Paper submitted for the International Congress of IIAS, « Global Problems and National Regulations: Challenges to Regulatory Strategies », Lausanne, 4-8 July

Taking a global solution to the national level: the case of multi-level regulation to counter the financing of terrorism in Europe

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ABSTRACT

Ambitions to find common solutions to shared problems have triggered intense interactions between national, regional and international legal spheres, resulting in a complex web of normative instruments. Looking at the issue from a European perspective, this paper discusses the tensions that arise between, on the one hand, this 'multi-level regulatory structure', and, on the other hand, the need to give sense and legitimacy to rules in the domestic setting. In doing so, the paper first turns to the phenomenon of multi-level regulation as such, outlining its evolution and illustrating its main characteristics through the example of counter-terrorist financing. The discussion then looks to possible tensions that such a regulatory set-up can cause from the perspective of the domestic legal order.

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I. INTRODUCTION[*]

New threats tend to call for new responses, and as globalisation and an enhanced interdependency have pushed transboundary problems to the top of the agenda, states have felt encouraged to coordinate policies and find common solutions (UN (2004)). Over the last decades, such ambitions have triggered important quantitative and qualitative changes in interactions between the national, regional and international legal spheres, and the result is a complex web of normative instruments, ranging from binding international norms to recommendations and best practices. This paper approaches this phenomenon from the legal perspective of 'multi-level regulation' (MLR) (Follesdal et al. (2008), Husabø and Bruce (2009)), arguing that in the absence of a 'global government', the multi-level regulatory structure has evolved as a way for states to tackle shared problems in a coordinated fashion. Recent efforts to provide for a more effective counter-terrorism regime on the global level are illustrative in this regard. Indeed, terrorism has been widely considered "a real challenge to

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the world" (2001/930/CFSP (OJ 2001 L 344/90)), triggering "an unprecedented wave of policy interventions" on all regulatory levels (Den Boer (2003: 1)). In this endeavour, a particular emphasis has been put on efforts to undercut the financing of terrorism, notably through attempts to harmonize national legislations. However, counter-terrorism is traditionally synonymous with safeguarding national security, and as such, it goes to the core of classic state interests and their balancing with fundamental rights. On the national level, the necessity to align rules with extra-national instruments thus needs to be reconciled with wishes or needs to preserve the coherence of the domestic legal order, its principles and traditions. Looking at the issue from a European perspective, this paper will discuss the tensions that arise between, on the one hand, the multi-level regulatory structure, and, on the other hand, the need to give sense and legitimacy to the rules in question in the domestic setting. To do so, the paper will first turn to the phenomenon of MLR as such, outlining its evolution and illustrating its main characteristics through the example of counter-terrorist financing (II). The discussion will then look to possible tensions that such a regulatory set-up can cause from the perspective of the domestic legal order (III).

II. THE DEVELOPMENT OF MULTI-LEVEL REGULATION IN THE FACE OF A PERCEIVED GLOBAL PROBLEM

Taking due note of the phenomenon of increasingly interacting and intersecting policy spheres, political science and public administration scholarship has for quite some time spoken of 'multi-level governance'.[1] On the one hand, this concept has been used to denote the assumption of public tasks by actors other than classical government institutions. On the other hand, it has described complex governance at separate but increasingly entwined levels of formal jurisdictional or administrative authority, ranging from the local level, via the national, to the macro-regional and global levels (Wessel and Wouters (2008: 11)). Traditionally anchored in a conception of legally autonomous national orders with an exclusive competence to create, implement and enforce norms, legal studies have acknowledged the increasing enmeshment of regulatory levels much more recently. Through a variety of approaches,[2] they have however also come to recognize that "the creation, application and interpretation of national as well as international norms should take account of the multi-level structure of the system" (Wessel and Wouters (2008: 31-2)). Such legal interactions between global, regional and national regulatory spheres have come to be referred to as 'multi-level regulation' (Follesdal et al. (2008), Husabø and Bruce (2009)). In the absence of a 'global government', the multi-level regulatory structure has evolved in response to states' willingness—and even felt need—to tackle global problems in a coordinated

fashion. This part of the paper will explain more in detail the ambition and evolution in legal interactions that lie behind the development of the multi-level regulatory structure. This phenomenon will then be illustrated by the example of counter-terrorist financing (CTF) in a European perspective, thereby also bringing to the fore some important characteristics of the MLR setting.

Towards a multi-level regulatory structure

Importantly, the idea of multiple regulatory levels on the global scale is not new: the separation between the domestic legal order and the international one is centuries, if not millennia, old. Nor are interactions between these levels an entirely novel phenomenon: principles to deal with conflict of laws are ancient, and the classic conceptions of monism and dualism indicate the existence of deep-rooted debates on the relationship between internal law of individual states and the international legal structure (see e.g. Triepel (1923), Kelsen (1926), Virally (1990)). What is new however is the nature of these interactions, as they have evolved both quantitatively and qualitatively (Walker (2008), Nijman and Nollkaemper (2007), von Bogdandy (2008: 399-401)).

On the one hand, there has been an exponential increase in international rules, both in regard to their number and their scope. Based on principles of sovereign equality, non-interference in the internal affairs of states and state consent, international law was traditionally restricted to a rather limited number of areas, such as diplomatic conduct, or the law of the high seas. Throughout the twentieth century, but especially over the last decades, a panoply of new bilateral and multi-lateral treaties have emerged in specific subject areas, such as the environment, trade, human rights or international crime. The result is a 'thick' legal system which "suggests that areas previously within the exclusive purview of national politics are becoming legalized" on an international plane (Burke-White (2004: 968). See also Slaughter and Burke-White (2007: 111)). Importantly however, the 'lifting' of policy-making to extra-national levels has not necessarily diminished national activity in those fields, and "today, many international norms address domestic issues, which are also addressed, often, by domestic norms" (von Bogdandy (2008: 401)). Furthermore, there has also been an exponential increase in the number of jurisdictions that apply international law (Burke-White (2004: 965)): not only have new international tribunals been created, but national courts also increasingly apply international law.[3] These developments make it more and more difficult to draw clear dividing lines between internal and international legal spheres (Nijman and Nollkaemper (2007), Burke-White (2004), Peters (2007,2009)).

Linked to the above changes is the significant shift away from states as the sole actors in policy-making, and towards situations where they are complemented by other entities. On the one hand, non-governmental organizations and other private actors have obtained a greater role in policy-making both at national and international levels, for example through negotiation, consultation or self-regulation (Slaughter (1997), Wessel and Wouters (2008)). More importantly in view of the case discussed in this paper, international organizations (IOs) have also come to play a very significant part in international normative processes, both by pushing treaty-making procedures, and by enacting decisions which are increasingly considered sources of international law (Alvarez (2005), Klabbers (2009), Blokker and Schermers (2001), Delbrück (2001)). The result of these developments is a "policy cycle characterized by plurality in terms of policy instruments" (Wessel and Wouters (2008: 22-3). See also Alvarez (2005)). Indeed, the regulatory setting involves a broad range of forums, these forums engage in different decision-making processes, and the instruments they produce vary greatly, ranging from binding law to exchange of best practices, via recommendations and policy guidelines.

The ever-stronger role played by IOs has also led to important substantive changes in the international legal order. Arguably, IOs are mainly an arena for the interaction of sovereign and equal member states, and these institutions would thus merely "underline the inter-State nature of the traditional system" (Schreuer (1993: 451)). Nevertheless, states have also come to transfer an important number of functions and powers to these organisations, and this aspect is significant in terms of the flexibility of requirement of state consent to be bound by international law (Krisch and Kingsbury (2006: 1), Alvarez (2002), Brunnée (2002), Fitzmaurice (2005), Tomuschat (1993)). For example, the United Nations Security Council has been seen to attenuate the position of individual states by unilaterally enacting broad and temporarily indefinite norms amounting to 'international legislation' (Krisch and Kingsbury (2006: 1). See also p. 7 below).

On the European level, the European Union (EU) has come to play a very important role, due to the particularities of its legal order. In a classic situation of legal interaction, international law imposes certain obligations on states, which the individual state then decides how to implement, thus consisting of two vertically arranged regulatory levels (Lavranos (2004)). Over time, the EU has obtained extensive competence to legislate in many policy areas, resulting in parallel external legal relationships (Bethlehem (2001), Lavranos (2004: 4), *AETR* (1971)). For example, the EU has become a member of certain IOs—sometimes alongside its member states—and in many cases it is thus obliged to implement decisions by these organizations, to the

degree covered by its competence. Furthermore, since the EU has internal competence to legislate in certain areas, it sometimes implements decisions of IOs that it is not a part of, but that some or all of its member states are a part of. International treaties concluded by the EU form an integral part of the European legal order as they enter into force, and so do decisions by organs of IOs established by such treaties (*Haegeman* (1974), *Kupferberg* (1982)). For EU members, this transforms obligations of public international law into EU law measures, modifying their legal nature "by attaching [EU] law characteristics such as supremacy over all national law and possible direct effect to them" (Lavranos (2004: 5). See also Wouters et al. (2008)). This means that it is no longer exclusively the national systems of the EU member states that determine how to implement international law and which rank to give it, and the EU adds "a new distinct layer of law between the international and national legal orders" (Lavranos (2004: 4). See also Bethlehem (2001)).[4]

The result of the above-mentioned developments is a complex web of interacting normative instruments, which frequently regulate the same matter, in similar but not necessarily identical words (Nuotio (2006: 1015), Wouters et al. (2008)). And, in the European context, the setting is further complicated by the 'europeanization' of law, both from a national angle (through the approximation of national law to EU law), and from the international perspective (through the provision of distinct qualities and features to international norms that become binding on the EU). These processes profoundly affect the reception, interpretation and application of norms in the EU, but also in the wider European context, and they thus contribute further to the multi-level regulatory setting (Maiani (2008), Wouters et al. (2008)).

Importantly, MLR is not a completely new regulatory strategy, consciously built from the ground up specifically in view of solving emerging global problems. Nor should it however be discarded simply as a case of 'old wine in new bottles'. Instead, a more fitting analogy would be that of a new cocktail: the multi-level regulatory setting is the result of a combination of several, often pre-existing, ingredients. Faced with a perceived shared problem, but lacking a 'global government' *per se*, these ingredients have converged as a more realistic opportunity for states to coordinate policies, based on the existing structures of the legal orders. The multi-level regulatory setting consequently concerns traditional issues such as treaty-making and treaty-implementation, international cooperation, conflict of laws and hierarchy of norms, but these issues acquire new dimensions as the boundaries between the international, the regional and the national are becoming less clear (Peters (2009), Burke-White (2004)). In short, MLR is a succinct way to describe the result of a multitude

of developments that have originated in the existing international legal structure, but which have come to trigger an important set of new questions in regard to the legal interactions in that structure. This phenomenon is well illustrated by the last decade's normative efforts to counter the financing of terrorism, an emblematic example of the jungle of normative instruments that characterizes MLR.

Multi-level regulation to counter the financing of terrorism

While the attempts to combat terrorism go far back,[5] the attacks of 11 September 2001 brought on new dimensions in these efforts by "turn[ing] the perception of global danger represented by international terrorism into a self-evident reality" (Bianchi (2006: 1045). See also Den Boer (2003)). Counter-terrorism is traditionally synonymous with safeguarding national security and protecting citizens, and by hinging on measures of strong constitutional significance, such as police actions, seizures and expulsions, it goes to the core of traditional state interests and of fundamental rights. Prior to 11 September, the need for counter-terrorism legislation had thus mainly been determined by national experiences (see CE (2011)), but with the attacks came a wide-spread conviction that as an increasingly global phenomenon, terrorism requires a globally coordinated response. Not only were international threats established as significant for the consideration of national security issues, but the criminalization of terrorism was seen as a requirement to protect universal values (Husabø and Bruce (2009: 425, 447), Nuotio (2006: 1001)). And in these efforts, there came to be a particular focus on measures to undercut the financing of terrorism, e.g. through the freezing of assets on the basis of affiliation or the criminalization of the wilful provision of funds intended for terrorist acts. As a typical example of an issue seen to require international cooperative action as well as direct domestic measures touching on the civil rights of citizens, it therefore provides for an important 'test case' in the context of this paper (Nuotio (2006: 1014). See also Husabø and Bruce (2009: 421)). While a comprehensive description of all normative instruments involved in CTF is beyond the scope of this paper, a brief outline of the main instruments that have emanated from the international and European levels will follow. This outline is illustrative of the main trends of MLR in this case, and provides for a suitable background to the discussion on the domestic level in part III.

In 1999, the International Convention on the Suppression of the Financing of Terrorism (the 1999 Convention) was adopted within the framework of the United Nations (UN), forwarding the obligation for participating states to criminalize the provision of funds for terrorist purposes, and attempting to ensure that adequate

powers exist in national legal systems to address the issue.[6] In the wake of the '9/11 attacks', this Convention provided the basis upon which the international community came to establish more ambitious measures (Gilmore (2004: 74), Sambei et al. (2009: 276ss)). Such efforts were led by the UN Security Council (SC), which under the UN Charter (UNC), has been given the primary responsibility for the maintenance of international peace and security (UNC Art. 24(1), in conjunction with Art. 1(1)). Member states are required to carry out the decisions of the SC, and under Chapter VII UNC it can adopt binding resolutions.[7] Acting under Chapter VII, the SC unanimously passed Resolution 1373 on 28 September 2001, declaring international terrorism a threat to peace and imposing a broad duty on all states to, *inter alia,* criminalize the financing of international terrorism, and freeze all assets belonging to physical and legal persons linked to such activities (Art. 1 and 2). Many, of the binding duties contained in Resolution 1373 were taken directly from the 1999 Convention, though in some instances the Resolution went beyond the obligations in the Convention, and in some the Convention provided for more detailed regulation. As Resolution 1373 did not render the Convention obsolete, the end-result is the co-existence of two partially overlapping international regulatory instruments.[8]

Resolution 1373 is especially noteworthy as it establishes a far-reaching and temporarily indefinite normative regime that can be deemed 'international legislation' (Yemin (1969: 6)), and which marks a dramatic change of SC practice. Previous resolutions on the subject of terrorism, though numerous, had always targeted particular states or entities, in situations pertaining to specific crises, and/or with measures of a precise duration (Marschik (2005: 461), Szasz (2002: 901)). For example, Resolution 1267(1999) specifically declared the failure of the Taliban authorities to respond to demands following the attacks on the US embassies in Kenya and Egypt a threat to international peace, requiring—among other things—states to freeze financial resources controlled by them.[9] However, built on the idea that *any* act of international terrorism constitutes a threat to international peace and security, Resolution 1373 provides for a much wider regime. As will be discussed more fully below, this innovative, though legally questionable,[10] aspect of the Resolution is particularly interesting in view of this paper, since—as will be discussed more fully below—the possible existence of a unilateral international legislator raises important questions with regard to democratic processes and legitimacy at the national level.

On the international plane, the Financial Action Task Force (FATF) has also come to play an important role. The FATF is an independent inter-governmental body hosted by the OECD, and which develops anti-money

laundering (AML) policies intended to protect the global financial system. Following 11 September, the FATF's mandate was extended to cover also CTF. Consequently, it devised nine Special Recommendations (SRs), accompanied by interpretative notes intended to guide countries in their implementation. Some of these recommendations mirror obligations forwarded by the 1999 Convention and Resolution 1373, while others refer more specifically to a financial regulatory framework.[11] The nine SRs have become recognized as the global CTF standard and they play a pivotal role in the multi-level regulatory set-up. On the one hand the special recommendations have been very influential in pushing AML/CTF policies, and the SC has even urged all UN member states to implement them.[12] On the other hand, the work of the FATF can in turn be seen to have received impetus from the SC, with the extension of its mandate being a consequence of the more general push towards undercutting terrorist finance (Levi (2010: 653)). In terms of MLR, the work of the FATF is thus very interesting in that it provides for a situation in which a soft law instrument both benefits from and complements more hard law instruments, with important effects on all regulatory levels.

On the European level, the EU has been active in shaping counter-terrorism policy, both by developing its own strategy, and by taking active measures to implement measures provided by the 1999 Convention, SC Resolutions and the FATF.[13] In December 2001, the Council adopted Common Position 2001/930/CFSP (OJ 2001 L 344/90), basically reiterating the measures outlined in SC Resolution 1373[14] and requiring member states, or—to the extent of its competence—the EU to take action. In preparing its policy response to the 11 September attacks, "the EU faced the challenge of bringing together a wide array of possible instruments from its various pillars"[15] (Spence (2004: 81). See also Husabø and Bruce (2009: 4)). Consequently, the efforts on behalf of the EU to counter the financing of terrorism are numerous and wide-ranging, but the main instruments of relevance can be outlined in three categories, reflective of the global instruments described above. First, a Framework Decision on combating terrorism (the Framework Decision or the FD) was adopted, stipulating that each member state shall ensure that the intentional participation in the activities of a terrorist group, for example by funding in any way, is made punishable (OJ 2002 L 164/3). The Framework Decision was binding on member states but not directly applicable, and specific time limits were laid down for the transposition of the FD in national law. Second, in order to comply with the provision in Resolution 1373 that all states freeze without delay any financial assets of persons involved in terrorist acts, the EU amended its existing freezing legislation, but in parallel it also provided for a wider sanctions regime.[16] Third, reporting to

the UN on its implementation of Resolution 1373, the EU linked the special recommendations of the FATF to Resolution 1373, and intended that these "be at least partly implemented" (S/2001/1297: Para 1(a)). Subsequently, the EU AML Directive was revised twice, essentially in view of compliance with international standards, and the third AML Directive referred specifically to terrorist-financing, prohibiting it in wording similar, though not identical, to that of the 1999 Convention (OJ 2005 L 309/15). In addition to this Directive, the EU has forwarded a range of associated instruments, also closely linked to the FATF's preventive approach (Mitsilegas and Gilmore (2007: 130)).[17]

As can be seen from the above, the past decade has witnessed a strong push for legislative activity in the field of CTF, on the international as well as on the European level, and there is a close relationship between the resulting normative instruments. And, while this close relationship can be traced back to a shared goal—the cutting of funding for terrorist acts—the fact remains that the efforts to achieve the goal are scattered in a multitude of normative instruments. Indeed, in attempting to face the perceived shared terrorist threat, states have turned to a series of existing structures. These structures have sometimes had their mandate openly extended (as in the case of the FATF) or *de facto* stretched very far (as in the case of SC resolution 1373), but their initial institutional and functional set-up still retains an important role. While the resulting instruments thus recognize each other, they overlap only partially, and they remain closely connected to their own individual logic. The consequences of this complex reality are significant, especially when taken to the domestic level.

III. Tensions ensuing from multi-level regulation in the domestic setting

The European Commission rather recently highlighted that EU counter-terrorism policy is "without prejudice to the fact that Member States are the main actors in this sensitive policy area" (COM(2010)386: 2), and according to the former EU Counter Terrorism Coordinator, "the main thrust of Europe's defence against terrorism remains firmly at the level of national governments" (Laitner (2005)). As shown above, the area of counter-terrorism has nonetheless been lifted from the exclusive national level to also find itself regulated at the European and international levels, in an overall aim to provide a coordinated global response to a perceived global problem. Indeed, a stated purpose of boosting CTF at all levels is to harmonize legislation to avoid discrepancies which could be (ab)used by terrorists.[18] At the same time, the implementation of extra-national regulation essentially takes place at the national level, and the efficacy of the MLR set-up

consequently relies heavily "on the willingness and actual capacity of states to incorporate international standards in their domestic legal systems and to subject them to their adjudication and enforcement procedures" (Bianchi (2006: 1045). See also Bianchi (2004), Slaughter and Burke-White (2007), Halberstam and Stein (2009: 29)). Sometimes, states are however hesitant to relinquish control, and this especially in sensitive areas. Counter-terrorism depends strongly on the domestic constitutional and legal framework (CE (2011)), and on the national level alignment with extra-national instruments needs to be reconciled with the legitimacy of the domestic legal order. Drawing from the example of CTF, this part of the paper brings to the fore a number of obstacles that arise when provisions emanating from extra-national levels are to be accommodated at the domestic level. Importantly, these tensions are not necessarily unknown to the 'classic' relationship between international and national law, but they are for various reasons intensified in the MLR setting. Before discussing this more in detail, mention will first be made of the important issue of national implementation discretion in this context.

National implementation discretion v. effective regulation

The national level retains a strong practical role in the multi-level regulatory structure since many extra-national norms require domestic norms for their implementation. The under international law classical freedom of implementation of treaty obligations indicates that whereas states are generally bound as to the objective to be achieved, they have the choice as to the forms and methods of implementation (Nuotio (2006: 1015)), and by analogy, this is also applicable to SC Resolutions (Denis (2004: 24), Husabø and Bruce (2009: 429-30)). While some resolutions are rather specific in their aim, thereby reducing the national discretionary scope,[19] Resolution 1373 indeed provides particularly wide-ranging and general obligations that leave considerable lee-way to states as to the means of implementation. In regard to the European regulatory context, while the Framework Decision and various Directives theoretically also contain obligations of result rather than means, the practical impact of states' implementation discretion equally depends on the normative density of the instruments in question.[20] While the actual freedom with respect to the forms and methods of implementation thus varies in practice, the discretion in implementation still essentially becomes a question of interpretation, giving states scope to accommodate their national traditions. Indeed, if the new legal norms are to fit coherently and legitimately into different domestic legal orders, a certain degree of national discretion is necessary (Husabø and Bruce (2009: 434)). At the same time, an important variation in interpretation between

regulatory levels could threaten the effectiveness of the regulation and impede cooperation. Importantly, the strong role the national level thus retains carries with it the risk that domestic institutions simply "co-opt the force of international law to serve their own objectives" (Slaughter and Burke-White (2007: 128)), or more wilfully 'cherry-pick' among their extra-national obligations, by for example making reservations to provisions they are reluctant to implement. In the context of counter-terrorism, a good example of the latter is provided by the *aut dedere aut judicare* principle. Resolution 1373 suggested an obligation for states to either prosecute or extradite presumed terrorists, including those suspected of terrorist-financing (Res 1373(2001): paras 2(e) and 3(g)), and this obligation was then explicitly provided in Resolution 1456 (2003).[21] As most anti-terror treaties also contain a 'prosecute or extradite' clause, state parties who do not introduce the principle in their criminal legislation would arguably make themselves internationally responsible vis-à-vis other parties, but here the operation of the clause has been limited by state reservations (Bianchi (2006: 1055)). For example, in regard to article 14 of the 1999 Convention,[22] Belgium has "reserve[d] the right to refuse extradition or mutual assistance in respect of any offence set forth […] which it considers to be a political offence". While Belgium at the same time recognizes that it is generally bound by the *aut dedere aut judicare* principle,[23] it would still arguably seem that such a reservation undermines the functioning of the principle, and thus also the practical impact of what could be a very strong tool in a comprehensive counter-terrorism regime (Bianchi (2006: 1055)).

Strictly speaking, the challenge of balancing a sufficient degree of implementation discretion with consistency and effectiveness in implementation is not a problem unique to multi-level regulation. Indeed, it is a question that frequently arises in 'classic' relationships between international law and national law where, for example, an international treaty contains obligations of result. However, this challenge is exacerbated in a multi-level regulatory setting, for two main reasons. First, the quantitative increase in interaction and overlap between normative instruments at several levels means that there are simply more occasions for such implementation challenges to occur. Secondly, as extra-national normative processes delve deeper into policy areas which were previously strictly 'national', such challenges become more difficult to overcome, both because there is a higher risk of substantive conflicts between fundamental norms and principles, but also because qualitative changes at the law-making stage raise questions as to the degree of national discretion that actually remains. The impact of these developments will be discussed in turn.

The reconciliation of numerous overlapping normative instruments

As was shown above, a typical characteristic of a multi-level regulatory setting is the occurrence of an increasing number of binding obligations that overlap, but which are not identical. The 1999 Convention, Resolution 1373 and the Framework Decision for example all provide that states shall take necessary measures to ensure that the funding of terrorist activities is made punishable, and although they use similar wording, the provisions retain important differences. According to Art 1(b) of Resolution 1373, an illegal act of financing is the “wilful provision or collection, by any means, directly or indirectly” of funds, whereas the 1999 Convention adds the limitation that the funds also be “unlawfully” provided. This lack of the criteria of unlawfulness in Resolution 1373 has raised questions as to whether the Resolution is less likely to accept justifications and exceptions (Husabø and Bruce (2009: 265)). Similarly, Art 1(b) of Resolution 1373 stipulates that states criminalize the financing of “terrorist acts”, without further defining such acts, while Art 2(1) of the 1999 Convention on the contrary contains a thorough definition of the acts it is illegal to finance, though without calling them terrorist acts. In view of the overlapping of instruments, states have been faced with the very practical problem of knowing which instrument to implement, i.e. whether to focus on one, try to combine them or endeavour a separate implementation of each. Thus, Sweden for example decided on a separate implementation of the 1999 Convention, without mentioning Resolution 1373, but in its reports to the SC, reference was made to the act implementing the Convention as a measure to fulfil Resolution 1373 (Husabø and Bruce (2009: 259-60)). Another example, indicative of how different states have interpreted things differently, is provided in the context of the sanctions regime targeting the assets of the Taliban, Al-Qaeda and Usama bin Laden. Reports of the member states of the EU to the UN Sanctions Committee indicate that 11 states based their compliance with obligations under SC Resolution 1333(2000) only in the EU Regulation on the matter (Regulation 881/2002). On the other hand, the remaining 16 member states interpreted it as necessary to adopt additional legislative measures, directly aimed at implementing the Resolution in national law, and coexisting with Regulation 881/2002 (*Ahmed and others* (2010: para. 22). See also *Kadi v Commission* (2010: para. 36)).

While the large number of overlapping normative instruments arguably does not constitute an implementation problem in itself if there is no direct conflict, it nonetheless presents domestic legislators with a range of possible difficulties, essentially in view of how to ensure coherent and effective regulation on the national

level. The multi-level regulatory setting seemingly gives states interpretative lee-way to decide whether to (try to) remain completely loyal to all extra-national instruments, or whether to not fulfil their international obligations in every detail. While the former is strictly speaking the legal requirement, it risks rendering national legislation exceedingly complicated and rather inaccessible. In this regard, Husabø and Bruce have forwarded the example of the new Norwegian penal code, in which the description of the conduct it is illegal to finance has become threefold, in an attempt to comply both with the EU Framework Decision and the 2005 Council of Europe Convention on the Prevention of Terrorism. Similarly, Swedish law also contains three parallel definitions of conduct it is illegal to finance, i.e. certain basic offences that it is illegal to finance regardless of any further intention, certain basic offences that it is illegal to finance provided that they are (or will be) committed with a terrorist purpose as defined in the 1999 Convention, and a set of basic offences it is illegal to finance provided that they are committed with a terrorist aim and meet the dangerousness requirement of the EU Framework Decision (Husabø and Bruce (2009: 267-9)). If states thus risk over-complicating their legislation by attempting to 'cover all' overlapping global and European obligations in detail, a more sweeping implementation on the other hand risks inducing a lack of specificity in legislation at the national level. Thus, the cumulative effect of normative instruments in a multi-level regulatory setting, combined with strictly national policy decisions forwards a risk of exceptionally broad legislative measures, and "[t]his cumulative effect partly appears to be an unintended consequence of multilevel regulation and formal legal logic" (Husabø and Bruce (2009: 443)).

Substantive tensions between regulatory levels

The relocation of regulatory activity beyond the national sphere becomes particularly problematic when the substance of extra-national norms conflicts with national constitutional principles. In the context of CTF, this has appeared as a difficulty essentially in the area of fundamental rights. The global and regional instruments in this case directly impact on the interests of individual citizens, for example by freezing their assets or confiscating their property. And, because of the preventive nature of the measure of freezing assets, such measures have tended to be carried out immediately, without giving prior notification to the individuals involved. This has on the one hand raised questions of arbitrary infringements of procedural guarantees, such as the right to a fair hearing and the right to judicial review, but also for example of the fundamental right to property. In the field of CTF, particular problems have moreover been posed by charities and non-profit

organizations, which frequently enjoy a special status in domestic law, and the financial control of which may thus encroach on fundamental rights such as freedom of expression or freedom of association (Bianchi (2006: 1053)). States consequently find themselves confronted with the dilemma of complying with global standards in view of countering terrorist financing, at the expense of adequate fundamental rights protection, or upholding the fundamental rights framework, at the expense of compliance with CTF standards (Slaughter and Burke-White (2007: 128-9)). This overarching "dichotomy"[24] brings up various obstacles to a well-functioning MLR setting, as it raises questions both on how to implement or interpret extra-national norms that conflict with national ones, and in regard to the position of the national level in respect of extra-national norms that conflict among themselves (see Halberstam and Stein (2009)).

Concerning the issue of how the national level should deal with conflicts that arise between national legislation and extra-national norms, mention should be made of the principle of consistent interpretation, i.e that courts should, wherever possible, construe national law in conformity with international law and/or European law. In regard to international law, this principle can be inferred essentially from state practice (Betlem and Nollkaemper (2003: 574)). State constitutions traditionally contain provisions regulating foreign affairs and the relationship to international law, and studies have shown that such references are becoming increasingly refined (Peters (2009), von Bogdandy (2008), Nijman and Nollkaemper (2007)). Today, constitutions frequently provide for the binding force of international law at the national level, and although primacy over the national constitution itself tends to be more controversial, there is often sweeping recognition of the primacy of international law over domestic law (Peters (2009: 171)). In regard to the European legal order, the issue has been amply discussed in case-law, and states must, to the extent of their national discretion, construe implementing legislation in conformity with EU law requirements, with the European Court of Justice (ECJ) playing an important role in controlling uniformity (*Von Colson* (1984: paras. 26-28), *Marleasing* (1990: para 8), Betlem and Nollkaemper (2003: 574)). This means that on the one hand, the issue is rather clear, as the principle of consistent interpretation in contemporary state practice arguably reduces clashes between domestic constitutional law and international law to a minimum (Peters (2009: 177)). At the same time, it should be emphasized that domestic legal actors each speak from their own perspective, and an important legal condition for the application of the principle of consistent interpretation is that the national law provision in question must be open to such interpretation, i.e. a *contra legem* interpretation is not required, and the

scope for interpretation allowed in the wording of the national provision is decisive (Betlem and Nollkaemper (2003: 576)). Therefore, while national courts can be said to have a *bona fide* obligation to take extra-national norms into account, and give reasons for non-compliance, international bodies need to grant a margin of appreciation to national decision-makers (Peters (2009: 198)). Indeed, as argued by the European Court of Human Rights, "national authorities have a direct democratic legitimation and are […] in principle better placed than an international court to evaluate local needs and conditions" (*Hatton v. UK* (2003: para 97)). It thus seems that the question again becomes one of finding an adequate balance between consistency in implementation and national discretion.

In an MLR setting, substantive tensions between provisions do not simply concern the relationship between extra-national norms on the one hand, and national norms on the other, but they may also arise in regard to the relationship between the various levels, more widely. What happens when the domestic level is confronted with binding international obligations that do not concur with other binding international obligations? Or, with obligations emanating from the European level? And, which courts should entertain such cases, and how should court action and normative instruments on the different levels be reconciled (Feinäugle (2008: 231), Eckes (2008))? In the CTF context, several interesting points in this regard can again be drawn from the area of fundamental rights protection, where states are not only bound by national constitutional principles, but also by a series other instruments, both on the international level, and on the European level.

The implementation of Resolution 1373 is illustrative of how conflicts between various binding extra-national level obligations impeded the smooth functioning of the multi-level regulatory setting. Indeed, the asset-freezing regime set up under this Resolution has been seen as giving "national governments new licence to undertake otherwise illegal or unjust policies" (Slaughter and Burke-White (2007: 128)), and while this problem is particularly grave in the case of more repressive national regimes, all states have unquestionably been confronted with the dilemma of whether to favour the CTF regime under Resolution 1373, or whether to comply with their human rights obligations. On the one hand, states have the obligation to comply with binding SC resolutions under Art. 25 UNC, but at the same time, states party to international human rights treaties are also bound to respect them in implementing decisions emanating from IOs (Bianchi (2006: 1059-60), *Waite and Kennedy v. Germany* 1999: para 67)). Arguably states could claim that the threat of terrorism induces a state of emergency, thus triggering the derogation regimes allowed under many human rights conventions, but not

only is it doubtful whether international terrorism constitutes the often essential 'threat to the life of the nation', but derogating measures are also generally only allowed to the extent strictly required by the exigencies of the situation, and in any case states cannot derogate from non-derogable rights or peremptory norms of general international law (HRC 2001: para 11). And, while the right to property or the right to an effective remedy may not constitute absolute rights *per se* (Bianchi (2006: 1065-8)),[25] important questions have been raised by asset-freezing regulations, since "[b]ecause individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming made permanent, which […] threatens to go well beyond the purpose of the United Nations to combat the terrorist threat posed by an individual case" (GA (2009: para. 42). See also *Kadi v. Commission* (2010: para. 150)).

In regard to conflicting provisions, it has been argued that Art. 103 UNC can be invoked to claim that Resolution 1373 would take precedence over international human rights obligations. According to Art. 103, the UNC prevails over any other treaty,[26] and the prevalent view is that this priority extends also to binding decisions of UN organs, such as SC Chapter VII Resolutions. In the context of CTF, this argument was used by the Court of First Instance of the EU (CFI, now the General Court) in the 2005 *Yusuf* and *Kadi* cases. These cases arose out of the then European Community's (EC) implementation of sanctions against individuals who were identified by name at the UN level (SC Resolution 1267(1999) and subsequent resolutions, see note 9)[27]. One issue was whether the SC Resolutions would confer power on EU institutions to by-pass, through Regulation 881/2002, certain fundamental rights provided under EU law. Emphasizing that the rule of primacy laid down in Art. 103 UNC extends to SC Resolutions, the Court argued that from the standpoint of international law, the obligations under the UNC "clearly prevail over every other obligation of domestic law or of international treaty law" (*Kadi v. Council* (2005: para 181)). The Court highlighted that the EC was not a member of the UN, and was therefore not directly bound by the SC Resolutions, but argued that at the time the treaty establishing the Community was concluded, the member states were bound by the UNC, implying a duty on the part of Community institutions not to impede on these obligations. The Court thus accepted the defendants' arguments that the Community should abide by the SC sanctions regime, not because of general international law, but by virtue of the EC treaty itself. Ruling on appeal in September 2008, the ECJ set aside the judgements of the CFI, and annulled Regulation 881/2002 in so far as it concerned the appellants (*Kadi and Al Barakaat International Foundation* v *Council and Commission* (2008)). The ECJ's conclusion was that EU Courts must in principle be

able to ensure the full review of the lawfulness of all EU legislative acts in light of fundamental rights, as an expression of a constitutional guarantee of the Union. The ECJ did not call into question the primacy of the SC Resolution from the perspective of international law, but concluded that the fact that the contested Regulation sought to implement a SC Resolution does not allow derogation from this constitutional guarantee. And, in this particular case, the ECJ found that the Regulation had not respected the appellants' rights of defence—in particular their right to be heard—and had infringed their right to judicial review, as well as their right to property.[28]

The transformation of SC Resolutions into operative EU law puts member states not only under the obligations of international law, but also under obligations deriving from EU law (Halberstam and Stein (2009: 34)), triggering crucial questions in regard to the relationship between binding SC Resolutions and the European legal order, with important implications at the national level. In the above-mentioned *Kadi* cases, as well as in an increasing number of similar cases,[29] this relationship has been explored, revisited and modified, going from a strictly internationalist approach in the CFI to a more EU/EC focused approach in the ECJ (Halberstam and Stein (2009: 43)). See also De Burca (2010)). In respect of this paper, it suffices at this point to highlight that the existence of multiple competing claims of authority—arguably a typical result of the multi-level regulatory setting—raises a number obstacles at the domestic level, especially where critical values such as human rights and state security appear to be in direct conflict, and where the favouring of one seems to come at the expense of the other (Slaughter and Burke-White (2007: 128)).

International legislation v. national legitimacy

As mentioned above, the evolution towards a multi-level regulatory setting includes qualitative changes in law-making at the international level, and the implication of this in regard to the domestic level is also worth a brief mention. In the CTF context, Resolution 1373 again provides for a noteworthy example. As stated, this Resolution marked a dramatic change of practice, imposing wide-ranging measures, "going well beyond existing international law" (Wood (2005: 232)). In regard to its implementation on the domestic level, the specificities of the Resolution are significant as many of the binding duties contained in the first two paragraphs of resolution 1373 were taken directly from the 1999 Convention. In September 2001, this Convention was only ratified by a handful of states,[30] and certain purely treaty-rules were thus rendered binding on all states, irrespective of them having consented thereto (Guillaume (2004: 543), Alvarez (2003: 874-5)). Resolution 1373

is arguably not the first instance of the SC 'imposing' treaty-rules, by for example modifying existing treaties, or extending particular obligations to specific parties, but it is the first case where the SC rendered portions of a treaty binding on *all* member states, more generally (Wendt (2009)). It is true that strictly speaking, the SC did not declare the 1999 Convention binding as such, but rather incorporated provisions from it into a binding resolution, but the end-result still raises important issues. First of all, the ratification of a multi-lateral treaty typically requires a significant measure of domestic legislative action, and by circumventing this process, it would seem that the SC severely undermined local democratic processes, and even the possibility of the elaboration of alternate domestic approaches (Slaughter and Burke-White (2007: 128)). This in turn could have posed a significant obstacle to the implementation of the Resolution on the domestic level, simply by reducing the legitimacy of the measure. This is all the more important in view of the limited membership of the SC: while on the one hand Art. 24 UNC would indicate that in discharging its duties, the SC acts of the behalf of the wider UN membership, its inherently undemocratic character and executive role under the Charter would seem to make it particularly unsuitable to override existing national democratic processes through wide-reaching "international legislation" (Arangio-Ruiz (2000). See also note 10). Secondly, and more technically, the reiteration of treaty-obligations through a binding resolution incorporates such obligations within the legal framework of the UN. While treaties typically allow States to withdraw from their obligations (Fry (2008: 235-6)), there is no possibility to withdraw from resolutions. By reiterating existing treaty-rules, the SC hence indirectly changed the nature of those obligations, arguably limiting the scope for national discretion and again interfering in national processes. Nonetheless, it is important at this point to mention the general acceptance of Resolution 1373, and the fact that no state has openly objected to it. On the contrary, already in April 2005, as many as 191 states had submitted a report to the UN on their implementation of the Resolution, and the UN Secretary General described state cooperation in this context as "unprecedented and exemplary" (Slaughter and Burke-White (2007: 127)). While the specific characteristics of Resolution 1373 could therefore raise important obstacles to implementation in view of a questionable legitimacy, it would seem that in the case of CTF, this is not necessarily the case.

IV. CONCLUSION

The functioning of the multi-level regulatory structure is arguably based on the idea that the extra-national regulatory framework penetrates the surface of the sovereign state and interacts with the domestic level to

effectively respond to a transnational threat. Yet, this functioning can be seen as a “double-edged sword” (Slaughter and Burke-White (2007: 128)). On one edge is the opportunity to use domestic legislation to further globally shared objectives, but on the other is a risk of undermining domestic democratic processes, preventing national experimentation with alternate approaches, or deferring too strongly to national discretion and thereby impeding effective coordination. Similarly, it has been argued that “when the UN enlists regional organizations and States in taking action against specific individuals, the multiplicity of institutions involved may be a blessing or a curse” (Halberstam and Stein (2009: 70)). On the positive side, action at several regulatory levels implies a possibility for several veto points, improving accountability by for example testing UN Resolutions for compatibility with fundamental rights. More negatively however, spreading regulatory action over several levels can also be seen as creating opportunities for policy trade-offs and evasion of responsibility, which in turn poses grave risks both for effective fundamental rights protection, and for a uniform response to an ‘international challenge’ such as terrorism (Halberstam and Stein (2009: 70)).

It can be argued that a formal hierarchy between extra-national norms and domestic legislation is becoming less and less relevant in the MLR context, because state constitutions are increasingly converging, with evidence of constitutional practice responsive to international law (Peters (2009: 195), See also von Bogdandy (2008), Ginsburg (2006)). But at the same time, such practice can also be shown to be “jealous of safeguarding at least domestic core constitutional principles against international intrusion” (Peters (2009: 195)). More specifically in regard to the case of MLR to effectively counter the financing of terrorism it is important to highlight that overall, it would not seem however that the difficulties encountered at the domestic level in implementing regulatory framework are attributable to a lack of *will* to act, but that it is more a question of technical capacity to do so (Bianchi (2006: 1070)). How to implement wide-ranging and sweeping obligation in a harmonized manner? And how to prioritize conflicting obligations and jurisdictions? In order for the MLR setting to function in view of providing for a ‘global’ solution, competing claims of authority need to be adjusted, and one suggestion would indeed be to focus not so much on the formal sources of law, but more on the substance of the rules in question (Peters (2009: 198)). Arguably, this would not necessarily solve the problem of needing to balance national constitutional principles with international cooperation in applying the principle of consistent interpretation, but it would provide for more flexibility, and thereby better fit the “fluent

state of interaction and reciprocal influence" (Peters (2009: 197), See also von Bogdandy (2008: 398)) that has come to characterise MLR.

NOTES

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[1] Many different denominations have been used, such as multi-tiered governance, polycentric governance, multi-perspectival governance, functional overlapping competing jurisdictions, fragmegration, multi-scalar governance, and spheres of authority. These concepts all highlight slightly different aspects, but they "share a concern with explaining the dispersion of central government authority both vertically, to actors located at other territorial levels, and horizontally, to non-state actors" (Bache and Flinders (2004: 4). See also Hooghe and Marks (2002)).

[2] For example through constitutionalist theories, global administrative law, transnational legal process theory or legal pluralism. For a discussion on this, see Wessel and Wouters (2008). Follesdal, Wessel and Wouters are among the first, and still few, to speak of 'multi-level regulation' as such, in an attempt to draw together insights from the various legal theories recognizing aspects of this phenomenon, and the theory on multi-level regulation as used in this research thus draws upon and aims to further develop the concept as introduced by them. See also Husabø and Bruce (2009) for a recent and for this study particularly relevant practical examination of multi-level regulation in regard to Nordic, Dutch and German Criminal law.

[3] In this regard, a significant recent development is also the proliferation of so-called 'hybrid' tribunals, which explicitly seek to mix domestic and foreign elements. Representing another indication of the way national and international legal systems increasingly communicate and influence each other, these 'hybrid' courts can arguably be interpreted "as part of a system of multilevel global governance in which the national and international levels are more deeply intertwined than ever before" (Burke-White (2004: 977)).

[4] It has been argued that such an arrangement is not feasible outside the European context (Posner and Yoo (2005: 966)), and in this sense its importance in a discussion regarding MLR as a 'global' phenomenon would seem minor. At the same time, the "European way of law", with legal functions such as the strengthening of domestic institutions or the compelling of domestic action, has been claimed to guide "the future of international law writ at large" (Slaughter and Burke-White (2007: 112)), and in this sense, the example of the EU and its role in the MLR setting is an interesting piece of the puzzle.

[5] Excluding some 18th and 19th century extradition treaties which, among other crimes, also dealt with the perpetrators of terrorist acts, the first major multilateral effort to address terrorism was the 1937 Convention for the Prevention and Punishment of Terrorism, which however never entered into force (van Ginkel (2010: 8-9)). A number of issue-specific

conventions and protocols aimed at countering particular aspects of terrorism were concluded in the latter half of the 20th century, but this 'piecemeal' treaty regime, largely the result of compromise, was hampered by watered-down obligations, extensive national reservations and slow responses (Husabø and Bruce (2009: 422-425)). Currently there are in total 30 universal and regional treaties on the subject of international terrorism (van Ginkel (2010: 10)).

[6] Participating states are for example required to introduce criminal, civil or administrative liability for legal persons (Art. 5 1999 Convention) or take appropriate measures for the tracing, freezing and confiscation of any funds used or allocated for the purposes of committing an offence within the meaning of the convention (Art. 8 1999 Convention).

[7] According to UNC Art. 25, "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". These decisions are binding, as when the Council has "determin[e] the existence of any threat to peace, breach of the peace, or act of aggression" (Art. 39 UNC), it "may decide what measures […] are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures" (Art. 41 UNC).

[8] In this regard, it should be highlighted that Resolution 1373(2001) in a non-binding provision calls upon states to become parties as soon as possible to relevant international conventions and protocols relating to terrorism, including the 1999 Convention (SCRes. 1373(2001), Art. 3(d). See also Husabø and Bruce (2009: 31)).

[9] The system of restrictive measures set up by Resolution 1267(1999) has been strengthened and extended to include Usama bin Laden and Al-Qaeda by SCRes. 1333(2000), and updated by subsequent Resolutions 1390(2002), 1455(2003), 1526(2004), 1617(2005), 1735(2006), 1822(2008) and 1904(2009).

[10] Various claims have been made that Resolution 1373 was enacted *ultra vires* the powers of the SC, as it would arguably be limited to making preliminary and situation specific decisions. This since the GA, *a contrario*, is provided with broader powers under the UNC, and since the interpretation of the wording "threat to peace" implies an immediate and specific danger. Importantly, in a 2010 report to the GA, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recommends that Resolutions 1373(2001), and 1267(1999) be replaced by a single resolution, not adopted under Chapter VII, as Chapter VII "does not provide the proper legal basis for maintaining the current framework of mandatory and permanent Security Council resolutions of a quasi-legislative or quasi-judicial nature" (GA (2010: 2)). Among numerous discussions regarding the (non)competence of the United Nations Security Council to enact 'international legislation', see e.g. Szasz (2002), Happold (2003), Denis (2004), Marschik (2005), Talmon (2005), de Wet (2005), Rosand (2005) and Joyner (2007).

[11] For example through the regulation of alternative remittance systems (SR VI), the monitoring of wire transfers (SR VII), the targeting of cross-border cash movements (SR IX), and steps to reduce the vulnerability to abuse of the non-profit sector (SR VIII).

[12] SCRes. 1617(2005). For further discussion on the role of the FATF recommendations and their relationship to other instruments at the global and regional level, see Gilmore (2004) and Mitsilegas and Gilmore (2007). See also Husabø and Bruce (2009: 257).

[13] For the purposes of this paper, efforts to undercut the financing of terrorism at the European level will focus on the EU. It is important to note however that the EU is not the only actor in this field at the European level, where for example the Council of Europe also plays a significant role, essentially through the Convention for the prevention of terrorism, and the Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism (Warsaw 2005).

[14] In Recital 3 of the preamble of Common Position 2001/930, the Council reaffirms "the determination of the EU and its Member States to play their full part, in a coordinated manner, in the global coalition against terrorism, under the aegis of the United Nations". See also Reinisch (2004: 125), and Husabø and Bruce (2009: 6).

[15] Between 1993 and 2009 the EU legally consisted of three "pillars", i.e. three specific institutional frameworks for the conduct of certain policies, functioning on the basis of different decision-making procedures. Thus, the European Communities (EC) pillar dealt with economic, social and environmental policies, the Common Foreign and Security Policy (CFSP) with foreign policy and military issues, and the Police and Judicial Cooperation in Criminal Matters (PJCC) coordinated the fight against crime. The pillar structure has disappeared with the Treaty of Lisbon, although the CFSP is still subject to specific rules concerning decision-making and judicial supervision.

[16] In regard to the freezing of terrorist assets, the EU already had legislation in place implementing SC Resolution 1267 and its successors, targeting the Taliban, Bin Laden and Al-Qaeda and requiring, in particular, the freezing of funds of individuals, groups and entities designated by the Committee set up under the Resolution. In parallel, a wider sanctions regime was also provided through Common Position 2001/931/CFSP and Regulation (EC) No 2580/2001 of 27 December 2001. Regulation 2580/2001 provides for the freezing of broadly defined assets, targeting individuals and entities on a regularly updated list established by a separate Council Decision (OJ 2001 L 344/83).

[17] Examples of such instruments include Regulation (EC) No 1889 of 26 October 2005 on cash couriers (OJ 2005 L 309/9), reflecting SR IX; Regulation (EC) No 1781 of 15 November 2006 on wire transfers (OJ 2006 L 345/1), reflecting SR VII, and Directive 2007/64/EC of 13 November 2007 on alternative remittance systems (OJ 2007 L 319/1), reflecting SR VI.

[18] For example, in the Proposal for the Framework Decision, an enhanced judicial cooperation was claimed necessary since "[i]ncreasingly, terrorism stems from the activities of networks operating at international level, which are based in several countries and exploit legal loopholes" and since "[t]errorists might otherwise take advantage of any differences in legal treatment in the different Member States." (COM(2001) 521 Final, p. 3).

[19] The UN sanctions regime established under Resolutions 1267(1999), 1333(2000) and 1390(2002) for example require UN member states to freeze the assets of particular individuals without leaving these states much scope of discretion. See e.g. Eckes (2009: 13).

[20] According to Art. 34 (2) (b) of the former EU Treaty, the purpose of a framework decision was an "approximation" of national law, binding member states only "as to the result to be achieved". According to Art. 288 of the Treaty on the Functioning of the European Union, "[a] directive shall be binding as to the result to be achieved […] but shall leave to the national authorities the choice of form and methods". However, the nature of this result, and thus the obligation imposed on the Member State, varies according to the content (Bieber and Maiani (2004: 26)). Furthermore, with regard to directives, the discretion of EU member states has in practice become restrained by a number of rules and principles, such as deadlines for transposition, requirements that directives be transposed in binding legal provisions, and that the result be effectively attained. While also subject to interpretation, states' implementation discretion with regard to the FD remains somewhat larger, since FDs cannot entail direct effect (Art. 34.2 lit. b former TEU), and their respect is only monitored by the rather weak mechanisms of control available under the 'third pillar' (Bieber and Maiani (2004: 35)). Indeed, while the pillar structure disappeared in 2009, the old third pillar institutional rules concerning legal effects of instruments and judicial supervision provisionally apply (see note 15).

[21] According to paragraph 3 of the declaration attached to Resolution 1456 (2003), "States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute".

[22] Article 14 of the 1999 Convention provides that "[n]one of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on

such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives."

[23] Belgium's full reservation to the 1999 Convention reads: "1. In exceptional circumstances, the Government of Belgium reserves the right to refuse extradition or mutual legal assistance in respect of any offence set forth in article 2 which it considers to be a political offence or as an offence connected with a political offence or as an offence inspired by political motives. 2. In cases where the preceding paragraph is applicable, Belgium recalls that it is bound by the general legal principle *aut dedere aut judicare*, pursuant to the rules governing the competence of its courts." (http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en#1)

[24] The problems related to the need to balance individual fundamental rights protection against the collective interest in the prevention of terrorism has been amply acknowledged and debated. For a comprehensive survey on counter-terrorism and human rights to date see ICJ (2009), which interestingly concludes, *inter alia,* that there is not necessarily any implied dichotomy between securing people's rights and people's security, and that the legal framework that existed prior to 11 September was robust and effective without undermining fundamental rights.

[25] Interestingly, the Court of First Instance has held *in dictum* that an arbitrary infringement of the right to property could be seen as "contrary to *jus cogens*" (*Kadi v. Council* (2005: para 242)).

[26] Article 103 states 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".

[27] The EU's administration of the more general freezing regime set up under SC Resolution 1373 has also given rise to interesting case-law. As Resolution 1373 does not identify specific targets, but relies instead on separate member state and EU identification regimes, it has been seen to give rise to a different set of questions of conflict between human rights guarantees and observance of the UN regime, and in *OMPI v. Council* (2006), the CFI held EC fundamental rights standards fully applicable to the EC's own decisions to list certain individuals to have their assets frozen (*OMPI v. Council* (2006: 121), Halberstam and Stein (2009: 31 and 36)).

[28] Taking into account the risks an immediate annulment incur in regard to the effectiveness of the restrictive measures and the possibility that the imposition of such measures could still prove justified, the ECJ maintained the effects of the Regulation for a period of three months, to allow the Council to remedy the infringements found. Through Regulation (EC) No 1190/2008 the sanctions against Mr. Kadi's were maintained, but in a recent judgement of the EU General Court, this Regulation was also annulled in so far as it concerned Mr. Kadi (*Kadi v Commission* (2010)).

[29] See e.g. Cases T-253/02, *Ayadi v. Council*, and T-49/04, *Hassan v Council and Commission,* CFI Judgments of 12 July 2006 and joined Cases C-399/06 P and C-403/06 P *Faraj Hassan* and *Chafiq Ayadi* v *Council,* ECJ Judgments of 3 December 2009; Cases T-47/03 and T-327/03, *Jose Maria Sison* and *Stichting Al-Aqsa v Council,* CFI Judgements of 11 July 2007; Case T-341/07, *Jose Maria Sison v Council,* CFI Judgement of 30 September 2009; C-117/06, *Möllendorf and others*, ECJ Judgment of 11 October 2007. For similar cases in other judicatures, see e.g. application no. 10593/08, *Nada v Switzerland,* before the Grand Chamber of the European Court of Human Rights, and the *Sayadi* case before the Human Rights Committee (CCPR/C/94/D/1472/2006).

[30] Prior to 28 September 2001, the 1999 Convention had been ratified by only four states (Botswana, Sri Lanka, the UK and Uzbekistan). The treaty came into force on 10 April 2002, after 22 ratifications, and it today has 173 parties.

References

Case law

<u>European Court of Human Rights</u>

Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, Appl. No 45036/98, 30 June 2005

Hatton v. UK, Appl. No 36022/97, 8 July 2003

Nada v Switzerland, Appl. No. 10593/08

Waite and Kennedy v. Germany, Appl. No 26083/94, 18 February 1999

<u>The Court of Justice of the European Union</u>

AETR, Case 22/70, Court of Justice of the European Communities, 31 March 1971

Ahmed Ali Yusuf, Al Barakaat International Foundation v Council and Commission, Case T-306/01, Court of First Instance, 21 September 2005

Ayadi v. Council, Case T-253/02, Court of First Instance, 12 July 2006

P *Faraj Hassan* and *Chafiq Ayadi* v *Council,* Joined Cases C-399/06 P and C-403/06, European Court of Justice, 3 December 2009;

Haegeman v. Belgian State, Case 181/73, 30 April 1974

Hassan v Council and Commission, Case T-49/04, Court of First Instance, 12 July 2006

Jose Maria Sison and *Stichting Al-Aqsa v Council,* Cases T-47/03 and T-327/03, Court of First Instance, 11 July 2007

Jose Maria Sison v Council, Case T-341/07, Court of First Instance, 30 September 2009

Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A., Case 104/81, 28 October 1982

Marleasing SA v La Comercial Internacional de Alimentacion SA, Case C-106/89, 13 November 1990

Möllendorf and others, Case C-117/06, European Court of Justice, 11 October 2007

Organisation des Modjahedines du people d'Iran (OMPI) v. Council, Case T-228/02, 12 December 2006

Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, Case 14/83, 10 April 1984

Yassin Abdullah Kadi v Council and Commission, Case T-315/01, Court of First Instance, 21 September 2005

Yassin Abdullah Kadi and Al Barakaat International Foundation v *Council and Commission,* Joined Cases C-402/05 P and C-415/05, European Court of Justice, 3 September 2008

Yassin Abdullah Kadi v *European Commission,* Case T-85/09, General Court , 30 September 2010

<u>Other jurisdictions</u>

Ahmed and Others, UK Supreme Court, 27 January 2010

Sayadi, CCPR/C/94/D/1472/2006, Human Rights Committee, 29 December 2008

United Nations Documents and Reports

GA (2009), "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development", *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/12/22, 2 September 2009.

GA (2010), “Promotion and protection of human rights and fundamental freedoms while countering terrorism”, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,* UN Doc. A/65/258, 6 August 2010.

HRC (2001), *General Comment No. 29,* UN. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

ICJ (2009), “Assessing damage, urging action”, *Report by the Eminent Jurists Panel of the International Commission of Jurists*, Geneva.

S/2001/1297, *Report by the European Union to the Committee established under paragraph 6 of Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting on 28 September 2001*, 28 December 2001.

UN (2004), “A More Secure World: Our Shared Responsibility”, *Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change*, United Nations Department of Public Information.

European Union Documents

COM(2001)521 Final, “Proposal for a framework Decision on combating terrorism”, OJ 2001 C 332E/300, 17 November 2001.

CE (2011), Partial declassification of document 14306/04 (5 Nov 2004), *Interim Report on the Evaluation of National Anti-Terrorist Arrangements,* 3 March 2011.

COM(2010)386, “The EU Counter-Terrorism Policy: Main Achievements and Future Challenges”, *Communication from the Commission to the European Parliament and the Council*, 20 July 2010.

Works

Alvarez, José (2002), "The New Treaty-Makers", *Boston College International and Comparative Law Review*, 25: 213-234.

Alvarez, José (2003), "Hegemonic International Law Revisited", *The American Journal of International Law*, 97(4): 873-888.

Alvarez, José (2005), *International Organizations as Law-Makers*, Oxford, New York: Oxford University Press.

Arangio-Ruiz, Gaetano (2000), "On the Security Council’s “Law-Making”", *Rivista di diritto internazionale*, 3: 609-725.

Bache, Ian and Flinders, Matthew (2004), "Themes and Issues in Multi-Level Governance", in Ian Bache and Matthew Flinders (eds.), *Multi-Level Governance*, New York, Oxford: Oxford University Press, pp. 1-11.

Bethlehem, Daniel (2001), "Regional Interface between Security Council Decisions and Member States Implementation: The Example of the European Union", in Vera Gowlland-Debbas (ed.) *United Nations Sanctions and International Law*: Kluwer Law International, pp. 291-305.

Betlem, Gerrit and Nollkaemper, André (2003), "Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation", *European Journal of International Law*, 14: 569-589.

Bianchi, Andrea (2004), "Enforcing International Law Norms against Terrorism: Achievements and Prospects", in Andrea Bianchi and Yasmin Naqvi (eds.), *Enforcing International Law Norms against Terrorism*, Oxford, Portland: Hart Publishing, pp. 491-534.

Bianchi, Andrea (2006), "The Security Council's Anti-Terror Resolutions and Their Implementation by Member States - an Overview", *Journal of International Criminal Justice*, 4: 1044-1073.

Bieber, Roland and Maiani, Francesco (2004), *Précis de droit européen*, Stämpfli.

Blokker, Niels M. and Schermers, Henry G. (eds.) (2001), *Proliferation of International Organizations: Legal Issues*, The Hague: Kluwer Law International.

Brunnée, Jutta (2002), "COPing with Consent: Law-Making under Multilateral Environmental

Agreements", *Leiden Journal of International Law*, 15: 1-52.

Burke-White, William W. (2004), "International Legal Pluralism", *Michigan Journal of International Law*, 25: 963-979.

De Burca, Grainne (2010), "The European Court of Justice and the International Legal Order after Kadi", *Harvard International Law Journal*, 51(1): 1-49.

de Wet, Erika (2005), "The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions", in Rüdiger Wolfrum and Volker Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, Heidelberg, New York: Springer, pp. 183-241.

Delbrück, Jost (2001), "Structural Changes in the International System and Its Legal Order: International Law in the Era of Globalization", *Swiss Review of International and European Law*, 11(1): 1-36.

Den Boer, Monica (2003), "9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment", *Notre Europe - Policy Papers*, 6.

Denis, Catherine (2004), *Le pouvoir normatif du Conseil de Securité des Nations Unies: portée et limites*, Bruxelles: Editions Bruylant, Editions de l'Université de Bruxelles.

Eckes, Christina (2008), "Trapped between Courts or How Terrorist Suspects Lost Their Right to a Remedy", in Andreas Follesdal; Ramses A. Wessel and Jan Wouters (eds.), *Multilevel Regulation and the EU - the Interplay between Global, European and National Normative Processes*, Leiden, Boston: Martinus Nijhoff Publishers, pp. 261-300.

Eckes, Christina (2009), *EU Counter-Terrorist Policies and Fundamental Rights - the Case of Individual Sanctions*, Oxford: Oxford University Press.

Feinäugle, Clemens A. (2008), "Legal Protection of the Individual against UN Sanctions in a Multilevel System", in Andreas Follesdal; Ramses A. Wessel and Jan Wouters (eds.), *Multilevel Regulation and the EU - the Interplay between Global, European and National Normative Processes*, Leiden, Boston: Martinus Nijhoff Publishers, pp. 231-259.

Fitzmaurice, Malgosia (2005), "Consent to Be Bound - Anything New under the Sun?" *Nordic Journal of International Law*, 74: 483-508.

Follesdal, Andreas; Wessel, Ramses A. and Wouters, Jan (eds.) (2008), *Multilevel Regulation and the EU - the Interplay between Global, European and National Normative Processes*, Leiden Boston: Martinus Nijhoff Publishers.

Fry, James D. (2008), "Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and Their Legal Implications", *Michigan Journal of International Law*, 29(2): 197-291.

Gilmore, William C. (2004), *Dirty Money - the Evaluation of International Measures to Counter Money Laundering and the Financing of Terrorism*, Strasbourg: Council of Europe Publishing.

Ginsburg, Tom (2006), "Locking in Democracy: Constitutions, Commitment, and International Law", *International law and politics*, 38: 707-759.

Guillaume, Gilbert (2004), "Terrorism and International Law", *International Comparative Review Quarterly*, 53: 537-548.

Halberstam, Daniel and Stein, Eric (2009), "The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order ", *Common Market Law Review*, 46: 13-72.

Happold, Matthew (2003), "Security Council Resolution 1373 and the Constitution of the United Nations", *Leiden Journal of International Law*, 16(03): 593-610.

Hooghe, Liesbet and Marks, Gary (2002), "Types of Multi-Level Governance", *Cahiers européens de sciences po*, 3.

Husabø, Erling J. and Bruce, Ingvild (2009), *Fighting Terrorism Though Multilevel Criminal Legislation - Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and Their Implementation in Nordic, Dutch and German Criminal Law*, Leiden, Boston: Martinus Nijhoff Publishers.

Joyner, Daniel H. (2007), "Non-Proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council", *Leiden Journal of International Law*, 20(02): 489-518.

Kelsen, Hans (1926), "Les rapports de système entre le droit interne et le droit international public", *RCADI*, IV.

Klabbers, Jan (2009), *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press.

Krisch, Nico and Kingsbury, Benedict (2006), "Introduction: Global Governance and Global Administrative Law in the International Legal Order", *European Journal of International Law*, 17(1): 1-13.

Laitner, Sarah (2005), "Delays Thwart EU Chief's Anti-Terror Fight", *Financial Times*, 6 March.

Lavranos, Nikolaos (2004), *Legal Interaction between Decisions of International Organizations and European Law*, Groningen: Europa Law Publishing.

Levi, Michael (2010), "Combating the Financing of Terrorism", *British Journal of Criminology*, 50(4): 650-669.

Maiani, Francesco (2008), "Legal Europeanization as Legal Transformation: Some Insights from Swiss 'Outer Europe'", *EUI Working Paper/MWP*, 32.

Marschik, Axel (2005), "Legislative Powers of the Security Council", in Ronald St.John Macdonald and Douglas M. Johnston (eds.), *Towards World Constitutionalism - Issues in the Legal Ordering of the World Community*, Leiden, Boston: Martinus Nijhoff Publishers, pp. 457-492.

Mitsilegas, Valsamis and Gilmore, Bill (2007), "The EU Legislative Framework against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards", *International & Comparative Law Quarterly*, 56(01): 119-140.

Nijman, Janne E. and Nollkaemper, André (eds.) (2007), *New Perspectives on the Divide between National and International Law*, Oxford: Oxford University Press.

Nuotio, Kimmo (2006), "Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law", *J Int Criminal Justice*, 4(5): 998-1016.

Peters, Anne (2007), "The Globalization of State Constitutions", in Janne E. Nijman and Andre Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law*, Oxford: Oxford University Press, pp. 251-308.

Peters, Anne (2009), "Supremacy Lost: International Law Meets Domestic Constitutional Law", *ICL Journal*, 3: 170-198.

Posner, Eric A. and Yoo, John C. (2005), "Reply to Helfer and Slaughter", *California Law Review*, 93(3): 957-973.

Reinisch, August (2004), "The Action of the European Union to Combat International Terrorism", in Andrea Bianchi and Yasmin Naqvi (eds.), *Enforcing International Law Norms against Terrorism*, Oxford, Portland: Hard Publishing, pp. 119-162.

Rosand, Eric (2005), "The Security Council as "Global Legislator": *Ultra Vires* or Ultra Innovative?" *Fordham international law journal*, 28(3): 542-590.

Sambei, Arvinder; du Plessis, Anton and Polaine, Martin (2009), *Counter-Terrorism Law and Practice - an International Handbook*, Oxford: Oxford University Press.

Schreuer, Chistopher (1993), "The Waning of the Sovereign State: Towards a New Paradigm for International Law", *European Journal of International Law*, 4: 447-471.

Slaughter, Anne-Marie (1997), "The Real New World Order", *Foreign Affairs*, 76(5): 183-197.

Slaughter, Anne-Marie and Burke-White, William (2007), "The Future of International Law is Domestic (or, the European Way of Law)", in Janne E. Nijman and André Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law*, Oxford: Oxford University Press, pp. 110-133.

Spence, David (2004), "International Terrorism: The Quest for a Coherent EU Response", *L'Europe en formation*, 2: 75-99.

Szasz, Paul C. (2002), "The Security Council Starts Legislating", *The American Journal of International Law*, 96(4): 901-905.

Talmon, Stefan (2005), "The Security Council as World Legislature", *The American Journal of International Law*, 99(1): 175-193.

Tomuschat, Christian (1993), "Obligations Arising for States without or against Their Will", *RdC*.

Triepel, Heinrich (1923), "Les rapports entre le droit interne et le droit international", *RCADI*, 1923-I.

van Ginkel, Bibi (2010), *The Practice of the United Nations in Combating Terrorism from 1946 to 2008*, Antwerp: Intersentia.

Virally, Michel (1990), "Sur un pont aux ânes: les rapports entre droits internationales et droits internes", in Michel Virally (ed.) *Le Droit International En Devenir*, Genève: Publications de l'IUHEI, pp.

von Bogdandy, Armin (2008), "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law", *International Journal of Constitutional Law*, 6(3-4): 397-413.

Walker, Neil (2008), "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders", *International Journal of Constitutional Law*, 6(3-4): 373-396.

Wendt, Karin (2009), "The Imposition of Treaty-Rules by the Security Council: Disregarding or Destroying the Principle of State Consent?", Master Dissertation, Graduate Institute of International and Development Studies, Geneva, Switzerland.

Wessel, Ramses A. and Wouters, Jan (2008), "The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres (Towards a Research Agenda)", in Andreas Follesdal; Ramses A. Wessel and Jan Wouters (eds.), *Multilevel Regulation and the EU - the Interplay between Global, European and National Normative Processes*, Leiden, Boston: Martinus Nijhoff Publishers, pp. 9-47.

Wood, Michael C. (2005), "The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions", in Rüdiger Wolfrum and Volker Röben (eds.), *Developments of International Law in Treaty Making*, Berlin: Springer.

Wouters, Jan; Nollkaemper, André and de Wet, Erika (eds.) (2008), *The Europeanisation of International Law. The Status of International Law in the EU and Its Member States*, The Hague: TMC Asser Press.

Yemin, Edward (1969), *Legislative Powers in the United Nations and Specialized Agencies*, Leyden: A.W.Sijthoff.