fall below the German fundamental rights standard, because otherwise those national constitutional courts and supreme courts might be tempted to declare EU Acts as contrary to their own constitutional law provisions, which would create a new era of controversy between Luxembourg and Karlsruhe.[58]

The *Lisbon Treaty* has found a compromise for this dilemma which seems quite important: the *EU Charter* is not taken over into the text of the *Lisbon Treaty*, but is mentioned there, becoming a legally binding annexe to the *Treaty*.[59] That, in itself, is a vast improvement vis-à-vis the present legal situation. The *Charter* embraces civil and political rights, as the *ECHR* provides, and picks up some important economic, social and cultural rights, as found in the revised *European Social Charter*.[60] This comprehensive human rights approach immediately had to face opposition by the United Kingdom,[61] and nearly led to the foundering of the whole project. As it stands, however, a complex compromise was found which made it possible for the *EU Charter* to be accepted by all.

B *The EU Charter — An Overview*

The *EU Charter* is divided into seven chapters, successively dealing with:

I. human dignity;[62]

II. fundamental freedoms, including rights to property and asylum;[63]

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56 *EU Treaty*, above n 22, art 6(3).

57 *Solange I*, Bundesverfassungsgericht [German Constitutional Court], 2 BvL 52/71, 29 May 1974 reported in (1974) 37 BVerfGE 271; *Solange II*, Bundesverfassungsgericht [German Constitutional Court], 2 BvR 197/83, 22 October 1986 reported in (1986) 73 BVerfGE 339, 374; *Maastricht Decision*, Bundesverfassungsgericht [German Constitutional Court], 2 BvR 2134/92, 12 October 1993 reported in (1993) 89 BVerfGE 155.

58 For the most recent cases of the German Constitutional Court along this line, see *Lisbon Treaty Decision,* Bundesverfassungsgericht [German Constitutional Court], joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009.

59 *EU Treaty*, above n 22, art 6(1).

60 Opened for signature 3 May 1996, CETS 163 (entered into force 1 July 1999). Cf Eibe Riedel, 'Solidarität' in Meyer, above n 54, 321.

61 For details, see Riedel, above n 60, 325.

62 See Martin Borowsky, in Meyer, above n 54, 81; Wyatt, above n 38, 290–2 [9-005–9-006].

63 See Norbert Bernsdorff, in Meyer, above n 54, 157; Wyatt, above n 38, 292–9 [9-007–9-011].

III. equality rights;[64]

IV. solidarity rights, ranging from collective bargaining and action, placement services, workers' information rights within the undertaking, protection against unjust dismissal, and fair working conditions, to children's and family rights, social security, health care, environmental protection and consumer protection;[65]

V. citizens' rights, including voting rights and a right to good administration, requiring the institutions and bodies of the EU to act.[66] This includes, to name but some: the common law tradition of 'openness, fairness and impartiality'; redress of grievances through ombudspersons and petition rights; diplomatic and consular protection in third countries; and freedom of information and access to information or documents by the EP, European Council and European Commission;

VI. habeas corpus rights under the title 'Justice', containing some — but not all — justice rights, as found in the *ECHR* and national constitutions;[67] and lastly

VII. a chapter on general provisions, making it clear that the *EU Charter* only applies to acts by EC organs, or to decisions by national organs when applying EC law internally.[68] Article 51(2) bluntly affirms: 'The *Charter* does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the *Treaties*', mitigating fears that the ECJ might later on arrogate new EU powers.[69]

Article 51 of the *EU Charter* then sets out a general limitation clause mainly fashioned along the lines as laid down in almost identical terms in arts 8(2), 9(2), 10(2), 11(2) of the *ECHR*.[70] After much debate as regards the relationship of the *EU Charter* to the *ECHR*, and in particular as relating to the status of the ECJ and the ECtHR in future, art 52 (3) produced a compromise:

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64 See Sven Hölscheidt, in Meyer, above n 54, 275; Wyatt, above n 38, 299–303 [9-012–9-014].

65 See Riedel, above n 60; Wyatt, above n 38, 303–9 [9-015–18]; Craig and de Búrca, above n 38, 414.

66 See Siegfried Magiera, in Meyer, above n 54, 417; Wyatt, above n 38, 309–10 [9-019].

67 See Albin Eser, in Meyer (ed), above n 54, 477; Wyatt, above n 38, 310–13 [9-020–9-021].

68 See Borowsky, in Meyer, above n 62, 527.

69 Craig and de Búrca, above n 38, 415.

70 Those limitation clauses read as follows (in *ECHR* art 11(2), by way of example): 'No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'.

> Insofar as this *Charter* contains rights which correspond to rights guaranteed by the *Convention for the Protection of Human Rights and Fundamental Freedoms*, the meaning and scope of those rights shall be the same as those laid down by the said *Convention*. This provision shall not prevent Union law providing more extensive protection.

C *Clash of Jurisdiction between the ECJ and ECtHR?*

It remains to be seen whether the ECJ will take over any future jurisprudential developments by the ECtHR, or whether it will develop its own line of interpretation, taking into account merely the text of the *ECHR* as interpreted by the date of entry into force of the *EU Charter*. It is quite obvious that there will be increasing conflicts of interpretation once such a charter is in force. To take just one example: whereas art 14 of the *ECHR* (on non-discrimination) in practice has only played a supplementary function in the case law of the ECtHR, art 12 of the *TFEU* (formerly art 6 of the *EC Treaty*) has been the source of much further application in EC law, in relation to economic freedom rights. Thus, there was the need to produce an additional protocol to the *ECHR* to remedy precisely this discrepancy in the scope of application of the non-discrimination issue in the Council of Europe and EU contexts.[71]

So, a real clash of jurisdiction is foreseeable, despite the nicely worded art 53 on the 'level of protection' which says:

> Nothing in this *Charter* shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and by the Member States' constitutions.

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71 *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 2000, ETS 177 (entered into force 1 April 2005). For an overview, see Pieter van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (4th ed, 2006) 989–92. It is to be noted that only very few Member States of the Council of Europe have so far ratified the *Protocol*. Article 1 of the *Protocol* largely repeats art 14 of the *ECHR*, but introduced a stand-alone guarantee which raised a lot of objections. Newer categories on non-discrimination were not included, because the examples given in art 1 of the *Protocol* and art 14 of the *ECHR* are merely examples, and not meant to be exclusive categories. The UN Committee on Economic, Social and Cultural Rights in May 2009 adopted *General Comment No 20: Non-Discrimination in Economic Social and Cultural Rights (art 2, para 2)*, 44th sess, UN Doc E/C12/GC/20 (2009), stressing that art 2(2) of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) is not a stand-alone right, but must be read in conjunction with other specific rights. The Committee also took on board newer categories of 'other status' like sexual orientation, mirroring recent reporting practice under the *Covenant*.

D *Possible Conflict Solutions*

The mere existence of two jurisdictions, it is submitted, will ultimately produce divergent decisions in some instances. How can this be remedied? Four positions seem viable.

First, the EU might join the *ECHR*. This is unlikely to happen quickly, as it may raise too many constitutional problems between the 27 EU Member States and the 47 Council of Europe Member States. Nonetheless, the *Lisbon Treaty* specifically opens up that possibility in art 6(2) of the *EU Treaty* and arts 218(6)(a)(ii), (8) of the *TFEU*, requiring unanimous decisions of the Council and EP, and of all Member States.

Secondly, the ECJ might be treated like a supreme court of law, applying European law, and given the power or duty to ask for advisory opinions or preliminary rulings from the ECtHR. However, most EU lawyers resist this solution.[72]

Thirdly, a '*tribunal des conflits*', composed of presidents and vice-presidents of both Courts should be empowered to settle divergent interpretations. This would be the easiest way out, and would follow French precedents.

Fourthly, more likely, the existing 'system' of informal meetings between judges of both jurisdictions might be formalised and regularised. After all, so far, very few instances of divergent interpretation have, in fact, arisen. But this might well change dramatically once the *EU Charter* is in full operation. The case of *Senator Lines GmbH v 15 Member States of the European Union* provides a useful comparison to illustrate this.[73]

To conclude this overview, a few general remarks about the *EU Charter* seem called for. Seen objectively through the lenses of the general population, the *EU Charter* is probably a tag swindle; it promises more than it contains. Not every state action or supranational organ action is brought into focus, as one might have expected in a constitutional document, but instead, only a very small area of organ action of the EC (now EU) will be addressed. In the area of social rights, the extensive limitation clauses and preference rules of national law will reduce the ambit of the *EU Charter* even further. Article 51(2) thus emphasises: 'The *Charter* does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the *Treaties*'.

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72 Craig and de Búrca, above n 38, 419.

73 [2004] IV Eur Court HR 331 ('*Senator Lines*'). See also *Matthews v United Kingdom* [1999] I Eur Court HR 251. Similarly, on the relationship between the ECtHR and ECJ, cf *Waite v United Kingdom* [1999] I Eur Court HR 393. See also Christian Koenig and Andreas Haratsch, *Europarecht* (4th ed, 2003), 97–8.

These restrictive formulations were the price to be paid to the critics, like Lord Goldsmith from the United Kingdom.[74] Most other Member States would have preferred less restrictive language. A protocol to the *Lisbon Treaty*, which was conceded to the UK, now provides that: 'The *Charter* does not extend the ability of ... any court or tribunal of ... the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of ... the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms'.[75] This in itself is not such a bad thing: it simply means that the *EU Charter* is not directly applicable in domestic British law. It may become indirectly applicable to the extent that the *EU Charter* provisions merely restate *ECHR* provisions; but no *EU Charter* would have been needed for that.

Moreover, this did not preclude the ECJ or the Court of First Instance ('CFI') nevertheless applying the *EU Charter* — even before the *Lisbon Treaty* entered into force on 1 December 2009. British courts in the past have always been scrupulously faithful to treaty obligations and have applied EU law, as interpreted by the ECJ, quite without exception — which cannot be said for some other Member States.

E *The 'Solidarity' Chapter (IV) of the* EU Charter

As regards social rights (Chapter IV of the *EU Charter*),[76] the United Kingdom insists that the Charter does not establish justiciable rights, unless such rights are provided for under national British law. This is a real exception and a step back from the consensus reached in 2004 when the Draft Constitutional Treaty was agreed upon. The hope that Britain might behave, as with the optional protocol on the Social Union in the *Maastricht Treaty*, is slender: there the new Labour government gave up its protocol position, enabling the Social Union to be fully integrated into the *Amsterdam* and *Nice Treaties*. Poland and the United Kingdom formulated their misgivings in the *EU Charter Protocol*, appended to the *Lisbon Treaty*. Under art 1(1), the two states went one step further and insisted that: 'The *Charter* does not extend the ability of the European Court of Justice or of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms'. Under art 1(2), both states insisted that Chapter IV of the *Charter* does not create immediately justiciable rights as far as Poland and the United Kingdom are concerned, unless these rights already exist under domestic law.

It remains to be seen whether this declaration is in line with existing EC law and with the law of the *ECHR*. The Polish delegation was mainly concerned with such

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74 See Lord Goldsmith, 'The Charter of Rights — A Brake Not an Accelerator' [2004] *European Human Rights Law Review* 473.

75 *Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom* [2007] OJ C 306/156, art 1(1) ('*EU Charter Protocol*').

76 See Riedel, above n 61.

issues as homosexuality and family rights, abortion and genetic engineering, and other ethically controversial issues where the Member State wishes to retain the predominance of national regulation, quite irrespective of the ECtHR's practice to leave a broad margin of appreciation to Member States. The Czech Republic and Slovakia have been reluctant about the *ECHR* as well. They feared that the *EU Charter* might create a problem for the legality of the *Beneš decrees*, which legitimised the expulsion and expropriation of Germans and Hungarians in Czechoslovakia after the Second World War. On 23 October 2009, the Czech Republic was offered the possibility of being exempted from the binding force of the *EU Charter* under the *Lisbon Treaty* as Great Britain and Poland are. Apart from these exceptions, most other states have not made inroads to the *EU Charter*, but have enhanced its role by legally referring to it in the *Lisbon Treaty*.

III European Judicial Regulation — De-listing Cases Under European and International Law

A few words about European judicial regulation ensue. No-one questions the role of the ECJ as protector of EU law. The *acquis communautaire* is extended and the new treaty provisions in the *TFEU* will be mostly justiciable. By way of example, a couple of recently decided cases of the ECJ or of the CFI will be singled out, illustrating the effects that EU human rights produce when measured against general international law, as exemplified by United Nations ('UN') organ acts.

In the joined cases of *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*,[77] the relationship of the so-called 'smart sanctions' of the UN Security Council ('UNSC') with legal acts of the EC was at issue, particularly the validity of four regulations,[78] whether or not these EC laws contravened fundamental rights. The

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77 (C-402/05 P; C-415/05 P) [2008] ECR I-6415 ('*Kadi and Al Barakaat*'). See also *Kadi v Council of the European Union and Commission of the European Communities* (T-315/01) [2005] ECR II-3649; *Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (T-306/01) [2005] ECR II-3533. For an in-depth analysis of these cases, see Maria Tzanou, 'Case-note on Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*', 10 *German Law Journal* 123, available also in electronic format at <http://www.germanlawjournal.com/print.php?id=1081>.

78 *Council Regulation (EC) No 337/2000 of 14 February 2000 Concerning a Flight Ban and a Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan* [2000] OJ L 43/1; *Council Regulation (EC) No 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) No 337/2000* [2001] OJ L 57/1; *Council Regulation (EC) No 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban, and repealing Council Regulation (EC) No*

plaintiffs Kadi and Jusuf claimed that the CFI had unjustifiably turned down their annulment claims. Following the 9/11 events in 2001, the UNSC had set up a Sanctions Committee under art 29 of the *Charter of the United Nations* ('*UN Charter*'), to establish 'targeted sanctions' against anyone contributing, aiding or abetting terrorists.[79] It began with Resolution 1267 in 1999, whereby all Member States of the UN were obligated to freeze all monetary accounts and financial operations which were directly or indirectly controlled by the Taliban.[80] The Sanctions Committee demanded the freezing of all assets of Osama Bin Ladin, Al Qaida and its supporters worldwide. A special list of names was elaborated which could be renewed, amended or corrected once a year by the Sanctions Committee, consisting of the 15 Member States of the UNSC. Since 2001, measures were no longer targeted against Member States but against 'international terrorism' generally. The UNSC naturally addressed primarily Member States of the UN to implement the obligations as outlined by the Sanctions Committee, as obligations flowing from membership obligations under the *UN Charter*, by freezing the accounts according to their respective national laws. Whoever finds himself on the list of the Sanctions Committee, in practice, has no legal remedies available to challenge the situation. The UNSC purposely did not set up a legal mechanism to control the actual listing procedures.[81]

This follows from the traditional view, as succinctly formulated by the then US Secretary of State, John Foster Dulles, in 1950: 'The Security Council is not a body that merely enforces agreed law. It is law unto itself. If it considers any situation as a threat to the peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks as expedient'.[82] But this position has been challenged by a vast majority of writers on the topic. As early as 1948, the International Court of Justice ('ICJ'), in the case

467/2001 [2002] OJ L 139/9, as amended by *Commission Regulation (EC) No 1347/2005 of 16 August 2005 Amending for the 51st Time Council Regulation (EC) No 881/2002* [2005] OJ L 212/26.

79 On the issue of targeted sanctions and terrorism, see amongst many others, Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 *European Journal of International Law* 881; Piet Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and the UN Security Council Resolutions: In Search of the Right Fit' (2007) 3 *European Constitutional Law Review* 183; Nikolaos Lavranos, 'Judicial Review of UN Sanctions by the Court of First Instance' (2006) 11 *European Foreign Affairs Review* 471; Christina Eckes, 'Judicial Review of European Anti-Terrorism Measures — the *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 *European Law Journal* 74; Larissa van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 *Leiden Journal of International Law* 797.

80 SC Res 1267, UN SCOR, 54th sess, 4051st mtg, UN Doc S/Res/1267 (1999).

81 On the historical evolution of economic sanctions under Chapter VII of the *UN Charter* see Robin Geiss, 'Humanitarian Safeguards in Economic Sanctions regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects' (2005) 18 *Harvard Human Rights Journal* 167.

82 John Foster Dulles, *War or Peace* (1950) 194–5.

of *Admission of a State to the United Nations (Article 4 of the Charter)*,[83] held that '[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the *Charter* when they constitute limitations on its powers or criteria for its judgment'. Consequently, the UNSC that undoubtedly has the primary responsibility for maintaining peace and security, cannot have the discretionary power to disregard the rule of law, one of the foundational principles of a peaceful international order for which the UN was set up, including the *UN Charter* principles of arts 1–2. Thus, art 103 of the *UN Charter* cannot be read solely in conjunction with arts 24(1), 25, but is itself subject to art 24(2). Therefore, ultra vires acts of the UNSC would be illegal. This line of argument formed the basis also of the case of *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*,[84] which unfortunately was settled out of Court before the ICJ could pronounce on this issue.

The list of names would be set up by unanimous decision of the Sanctions Committee, without the need to lay open national decisions demanding the addition of names to the list. After much criticism, this was changed by Resolution 1390 in 2002,[85] when it was decided that henceforth the Member State requesting a listing of a terrorist would have to submit reliable informations.[86] 'De-listing' only occurs upon application of the home state or state of residence of the alleged suspect. Until December 2009, listed persons thus only had at their disposal the institution of diplomatic protection, which is a purely discretionary instrument of sovereign decision by states. The alleged terrorist had no legal standing of his own. He could, of course, seek redress from his own national courts or those of his place of residence if violations of higher constitutional law were alleged.

However, on 17 December 2009, Resolution 1904[87] established the Office of the Ombudsperson,[88] which took over the functions of the Focal Point[89] that previously had received de-listing requests from individuals, groups, undertakings and entities seeking to be removed from the Consolidated List as established by Resolution 1267. The specific procedure set up in annex II of Resolution 1904 gives details

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83 (*Advisory Opinion*) [1948] ICJ Rep 57, 64.

84 (*Libya v USA*) (*Provisional Measures*) [1992] ICJ Reports 114, 175 (Weeramantry J, in dissent) ('*Lockerbie*').

85 SC Res 1390, UN SCOR, 57th sess, 4452nd mtg, UN Doc S/Res/1390 (2002).

86 For an updated overview see UN Security Council Sanctions Committees, *Security Council Sanctions Committees: An Overview*, United Nations, <http://www.un.org/Docs/sc/committees/intro.htm> at 25 August 2010. See also van den Herik, above n 79, 804; Eeckhout, above n 79; *Fifth Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, UN Doc S/2006/750 (2006) 14–17 [37–43].

87 SC Res 1904, UN SCOR, 64th sess, 6247th mtg, UN Doc S/Res/1904 (2009) [20].

88 Kimberly Prost was appointed as Ombudsperson on 3 June 2010: *Letter Dated 3 June 2010 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2010/282 (2010).

89 The Focal Point mechanism was established by SC Res 1730, UN SCOR, 61st sess, 5599th mtg, UN Doc S/Res/1730 (2006).

about information, such as court decisions, and opens the way for dialogue with the petitioner and requires that a Monitoring Team regularly reviews the Consolidated List.[90] Under paragraph 34, the Sanctions Committee is encouraged to continue to ensure that fair and clear procedures exist for placing individuals, groups, undertakings and entities on the Consolidated List and for removing them as well as for granting humanitarian exemptions. These developments highlighted the world-wide criticism, at the time, that the de-listing procedure required some action to give it legitimacy.

The situation is quite different, though, for EU Member States, as the CFI found. The Court turned down the annulment applications of Kadi and Jusuf, because the Council of Ministers of the EU had taken a special legal route: the 'smart sanctions' set up by the UNSC were taken over, based on arts 60(1), 301, 308 of the *EC Treaty*.[91] This meant that henceforth the UNSC's sanction measures had to be applied directly in every Member State of the EC. As a consequence of this, private banks, other financial institutions and insurance companies were enjoined to stop any monetary dealings with listed persons. This cut off due process of law at the national level. Thus, listed persons could engage the CFI or the ECJ. The CFI turned down the claims of Kadi and Jusuf, by emphasising the predominance of the international law regulation over the EU regulation. Article 103 of the *UN Charter* does provide that: '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 agreement, their obligations under the present *Charter* shall prevail'. This reading of *UN Charter* obligations has been heavily criticised, and the ECJ ultimately overruled that understanding of the relationship between the UN and the EU.

The rule to be applied thus seems very clear at first sight. Article 307 of the *EC Treaty* confirms this for old treaties in relation to later EC law. Article 103 of the *UN Charter* is, however, directed at only the UN Member States, and the EC is not a party to the *UN Charter*. This follows from arts 24, 48, 103 of the *Charter*.

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90 In accordance with SC Res 1822, UN SCOR, 63rd sess, 5928th mtg, UN Doc S/Res/1822 (2008) [25].

91 *EC Treaty* art 60(1) reads: 'If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned'. *EC Treaty* art 301 reads: 'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on the 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 Council shall act by qualified majority on a proposal from the Commission'. *EC Treaty* art 308 provides: 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'.

The CFI pointed to art 10 of the *EC Treaty*, which lays down the principle of 'Community trust or fidelity', whereby the Member States are obligated not to violate the fulfilment of their UN obligations. Thus, the Court held that the primacy of UN law must be respected by the EC, which meant that the Court could no longer raise fundamental rights claims as a special test of validity of a regulation. This decision had the effect that UN law cut off the avenues for human rights protection at the EC level as well as at the national level — a most astonishing consequence!

The CFI realised the enormous effect of its decision and formulated one little proviso: where UN law clearly violates *ius cogens* norms, the claimants might be able to rely on human rights after all.[92] The literature suggests that *ius cogens* norms do not cover much: only severe cases of torture, genocide, slavery and massive discrimination might bring this proviso into operation, but not violations against normal habeas corpus rights and substantive fundamental rights, as laid down in the UN human rights treaties.[93] Only crass cases of arbitrariness can be covered by the *ius cogens* argument.

The decision of the CFI is questionable on two grounds. First, the CFI could have limited its reasoning by pointing out that implementation of the UNSC resolution via the EC regulation was technically the wrong route and illegal because the EC lacked competency in this sphere. This is because it affected the Common Foreign and Security Policies of the EU for which only intergovernmental decisions, which are not justiciable, can be taken by Member States, leaving open redress avenues against each individual Member State involved, at the domestic law level, even if arts 60(1), 301, 308 of the *EC Treaty* might seem to justify such action.

Secondly, the CFI might also have taken a more critical approach vis-á-vis a wide interpretation of art 103 of the *UN Charter*. Article 103 is not meant to be a carte blanche — it is not meant to justify a privileged position for the UNSC without any exceptions. The *UN Charter* wisely contains a number of human rights references, and human rights and solidarity rights are put alongside the aim of peacekeeping throughout the *Charter*. Measures taken by the organs of the UN under the peacekeeping target must themselves conform to the other principal targets of the *Charter*.

Moreover, art 24(2) of the *UN Charter*, which is often overlooked, clearly emphasises this point: 'In discharging these duties the UNSC shall act in

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92 On the criticism of narrowing *UN Charter* obligations to *ius cogens* issues see, inter alia, Eckes, above n 79, 87–91; Lavranos, above n 79, 475–80; and a very critical examination, with convincing arguments, of the CFI decision by Eeckhout, above n 79, 193–7.

93 See, eg, Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd ed, 2008), 38; Jochen Frowein, 'Jus Cogens' (1984) 7 *Encyclopedia of Public International Law* 327; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988); Anthony D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens!' (1990) 6 *Connecticut Journal of International Law* 1.

accordance with the Purposes and Principles of the United Nations'. Thus, the *UN Charter* has not opened up a carte blanche for the UNSC. Ultra vires acts and abuses of discretionary powers by the UNSC, which violate human rights, it is submitted, do not belong to the primacy rule laid down in art 103.

Not the entire bouquet of human rights treaties, including the entire *Universal Declaration of Human Rights*,[94] can be read from the *UN Charter* obligations because the human rights references in the *Charter* are too few as compared with references related to peacekeeping. However, the customary rules of minimum human rights standards, to which habeas corpus rights undoubtedly belong, can be taken into account.[95] They form an effective counter-weight to the UNSC rights of decision-making. In my opinion, therefore, the CFI might have stressed that ruling out due process, legal redress, and legal hearing of alleged violators would render the UN measure ultra vires, and thus not applicable at the EC level. This would leave the issue to the individual Member States of the UN who at the same time are Member States of the EU. Cutting off claims to habeas corpus rights by the CFI thus would appear to be quite untenable. The cases involving Kadi and Jusuf then went before the ECJ.[96] The ECJ overruled the decisions of the CFI, following largely the convincing arguments advanced by Advocate-General, Miguel Poiares Maduro, and somewhat redressed the balance. While maintaining that the ECJ would not question the legality of UNSC action as such, the consequences of such UN action, as evidenced by the implementation measures taken at domestic or regional levels, would have to meet the minimum requirements of human rights protection under the EU legal order, particularly: the right to a hearing (due process); the right to a remedy; and the right of property protection under the *ECHR* and constitutional law principles of EU Member States.[97] The ECJ went on to hold, however, that those criteria had been adequately met.

Had the ECJ followed the CFI's line of argument, the claimants might still have sought redress from the ECtHR in Strasbourg, which would then have to qualify the lines of argument which it had developed in the *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* and *Senator Lines* cases.[98] It is even tenable that

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94 GA Res 217A (III), UN GAOR, 3rd sess, 188th plen mtg, UN Doc A/Res/217A (III) (1948).

95 On the customary rules of minimum human rights standards see Eibe Riedel, 'International Law Shaping Constitutional Law — Realization of Economic, Social and Cultural Rights' in Eibe Riedel (ed), *Constitutionalism — Old Concepts, New Worlds* (2005) 105, 105–7; Eibe Riedel, 'Universeller Menschenrechtsschutz — Vom Anspruch zur Durchsetzung' in Gerhart Baum, Eibe Riedel and Michael Schaefer (eds), *Menschenrechtsschutz in der Praxis der Vereinten Nationen* (1998) 25, 26–33.

96 See Andrea Gattini, 'Case Law: Joint Cases C-402/05 P and 415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council and Commission*, judgment of the Grand Chamber of 3 September 2008, nyr' (2009) 46 *Common Market Law Review* 213.

97 Ibid 221–3.

98 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] VI Eur Court HR 107 ('*Bosphorus*'); Sionaidh Douglas-Scott, '*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, Application No 45036/98, Judgment of

the ECtHR might extend its jurisdictional competency to acts of the EC, measuring them against the *ECHR* provisions. If the ECJ does not balance the human rights reference in art 6(3) of the *EU Treaty* with the clear provisions of the *ECHR*, it is quite plausible that the ECtHR might opt for a different result than the ECJ, opening up collisions of those two courts.[99] In fact, the ECtHR in the *Bosphorus* case went a step further by saying that, in examining the issues, the Court would analyse whether the protection in the individual case is 'manifestly deficient', thus opening judicial control.[100]

In the *Lockerbie* case,[101] the ICJ nearly had to decide on the merits if and how far art 103 of the *UN Charter* reaches. The case was settled amicably out of Court, though, much to the displeasure of academics, so that the question of the proper relationship between the ICJ and the UNSC still remains an open question.

In two further recent decisions of the CFI, *Organisation des Modjahedines du Peuple d'Iran v Council of the European Union*,[102] and of the ECJ, *Segi v Council of the European Union*,[103] the two EU Courts now shift their lines of argument slightly. They now emphasise that legal hearing, as a fundamental right, can still be raised at the national level — even if reliance on it is precluded at the EU level — and if turned down at the national level, access to the ECtHR in Strasbourg remains. The Courts used this line of argument to turn down the plea that a legal hearing had been denied because redress is available at the national level. The difficulty with this position is, however, that national courts will not easily unsettle EU legislative acts, so that a void might ensue, unless those courts will measure the de-listing procedures against their own domestic law parameters. In that case, redress is available, and recourse to the ECtHR is ultimately open.

The CFI argues similarly: as rights of defence remain valid, the claimants ultimately cannot win. However, the Court in its reasoning now points out that claimants must be entitled to know what is held against them, either concurrently with the decision to freeze accounts, or as soon as possible afterwards. The six-monthly intervals of reviewing listing procedures at the EU level need particular justifications. While the element of surprise initially is a valid argument, at least at the follow-up decisions the argument is no longer valid or plausible. These newer decisions clearly point in the direction that the European Courts are not willing to unreservedly take over the wide political margin of discretion of the UNSC in the European context, and that a proper balancing with EU human rights provisions must always be struck. Looked at from this perspective, it appears that the EU is well on the way to establishing its own rule of law parameters, upholding those

the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 EHRR 1' (2006) 43 *Common Market Law Review* 243; *Senator Lines* [2004] IV Eur Court HR 331.

99 See Tzanou, above n 77, 123.

100 Eckes, above n 79, 74.

101 (*Libya v USA*) (*Preliminary Objections*) [1992] ICJ Reports 114.

102 (T-228/02) [2006] ECR II-4665.

103 (C-355/04 P) [2007] ECR I-1657.

standards even in cases of conflict with the UNSC. And if the ECJ or the CFI do not do so, the national constitutional or supreme courts, and ultimately the ECtHR, will do so.

It looks as though the European courts are beginning to develop a kind of '*Solange*'-jurisprudence when faced with international law and European human rights law: '*as long as*' ('*solange*') the universal human rights protection system falls far behind or even negates the protection of individual rights, the regional high standards of rights protection will be examined closely by these courts, just as the German Constitutional Court posited way back in 1974 in the case of *Solange I*.[104] This might serve to accelerate attempts to create an effective system of monitoring Sanctions Committee decisions of the UNSC.

The creation of a so-called 'Focal Point', and as of 2009 the Office of the Ombudsman, at the administrative level for de-listing procedures, would not appear to suffice. In a recent article,[105] Robin Geiss persuasively argued that while the powers of the UNSC under Chapter VII of the *UN Charter* remain in economic sanctions matters during times of severe humanitarian crises (just as the UN Committee on Economic, Social and Cultural Rights had outlined as regards the effects of economic sanctions in Iraq),[106] the UNSC should set up a proper monitoring mechanism at regular intervals, so that the alleged terrorists have a right to due process (fair hearing), and remedies available at the national level for examining their property rights affected by listings. But in order to maintain a balance between the necessary and legitimate security interests and the human rights guarantees, the monitoring and, in particular, the procedural guarantees, would have to give way at the time of the initial listing procedure to ensure the effectiveness of such listing measures. The human rights, and in particular habeas corpus rights, of the listed persons and institutions, however, would have to be stringently upheld in every subsequent de-listing procedure, at relatively short intervals. Thus, in the area of human rights protection, the very high standard of protection at the European level deserves praise, and is one of the great advantages of European political integration when compared with the much less stringent applications of existing universal human rights norms.

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104 Bundesverfassungsgericht [German Constitutional Court], 2 BvL 52/71, 29 May 1974 reported in (1974) 37 BVerfGE 271.

105 Geiss, above n 81, 167.

106 UN Committee on Economic, Social and Cultural Rights, *General Comment No 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, 17th sess, UN Doc E/C12/1997/8 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev8, (2006) 51. See also Committee on Economic, Social and Cultural Rights, *General Comment No 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C12/1998/24 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev8, (2006) 55.

IV Conclusion

It was to be expected that the EU integration process with 27 Member States and several more *ante portas*, will in future be slower than before. It is clear, however, that the 'piecemeal social engineering' approach that characterised the entire process of European integration since 1958 probably has come to an end with the *Lisbon Treaty*. There are clear indications that other EU Member States, and supreme courts or constitutional courts of other states take a similar view. European functionalism with extended interpretation mandates will now probably be curbed, or has probably even come to an end. It remains to be seen how the intergovernmental and partially integrated structure of the EU will develop with those constraints, particularly as regards the fully integrated internal market, and whether such a far-reaching and astonishing position will ultimately prevail.

So, the question posed at the very beginning, 'where is Europe heading?', can confidently be answered: the EU as a legal and political order after the *Lisbon Treaty* is continuing to develop and is becoming more and more entrenched in 27 Member States, particularly as far as human rights protection and the rule of law are concerned. Moreover, the new EU Reform Treaty, called the *Lisbon Treaty*, is faithfully following the well-tried patterns of treaty-making in the last 20 years: three new steps are proposed, then criticised, and two steps are then taken back — but the net result is at least one step forward. There is no indication that this 'unionising' effect is likely to be given up entirely in future. But the process is likely to slow down for a while, for which the protracted negotiations over several years and the recent *Lisbon Treaty Decision* of the Federal Constitutional Court of Germany are indicative,[107] and that demands patience which is not always to be had.

[107] Bundesverfassungsgericht [German Constitutional Court], joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009.