# Sanctions against Individuals – Fighting Terrorism within the European Legal Order

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Rulings in the cases of *OMPI*, *Sison* and *Segi* – Violation of the right to a fair hearing, the duty to give reasons, and the right to judicial protection – Jurisdiction to review lists of terrorist suspects – Extension of Article 35 TEU – Preliminary rulings on common positions – Improvements of the listing procedure – New legal bases for restrictive measures under the Treaty of Lisbon – Recommendations how to reform the autonomous EU listing procedure further

## Introduction

As part of the international fight against the financing of terrorism both the United Nations (hereafter, UN) and the European Union (hereafter, the Union, EU) have been adopting restrictive measures against natural and legal persons not directly related to the power structure of a state since 1999 and 2001 respectively. These 'individual sanctions', imposed both on EU citizens and third country nationals, typically consist of asset freezes and travel bans.

The Union in particular adopts two types of sanctions: (1) individual sanctions implementing lists of terrorist suspects drawn up by the UN Sanctions Committee,[1] and (2) sanctions based on EU-managed lists (autonomous EU sanctions regime).[2] Both types of European sanctions against individuals have triggered wide-spread concern amongst human rights lawyers.[3] The Parliamentary Assem-

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[1] EC Regulation 881/2002, *OJ* [2003] L 139/9, 29.5.2002, implementing UN Security Council Resolution 1267 (1999), of 15 Oct. 1999.

[2] Common Position 2001/931/CFSP, *OJ* [2001] L 344/93, 27.12.2001; Council Regulation EC/2580/2001, *OJ* [2001] L 344/70, 27.12.2001, implementing UN Security Council Resolution 1373 (2001), of 28 Sept. 2001.

[3] On both autonomous EU sanctions and EU sanctions based on UN lists of terrorist suspects: S. Bartelt, et al., "'Intelligente Sanktionen" zur Terrorismusbekämpfung in der EU' [Intelligent sanctions to fight terrorism in the EU], (2003) *EuZW*, p. 715 et seq.; I. Cameron, 'European Union Anti-

*European Constitutional Law Review, 4: 205–224, 2008*

doi:10.1017/S1574019608002058

bly of the Council of Europe went as far as calling the practice 'unworthy' of an international body such as the EU.[4] Besides arguments that they infringe substantive rights, a majority agrees that they do not comply with the procedural rights guaranteed in the European legal order.[5]

In December 2006, five years after the autonomous sanctioning regime of the Union was introduced, the Court of First Instance (hereafter, CFI) annulled for the first time an EC Council decision declaring a legal entity a terrorist organisation and freezing its assets (judgment in the case of *Organisation des Modjahedines du peuple d'Iran* – hereafter, *OMPI*).[6] The Court found fault with the fact that those listed could not exercise their rights of the defence, that they were not even notified of their listing or informed of the underlying reasons, and that they could not exercise their right to an effective judicial remedy.[7] The CFI concluded that at no stage during the proceedings, not even at the time the judgment was proclaimed, were the EU Courts in the position to rule on the lawfulness of the listing.[8] The CFI later confirmed the *OMPI* ruling in the cases of *Sison*[9] and *al-Aqsa,*[10] annulling two EC Council decisions to list individuals as terrorist suspects and to freeze their financial assets.

Notwithstanding the successful challenges against their listings the applicants in the cases of *OMPI*, *Sison* and *al-Aqsa*[11] remained listed and the Council contin-

Terrorist Blacklisting', 4 *Human Rights Law Review* (2004); *see also*: D. Marty, Report of the Committee on Legal Affairs and Human Rights to the Council of Europe, Document 11454, of 16 Nov. 2007, which was endorsed by the parliamentary assembly on 23 Jan. 2008 in Recommendation 1824 (2008) and Resolution 1597 (2008); on sanctions based on UN lists: I. Cameron, 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions', Report to the Council of Europe, of 6 Feb. 2006, <http://www.coe.int>, visited: 28 March 2008; P. Eeckhout, 'EC Law and UN Security Council Resolutions – In Search of the Right Fit', 3 *EuConst* (2007), p. 183 et seq.

[4] Resolution 1597 (2008) of the Parliamentary Assembly, Council of Europe, 23.1.2008, para. 7.

[5] *Supra* n. 3.

[6] CFI 12 Dec. 2006, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran* v. *Council and UK* (hereafter, *OMPI*).

[7] Ibid., the right to a fair hearing, paras. 91 et seq. (applicability), paras. 114 et seq. (purpose and restrictions), obligation to state reason, para. 109 (applicability), paras. 138 et seq. (purpose and restrictions), right to effective judicial protection, paras. 110 et seq. (applicability), paras. 152 et seq. (purpose and restrictions).

[8] Ibid., para. 173.

[9] CFI 11 July 2007, Case T-47/03, *Sison* v. *Council*.

[10] CFI 11 July 2007, Case T-327/03, *al-Aqsa* v. *Council*.

[11] *See*: Decision 2007/445/EC *OJ* [2007] L 169/58, 29.06.2007, challenged in *OMPI* and *al-Aqsa*; the applicants are still listed in the most current decision: 2007/868/EC: Council Decision of 20 Dec. 2007 implementing Art. 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/445/EC.

ues to identify and list individuals as terrorist suspects and to freeze their financial assets. The successful challenges have, however, led to considerable changes in the Union's sanctioning practice. The European institutions expressed their general intention to improve the procedural safeguards of the adoption procedure[12] and they introduced a number of specific changes, such as notification of those listed, including a detailed statement of reasons.[13] Despite these improvements it has been argued that 'fundamental human rights remain unprotected.'[14]

Once the Treaty of Lisbon enters into force, new provisions will unequivocally give the Union the competence to adopt restrictive measures against natural and legal persons.[15] The EU Courts will have jurisdiction to review sanctions against natural and legal persons.[16] Moreover, an explicit reference is made to the provision of the necessary legal safeguards, which will need to be determined in more detail.

A further case concerning the autonomous European sanctions regime, the case of *Segi*, highlights an additional weakness of the EU's sanctioning practices, which has not so far been addressed by the reforms introduced by the Council as a response to *OMPI*: the lack of judicial protection from listings in the Union pillars (Second and Third Pillar). The strict limitation of the jurisdiction of the EU Courts in the Union pillars makes it possible for the Council to adopt lists publicly alleging that certain persons are supporting terrorism without giving them any opportunity to challenge this allegation.

The aim of this article is to assess the adoption of autonomous sanctions against individuals in the EU. Particular attention is given to the rulings of the EU Courts and to the changes introduced to the sanctioning procedure in response to these rulings. It will be submitted that restrictive measures against private individuals could be adopted in compliance with the general principles of EU law.

Part Two sets the scene; it is split into two sections: Section One outlines the adoption procedure and places autonomous European sanctions in the broader context of restrictive measures adopted against individuals, while Section Two turns to the different positions the CFI takes with regard to the two sanctions regimes. Part Three then focuses on the most central criticism of the EU's sanctioning practice: the lack of (adequate) legal safeguards. While not aiming to give a full account of the case-law of the EU Courts on autonomous European sanc-

[12] Notice for the attention of the persons, groups and entities on the list provided for in Art. 2(3) of Council Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *OJ* [2007] C 144/01, 29.6.2007.

[13] Council Document 10826/07 on the fight against the financing of terrorism – implementation of Common Position 2001/931/CFSP, of 21 June 2007, *see* in particular paras. 17 et seq.

[14] D. Marty, *supra* n. 3, para. 22.

[15] *See* Arts. 75 and 215 of the Treaty on the Functioning of the European Union (TFEU).

[16] Art. 275 TFEU.

tions, it sets out the main components of the judgments in *Segi* (Section One) and *Sison* (Section Two). Part Four considers the changes that were introduced by the Council as a reaction to the CFI's judgments and the changes proposed in the Treaty of Lisbon. Finally, this paper offers recommendations how the sanctioning procedure could be improved and how the EU Courts should interpret their mandate in order to comply with the rule of law and fundamental rights (Part Five).

## Autonomous sanctions in context – setting the scene

### *The two different types of sanctions*

To fully understand the autonomous sanctions regime of the EU it is necessary to distinguish the different legal instruments involved and to contrast autonomous sanctions with those based on UN lists.[17] In the latter case, the Union faithfully copies lists of names drawn up by the UN Sanctions Committee. The former are based on autonomous Union lists. Following the general call of the UN Security Council to combat the financing of terrorism[18] the member states independently identify terrorist suspects, who are then listed and sanctioned by the Union.

Both forms of individual sanctions are adopted on a joint legal basis consisting of Articles 301, 60 and 308 EC. The adoption of both takes place in a three-level procedure: those targeted are first identified either at the national or at the UN level; the Council then draws up a list of terrorist suspects under the Union pillars; finally, the Community adopts the actual operational measures, such as asset freezes and travel bans, in a general EC regulation,[19] which is applied to lists of persons contained in EC Council decisions.

The combined use of a Union law instrument and an EC regulation is determined by Article 301 EC vesting the Community with the competence to adopt state sanctions. It has been equally used to target individuals unrelated to the power structure of a state. In the case of autonomous sanctions in particular, the Union lists of terrorist suspects are attached to cross-pillar common positions based on Articles 15 and 34 TEU.[20] These common positions, even though they directly name the individuals targeted, require further implementation by the Community and by the member states. The EC regulations, by contrast, are directly applicable, but they do not contain a list of terrorist suspects. The lists determining the circle of persons to whom the EC regulations are applied are adopted in a separate Council decision.[21]

[17] The UN lists are adopted based on UN Security Council Resolutions 1267, 1333, and 1390.

[18] UN Security Council Resolution 1373 of 28 Sept. 2001.

[19] Regulation 2001/2580/EC, *OJ* [2001] L 344/70, 27.12.2001.

[20] Common Position 2001/931/CFSP, *OJ* [2001] L 344/93, 27.12.2001.

[21] E.g.: Council Decision 2002/334 on 2 May 2002, repealed by Council Decision 2002/460 on 17 June 2002.

*Sanctions through the lens of the CFI*

The CFI has taken a fundamentally different view on the two sanctions regimes. Sanctions implementing UN lists of terrorist suspects were (in)famously endorsed by the CFI in the cases of *Yusuf* and *Kadi* in September 2005.[22] In these cases, the Court essentially found that the Community is not only competent to adopt individual sanctions but that it is obliged to adopt them by virtue of the unconditional primacy of UN Security Council resolutions within the European legal order. The CFI argued that, as a result of this primacy, the EU institutions could not exercise any form of discretion and, moreover, that the EU Courts are precluded from exercising jurisdiction to review European law implementing UN lists of terrorist suspects in the light of the general principles of EU law. Those listed were left with judicial review on the basis of *jus cogens* which was even by the supporters of the CFI reasoning found to be a review 'devoid of any actual substance.'[23]

By contrast, in *OMPI*, *Sison* and *al-Aqsa* the CFI fully reviewed autonomous European sanctions against individuals and annulled the contested measures for breaching general principles of EU law. While the Court found the Community equally competent to adopt autonomous sanctions against individuals, it criticised the adoption procedure as being inadequate. Despite certain differences between sanctions based on UN lists (*Yusuf, Kadi, Hassan*, and *Ayadi*) and those based on EU-managed lists (*OMPI*, *Sison,* and *al-Aqsa*) the argument is made that, since the adoption procedure of both types of European sanctions against individuals is nearly identical, the conclusion that it infringes fundamental rights is transferrable. Hence, the CFI's rulings concerning UN-based sanctions must be read that a prevailing obligation under the UN Charter justifies a restriction of fundamental rights which otherwise would not be possible under EU law.

The CFI justifies the difference in its approach with the lack of discretion of the EU institutions when adopting sanctions against those identified by the UN: the UN sanctions lists enjoy primacy and bind all EU institutions including the EU Courts. The listing proposal of a member state,[24] by contrast, is not a binding

[22] CFI 21 Sept. 2005, Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation* v. *Council and Commission*; appealed, *see*: C-415/05 P, *Al Barakaat* v. *Council and Commission*, *OJ* [2006] C 48/23, 25.2.2006; CFI 21 Sept. 2005, Case T-315/01, *Yassin Abdullah Kadi* v. *Council and Commission*; appealed, *see*: Case C-402/05 P, *Kadi* v. *Council*, *OJ* [2006] C 36/39, 11.2.2006; *see* for a comprehensive analysis of the relationship between the UN Charter and EU law: P. Eeckhout, *supra* n. 3, p. 183 et seq.; on the issue of competences: C. Eckes, 'Judicial review of European anti-terrorism measures – The Yusuf and Kadi judgments of the Court of First Instance', 14 *European Law Journal* (2008), p. 74 et seq.

[23] C. Tomuschat, 'Case law: Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, judgment of the Court of First Instance of 21 September 2005; Case T-315/01, Yassin Abdullah Kadi v. Council and Commission, judgment of the Court of First Instance of 21 September 2005, nyr', 43 *CMLRev* (2006), p. 537 et seq., p. 551.

[24] On proposals of third states, *see* Council Document 10826/07, 21 June 2007, para. 7.

obligation. Hence, the CFI held that the Council takes a discretionary decision both for the initial listing and the decision to keep someone listed (subsequent listing) when it adopts *autonomous* sanctions.[25]

## Lack of legal safeguards

Procedural rights such as access to documents and the right to a fair hearing are inseparably interlinked with the right to effective judicial protection. In *Sison* the Court explicitly stated that 'the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question.'[26] The following section will examine the right of access to court, while the next section will look into the procedural safeguards necessary to place those listed in the position to exercise their judicial rights effectively.

### *Judicial protection*

While those targeted by sanctions adopted to implement UN lists are – at least for the moment[27] – virtually without judicial protection, the situation of those targeted by autonomous European sanctions is more complex. The CFI agreed to fully review Community asset freezes;[28] at the same time, those targeted have not yet been able to fully benefit from this review because they lacked all knowledge of the allegations which led to their listing. Union listings, by contrast, have not been made subject to substantial judicial control at all.

The lack of judicial protection from Union lists of terrorist suspects is best illustrated by the case of *Segi*.[29] This case differs from *OMPI*, *Sison* and *al-Aqsa* in that the organisation in question was listed as an alleged terrorist supporter in a common position only; it was not made subject to a Community asset freeze.[30]

In the autonomous European sanctions regime the Council distinguishes EU-internal terrorist suspects and EU-external terrorist suspects. *Segi* and all those who have close links with the EU fall within the former group. While the Union

[25] Art. 1(4) and (6) of Common Position 2001/931; *see* discussion at: T-47/03, *Sison*, *supra* n. 9, para. 161 et seq.

[26] T-47/03, *Sison*, *supra* n. 9, para. 137; the court here referred to ECJ 19 Feb. 1998, Case C-309/95 *Commission* v. *Council*, para. 18 and CFI 29 May 1997, Case T-89/96 *British Steel* v. *Commission*, para. 33.

[27] In the cases of *al-Barakaat* and *Kadi* appeals are pending before the ECJ, *supra* n. 22.

[28] CFI, T 228/02, *OMPI*, *supra* n. 6; T-47/03, *Sison, supra* n. 9; T-327/03, *al-Aqsa*, *supra* n. 10.

[29] CFI 7 Juny 2004, Case T-338/02, *Segi and others* v. *Council*; ECJ 27 Feb. 2007, Case C-355/04 P, *Segi and others* v. *Council*.

[30] *See* for more details on this case: C. Eckes, 'How not being sanctioned by a Community instrument infringes a person's fundamental rights: the case of SEGI', *King's College Law Journal* (2006), p. 144-154.

lists them as alleged terrorist supporters in CFSP common positions, their assets are not frozen by the *Community* but by the *member states*.[31] This is due to the fact that with regard to EU-internal terrorist suspects there is no political consensus whether the EU is in fact competent to adopt sanctions against them. This is a further difference between autonomous sanctions and UN-based sanctions: while, as was demonstrated by the case of *Yusuf*, the EU adopts individual sanctions against EU citizens in order to implement UN lists of terrorist suspects on the basis of Articles 301, 60 and 308 EC, autonomous sanctions against EU-internal terrorists are considered to be outside the realm of Article 301 EC.[32]

In *Segi* the applicants asked the CFI to grant damages for Segi's allegedly illegitimate inclusion in a Union list of terrorist suspects.[33] The CFI found that its own jurisdiction did not cover actions for damages for Union measures.[34] As a consequence, and by contrast with *OMPI*, *Sison* and *al-Aqsa,* the Court did not examine the actual grievance of the applicants, but only the institutional question of whether the third pillar measure transgressed into Community competences. The CFI did not follow the applicants' argument that the lack of any judicial remedy itself must give them a course of action. Instead, the Court ruled:

> (…) it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts, with regard to the inclusion of Segi on the list of persons, groups or entities involved in terrorist acts. (…) the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU (…).[35]

In the appeal both Advocate-General Mengozzi[36] and the ECJ explicitly rejected the CFI's finding that those listed in a Union instrument *only* do not dispose of an effective judicial remedy. The Advocate-General agreed with the CFI that the EU Courts are not competent to rule on an action for damages in the Union pillars. He suggested that *national courts* should fill this gap. Arguing that the *Foto-Frost* rule[37] does not apply in the Union pillars the Advocate-General found a compe-

[31] Statens Öffentliga Utredninga Internatinalla Sanktioner, Betänkande av Sanktionslagutredningen (SOU 2006:41), Stockholm 2006, p. 22-23.

[32] Ibid.

[33] Annexed to Common Position 2001/931/CFSP.

[34] CFI, T-338/02, *Segi, supra* n. 29, para. 35, considering the applicants to be affected by a third pillar measure only.

[35] Ibid., para. 38.

[36] AG Mengozzi 26 Oct. 2006, Opinion in C-354/04 P, *Gestoras Pro Amnistia and others* v. *Council* and C-355/04 P, *Segi and others* v. *Council*.

[37] In ECJ 22 Oct. 1997, Case 314/85, *Firma Foto-Frost,* the ECJ held that the EU Courts are the sole arbiter of the validity of Community law.

tence – or even obligation – of the national courts to review Union law based on the principle of loyal co-operation in Article 10 EC. He considered that the current state of integration, and in particular the limited jurisdiction of the EU Courts in the Union pillars justify a competence of the national courts to rule on the lawfulness of Union law in the light of the general principles of EU law.[38]

The ECJ went down a different path. It extended Article 35(1) EU to allow for preliminary rulings on the validity of common positions. The Court ruled:

> Article 35(1) EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The right to make a reference to the Court of Justice for *a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties* (…).
>
> As a result, it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. (…).[39]

However, the ECJ's ruling remained vague on how actions eventually leading to a preliminary ruling request could be effectively started before the national courts, particularly in view of the fact that so far individuals were not even informed which country instigated the listing. The pertinent questions are: Which national courts should individuals address for protection? Should they simply bring an action in the courts of their own state of citizenship or residence? Would the national court in question then potentially have to assess the legality of another member state's listing request?

In this regard the CFI's ruling in *Sison* becomes relevant. The case itself dealt with the lawfulness of the EC Council decision implementing the regulation governing the Community asset freezes (First Pillar). However, essentially the CFI analysed the procedural rights of those listed pursuant to Common Position 2001/

[38] The so-called 'general principles of Community law' apply to all three pillars, *see* Art. 6 TEU. In the following they are therefore called 'general principles of EU law'. *See* in this regard *also*: T. Tridimas, *General Principles of EU Law*, second edition of the book: *General Principles of EC Law*, 2006.

[39] ECJ, C-355/04 P, *Segi supra* n. 29, paras. 53-54.

https://doi.org/10.1017/S1574019608002058 Published online by Cambridge University Press

931/CFSP and procedural rights must also be complied with under Union law (Second and Third Pillar), irrespective of whether they lead to the adoption of a Community instrument. The Court's findings are consequently transferable to the Union listings; in particular, its finding that those listed had a right to a personalised statement of reasons, including the identification of the designating country. This will improve the individual's position in seeking review in national courts in that they at least know in which national courts they should introduce their action.[40]

After the ruling of the CFI the applicants in *Segi* appeared to be left without judicial protection at all. The ECJ's ruling however not only showed the applicant a new way of access to the EU Courts but must also be seen as a judgment of principled importance with regard to judicial protection from Union law that directly impacts on the rights of individuals. It acknowledged that the nature of Union law has changed and that therefore the exclusion of judicial review by the ECJ is no longer justifiable in the light of the rule of law. The right of access to justice as it is protected by the general principles of EU law depends on the legal effects of the measures on the position of the individual, and even though Union law instruments do not usually directly impact on the rights of individuals, lists, which directly identify individuals as being involved in terrorism,[41] entail legal effects *vis-à-vis* individuals.[42] This is sufficient to make judicial review necessary.

*Other procedural rights*

In principle the CFI accepted jurisdiction to fully review the *Community* decision (as opposed to the Union list) to sanction the applicant in *OMPI, Sison* and *al-Aqsa*. However, the Court then ruled that indeed the applicant 'has not been placed in a position to make good use of his right of action before the Court'[43] and that the Court itself was 'not in a position to carry out adequately its review of the lawfulness of the decision'[44] because not only did the applicants not have knowledge of the allegations against them, but also the CFI itself lacked the necessary information.

The rights of the defence are categorised as fundamental rights under European law.[45] The ECJ has repeatedly emphasised their importance.[46] The case of

[40] *See infra* for more detail.

[41] CFI, Case T-228/02, *OMPI, supra* n. 6.

[42] ECJ, Case C-355/04 P, *Segi*, *supra* n. 29, para. 53.

[43] T-47/03, *Sison*, *supra* n. 9, para. 219.

[44] Ibid., para. 225, *see also*: *OMPI, supra* n. 6, para. 172.

[45] On the status of the right to be heard: D. Curtin, 'The Right to Fair Procedures in Administrative Law' in James O'Reilly (ed.), *Human Rights and Constitutional Law* (1992), p. 293, 299 and 309; T. Tridimas, The General Principles of EU Law (2006), p. 34-42; *see also*: K. Kanska, 'Towards Adminsitrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', 10 *European Law Journal* (2004), p. 296 (309).

[46] Recently: ECJ 15 June 2006, Case C-28/05 *Dokter and others,* paras. 73-75.

*Sison* is a particularly seminal ruling demonstrating that the listing procedure falls short of the general standard of procedural rights under EU law. After pointing out that it was appropriate to examine all three pleas together 'for they are closely linked',[47] the CFI developed a lengthy abstract argument and found the duty to state reasons in Article 253 EC, the rights of the defence, and the right to a fair trial, *fully applicable* to sanctions against individuals adopted by the EU.[48] The CFI then outlined the purpose and restrictions of these three safeguards,[49] and held that the listing procedure failed to comply with all three.[50] Surprisingly the CFI did not in this section directly refer to its judgment in *OMPI* in which it had already made a similar argument.[51]

Since the rights of the defence at the Community level depend on the competences exercised at this level, it is crucial to understand the division of tasks between the national authorities and the European institutions. The division of competences differs depending on whether an *initial* decision is taken to list someone and freeze his funds (Article 1(4) of Common Position 2001/931/CFSP) or whether a *subsequent* decision is taken to maintain the person on the list and to keep his funds frozen (Article 1(6) of Common Position 2001/931/CFSP).[52] The CFI's ruling in *Sison* reads as if the listing at the European level was based on the Council's finding that a decision in proceedings at the national level satisfies the criteria of Article 1(4); this would typically be a decision to instigate investigations. The listing and sanctioning at the European level are additional consequences attached in an independent decision to separate proceedings at the national level; however, as the working methods of the Working Party reveal the listing follows a 'proposal' of the member states.[53]

In the course of taking the initial decision the Court found the Council competent to verify '*that there exists a decision* of a national authority meeting that definition', whereas in the course of taking subsequent decisions the Court considered it necessary that the Council verified '*the consequences of that decision* at the national level.'[54] The Court appeared to imply that where a person is listed for years *without any action* by the national authorities the listing at the European level should *not* be renewed. As a consequence, in the course of the initial listing '[t]he rights of the

[47] T-47/03, *Sison*, *supra* n. 9, para. 137.

[48] Ibid., para. 138-160.

[49] Ibid., paras. 161 et seq.

[50] Ibid., para. 218 (duty to state reasons)*;* para. 214 (rights of the defence); and para. 225 (right to a fair trial).

[51] Absence of any reference to *OMPI*, *supra* n. 6, but repeated references to *Yusuf, supra* n. 22, in T-47/03, *Sison*, *supra* n. 9.

[52] Ibid., para. 161; this becomes obvious in the word 'whereas' in para. 164.

[53] *See infra*; Council Document 10826/07, 21 June 2007, Annex II, para. 6.

[54] T-228/02 *OMPI*, *supra* n. 6, para. 117 (emphasis added); T-47/03, *Sison*, *supra* n. 9, para. 164.

defence of the person concerned must be effectively safeguarded in the national procedure (…)',[55] while with regard to the subsequent decisions those listed have more extensive rights at the Community level to make their views known;[56] i.e., while the CFI acknowledged that a hearing before the initial decision 'would be liable to jeopardise the effectiveness of the listing',[57] it explicitly stated that '[a]ny subsequent decision to freeze funds must accordingly be preceded by the possibility of a further hearing and, where appropriate, notification of any new incriminating evidence.'[58]

When outlining the legal safeguards which the European institutions have to provide in the listing and sanctioning procedure the CFI not only had to strike a balance between the rights of the affected individual and the security interests of the society as a whole, but also to take into account the principle of subsidiarity and the sovereignty of the member states. The European institutions can only offer the opportunity of a fair hearing to the extent that they do not interfere with the rights of the member states to conduct their own procedures of criminal investigations. Indeed, the CFI pointed out that making the existence of 'serious and credible evidence and clues' subject to a hearing at the Community level would be contrary to Article 10 EC[59] and identified an obligation of the Council to defer as far as possible to the assessment conducted by the national authorities.[60] The Court found that it is not for the Council to control compliance with fundamental rights at the national level.[61]

The CFI's ruling in *Sison* is in line with the case-law of the EU Courts concerning the rights of the defence in double-staged procedures in which the Community and the member states share administrative tasks (co-operative or composite administrative procedures).[62] Even though the case-law is not completely coherent, the Courts appear to have always held that the right to be heard is closely linked with the institutions' exercise of discretion.[63] This is convincing. Nonethe-

[55] T-47/03, *Sison*, *supra* n. 9, para. 166.
[56] Ibid., para. 168.
[57] Ibid., para. 175.
[58] Ibid., para. 178.
[59] Ibid., para. 169.
[60] Ibid., para. 171.
[61] Ibid., para. 168.
[62] H. Nehl, *Principles of Administrative Procedure in EC Law* (1999), p. 88-90; G. della Cananea, 'The European Union's Mixed Administrative Proceedings', 68 *Law and Contemporary Problems* (2004), p. 197 et seq.
[63] CFI 9 Nov. 1995, Case T-346/94 *France-Aviation* v. *Commission*, paras. 26-38; more recently: CFI 8 July 2004, Case T-198/01 *Technische Glaswerke Ilmenau* v. *Commission*, paras. 152-160; CFI, Case T-47/03, *Sison*, *supra* n. 9, para. 165 referred to CFI 2 Aug. 2000, Case T-189/00 R *Invest Import und Export and Invest Commerce* v. *Commission*, paras. 40-41; ECJ 24 Oct. 1996, Case C-32/95 P *Commission* v. *Lisrestal and others*, paras. 21-43 and ECJ 21 Sept. 2000, Case C-462/98 P *Mediocurso* v. *Commission*, paras. 36-44.

less, the resulting limitations of the rights of the defence at the Community level give rise to concerns:[64] the listing at the European level would be tainted with a potential breach of procedural rights occurring at the national level; yet, because of the particular division of responsibility this defect could not be healed by the Council and would not be reviewable by the EU Courts.

In *Sison* the CFI went on to emphasise the close link between the rights of the defence and the duty to state reasons.[65] The Court here appears to take a position similar to the position of the European Court of Human Rights in its interpretation of procedural rights under the Convention; the Strasbourg Court has repeatedly ruled that the national procedures must ensure a certain level of fairness in an overall evaluation and that certain requirements can to some extent substitute for others.[66] In more detail, the CFI held that even if *publishing* an actual specific statement of reasons 'would be capable of causing serious damage to their [those listed] reputations', it 'must be formalised and brought to the knowledge of the parties concerned.'[67] Despite the fact that the CFI qualified the decision to list a specific person as an act of 'general application', sharing the 'legislative nature' of the underlying regulation[68] it rejected a 'formulaic wording' and required the Council to 'indicate the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned'[69] at least concomitant with the act in question.[70]

Hence, unless overriding considerations concerning the security of the Community and its member states militate against it, those listed have to be informed of the decision which was found to satisfy the criteria in Article 1(4) of Common Position 2001/931/CFSP, the (national) author of this decision, and where applicable any new incriminating evidence which had not been scrutinised by the national authorities, as well as the grounds for continuing to include the persons concerned in the list in accordance with Article 1(6) of Common Position 2001/931/CFSP. The identification of the possible restrictions defines the true content of the rights to the defence in practice; the CFI acknowledged that

> it is also conceivable that restrictions on access may concern the specific content of or the particular reasoning of that decision, or even the identity of the authority

[64] *See* in general: H. Nehl, *supra* n. 62.

[65] T-47/03, *Sison*, *supra* n. 9, para. 187.

[66] *See* in particular: ECtHR, *Kamasinski* v. *Austria*, Appl. No. 9783/82, Series A 168, of 19 Dec. 1989, para. 62; ECtHR, *Hadjianastassiou* v. *Greece*, Series A, No 252-A, 16 *EHRR* 219, of 16 Dec. 1992, para. 31; ECtHR, *Hamer* v. *France*, of 7 Aug. 1996, *RJD* 1996-III, No. 13.

[67] T-47/03, *Sison*, *supra* n. 9, para. 194.

[68] Ibid., para. 145.

[69] Ibid., para. 190.

[70] Ibid., para. 186.

> that took it. It is even possible that, in certain, very specific circumstances, the identification of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardise public security, by providing the party concerned with sensitive information which it could misuse.[71]

The CFI's application of the rights of the defence to the circumstances of the particular case of *Sison* exemplified the deficiencies of the listing procedure.[72] The CFI found that at no time before the judicial proceedings the evidence was notified to the applicant.[73] Mr Sison did not know what national decisions the listing was based on. In fact, not even in the judicial proceedings could the CFI establish with certainty whether the listing was exclusively based on the decisions mentioned by the Council[74] and which were not even taken by the identified 'competent national authority'.[75]

In summary, despite the fact that in *Sison* the CFI acknowledged considerable restrictions to the procedural rights of those listed at the Community level justified on the one hand by the division of competences between national authorities and the European institutions, and on the other by overriding interests of security and international co-operation the CFI found the Council in breach of fundamental principles of European law. In an abstract discussion of the applicability, purpose and limitations of procedural safeguards the Court further equipped the Council with guidelines on how to reform the listing procedure.

The significance of the CFI's ruling in the case of *Sison* is subject to a number of limitations. First, the Court did not seize the opportunity to rule incidentally on the lawfulness of the contested regulation;[76] it did not address the lawfulness of the Union's autonomous sanctions regime in principle. Secondly, Mr. Sison did not challenge the common position which named him as a terrorist suspect. Lastly, it must be pointed out that the successful challenges in *OMPI*, *Sison* and *al-Aqsa* did not help the applicants themselves; all three continue to be listed today.[77] The Council continued to list them in defiance of the CFI's rulings, first under the exact same procedures which the Court had declared faulty, and then, after the

[71] Ibid., para. 183.

[72] *See*, e.g., the harsh criticism at: I. Cameron, 'European Union Anti-Terrorist Blacklisting', 4 *Human Rights Law Review* (2004); *see also*: D. Marty, *supra* n. 3.

[73] T-47/03, *Sison*, *supra* n. 9, para. 208.

[74] Ibid., para. 222.

[75] Ibid., para. 224.

[76] Specifically rejected as unnecessary: CFI 11 July 2007, Case T-327/03, *Stichting Al-Aqsa*, para. 67.

[77] Council Common Position 2007/871/CFSP of 20 Dec. 2007 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2007/448/CFSP, *OJ* [2007] L 340/109, 22.12.2007.

Council had introduced certain changes, under the new procedures which will be discussed in more detail in the following section. On 10 September 2007 Mr. Sison brought a new action[78] for annulment of the new Council decision listing him,[79] which was adopted between the oral hearing and the pronouncement of the judgment declaring the earlier listing unlawful.

## Reform of the autonomous sanctions regime

### *Changes to the procedure*

In reaction to the CFI's criticism in *OMPI*, the Council introduced a number of procedural safeguards to the adoption procedure of individual sanctions.[80] These include: (1) a statement of reasons is now to be provided for each person subject to an asset freeze,[81] and (2) those listed are notified of their listing (i),[82] of the possibilities to submit a request for de-listing (ii), and of the possibilities to bring a legal action before the CFI (iii). The new statement of reasons must be 'sufficiently detailed to allow those listed to understand the reasons for their listing and to allow the Community Courts to exercise their power of review.' In particular, it must contain information about the acts committed, the competent national authority, the type of decision that was taken, and the classification under Article 2(3) of Regulation 2580/2001.[83] These requirements set out by the Council seem to address directly the CFI's points of criticism in *OMPI* and *Sison*.

Additionally, certain rules for inclusion on the list were agreed and made publicly available. Originally, an *ad hoc* forum constituted by the member states, the Commission and the General Secretariat and subordinate to the Committee of Permanent Representatives (the so-called 'clearing house')[84] was in charge of drawing up the lists of terrorist suspects. The clearing house was replaced by a new permanent Council Working Party in charge of examining and evaluating information with a view to listing, assessing whether the information meets the criteria, preparing the regular review and making recommendations for listings and de-listings.[85] Despite the fact that the clearing house was judged to be comparatively

[78] CFI, Case T-341/07 *Sison* v. *Council*, *OJ* C 269/105, 10.11.2007; *see also*: CFI, Case T-157/07 *OMPI*, action brought on 9 May 2007, *OJ* [2007] C 140/70, 23.6.2007.

[79] Council Decision 2007/445/EC, *supra* n. 11.

[80] *See* the specific reference to the case of *OMPI* at Council Document 11309/07, 29 June 2007, p. 2.

[81] Council Document 10826/07, 21 June 2007, Annex II, paras. 17-19.

[82] Ibid., paras. 20-21.

[83] Ibid., paras. 17-18.

[84] Council Document 11693/02, 3 Sept. 2002, Annex I, 'Decision of the Permanent Representatives Committee of 7 December 2001'.

[85] Council Document 10826/07, *supra* n. 81, Annex I, page 4.

effective,[86] it was criticised for its lack of funds and continuity.[87] Other criticisms pointed out that there was no formal de-listing or review procedure and that the listing criteria were not public.[88]

The 'working methods' of the Working Party have now been declassified and is hence publicly available;[89] the Working Party ensures that the 'criteria' in Articles 1(3) and 1(4) of Common Position 2001/931/CFSP are met.[90] The former defines the meaning of 'terrorist act', 'terrorist group', while the latter stipulates that listings are based on

> precise information or material in the relevant file which indicates that a decision has been taken by a competent [usually judicial] authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.

In fact, this appears to allow the Working Party to review the alleged offence, ensuring that it meets the criteria set out in Article 1(3). Even though it cannot examine whether the decision of the national authority is well-founded, the Working Party should establish that an allegation within the meaning of Article 1(3) is raised by the competent national authority.

The intensity of the review of the procedure that cumulates in a decision justifying a listing by the Union varies depending on whether the listing is proposed by a member state or by a third state: only with regard to the latter the Working Party has the explicit mandate to check whether the rule of law was upheld and the right to a fair trial of those listed was complied with.[91]

The Council read the CFI's criticism in *OMPI*, *Sison* and *al-Aqsa* as being limited to procedural defects, which it considers to have remedied with its reforms. Legal safeguards in the listing procedure were imperatively needed and their introduction must be welcomed. How effective the changes are in practice, i.e., whether

[86] A. Bendiek, 'EU Strategy on Counter-Terrorism – Steps Towards a Coherent Network Policy', *SWP Research Paper*, Stiftung Wissenschaft und Politik, German Institute for International and Security Affairs, Nov. 2006, <http://www3.swp-berlin.org/>, visited 28 March 2008, p. 6 and 19.

[87] R. Niblett and D. Mix, 'Transatlantic Approaches to Sanctions: Principles and Recommendations for Action', Oct. 2006, page 24 (available at: <http://www.csis.org/>).

[88] F. Meyer, 'Lost in Complexity – Rechtsschutz gegen Smart Sanctions in der EU', (2007) *ZEUS*, I. Tappeiner, 'The fight against terrorism. The lists and the gaps.', 1 *Utrecht Law Review* (2005), p. 97; B. Bowring, 'Terrorist Designation with Regard to European and International Law: The Case of the PMOI', International Conference of Jurists in Paris on Wednesday, 10 Nov. 2004.

[89] *See* the working methods of the Working Party in: Council Document 10826/07, *supra* n. 81.

[90] Ibid., Annex II, para. 2.

[91] Ibid., Annex II, paras. 4-7.

the statements of reasons will place those listed in the position to effectively exercise their right to judicial protection, and whether sufficient information is made available to the EU Courts to review the lawfulness of the listing decisions, remains to be seen. *Prima facie* it appears as if the mandate of the Working Party and the procedural rights of those listed after the reforms meet the minimum requirements set out by the CFI in *OMPI* and *Sison*.

*Treaty of Lisbon*

The Treaty of Lisbon acknowledges the need for action by the Union to fight terrorism in numerous provisions.[92] The Lisbon Treaty will introduce two possible legal bases for restrictive measures against individuals: Articles 75 and 215 of the Treaty on the Functioning of the European Union (TFEU). This is an improvement as such. Further, the Lisbon Treaty addresses the criticism that individual sanctions infringe procedural rights: both Article 75 and Article 215 TFEU contain a clause stipulating that '[t]he acts referred to in this Article shall include necessary provisions on legal safeguards'[93] and Article 275 TFEU explicitly confers on the EU Courts jurisdiction to review restrictive measures against natural and legal persons.

The sanctioning procedure in Article 215 TFEU is the same as in Article 301 EC; only, that it contains an explicit competence for sanctions 'against natural or legal persons and groups or non-State entities.'[94] Despite the involvement of the High Representative of the Union for Foreign Affairs and Security Policy the Union's competences to adopt individual sanctions are *not* limited to EU-external terrorist suspects. Article 215 TFEU abandons the reference to 'third countries' entirely. This would appear to address the unease of those who argue that the wording of Article 301 EC does not allow the adoption of sanctions against EU-internal terrorists. Article 75 TFEU, on the other hand, differs from Article 60 EC considerably. While the former allowed for the adoption of 'necessary urgent measures on the movement of capital and on payments as regards the third countries concerned' pursuant to the procedure set out in Article 301 EC, Article 75 TFEU is a legal basis in its own right. Its objective is to ensure that the Union constitutes an area of freedom, security and justice.

[92] *See* the new Art. 43 (common security and defence policy) TEU; and the new Arts. 75 (area of freedom, security and justice), 83 (minimum rules for serious crimes), 88 (Europol), and 222 (solidarity clause) TFEU – *all references to the new Articles of the Treaties after the Lisbon Treaty enters into force*. At present the only references to terrorism are in Arts. 29 and 31 TEU (Police and Judicial Cooperation in Criminal Matters).

[93] Art. 215(3) and Art. 75(3) TFEU respectively.

[94] Art. 215(2) TFEU.

Since Articles 75 and 215 TFEU set out very different procedures, the choice of the legal basis is crucial for the involvement of the different institutions of the Union and the member states respectively. Pursuant to Article 75 TFEU a 'framework for administrative measures with regard to capital movements and payments' is established under the ordinary legislative procedure, which the Council then implements by qualified majority[95] following a proposal of the Commission. Article 215 TFEU, by contrast, requires a unanimous CFSP decision pursuant to Article 25 TEU that provides for further action by the Union. The CFSP decision is then implemented by the Council acting with qualified majority; the EP is informed only. Hence the two main differences are the voting requirements in the Council[96] and the involvement of the EP.[97]

The choice of the legal basis appears to depend on the origins of the list of the terrorist suspects: while Article 75 TFEU appears to serve as the basis for sanctions against terrorist suspects adopted in the autonomous sanctioning procedure, Article 215 TFEU appears to constitute *lex specialis* for financial sanctions against individuals based on UN lists, irrespective of whether the measures target EU-internal or EU-external terrorists. Hence, the Lisbon Treaty provides separate legal bases for the two different sanctions regimes of the EU: on the one hand the EU-mandated autonomous sanctions regime and on the other the one based on UN-lists of terrorist suspects. This is in line with the different approaches of the CFI.[98]

As a consequence, Article 75 TFEU would establish an entirely new competence of the Union for *autonomous* financial sanctions against *EU-internal terrorists*, such as asset freezes against *Segi*. At present these measures adopted by the member states because they are thought to fall outside the scope of Article 301 EC. Hence, if Articles 75 and 215 TFEU are interpreted in the way here proposed, cases where those listed in a CFSP instrument are not subject to further operational measures at the European level will no longer occur. This would also preclude the creation of a new jurisdictional vacuum based on a reading of Article 275 TFEU that limits judicial review to CFSP decisions effectively 'providing for restrictive measures'. Listings of EU-internal terrorists would be based on Article 75 TFEU, which is in any event subject to the jurisdiction of the EU Courts.

When entering into force, the Lisbon Treaty will improve the situation of those listed and sanctioned by the Union. It introduces two explicit legal bases for re-

[95] Qualified majority is the default voting requirement in the Council if the Treaty does not state otherwise (Art. 16(3) TEU).

[96] Qualified majority under Art. 75 TFEU and unanimity under Art. 215 TFEU.

[97] Ordinary legislative procedure under Art. 75 TFEU, while under Art. 215 TFEU the EP is merely informed.

[98] *See supra*.

strictive measures against natural and legal persons, both including specific references to legal safeguards, and establishes jurisdiction of the EU Courts for these measures.

## Conclusions and recommendations

This article does not reject the adoption of sanctions against individuals as a matter of principle. Yet, while it is *possible* to adopt individual sanctions in compliance with general principles of EU law, there is little doubt that in the past the Union has adopted these measures *without* offering the necessary procedural safeguards.

Two different types of sanctions adopted by the EU must be distinguished: sanctions based on UN lists of terrorist suspects and autonomous EU-managed sanctions. Even though certain parallels can be drawn between the two sanctions regimes in that both fail to provide sufficient legal safeguards and in that both have similar detrimental consequences for the rights of those affected, the origins of the defects of the listing procedure are different and so are the changes required to address them. The decisions of the Security Council, holding the monopoly to determine what constitutes a threat to international peace and security[99] and what is necessary to address such a threat,[100] undoubtedly weigh heavy in a balancing exercise aiming to reconcile conflicting rights and interests. To what extent obligations under the UN Charter could justify restricting or qualifying the general principles of EU law in the context of *UN-based sanctions* is not the subject of this article. Others have addressed this question.[101] The focus of this article is the *autonomous EU-managed sanctions regime*, which complies with a more general call of the UN to fight the financing of terrorism.[102]

In *OMPI*, *Sison* and *al-Aqsa* the CFI identified fundamental flaws in the autonomous listing procedure and developed convincing guidelines for a different approach. Originally, those listed were not notified at all, they did not have the opportunity to address the Council with a request for review, nor were they able to obtain knowledge of the information which led to their listing. In response to the CFI's rulings the Council introduced in 2007 a number of changes, such as the establishment of the Working Party and the issuing of a statement of reasons. The Treaty of Lisbon will hopefully give the Union two new legal bases for the adoption of individual sanctions. These are steps in the right direction, but they might not prove sufficient. Truly effective protection will depend on the interpretation of the new Treaty provisions and of the mandate of the new Council Work-

[99] Art. 39 UN Charter.
[100] Arts. 41 and 42 UN Charter.
[101] I. Cameron, *supra* n. 3; P. Eeckhout, *supra* n. 3, p. 183 et seq.
[102] UN Security Council Resolution 1373 (2001), 28 Sept. 2001.

ing Party. Not only the fundamental rights of those listed, but also the EU's legitimacy as a political entity must be taken into account.

Restrictive measures adopted by the EU must, as a minimum, comply with the safeguards outlined by the CFI in *Sison*. Those affected must have at least *after* the initial listing the opportunity to make their views know on the allegations raised against them. The statement of reasons must indicate the decision identified to satisfy the criteria in Article 1(4) of Common Position 2001/931/CFSP; this would – barring exceptional circumstances – include the author, date and content of that decision. While security concerns might justify the non-disclosure of certain information to the parties, the EU Courts must be able to access sufficient information to carry out full judicial review of the law and the facts of the case brought before them.

Additional problems are created by the division of tasks within the listing procedure pursuant to Common Position 2001/931/CFSP. Even though it is accepted that member states have to comply with general principles of EU law both when implementing their obligations under European law and when derogating from them,[103] neither the Council nor the EU Courts can assume competence to review independent criminal proceedings conducted by the national authorities.[104] This is not altered by the Council's decision to attach *additional* consequences for national proceedings, such as listing and sanctioning measures at the European level.

The Council exercises powers of appraisal when finding that the decision of a competent national authority satisfies the conditions of Article 1(4) of Common Position 2001/931/CFSP. Compliance with procedural rights and access to judicial review at the national level could be made an explicit precondition for a national decision to qualify as a decision within the meaning of Article 1(4) of Common Position 2001/931/CFSP. Member states would have to indicate in their 'proposal' that this condition was satisfied. This would at the same time ensure respect for the sovereignty of the member states to conduct autonomous national criminal procedures pursuant to their domestic rules *and* preclude the Union from carrying procedural defects of the national procedure into the European sphere by attaching additional adverse effects to a faulty decision of national authorities.[105]

For subsequent listings the Council is competent to review that there are reasons justifying the continued listing. This would have to be interpreted to include review that the national authorities have actually taken action subsequent to the

[103] *See* judgments such as: ECJ 13 July 1989 Case 5/88, *Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft*; ECJ 18 June 1991 Case C-260/89, *ERT* v. *DEP*.

[104] Even though not directly applicable *see* the value choice in Art. 35(5) TEU.

[105] This is in line with: ECJ 3 Dec. 1992, Case C-97/91 *Oleificio Borelli* v. *Commission*.

first listing proposal. The principle of proportionality requires that the longer the freezing continues the stronger must be the evidence supporting the freezing decision. As a final point, it must be ensured that those falsely listed and sanctioned have access to compensation.

Alan Buchanan makes a convincing argument that the legitimacy of a political entity depends on that entity's success in achieving a reasonable approximation of reasonable standards of justice; justice being understood as ensuring that all persons enjoy the relatively uncontroversial basic rights.[106] The Union is an entity separate from the member states. It takes its own autonomous decisions for which it is responsible. Even if the Union is neither competent to review national procedures, nor responsible for potential flaws at the national level, it cannot turn a blind eye to these flaws when attaching additional adverse consequences to national decisions. Listing someone as a terrorist suspect based on a national decision which *evidently* breaches fundamental procedural rights is in itself a violation of these rights.

[106] A. Buchanan, *Justice, Legitimacy, and Self-Determination – Moral Foundations for International Law* (Oxford, Oxford University Press 2004) Chapter 5.

https://doi.org/10.1017/S1574019608002058 Published online by Cambridge University Press