Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 29 September 2016[1]

Case C-158/14

A,
B,
C
and
D
v
Minister van Buitenlandse Zaken

(Request for a preliminary ruling from the Raad van State (Council of State, Netherlands))

(Article 267 TFEU — Fourth paragraph of Article 263 TFEU — Admissibility of an action for annulment and the review of the validity of an EU act in the context of preliminary ruling proceedings — Implementing Regulation (EU) No 610/2010 — Common Position 2001/931/CFSP — Council Regulation (EC) No 2580/2001 — Council Framework Decision 2002/475/JHA — Definition of terrorist acts — Whether acts of non-State armed forces in a non-international armed conflict constitute terrorist acts — Counter-terrorism conventions — International humanitarian law)

1. A, B, C and D have been found to have collected for, and transferred funds to, the 'Liberation Tigers of Tamil Eelam' ('the LTTE'), a group that fought a civil war against the Sri Lankan Government to create an independent State in the north and east of Sri Lanka for Tamil people and which has been classified as 'terrorist' by the European Union for approximately 10 years.

2. The Netherlands authorities have designated A, B, C and D as persons subject to restrictive measures to combat terrorism, applying Netherlands legislation implementing a United Nations Security Council ('UNSC') resolution. As a result, their resources are frozen, it is prohibited to provide financial services to them or for their benefit and no resources can be made available to them. In taking those measures, the Netherlands authorities treated the LTTE as a terrorist organisation. That finding took account of an implementing regulation of the Council of the European Union maintaining the LTTE on a list of groups involved in terrorist acts and to whom restrictive measures apply. In their challenge before the Netherlands' courts, A, B, C and D claim that that regulation is invalid because the LTTE's actions were not terrorist acts. Rather, they say, the LTTE was a non-State armed force engaged in a non-international armed conflict in Sri Lanka and its actions were thus governed solely by international humanitarian law, not by EU and international rules on the fight against terrorism. It follows that the European Union erroneously regarded attacks and kidnappings which the LTTE committed between 2005 and 2009 as 'terrorist acts' justifying LTTE's insertion on an EU list of entities involved in terrorist acts.

1 — Original language: English.

3. The Raad van State (Council of State) has made a request for a preliminary ruling asking in essence about the definition of 'terrorist acts' used when adopting the Council implementing regulation and whether possible inconsistencies between that definition in EU law and international law (in particular, the body of international law on the combating of terrorism and international humanitarian law) might affect the validity of the implementing regulation in question. It also asks whether A, B, C and D can invoke the invalidity of that implementing regulation in the main proceedings, now that individuals enjoy wider direct access to the EU Courts following the entry into force of the Treaty of Lisbon.

International law

International humanitarian law

4. International humanitarian law governs the conduct of hostilities during international and non-international armed conflicts. It is designed, inter alia, to provide protection for civilian populations in a conflict zone by restricting the effects of war on persons and property. [2]

5. A significant part of international humanitarian law is to be found in the four Geneva Conventions [3] and their three Additional Protocols. [4] One of the fundamental principles enshrined in the Conventions and Additional Protocols is the distinction between the civilian population and military combatants, and civilian objects and military objectives. They set out basic rights of prisoners of war (civilians and military personnel); protections for the wounded and sick; and protections for and rights afforded to civilians (non-combatants) in and around a war-zone. The European Union is not a Party to any of the Conventions or to their Additional Protocols. However, all the Member States are Parties to them.

6. Common Article 2 of each of the Geneva Conventions ('Application of the Convention(s)') provides in particular:

'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

…'

2 — Judgment of 30 January 2014, *Diakité*, C-285/12, EU:C:2014:39, paragraph 23.

3 — Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, *United Nations Treaties Series* ('U.N.T.S.'), Vol. 75, p. 31 ('the First Geneva Convention'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, U.N.T.S., Vol. 75, p. 85 ('the Second Geneva Convention'); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, U.N.T.S., Vol. 75, p. 135 ('the Third Geneva Convention'); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, U.N.T.S., Vol. 75, p. 287 ('the Fourth Geneva Convention').

4 — Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, U.N.T.S., Vol. 1125, p. 3 ('Protocol I'); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, U.N.T.S., Vol. 1125, p. 609 ('Protocol II'); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), of 8 December 2005, U.N.T.S., Vol. 2404, p. 261.

7. However, pursuant to Common Article 3 of each of the Geneva Conventions ('Conflicts not of an international character'), which codifies a rule of customary international law:[5]

'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

…'

8. Article 1 of Protocol I ('General principles and scope of application'), which concerns the protection of victims of international armed conflicts and also codifies customary international law,[6] states in particular:

'…

3. This Protocol, which supplements the Geneva Conventions …, shall apply in the situations referred to in [Common Article 2].

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.'

9. Article 51(2) of Protocol I provides that 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.

10. Protocol II concerns the protection of victims of non-international armed conflicts. The ICJ has not yet taken a position on whether that Protocol codifies rules of customary international law.

5 — See, for example, International Court of Justice ('ICJ'), *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, I.C.J. Reports 1986, p. 14, paragraphs 218 and 219; International Committee of the Red Cross (ICRC), Updated Commentary on the First Geneva Convention (2016), available at https://www.icrc.org ('2016 ICRC Commentary'), Common Article 3, paragraph 155; and ICJ, *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 ('ICJ, *Nuclear Weapons*'), paragraphs 78 and 79.

6 — The ICJ has found that the rules in Protocol I, when adopted, merely expressed pre-existing customary law: ICJ, *Nuclear Weapons*, paragraph 84.

11. Article 1 of Protocol II ('Material field of application') provides:

'1. This Protocol, which develops and supplements [Common Article 3] without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'

12. Article 4 of Protocol II ('Fundamental guarantees') states in particular that the taking as hostages of persons who do not take a direct part or who have ceased to take part in hostilities and acts of terrorism against them are prohibited 'at any time and in any place whatsoever'.[7]

13. Article 6 ('Penal prosecutions') sets out minimum guarantees applicable to the prosecution and punishment of criminal offences related to non-international armed conflict. It requires the authorities in power, at the end of hostilities, to endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[8]

14. The second sentence of Article 13(2) of Protocol II prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. Certain international criminal tribunals have found that to be a rule of customary international law, the breach of which gives rise to individual criminal responsibility.[9]

International law on the fight against terrorism and hostage-takings

Resolution 1373 (2001)

15. The United Nations Security Council adopted Resolution 1373 (2001) ('Resolution 1373 (2001)')[10] on 28 September 2001, in the aftermath of the attacks that took place in the United States on 11 September of that year. Point 1 requires all States to:

'(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

…

7 — Article 4(1) read together with Article 4(2)(c) and (d) of Protocol II.

8 — Article 6(5) of Protocol II.

9 — See International Criminal Tribunal for the former Yugoslavia Appeals Chambers, *Prosecutor v. Stanislav Galić*, judgment, IT-98/29-A (30 November 2006), paragraphs 86, 90 and 98 (the same conclusion was reached as regards Article 51(2) of Protocol I); Special Court for Sierra Leone Trial Chamber II, *Prosecutor against Brima et al*, judgment, SCSL-04-16-T (20 June 2007), paragraphs 662 to 666. See also 2016 ICRC Commentary, Common Article 3, paragraph 525.

10 — S/RES/1373 (2001).

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons …'

16. Point 3(d) calls on all States to 'become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 [11]'.

Multilateral and regional counter-terrorism conventions

17. States have not (yet) agreed on a comprehensive, generally applicable definition of what constitutes a terrorist act.[12]

18. The International Convention for the Suppression of Terrorist Bombings ('the Terrorist Bombings Convention') was signed in New York on 15 December 1997.[13] Although the European Union itself is not a Party, all its Member States are. The last recital of the Terrorist Bombings Convention indicates that the activities of military forces of States are governed by rules of international law outside the framework of the convention and that the exclusion of certain actions from the coverage of the convention therefore does not 'condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws …'.

19. Article 19(2) provides that 'the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by [the Terrorist Bombings Convention], and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are [also] not governed by [it]'.

20. The International Convention for the Suppression of the Financing of Terrorism ('the Terrorism Financing Convention') was signed in New York on 9 December 1999.[14] Although the European Union itself is not a Party, all its Member States are. Article 2(1) of the Terrorism Financing Convention provides that:

'Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the Annex; [15]

11 — See point 20 below.

12 — Attempts are being made to negotiate a Draft Comprehensive Convention on International Terrorism in the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996. Progress is slow however, partly due to the difficulty of finding agreement on the definition of terrorism and whether it should cover activities of armed forces during an armed conflict which are governed by international humanitarian law and of national liberation movements. See in particular UN General Assembly Sixth Committee, Summary record of its meetings at the seventieth session, A/C.6/70/SR.1, 2, 3, 4, 5, 27 and 29.

13 — U.N.T.S., Vol. 2149, p. 256.

14 — U.N.T.S., Vol. 2178, p. 197.

15 — That list includes, inter alia, the International Convention against the Taking of Hostages (see further point 25 below) (point 4) and the International Convention for the Suppression of Terrorist Bombings (point 9).

(b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.'

21. Pursuant to Article 8(1) of the Terrorism Financing Convention, State parties must adopt the appropriate measures, in accordance with their domestic legal principles, for identifying, detecting and freezing or seizing any funds used or allocated for the purpose of committing Article 2 offences together with the proceeds derived from such offences, for purposes of possible forfeiture.

22. Article 21 states that 'nothing in [the] Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions'.

23. The International Convention for the Suppression of Acts of Nuclear Terrorism ('the Nuclear Terrorism Convention') was adopted in New York on 13 April 2005.[16] Although the European Union is not a party, the great majority of the Member States are.[17] Article 4(2) of the Nuclear Terrorism Convention provides that the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by the convention, and that the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are also not governed by the convention.

24. Regional conventions include the recent Council of Europe ('CoE') Convention on the Prevention of Terrorism.[18] The European Union has signed, but not yet ratified, that convention. Furthermore, not all, but a great majority of, Member States have signed or ratified it.[19] Article 26(5) of the CoE Convention on the Prevention of Terrorism provides:

'The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a Party in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.'

International Convention against the Taking of Hostages

25. The International Convention against the Taking of Hostages ('the Hostages Convention') was adopted by the UN General Assembly on 17 December 1979.[20] Article 12 of the Hostages Convention states that 'in so far as the [Geneva Conventions and the Protocols thereto] are applicable to a particular act of hostage-taking, and in so far as States Parties to the [Hostages] Convention are bound under those conventions to prosecute or hand over the hostage-taker, the [Hostages] Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in [the Geneva Conventions and the Protocols thereto] …'.

16 — U.N.T.S., Vol. 2445, p. 89.

17 — Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

18 — CETS No 196.

19 — The 22 following Member States are parties to the convention: Austria, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

20 — *United Nations Treaties Series*, Vol. 1316, p. 205.

EU law

Treaty on the Functioning of the European Union

26. The fourth paragraph of Article 263 TFEU provides that 'any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'. The first paragraph specifies the types of acts which may be reviewed by the Court. These include acts of the Council. The second paragraph lays down the grounds of review for which the Court has jurisdiction. Pursuant to the sixth paragraph, proceedings are to be instituted '… within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'.

Charter of Fundamental Rights of the European Union

27. The first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'[21]) states that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'.

28. Article 48(1) provides that 'everyone who has been charged shall be presumed innocent until proved guilty according to law'. According to Article 48(2), 'respect for the rights of the defence of anyone who has been charged shall be guaranteed'.

Common Position 2001/931/CFSP

29. Recital 2 of Council Common Position 2001/931/CFSP[22] refers to Resolution 1373 (2001) setting out wide-ranging strategies to combat terrorism and in particular the fight against the financing of terrorism. Recital 5 states that the European Union should take additional measures in order to implement Resolution 1373 (2001).

30. Article 1(1) provides that 'the Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex'.

31. Article 1(2) defines 'persons, groups and entities involved in terrorist acts' as:

— persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,

— groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.'

21 — OJ 2012 C 326, p. 391.

22 — Common Position of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), as amended.

32. According to Article 1(3), a 'terrorist act' is:

'… one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

(i) seriously intimidating a population, or

(ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage-taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed under (a) to (h);

(j) directing a terrorist group;

(k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

…'

33. Pursuant to Articles 2 and 3, the (then) European Community, acting within the limits of the powers conferred on it by the (then) Treaty establishing the European Community, were required to 'order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex' and to 'ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of persons, groups and entities listed in the Annex'.

Council Regulation No 2580/2001

34. Recitals 3 and 4 of Council Regulation (EC) No 2580/2001 [23] refer to Resolution 1373 (2001). Recital 5 states that Community action is necessary in order to implement the Common Foreign and Security Policy ('CFSP') aspects of Common Position 2001/931. According to recital 14, the list referred to in Article 2(3) [24] may include persons and entities linked or related to third countries as well as those who otherwise are the focus of the CFSP aspects of Common Position 2001/931.

35. Article 1(2) defines the 'freezing of funds, other financial assets and economic resources' as '… the prevention of any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management'. Article 1(4) provides that 'terrorist act' has the same meaning under Regulation No 2580/2001 as in Article 1(3) of Common Position 2001/931. [25]

36. Article 2(1) provides that, except as permitted under Articles 5 and 6: [26]

'(a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in [the Article 2(3) list] shall be frozen;

(b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in [the Article 2(3) list].'

37. In accordance with Article 2(2) (and except as permitted under Articles 5 and 6), '… it shall be prohibited to provide financial services to, or for the benefit of, a natural or legal person, group or entity included in [the Article 2(3) list]'.

38. Article 2(3) provides that the Council is to establish, review and amend the list of persons, groups and entities to which Regulation No 2580/2001 applies ('the Article 2(3) list'), in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931. It states that the Article 2(3) list is to consist of:

'(i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

(ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

(iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii); or

(iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points (i) and (ii).'

23 — Regulation of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70), as last amended.

24 — See point 38 below.

25 — See point 32 above.

26 — Articles 5 and 6 concern the addition of interest due to frozen accounts; specific authorisations to use and make payments from frozen accounts; and specific authorisations to unfreeze funds, other financial assets or other economic resources, to make such assets and resources available and to deliver financial services.

39. In accordance with Article 9, 'each Member State shall determine the sanctions to be imposed where the provisions of this Regulation are infringed' and 'such sanctions shall be effective, proportionate and dissuasive'. [27]

Council Framework Decision 2002/475/JHA

40. Recital 3 of Council Framework Decision 2002/475/JHA [28] refers to the fact that all or some Member States are party to a number of conventions relating to terrorism. Recital 6 states that the definition of terrorist offences should be approximated in all Member States, including those offences relating to terrorist groups. According to recital 11, 'actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by the Framework Decision'. [29]

41. Article 1(1) provides:

'1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

— seriously intimidating a population, or

— unduly compelling a Government or international organisation to perform or abstain from performing any act, or

— seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

[the intentional acts referred to in points (a) to (i) are identical to those set out in points (a) to (i) of Article 1(3) of Common Position 2001/931 [30]].'

27 — See also recital 12.

28 — Framework Decision of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3), as amended.

29 — It was the European Parliament which recommended adding a recital distinguishing terrorist groups from groups in the European Union who resist totalitarian regimes and repression in third countries or who support such resistance. The objective was to ensure that the latter were not defined as terrorists whilst not preventing them from being prosecuted and punished for offences under national criminal laws: see European Parliament, Report on the Commission proposal for a Council framework decision on combating terrorism (COM(2001) 521).

30 — See point 32 above.

Inclusion of the LTTE in the Article 2(3) list

42. The LTTE was first placed on the list annexed to Common Position 2001/231/CFPS by Council Common Position 2006/380/CFSP.[31] It was inserted on the same day in the Article 2(3) list by Council Decision 2006/379/EC.[32] The LTTE has remained there as a result of a series of decisions and regulations, each of them repealing and replacing the previous one, and including Council Implementing Regulation (EU) No 610/2010.[33] The most recent list appears in the Annex to Council Implementing Regulation (EU) 2015/2425.[34]

Netherlands law

43. Article 2(1) of the Sanctieregeling terrorisme 2007-II (Regulation on sanctions for the suppression of terrorism 2007-II; 'the Sanctieregeling 2007') authorises the Minister van Buitenlandse Zaken (Minister for Foreign Affairs; 'the Minister'), in agreement with the Minister for Justice ('Minister van Justitie') and the Minister for Finance ('Minister van Financiën'), to adopt a listing order with respect to persons or groups who, in his opinion, belong to the group of persons or groups subject to Resolution 1373 (2001). Where such a decision is taken, all resources belonging to such persons or groups are to be frozen (Article 2(2)); it is prohibited to provide financial services to them or for their benefit (Article 2(3)) or to make resources available to them directly or indirectly (Article 2(4)).

44. The referring court states that Article 2 of the Sanctieregeling 2007 gives effect to Resolution 1373 (2001) but does not refer to Regulation No 2580/2001, Common Position 2001/931 or any acts placing persons or groups on the Article 2(3) list.

Facts, procedure and questions referred

45. A, B, C and D reside in the Netherlands. By decisions of 8 June 2010 ('the designation orders'), the Minister designated them as natural persons to whom the Sanctieregeling 2007 applies. As a result, their resources were frozen. By decisions of 25 November 2010, 8 December 2010 and 10 January 2011 ('the contested decisions'), the Minister rejected the challenges which A, B, C and D brought against the designation orders. The contested decisions were based on the fact that A, B, C and D belong to the group of persons to which Resolution 1373 (2001) refers. The Minister took the following circumstances into account in order to reach that conclusion: (i) A, B, C and D had been involved in raising funds for the LTTE; (ii) the LTTE was included in the Article 2(3) list; and (iii) criminal proceedings had been initiated against A, B, C and D before the criminal law section of the rechtbank 's-Gravenhage (District Court, The Hague) on the ground of, inter alia, their alleged infringement of Articles 2(1), 2(2) and 3 of Regulation No 2580/2001.

46. In judgments of 21 October 2011, the rechtbank 's-Gravenhage (District Court, The Hague) concluded, concerning the conviction of three of the four appellants for breaching Regulation No 2580/2001, that B, C and D had carried out (fundraising) activities for the LTTE, but acquitted them of the charges of participating in a terrorist group. It took the view that the terrorism provisions in the Netherlands penal code implement Framework Decision 2002/475 and that the conflict between the Sri Lankan Government and the LTTE was a non-international armed conflict within the meaning

31 — Common Position of 29 May 2006 updating Common Position 2001/931 and repealing Common Position 2006/231 (OJ 2006 L 144, p. 25).

32 — Decision of 29 May 2006 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2005/930/EC (OJ 2006, L 144, p. 21).

33 — Implementing Regulation of 12 July 2010 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation (EU) No 1285/2009 (OJ 2010 L 178, p. 1). See Article 1 and item 2.17 of the list set out in the Annex.

34 — Implementing Regulation of 21 December 2015 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation (EU) 2015/1325 (OJ 2015 L 334, p. 1).

of Article 1 of Protocol II.[35] As a result, having regard to recital 11 of Framework Decision 2002/475, the charges against B, C and D did not involve any participation in a terrorist group. However, the rechtbank 's-Gravenhage (District Court, The Hague) convicted B, C and D for breaching Articles 2(1), 2(2) and 3 of Regulation No 2580/2001. It considered that it was bound by the Council's decision to include the LTTE on the Article 2(3) list. It noted furthermore that the decisions whereby the LTTE had been included in the Article 2(3) list and which were applicable at the time when the alleged offences were committed had not been challenged before the General Court. The rechtbank 's-Gravenhage (District Court, The Hague) therefore proceeded on the assumption that those decisions were valid. Appeals against those judgments were pending before the Gerechtshof Den Haag (Regional Court of Appeal, The Hague) at the time of writing.

47. In the meantime, the appeals of A, B, C and D against the contested decisions were rejected as unfounded by administrative law sections of the rechtbank Zwolle-Lelystad (District Court, Zwolle-Lelystad), the rechtbank 's-Gravenhage (District Court, The Hague) and the rechtbank Alkmaar (District Court, Alkmaar). A, B, C and D then appealed against those judgments to the referring court. They contest their involvement in raising funds for the LTTE. They submit that the criminal law section of the rechtbank 's-Gravenhage (District Court, The Hague) ruled that the LTTE is *not* a terrorist group because the LTTE's conflict with the Sri Lankan Government was a non-international armed conflict.

48. According to the referring court, the LTTE was put on the Article 2(3) list because of a series of attacks and kidnappings between 2005 and 2009. The referring court further states that those acts appear to have taken place in Sri Lanka and to have been connected with the conflict between the Sri Lankan Government and the LTTE. The referring court considers that the Minister had grounds for assuming that A, B, C and D had been involved in fundraising for the LTTE. However, it has doubts as to the validity of the inclusion of the LTTE in the Article 2(3) list at the time of the Minister's decisions of 25 November 2010, 8 December 2010 and of the two decisions of 10 January 2011. It is also uncertain whether A, B, C and D would have had locus standi to challenge the validity of Implementing Regulation No 610/2010 before the General Court.

49. Against that background, the referring court has asked the Court for guidance on the following questions:

'(1) Having regard to, inter alia, Article 47 of [the Charter], would an action for the annulment of Implementing Regulation No 610/2010, in so far as that regulation included the LTTE on [the Article 2(3) list], brought before the General Court by the appellants in the present proceedings in their own name on the basis of Article 263 TFEU, have been admissible beyond doubt?

(2)

(a) Having regard to, inter alia, recital 11 [of] Framework Decision 2002/475, can actions by armed forces during periods of armed conflict, within the meaning of international humanitarian law, be terrorist offences within the meaning of that Framework Decision?

(b) If the answer Question 2(a) is in the affirmative, can actions by armed forces during periods of armed conflict, within the meaning of international humanitarian law, be terrorist acts within the meaning of Common Position 2001/931 and Regulation No 2580/2001?

(3) Are the actions which formed the basis of Implementing Regulation No 610/2010, in so far as it included the LTTE on [the Article 2(3) list], actions by armed forces during periods of armed conflict within the meaning of international humanitarian law?

35 — See point 10 above.

(4) Having regard to, inter alia, the answers to Questions 1, 2(a), 2(b) and 3, is Implementing Regulation No 610/2010, in so far as the LTTE was thereby included on [the Article 2(3) list], invalid?

(5) If the answer to Question 4 is in the affirmative, does that invalidity then also apply to the earlier and later Council decisions updating [the Article 2(3) list], in so far as those decisions resulted in the inclusion of the LTTE on that list?'

50. A, B, C and D, the Netherlands, Spanish and United Kingdom Governments, the Council and the European Commission have submitted written observations. With the exception of the United Kingdom Government, the same parties presented oral argument at the hearing on 8 March 2016.

Assessment

Preliminary remarks

51. In 2011, the LTTE challenged its inclusion in the Article 2(3) list before the General Court, arguing inter alia that Regulation No 2580/2001 does not apply to situations of armed conflict because those conflicts (and thus also acts committed in that context) are governed by international humanitarian law only. The General Court rejected that plea [36] but annulled on other (procedural) grounds a series of implementing regulations similar to Implementing Regulation No 610/2010, in so far as those regulations concerned the LTTE. The Council's appeal against that judgment [37] does not target the General Court's analysis of the concept of 'terrorist acts' in relevant EU legislation. That analysis however concerns the main issue raised here by the referring court, namely whether EU restrictive measures against the LTTE are compatible with international humanitarian law. I shall therefore refer to it where appropriate.

52. Next, the assets freezing measures at issue in the main proceedings are based on the Sanctieregeling 2007, which implements Resolution 1373 (2001). The Sanctieregeling 2007 does not refer to any of the EU law acts on which guidance is sought in the questions referred for a preliminary ruling. Nor does it appear that A, B, C and D are themselves included in the Article 2(3) list. In these circumstances, are Questions 2 to 5 relevant for settling the dispute in the main proceedings?

53. It is settled case-law that the Court may refuse to rule on a question referred for a preliminary ruling by a national court if it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose. [38]

54. I see no reason however to apply that case-law here. On the one hand, it is common ground that the assets freezing measures at issue were imposed on A, B, C and D because they had raised funds for the LTTE, which appears on the Article 2(3) list. As I have explained, that list implemented in what was then Community law the CFSP aspects of Common Position 2001/931, which itself implemented Resolution 1373 (2001). On the other hand, as the order for reference states, one of the arguments before the referring court for challenging those measures is that the LTTE cannot be regarded as a terrorist group and was thus erroneously placed on the Article 2(3) list. The referring court explains

36 — Judgment of 16 October 2014, *LTTE* v *Council*, T-208/11 and T-508/11, EU:T:2014:885, paragraph 83. The lodging of the applications by the LTTE before the General Court (on 11 April and 28 September 2011 respectively) postdates both the designation orders (8 June 2010) and the contested decisions (25 November 2010, 8 December 2010 and 10 January 2011).

37 — *Council* v *LTTE*, C-599/14 P (pending before the Court), in which I delivered my Opinion on 22 September 2016 .

38 — See, most recently, judgment of 8 June 2016, *Hünnebeck*, C-479/14, EU:C:2016:412, paragraph 30 and the case-law cited.

that the assets freezing measures at issue would have to be annulled if that argument succeeds, and that A, B, C and D might in such a case also be entitled to compensation for all periods during which the LTTE were included in the Article 2(3) list. That is in my view sufficient to conclude that Questions 2 to 5 bear a link with the main proceedings.

55. Although the referring court divides the second question into two parts, that question in reality seeks guidance from the Court on the following issue: taking into account recital 11 of Framework Decision 2002/475, do 'terrorist acts' within the meaning of Common Position 2001/931 and of Regulation No 2580/2001 potentially cover actions by armed forces during periods of armed conflict within the meaning of international humanitarian law, such as the conflict which opposed the LTTE and the Sri Lankan Government? In answering that question, I shall proceed on the basis that that conflict was a non-international armed conflict within the meaning of international humanitarian law.[39] That implies, in particular, that it was not a situation of internal disturbances and tensions to which neither Common Article 3 of the Geneva Conventions nor Protocol II applies. In making these assumptions, I rely on the referring court's explanation that the Minister and the rechtbank 's-Gravenhage (District Court, The Hague) found the conflict to have been a non-international armed conflict within the meaning of Article 1 of Protocol II. That is furthermore the Council's position in the present proceedings.

56. The third and fourth questions essentially concern the validity of Regulation No 610/2010. Assuming that the answer to the second question (as summarised in the previous point) is 'no', did the Council erroneously regard the attacks and kidnappings which the LTTE committed between 2005 and 2009 as 'terrorist acts' justifying the insertion of that group on the Article 2(3) list? What if, on the contrary, the answer to the question mentioned in the previous point is 'yes'? The fifth question arises only if Implementing Regulation No 610/2010 is invalid.

57. The first question is clearly distinct from the other questions and I shall therefore address it separately. It concerns admissibility and thus has to be examined first.

Would a direct action by A, B, C and D to annul Regulation No 610/2010 have been, beyond doubt, admissible (first question)?

58. A, B, C and D have not brought a direct action before the General Court under Article 263 TFEU seeking the annulment of Implementing Regulation No 610/2010. They have instead invoked the invalidity of that regulation before the Netherlands courts. The referring court asks whether they may do so. If they may not, there is no need to consider the questions regarding the validity of Implementing Regulation No 610/2010.[40]

59. The general rule under EU law is that, in proceedings before the national courts, every party has the right to plead the illegality of the provisions contained in EU acts which serve as the basis for a decision or act of national law relied upon against them and to ask the national court to refer that question to the Court.[41] Whilst national courts may conclude that an EU act is valid, they cannot declare it to be invalid.[42]

39 — Otherwise that question would be hypothetical.

40 — See, in that regard, judgment of 17 February 2011, *Bolton Alimentari*, C-494/09, EU:C:2011:87, paragraph 21.

41 — Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756 ('the judgment in *Pringle*'), paragraph 39 and the case-law cited.

42 — Judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 14 and 15. See also judgments of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraphs 27 and 30, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625 ('the judgment in *Inuit I*'), paragraph 95.

60. There is however an exception to that general rule. In its judgment in *TWD*, the Court held that where a party has a clear right under what is now Article 263 TFEU to bring proceedings to challenge an EU measure directly before the courts of the European Union and allows the time limit set down by that article to expire, he cannot later bring an 'indirect' challenge to the validity of that measure by calling its lawfulness into question before a national court and thereby have that issue brought before this Court under the preliminary ruling procedure.[43] In *Pringle*, the Court held that if it is *beyond doubt* that that party *would* have had locus standi under Article 263 TFEU, the exception will apply.[44] I shall refer to this as 'the *TWD* exception'. Where it applies and a party did not bring a direct action within the prescribed period, the EU act becomes definitive as against that person. In that way, acts producing legal effects cannot be called in question indefinitely[45] and legal certainty is thereby ensured.[46]

61. The *TWD* exception was established before the entry into force of the Treaty of Lisbon. At that time, the fourth paragraph of Article 230 EC set out when individuals had standing before the Union Courts.

62. In that context, the order for reference draws attention to the Court's judgment in *E and F*.[47] That case concerned two individuals who had challenged the legality of including a group (of which they were allegedly members) on the Article 2(3) list. Applying the fourth paragraph of Article 230 EC and examining the possible application of the *TWD* exception, the Court concluded that E and F did *not* have an indisputable right to bring a direct action because: (i) they themselves were not on the Article 2(3) list; (ii) the order for reference did not establish that their position within the group would have conferred on them the power to represent it before the General Court; and (iii) they were not indisputably 'directly and individually concerned' by the listing: inclusion of the group on that list was of general application and served, together with Regulation No 2580/2001, to impose an obligation to comply with specific restrictive measures on an indeterminate number of persons.[48]

63. However, although judgment in that case was delivered in June 2010, it related to matters arising before the Treaty of Lisbon came into force. The referring court is uncertain whether, after the entry into force of that treaty, the judgment in *E and F* continues to mean that A, B, C and D can invoke the invalidity of Implementing Regulation No 610/2010 before the Netherlands courts.

64. Pursuant to the fourth paragraph of Article 263 TFEU, an individual may now institute proceedings against (i) an act addressed to him ('the first limb'); (ii) an act which is of direct and individual concern to him ('the second limb'); and (iii) a regulatory act which is of direct concern to him and does not entail implementing measures ('the third limb').

65. The first two limbs of the fourth paragraph of Article 263 TFEU correspond to the fourth paragraph of Article 230 EC. The Court has confirmed that the conditions of 'direct concern' and 'individual concern' in that provision continue to have the same meaning as before the Treaty of Lisbon.[49] Thus, the condition of 'direct concern' means that the contested measure must (i) directly affect the legal situation of the individual and (ii) leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting

43 — See judgment of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90 ('the judgment in *TWD*'), paragraphs 17 and 18. That case involved a Commission decision addressed to a Member State that referred expressly to the recipient of the individual aid (TWD); the Member State had communicated the decision to that recipient.

44 — See judgment in *Pringle*, paragraph 41 and the case-law cited.

45 — See judgment of 15 February 2001, *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 29 and the case-law cited.

46 — Judgment in *TWD*, paragraph 16.

47 — Judgment of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382 ('the judgment in *E and F*').

48 — Judgment in *E and F*, paragraphs 49 to 52 and the case-law cited.

49 — Judgment in *Inuit I*, paragraphs 70 and 71.

from EU rules without the application of other intermediate rules.[50] The condition of individual concern is satisfied 'only if [the contested act] affects [the claimants] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.[51]

66. By widening the access to the General Court through the addition of a third limb,[52] the Treaty of Lisbon sought to guarantee effective judicial protection of natural or legal persons who, having no individual interest (and despite being directly concerned by the act in question), could otherwise obtain judicial review of a regulatory act, for which no implementing measures were required, only by infringing its provisions and then pleading that those provisions were unlawful in proceedings before national courts.[53] The third limb of the fourth paragraph of Article 263 TFEU must thus be interpreted in a way that ensures this higher degree of judicial protection. It cannot be the case that individuals should enjoy *less* protection than that enjoyed before the entry into force of the Treaty of Lisbon.

67. How, therefore, should the *TWD* exception be construed now that access to the EU Courts has been widened?

68. In *Pringle*, the Court confirmed that the *TWD* exception continued to be relevant after the entry into force of the Treaty of Lisbon. It referred to standing under the fourth paragraph of Article 263 TFEU without distinguishing between the different bases for such standing.[54] The Court said that 'it is not evident that the applicant in the main proceedings had beyond doubt standing to bring an action for the annulment of [a decision amending the Treaties] under Article 263 TFEU'.[55] In the circumstances, that was an obvious conclusion.

69. In my opinion, there is no good reason for construing the *TWD* exception differently in relation to the third limb from the way that it applies to the first and second limbs, or for thinking that it should not also apply to the third limb.

70. The *TWD* exception is very limited in its scope – if there is any doubt as to admissibility, the exception does *not* apply. Whether there is 'doubt' in any given case is a question that must be capable of being resolved in practice without any undue complexity, since a lawyer representing an individual must be able to advise his client with certainty as to what route his challenge should take. He will also require to be able to act quickly, since he will have to be alert to the two-month time limit for bring proceedings under Article 263 TFEU. Matters must, in my view, depend on the state of the case-law and the position of the individual concerned at the moment when he needs to decide whether to launch a direct action.

50 — See, inter alia, judgments of 5 May 1998, *Glencore Grain* v *Commission*, C-404/96 P, EU:C:1998:196, paragraph 41; of 29 June 2004, *Front national* v *Parliament*, C-486/01 P, EU:C:2004:394, paragraph 34; of 10 September 2009, *Commission* v *Ente per le Ville vesuviane and Ente per le Ville vesuviane* v *Commission*, C-445/07 P and C-455/07 P, EU:C:2009:529, paragraph 45 and the case-law cited; and of 17 September 2015, *Confederazione Cooperative Italiane and Others* v *Anicav and Others*, C-455/13 P, C-457/13 P and C-460/13 P, EU:C:2015:616, paragraph 46 and the case-law cited.

51 — Judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284 ('the judgment in *T & L Sugars*'), paragraph 63 and the case-law cited.

52 — Judgment in *Inuit I*, paragraphs 55 to 57; see also paragraphs 70 and 71.

53 — Judgments in *T & L Sugars*, paragraph 29 and the case-law cited, and of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852 ('the judgment in *Telefónica*'), paragraph 27. See also the 'Final report of the discussion circle on the Court of Justice', CONV 636/03, paragraph 21.

54 — Judgment in *Pringle*, paragraph 41 and the case-law cited. See also judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraphs 46 to 49 (the reasoning there suggests that the Court implicitly accepted the application of the *TWD* exception as regards the third limb).

55 — Judgment in *Pringle*, paragraph 42. The issue was whether that decision had or should have been adopted in accordance with the simplified revision procedure in Article 48(6) TEU.

71. If the individual was plausibly justified in having doubts as to the admissibility of a direct action, the *TWD* exception will not apply — and the Court should err on the side of allowing the challenge as to validity to be made via the Article 267 TFEU procedure. This will guarantee effective judicial protection, as Article 47 of the Charter requires.

72. That conclusion also makes sense in terms of case management: it is not in the interests of the EU judicature, by applying the *TWD* exception too widely, to encourage a flood of precautionary direct actions that the General Court will need to process and probably duly declare inadmissible. It is preferable that the national courts filter out challenges to validity that do not prima facie seem convincing.

73. Applying that reasoning to the present case, the referring court asks whether an action brought by A, B, C and D before the General Court would have been admissible 'beyond doubt'. For the reasons outlined above, that is the correct test to apply. To put the point another way, the decision of A, B, C and D to bring their action before the national court rather than before the EU judicature will be shown to have been vindicated either (i) if it is clear that they had no standing to bring proceedings on the basis of Article 263 TFEU or (ii) if they were justified in having doubts in that regard.

74. So far from there being doubt as to whether A, B, C and D could have challenged Implementing Regulation No 610/2010 on the basis of either the first or the second limb of the fourth paragraph of Article 263 TFEU, it seems clear that the General Court would have dismissed such an action as inadmissible. No EU act has been addressed to A, B, C and D. Nor were they indisputably 'directly and individually concerned' by the listing in Implementing Regulation No 610/2010. If an applicant does not satisfy one or other of those two conditions, he cannot challenge the act.[56] There is nothing in Implementing Regulation No 610/2010 that allows A, B, C and D to be identified. Whilst that regulation might very well concern other persons individually,[57] it does not identify who is a member of or in any other manner connected with the groups and entities listed in its Annex. A, B, C and D would therefore have been unable to demonstrate that they were 'individually' concerned.

75. With respect to the third limb, A, B, C and D were in my view justified in having doubts as to the admissibility of an action seeking annulment of Implementing Regulation No 610/2010 on the basis of that limb ('a regulatory act which is of direct concern to them and does not entail implementing measures').

76. Implementing Regulation No 610/2010 is a regulatory act, that is to say, an act of general application, other than a legislative act[58] (meaning legal acts adopted by legislative procedure[59]). It was adopted on the basis of Article 2(3) of Regulation No 2580/2001, which provides for Article 2(3) lists to be established, reviewed and amended by the Council, acting by unanimity and in accordance with Article 1(4), (5) and (6) of Common Position 2001/931. That procedure was not a legislative procedure. Implementing Regulation No 610/2010 also applied in part to an indeterminable class of individuals and legal persons:[60] as a result of the LTTE's listing, all persons have to respect the prohibitions laid down in Article 2(1)(b) and 2(2) of Regulation No 2580/2001.[61] Thus, even if it individually concerned the LTTE, it was clearly an act of general application in relation to A, B, C and D.[62]

56 — Judgment in *Inuit I*, paragraphs 75 and 76.

57 — Such as the persons and entities named in the Article 2(3) list.

58 — Judgment in *Inuit I*, paragraph 60.

59 — Article 289(3) TFEU.

60 — See, for example, judgment of 15 June 1993, *Abertal and Others* v *Commission*, C-213/91, EU:C:1993:238, paragraph 19.

61 — See points 36 and 37 above. See also judgment in *E and F*, paragraph 51 and the case-law cited.

62 — See, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 241 to 244, and of 23 April 2013, *Gbagbo and Others* v *Council*, C-478/11 P to C-482/11 P, EU:C:2013:258, paragraph 56.

77. It is therefore plain that Implementing Regulation No 610/2010 was of concern to A, B, C and D. Was it beyond doubt that it was of direct concern to them and that it entailed no implementing measures?

78. The concept of direct concern has its theoretical basis, in part at least, in the notion of causation. There must be a direct causal link between the act complained of and the alleged loss or injury justifying the granting of a remedy. [63] The policy reasons underlying the requirement are clear: if an additional measure is required in order to give full effect to the act complained of, it is that measure which must be challenged before the courts and not the original act.

79. In point 65 above, I set out the test in the form which the Court has used in its more recent case-law in order to determine the existence of direct concern. It is not, however, the sole variant to be found in the case-law. In *Les Verts*, the Court held that a measure satisfied the test where the measures at issue constituted a complete set of rules which were sufficient in themselves 'and which require[d] no implementing provisions'. [64] That variant is reproduced in substantively similar form in the third limb. Although the incorporation of the word 'and' is arguably tautological, the intention appears plain. In order to establish whether a measure is of direct concern to an applicant in the position of A, B, C and D, it is necessary to determine whether it entails implementing measures. [65]

80. The referring court notes that, in its view, it is difficult to draw precise guidance from the Court's recent case-law in relation to the exact meaning and application of the term 'implementing measures' in the present case. Whilst it is true that that case-law does not seek to define that expression in terms, it seems to me nonetheless that there are two elements in it from which some guidance can be drawn.

81. First, the Court held in the judgment in *T & L Sugars* that — in a case involving national measures required in order to implement two Commission implementing regulations — the precise nature of those measures had no bearing on their quality as 'implementing measures'. It went on to observe that that conclusion was not called into question by their allegedly mechanical nature. The test is rather whether the EU measures produce their legal effects vis-à-vis the applicant only through the intermediary of acts taken by (in that case) national authorities: if so, those acts constitute implementing measures within the meaning of the third limb. [66]

82. Second, the Court held in the judgment in *Telefónica* that, in order to determine whether a regulatory act involves such measures, the matter should be assessed by reference to the position of the person concerned. It is irrelevant whether the act in question entails implementing measures with regard to other persons and reference should be made exclusively to the subject matter of the action. [67]

83. The matter must therefore be determined by having regard to the position of A, B, C and D alone, in the context of the subject matter of their action before the national court, namely Implementing Regulation No 610/2010 and, given the manifest link between the two regulations, Regulation No 2580/2001.

63 — See, to that effect, judgment of 11 July 1984, *Commune de Differdange and Others* v *Commission*, 222/83, EU:C:1984:266, paragraphs 10 to 12.

64 — Judgment of 23 April 1986, *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 31.

65 — See, in that regard, judgment in *Telefónica*, paragraphs 27 to 29.

66 — See paragraphs 40 to 42. The mechanism in question is set out at paragraph 3 of the judgment, which reproduces paragraphs 39 to 45 of the General Court's judgment under appeal. T & L had argued that the only role left to the Member States was to act merely as a 'mailbox' (paragraph 18). The Commission maintained that the national measures in question were important and necessary (paragraph 24).

67 — See paragraphs 30 and 31.

84. Applying the above to the situation of A, B, C and D in the main proceedings, can it be said that A, B, C and D were 'directly affected by' Regulation No 2580/2001 in conjunction with Implementing Regulation No 610/2010? Plainly, they were not specifically affected, since their name does not appear on the Article 2(3) list.[68] But it can at least be argued that they were affected in the sense that the effect of a party being included on that list is that no person subject to EU law may collect or make funds available for their benefit. Such a conclusion would not necessarily be inconsistent with either the legislation or the case-law. On that basis, it might be argued that they should have challenged Implementing Regulation No 610/2010 directly before the General Court under the third limb of Article 263 TFEU. The difficulty such an approach presents is that (so far as is possible to tell from the facts before the Court) A, B, C and D did not become aware that their funds had been frozen on the basis of the Article 2(3) list until their inclusion on the designation orders made by the Minister. Nothing adverse had happened with regard to them until that point and there was accordingly nothing that they might wish to challenge. I cannot therefore say that they were entitled 'beyond doubt' to bring proceedings before the General Court on this basis.

85. Alternatively, is there — as the referring court suggests — an argument that, since Article 9 of Regulation No 2580/2001 requires the Member States to determine the sanctions to be imposed where the provisions of the regulation are infringed, this means that implementing measures are indeed required? If that is the case, the situation would be clear: A, B, C and D could not be required to bring proceedings before the General Court. Indeed, they would appear to have no standing on any basis to do so. Such an argument would reflect the text of the legislation but, at least arguably, not the case-law cited in point 82 above, which suggests that it is necessary to have regard to the specific circumstances of the case and not to the general circumstances surrounding it. Here, it is not the issue of sanctions which A, B, C and D seek to challenge in their action before the national courts. Rather it is their inclusion in a decision adopted pursuant to the Sanctieregeling 2007. Once again, I cannot say that the matter is beyond doubt.

86. What, then, is the position as regards the Sanctieregeling 2007 itself? The referring court states that Article 2 of the Sanctieregeling 2007 was enacted in order to give effect to Resolution 1373 (2001) and makes no reference to Regulation No 2580/2001, Common Position 2001/931 or any acts placing persons or groups on the Article 2(3) list. Nonetheless, the order for reference goes on to record that the Minister also expressly based his designation orders on the premiss that the LTTE is a terrorist group because it is included in the Article 2(3) list and on the fact that criminal proceedings had been initiated against A, B, C and D on the ground of, inter alia, their alleged infringement of Articles 2(1), 2(2) and 3 of Regulation No 2580/2001.[69] Can it on that basis be said that the Sanctieregeling 2007, and orders made under it, represent an implementing measure for the purposes of Article 263 TFEU? Putting matters neutrally, the position seems once more to me to be unclear and, accordingly, not beyond doubt.

87. Most of the study of the law and much of its application has to do with certainty. That is the aim which the law strives to achieve, since those who are subject to it must be clear what their rights and obligations are. But in using the expression 'beyond doubt' in its case-law, the Court has recognised the reality that that ideal may on occasion not be met. The *TWD* exception applies, in the interests of legal certainty, precisely (and exclusively) in situations where there *is* no doubt about whether an action brought before the General Court by this particular private party would have been admissible. In my view, this is not such a case. It follows that the *TWD* exception does not apply.

68 — It is worth noting in that regard that the Court held in the *T & L Sugars* judgment that since the applicants were not included specifically in the parties to which the legislation at issue applied (the applicants were cane sugar refiners and the legislation covered sugar producers) their legal situation was not directly affected by the legislation and it was not of direct concern to them (see paragraph 37).

69 — See point 45 above.

88. I therefore conclude, in answer to the first question, that a direct action by A, B, C and D challenging the validity of Implementing Regulation No 610/2010, in so far as that regulation concerned LTTE, would not beyond doubt have been admissible. It follows that A, B, C and D were justified in raising the invalidity of that regulation before the national court and asking that the request for a preliminary ruling be made pursuant to Article 267 TFEU.

Interpretation of Common Position 2001/931 and Regulation No 2580/2001 (the second to fifth questions)

The Court's jurisdiction to interpret Common Position 2001/931

89. The question arises first whether the Court has jurisdiction to interpret Common Position 2001/931, which is a CFSP act. As a matter of principle, the second subparagraph of Article 24(1) TEU excludes the Court's jurisdiction in this area, with the exception of its jurisdiction to monitor compliance with Article 40 TEU[70] and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU. Article 275 TFEU states in particular that the Court has jurisdiction to 'rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union', such as the CFSP measures which classified the LTTE as a terrorist group or organisation.[71]

90. That does not prima facie cover interpretation or review of the legality of such acts in a preliminary ruling. However, I share the position espoused by Advocate General Wathelet in his recent Opinion in *Rosneft* that, in the complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, the review of legality mentioned in the last sentence of the second subparagraph of Article 24(1) includes not only actions for annulment but also the preliminary ruling procedure.[72] The European Union's legal order, which is based on the rule of law,[73] has to ensure, within the scope of EU law, access to an effective remedy now guaranteed by the first subparagraph of Article 47 of the Charter. Preliminary rulings in cases involving validity play a pivotal role in this respect for persons who, like the applicants in the main proceedings, may suffer the harmful consequences of CFSP measures not addressed to them individually and who are therefore not in principle entitled to seek annulment of those measures before EU Courts on the basis of the second paragraph of Article 275 TFEU. As Advocate General Wathelet argues, moreover, the Court's power to review the legality of restrictive measures against natural or legal persons adopted on the basis of Chapter 2 of Title V TEU, in the context of a preliminary ruling, necessarily also involves the power to interpret such acts.[74]

91. As regards the present proceedings, the LTTE was not regarded as a terrorist group or organisation under Common Position 2001/931 until Common Position 2006/380 became effective. However, Common Position 2006/380 merely updated the list of persons and entities subject to restrictive measures under Common Position 2001/931. I therefore regard Common Position 2001/931, as amended by Common Position 2006/380, as a decision 'providing for restrictive measures against natural or legal persons on the basis of Chapter 2 of Title V of the [TEU]', within

70 — That provision, which concerns relations between the CFSP and other EU competences, is not relevant in the present case.

71 — See point 42 of this Opinion.

72 — Opinion of Advocate General Wathelet in *Rosneft*, C-72/15, EU:C:2016:381, points 38 and 62 to 66.

73 — Article 21(1) TEU.

74 — Opinion of Advocate General Wathelet in *Rosneft*, C-72/15, EU:C:2016:381, points 73 to 76.

the meaning of the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU. Consequently, the Court has jurisdiction to answer the second question in so far as it seeks interpretation of Common Position 2001/931 in addition to Regulation No 2580/2001.

The concept of 'terrorist act' in Common Position 2001/931 and Regulation No 2580/2001

92. The concept of 'terrorist act' in Article 1 of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001 has to be interpreted taking into account the wording, objectives and context of those provisions; the origins of that expression might also provide information relevant to its interpretation. [75]

93. The LTTE has been included in the Article 2(3) list on the basis that it has committed acts that are defined as 'terrorist acts' in Regulation No 2580/2001, which itself refers to the definition contained in Article 1(3) of Common Position 2001/931. [76] There is nothing in the wording of either EU measure suggesting that that concept may not cover actions committed during an armed conflict and which are governed by international humanitarian law.

94. Nor do the objectives of Common Position 2001/931 and Regulation No 2580/2001 support such an interpretation. These measures essentially pursue a preventive objective: they aim to combat terrorism by cutting it off from its financial resources through freezing the funds and economic resources of persons or entities suspected of involvement in terrorist activities or activities linked to terrorism. [77] Protecting those objectives is as important when acts are committed during armed conflicts as in other circumstances.

95. A reading of Common Position 2001/931 and Regulation No 2580/2001 on their own therefore suggests that a broad interpretation of the concept of 'terrorist acts' is appropriate. Does such an interpretation fall to be qualified having regard to the legislation and international law context in which they must be construed?

Framework Decision 2002/475

96. The referring court asks specifically (in point (a) in the second question) whether recital 11 of Framework Decision 2002/475 is relevant for interpreting the concept of 'terrorist act' in Common Position 2001/931 and Regulation No 2580/2001. Does the fact that that recital purports to exclude acts by armed forces during armed conflicts from the scope of the Framework Decision [78] have any consequence on the scope of that common position and regulation?

97. In my view, the answer is 'no'.

98. Framework Decision 2002/475 harmonises the criminal laws of the Member States and aims at approximating the definition of 'terrorist offences' in the Member States. [79] Its scope and objectives are thus different from those of Common Position 2001/931 and Regulation No 2580/2001, which are concerned with preventive measures against terrorism and do not seek to accompany or support national criminal law procedures. [80] The wording of recital 11 (especially the phrase 'are not governed

75 — See judgments in *Inuit I*, paragraph 50, and *Pringle*, paragraph 135.

76 — Article 1(4) of Regulation No 2580/2001.

77 — See judgment of 15 November 2012, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, C-539/10 P and C-550/10 P, EU:C:2012:711 ('the judgment in *Al-Aqsa*'), paragraph 67 and the case-law cited.

78 — See point 40 above.

79 — Recital 6 of Framework Decision 2002/475; see also Article 1(1).

80 — See judgment in *Al-Aqsa*, paragraph 67 and the case-law cited.

by this Framework Decision') itself makes it clear that, as the Commission submits, that recital's sole purpose is to clarify that Framework Decision 2002/475 does not govern 'actions' of armed forces during a period of armed conflict. Recital 11 of Framework Decision 2002/475 does not therefore provide any guidance on the meaning of 'terrorist act' in Common Position 2001/931 and Regulation No 2580/2001.[81] That position is, in any event, consistent with settled case-law according to which a recital in the preamble of an EU act has no binding legal force and thus cannot be used to derogate from the actual provisions of that act or for interpreting them in a manner clearly contrary to their wording.[82] Recital 11 does not refer specifically to any provision in the enacting terms of Framework Decision 2002/475 and can therefore under no circumstances have any impact on how to interpret other EU acts.

Interpretation in conformity with international law

99. That being so, it is still necessary to consider Article 3(5) TEU, according to which the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law, including customary international law, which is binding upon the institutions of the European Union.[83]

100. Furthermore, it is settled case-law that EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law.[84] Although the Court has mainly applied this requirement to agreements formally binding upon the Union,[85] the requirement has a broader scope. In *Poulsen and Diva Navigation*, the Court held 'that the [European Union] must respect international law in the exercise of its powers and that, consequently, [the EU law provision which it had to interpret in that case] must be interpreted, and its scope limited, in the light of the relevant rules of the [customary] international law of the sea'.[86] The Court went a step further in *Intertanko*.[87] It held there that the fact that an international agreement binds all Member States but not the EU 'is liable to have consequences for the interpretation … of the provisions of secondary law' even if the agreement does not codify customary rules of international law, and that it is incumbent upon it to interpret provisions of secondary law 'taking into account' the agreement in question.[88] The Court justified that by 'the customary principle of good faith' and the principle of sincere cooperation in what is now Article 4(3) TEU. The objective is to avoid, so far as possible, interpreting EU law in a manner that makes it impossible for the Member States to fulfil their international law commitments.

101. It is therefore necessary to examine first whether Common Position 2001/931 and Regulation No 2580/2001 can be interpreted in a manner consistent with the relevant rules of international law. If the answer is 'yes', there is no need to ascertain whether these rules are among those in the light of which the Court may review the legality of measures adopted by the EU institutions.[89]

81 — See, to that effect, judgment of 16 October 2014, *LTTE* v *Council*, T-208/11 and T-508/11, EU:T:2014:885, paragraph 73. As I have said, that point has not been appealed by the Council (see point 51 above).

82 — See, for example, judgment of 11 April 2013, *Della Rocca*, C-290/12, EU:C:2013:235, paragraph 38 and the case-law cited.

83 — See, to that effect, judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 101 and the case-law cited.

84 — See, for example, judgment of 15 March 2012, *SCF Consorzio Fonografici*, C-135/10, EU:C:2012:140, paragraph 51 and the case-law cited. See also the Opinion of Advocate General Mengozzi in *Diakite*, C-285/12, EU:C:2013:500, points 23 and 24.

85 — See, for example, judgments of 10 September 1996, *Commission* v *Germany*, C-61/94, EU:C:1996:313, paragraphs 52 to 58, and of 1 April 2004, *Bellio F.lli*, C-286/02, EU:C:2004:212, paragraph 33.

86 — Judgment of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453, paragraph 9. See also, for example, judgment of 15 January 2015, *Evans*, C-179/13, EU:C:2015:12, paragraph 35.

87 — Judgment of 3 June 2008, *The International Association of Independent Tanker Owners and Others*, C-308/06, EU:C:2008:312.

88 — Paragraph 52.

89 — Reviewing the validity of EU secondary law on grounds of international law (either international agreements or customary rules of international law) remains exceptional as it is subject to very strict conditions. Concerning international agreements, see, most recently, judgment of 4 February 2016, *C & J Clark International*, C-659/13 and C-34/14, EU:C:2016:74, paragraph 84. Concerning customary rules of international law, see judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraphs 101, 102 and 107.

102. A distinction has to be made between, on the one hand, the rules of international humanitarian law and, on the other hand, the rules of international law governing counter-terrorism or hostage-takings. I shall examine in this Opinion only those sources of international law to which reference is made either in the order for reference or in the parties' submissions.

– International humanitarian law

103. Regarding, first, international humanitarian law, the Court is entitled to assume that the Geneva Conventions and their Protocols are relevant as the LTTE and the Sri Lankan Government were engaged in an armed conflict at the material time. Furthermore, all Member States are parties to these Conventions and Protocols.[90] The Court is therefore under a duty to take them into account when interpreting Common Position 2001/931 and Regulation No 2580/2001, regardless of whether those Conventions and Protocols codify customary rules of international law.[91]

104. I reject the submission made by the applicants in the main proceedings that, because the LTTE was a non-State armed force engaged in a non-international armed conflict in Sri Lanka, international humanitarian law precluded the attacks and kidnappings which it committed between 2005 and 2009 from being regarded as 'terrorist acts'. First, Common Article 3 of the Geneva Conventions, which specifically governs non-international conflicts, prohibits violence to life and person at any time and in any place whatsoever, in particular murder of all kinds, and the taking of hostages when committed against 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "*hors de combat*" by sickness, wounds, detention, or any other cause'.[92] Although implicitly, that provision clearly prohibits acts of terrorism which may produce such consequences.[93]

105. Article 4(2)(d) of Protocol II is more explicit when it states that participants in a non-international armed conflict may not at any time and in any place whatsoever commit acts of terrorism against persons who do not take a direct part or who have ceased to take part in hostilities.[94] Nor may they, under Article 13(2) of Protocol II, commit acts or make threats of violence the primary purpose of which is to spread terror among the civilian population.

106. Protocol I applies primarily to international armed conflicts[95] and therefore does not appear immediately relevant to the present proceedings. Even if that protocol applied to the conflict between the Sri Lankan Government and the LTTE,[96] however, the conclusion would not be different as Protocol I also prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'.[97] International humanitarian law thus 'prohibits acts of terror in both international and non-international armed conflict, irrespective of whether they are committed by State or non-State parties'.[98]

90 — See point 4 above.

91 — See point 100 above, and the case-law cited.

92 — Common Article 3(1)(a) and (b). In its judgment of 27 June 1986 in *Nicaragua* v. *United States*, the International Court of Justice judged that the rules contained in Common Article 3 'constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts' and which reflect 'elementary considerations of humanity' (ICJ Reports, 1984, p. 392, paragraph 218).

93 — See, in that regard, Gasser, H.-P., 'Acts of terror, "terrorism" and international humanitarian law', *International Review of the Red Cross*, 2002, p. 560.

94 — As regards international armed conflicts, see Article 51(2) of Protocol I and Article 33(1) of the Fourth Geneva Convention.

95 — See Article 1(3), which refers to Common Article 2 of the Geneva Conventions.

96 — That would be so if the conflict constituted an armed conflict in which 'peoples [were] fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' (Article 1(4) of Protocol I).

97 — Article 51(2) of Protocol I.

98 — Pfanner, T., 'Scope of Application, Perpetrators of Terror, and International Humanitarian Law', in: Fernández-Sánchez (Ed.), *International Legal Dimensions of Terrorism* (Martinus Nijhoff Publishers, 2009), p. 289.

107. What is the position as regards actions directed at persons actively taking part in an armed conflict or against military objectives and which do not spread terror among the civilian population? Combatants in an international armed conflict have the right to participate directly in hostilities and therefore enjoy immunity with respect to their actions as combatants provided they comply with international humanitarian law. By contrast, participants in a non-international armed conflict do not enjoy immunity even when their actions are in conformity with Common Article 3 of the Geneva Conventions and Articles 4(2)(d) and 13(2) of Protocol II.[99] So, for example, a soldier of a non-State armed force who, without breaching international humanitarian law, killed an enemy combatant belonging to the government forces in a non-international conflict can be tried for murder. That results from the principles of sovereignty and non-intervention in domestic affairs.[100] Accordingly, participants in a non-international conflict do not escape repressive or preventive measures which a State may find appropriate in the circumstances,[101] provided it has jurisdiction for imposing those measures and respects applicable counter-terrorism conventions and other rules of international law binding upon it.[102]

108. It has been argued that characterising actions of participants in a non-international armed conflict as 'terrorist' might reduce their incentive to comply with international humanitarian law, on the basis that such participants will have little reason to comply with (in particular) Common Article 3 of the Geneva Conventions and Articles 4(2)(d) and 13(2) of Protocol II if such compliance is not ultimately rewarded in terms of criminal liability.[103]

109. It is true that the protection offered by Article 6(5) of Protocol II is relatively weak: that provision is drafted in purely programmatic terms[104] ('… shall endeavour to grant the broadest possible amnesty …') and thus offers no reward comparable to the 'combatant' immunity for those who respect international humanitarian law during the hostilities.[105] The fact that international humanitarian law does not impose immunity might undermine the effectiveness of that law and increase its enforcement costs. However, this (allegedly) less than optimal state of international law is not as such capable of altering international humanitarian law as it stands today.[106]

110. In any event, even assuming that the concept of 'terrorist act' has a narrower meaning in the context of a non-international armed conflict than it has in peacetime, the applicants in the main proceedings have neither demonstrated nor even argued that the attacks and kidnappings which formed the basis of LTTE's inclusion on the Article 2(3) list did not, in whole or in part, constitute violations of international humanitarian law. In particular, there has been no suggestion that none of

99 — What all the authorities in power are required to do is endeavour to grant those participants the broadest possible amnesty at the end of the hostilities (Article 6(5) of Protocol II). 'In non-international armed conflict, combatant and prisoner of war status are not provided for, because States are not willing to grant members of armed opposition groups immunity from prosecution under domestic law for taking up arms' (ICRC, 'The relevance of IHL in the context of terrorism', www.icrc.org/eng/resources/documents/faq/terrorism-ihl-210705.htm, accessed 4 July 2016).

100 — Article 3(1) of Protocol II states that 'nothing in [that Protocol] shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State'.

101 — Those measures can address actions which the State regards as terrorism but not only such actions (for example, high treason or espionage might also be targeted).

102 — See also 2016 ICRC Commentary, Common Article 3, paragraph 514, and points 111 to 121 below.

103 — See, inter alia, Pejic, J., 'Terrorist Acts and Groups: A Role for International Law?', *British Yearbook of International Law*, 2004, pp. 75 and 76, and Sassóli, M., 'Terrorism and War', *Journal of International Criminal Justice*, 2006, p. 970. As Sassóli notes, 'if every act committed against State forces is "terrorist", as some suggest, this weakens [international humanitarian law] and the willingness of armed groups to comply with IHL'. See Sassóli, M., 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts', in: Ben-Naftali, O. (Ed.), *International Humanitarian law and International Human Rights Law* (Oxford, OUP 2011, p. 37).

104 — By that expression, I mean that the provision merely sets out objectives and therefore does not aim to create rights or obligations for individuals.

105 — The Diplomatic Conference which adopted Protocol II rejected the proposal made by the International Committee of the Red Cross (ICRC) to require courts, in case of prosecutions carried out against participants to a non-international armed conflict, to take into consideration, to the greatest possible extent, the fact that the accused person respected the provisions of Protocol II. See ICRC, Draft Additional Protocols to the Geneva Conventions of 12 August 1949, Commentary, Geneva, 1973, p. 141 (Article 10(5)).

106 — See point 107.

these actions was directed against civilians or other persons not actively taking part in hostilities between the LTTE and the Sri Lankan Government. The applicants in the main proceedings rather submit that, as the LTTE has been involved in a non-international armed conflict within the meaning of international humanitarian law, its activities could in no circumstances be regarded as 'terrorist'.[107] For the reasons that I have explained, that submission must be rejected.

– International law on combating terrorism and hostage-takings

111. Regarding international law governing the fight against terrorism, I note first that the Convention on the Suppression of acts of nuclear terrorism, mentioned in the order for reference, bears no apparent link with the main proceedings. I shall therefore not consider it in what follows. Furthermore, the CoE Convention on the Prevention of Terrorism is not binding upon the European Union. Nor have all its Member States ratified it. That Convention does not therefore form part of the international rules which should guide the Court when interpreting Common Position 2001/931 and Regulation No 2580/2001.

112. Common Position 2001/931 and Regulation No 2580/2001 give effect to Resolution 1373 (2001).[108] Although the European Union is not itself a member of the United Nations, the Court has held that 'it is necessary for the [European Union] to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them'.[109] The Court must therefore, so far as possible, interpret Common Position 2001/931 and Regulation No 2580/2001 in conformity with Resolution 1373 (2001). However, that resolution neither defines 'terrorist act' nor limits its scope in the light of international humanitarian law.

113. The Terrorist Bombings Convention is binding upon all Member States. Considering the elements that prompted the Council to insert the LTTE on the Article 2(3) list, which refer to 'attacks' by the LTTE,[110] that Convention may also be relevant in the main proceedings. The Terrorist Bombings Convention must therefore be taken into account when interpreting Common Position 2001/931 and Regulation No 2580/2001.[111]

114. The Terrorist Bombings Convention excludes from its scope 'activities of armed forces during an armed conflict', which are governed by international humanitarian law.[112] That however does not mean that such acts may not qualify as 'terrorist acts' within the meaning of international humanitarian law. I am fortified in that conclusion by the last recital of the Terrorist Bombings Convention, which makes it clear that 'the exclusion of certain actions from the coverage of [the convention] does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws …'. That recital confirms what the Council correctly depicts as the complementary nature of the rules of international humanitarian law examined above with certain international rules on combating terrorism.

107 — Conversely, they could (in theory) be regarded as war crimes. The applicants in the main proceedings also briefly express doubt that the LTTE was effectively responsible for these attacks and kidnappings. However, they do not advance any specific element capable of calling the Council's position into question.

108 — See point 34 above.

109 — Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 294.

110 — See point 48 above.

111 — See point 100 above and the case-law cited.

112 — Article 19(2).

115. A similar reasoning applies to the Hostages Convention, which is also relevant in the present proceedings.[113] Although this convention does not formally bind the European Union, all Member States are parties thereto. The purpose of Article 12 thereof is merely to clarify the material scope of application of the Hostages Convention. That provision therefore has no impact whatsoever on the prevention and repression of hostage-takings that take place in armed conflicts and are thus governed by international humanitarian law.[114] Again, these various sets of international norms appear to be complementary.

116. Furthermore, as the Commission confirmed at the hearing, Member States' action pursuant to Common Position 2001/931 and Regulation No 2580/2001 falls in principle within the scope of the Terrorism Financing Convention. Those EU acts indeed seek to combat international terrorism through specific financial measures targeting persons, groups and entities involved in terrorist acts. The Terrorism Financing Convention is moreover binding upon all the Member States. The Court should therefore interpret Common Position 2001/931 and Regulation No 2580/2001, so far as possible, in a manner which does not risk putting all EU Member States in breach of their obligations resulting from that convention.

117. However, nothing in the Terrorism Financing Convention precludes actions by non-State armed forces in non-international conflicts from being regarded as 'terrorist acts'.

118. First, as the General Court held in its judgment of 16 October 2014, *LTTE* v *Council*,[115] Article 2(1)(b) of the Terrorism Financing Convention expressly envisages the possibility for 'terrorist acts' within the meaning of that convention being committed in the context of an armed conflict, provided two conditions are fulfilled: (i) the act must be intended to cause death or serious bodily injury and (ii) the act's purpose, by its nature or context, must be to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act. Consequently, in regulating the financing of terrorist acts pursuant to the Terrorism Financing Convention, State parties (or indeed the European Union) may include, in the definition of 'terrorist acts', acts committed during an armed conflict.

119. Second and in any event, Article 21 makes it clear that the Terrorism Financing Convention does not affect obligations binding on individuals as a result of international humanitarian law. Those obligations include the absolute ban on any of the acts set out in Common Article 3(1)(a) and (b) of the Geneva Conventions and in Articles 4(2)(d) and 13(2) of Protocol II.

120. Interpreting the concept of 'terrorist act' in Common Position 2001/931 and Regulation No 2580/2001 as covering actions committed by non-State armed forces in a non-international conflict is therefore no more inconsistent with the international law acts on combating terrorism and hostage-takings examined above than it is with the relevant rules of international humanitarian law.

121. I therefore conclude, in answer to point (b) in the second question, that actions by armed forces during a non-international armed conflict, governed by international humanitarian law, may constitute 'terrorist acts' within the meaning of Common Position 2001/931 and Regulation No 2580/2001, interpreted in the light of relevant rules of international humanitarian law and international law on combating terrorism and hostage-takings.

113 — The LTTE has been inserted on the EU list as a result of, inter alia, what the Council has termed 'kidnappings' between 2005 and 2009: see point 48 above. For the purposes of this analysis, I do not perceive any meaningful difference between that expression and the term 'hostage-taking' as used in the Hostages Convention.

114 — See Common Article 3(1)(b) of the Geneva Conventions and Article 4(2)(c) of Protocol II.

115 — T-208/11 and T-508/11, EU:T:2014:885, paragraph 64.

122. Taking into account the arguments submitted to the Court by the applicants in the main proceedings,[116] I also consider, in answer to the third and fourth questions, that the present reference has disclosed no factor of such a kind as to affect the validity of Regulation No 610/2010 in so far as it concerned the LTTE. In those circumstances, there is no need to consider the fifth question.

Conclusion

123. In the light of all the foregoing considerations, I suggest that the Court should answer the questions raised by the Raad van State (Council of State, The Netherlands) as follows:

— The exception established in the case-law resulting from the judgment of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, applies as regards the third limb of the fourth paragraph of Article 263 TFEU.

— It is not beyond doubt that, should A, B, C and D have challenged before the General Court the validity of Council Implementing Regulation (EU) No 610/2010 of 12 July 2010 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 1285/2009, in so far as that regulation concerned the Liberation Tigers of Tamil Eelam (LTTE), their application would have been admissible. It follows that A, B, C and D were justified in raising the invalidity of that regulation before the national court and asking that a request for a preliminary ruling be made pursuant to Article 267 TFEU.

— Actions by armed forces during a non-international armed conflict governed by international humanitarian law may constitute 'terrorist acts' within the meaning of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, and of Regulation No 2580/2001, interpreted in the light of relevant rules of international humanitarian law and international law on combating terrorism and hostage-takings.

— The present reference has disclosed no factor of such a kind as to affect the validity of Regulation No 610/2010 in so far as that regulation concerned the LTTE.

116 — See in particular point 110 of this Opinion.