T.R.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

THE IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTIONS AND HUMAN RIGHTS PROTECTION IN THE EU LEGAL ORDER

YÜKSEK LİSANS TEZİ

ESRA YILMAZ EREN

İstanbul - 2010

T.R.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

THE IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTIONS AND HUMAN RIGHTS PROTECTION IN THE EU LEGAL ORDER

YÜKSEK LİSANS TEZİ

ESRA YILMAZ EREN

Danışman: Prof. Dr. Sibel Özel

İstanbul - 2010

T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ

ONAY SAYFASI

Enstitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Esra YILMAZ EREN'in ***"THE IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTIONS AND HUMAN RIGHTS PROTECTION IN THE EU LEGAL ORDER"*** konulu tez çalışması **...01.10.2010 ...** tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği / ~~oyçokluğu~~ ile başarılı bulunmuştur.

Onaylayan:

Prof. Dr. Sibel ÖZEL Danışman .....

Prof. Dr. Selami KURAN Jüri Üyesi .....

Prof. Dr. Ercüment TEZCAN Jüri Üyesi .....

Onay Tarihi

Prof. Dr. Muzaffer DARTAN
Müdür

28/10/2010...tarih ve 2010/XII... Sayılı Enstitü Yönetim Kurulu kararı ile onaylanmıştır.

GENERAL INFORMATION

Name and Surname	: Esra Yılmaz Eren
Field/ Programme	: European Union Law
Supervisor	: Prof. Dr. Sibel Özel
Degree Awarded and Date	: LL.M. - September 2010

Keywords	: United Nations Security Council Resolutions, Economic Sanctions, European Court of Justice restrictive measures Cases, Human Rights protection.

ABSTRACT

THE IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTIONS AND HUMAN RIGHTS PROTECTION IN THE EU LEGAL ORDER

In the last decade, economic sanctions have become a major instrumentality of the UN Security Council in the struggle against terrorism. The implementation of those restrictive measures within the EU has brought many legal conflicts along with it.

In this context, the thesis turns to a discussion of the UN's sanctions regime and the issues raised in recent litigation in the European Courts – Kadi and Yusuf- surrounding implementation of that regime in the European Union and its Member States. The competence of the Union to implement economic sanctions, the place of the UNSC Resolutions within the Community hierarchy of norms has been analyzed.

Furthermore, the study describes the economic sanctions regime and the various judicial remedies across multiple levels of law- International, European and national- that the accused individuals may apply for remedy. In conclusion, it is supported that, since the affected individuals who have been subject to economic sanctions due to being in the "Terrorist watch lists" of the UNSC, have no locus standi before the International law, European Courts ought to provide judicial remedy for them and the UNSC Resolutions should be subject to judicial review.

GENEL BİLGİLER

İsim ve Soyadı : Esra Yılmaz Eren

Anabilim Dalı : Avrupa Birliği Hukuku

Tez Danışmanı : Prof. Dr. Sibel Özel

Tez Türü ve Tarihi : Yüksek Lisans - Eylül 2010

Anahtar Kelimeler : Birleşmiş Milletler Güvenlik Konseyi Kararları, Kısıtlayıcı Önlemler, Avrupa Adalet Divanı ekonomik yaptırım davaları, İnsan Hakları koruması.

ÖZET

AVRUPA BİRLİĞİ HUKUKUNDA BİRLEŞMİŞ MİLLETLER GÜVENLİK KONSEYİ KARARLARININ UYGULANMASI VE İNSAN HAKLARI KORUMASI

Son yıllarda ekonomik yaptırımlar BM Güvenlik Konseyinin teröre karşı savaş konusunda kullandığı önemli bir araç haline gelmiştir. Bu tedbirlerin AB bünyesinde alınan kararlarla uygulanması pek çok hukuki sorunu da beraberinde getirmiştir.

Bu bağlamda emsal karar olarak nitelendirilebilecek olan Yusuf ve Kadı davaları esas alınarak, kısıtlayıcı önlemlerin birlik içerisinde uygulanmasının doğurduğu sonuçlar incelenmiştir. Kararlarda tartışıldığı üzere, birliğin ekonomik tedbir uygulama yetkisi, BM Güvenlik Konseyinin AB Hukuku normlar hiyerarşisindeki yeri ele alınmıştır.

Bu tezde özellikle ekonomik yaptırımlara maruz kalan bireylerin uluslararası hukuk, Avrupa Hukuku ve yerel hukuk açısından başvurabilecekleri hukuki mekanizmalar araştırılmış, konuya ilişkin emsal kararlara değinilmiştir. Ayrıca, Birleşmiş Milletler Güvenlik Konseyi nezdinde hazırlanan "Terörist İzleme Listeleri"nde adlarının bulunması nedeniyle kısıtlayıcı tedbirlere maruz kalan bireylerin uluslararası hukukta BM güvenlik Konseyi kararlarını dava edebilecekleri bir mekanizma olmaması nedeniyle Adalet Divanı ve AİHM nezdinde korunmaları ve Güvenlik Konseyi kararlarının da yargısal denetime tabi tutulması gerektiği savunulmaktadır.

ACKNOWLEDGEMENTS

I would like to present my sincere gratitude to my supervisor Prof. Dr. Sibel Özel for her guidance and patience with her insightful comments and critics and also to all Marmara University EU Institute Lecturers.

I also want to render my thanks to Boğaziçi University European Community Law lecturer Dr. Virginia Brown Keyder and Bilgi University Law Faculty lecturer Reyda Ergün for their guidance and encouragement.

Additionally, I would like to express my deepest thankfulness and genuine appreciation to my family, especially my mothers, who made it possible to prepare a thesis with a 1 year old brat, and also my husband for his excellent support and patience.

Istanbul, 2010 Esra Yılmaz Eren

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AG	Advocate General
ASIL	The American Society of International Law
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CMLRev	Common Market Law Review
CTC	Counter-Terrorism Committee
EC	European Community
EEC	European Economic Community
ECHR	European Charter on Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECR	Report of Cases before the Court of Justice of the European Communities
ECrtHR	European Court of Human Rights
EU	European Union
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
IO	International Organization
Iss.	Issue
KFOR	UN-authorized Security Presence in Kosovo
MS	Member States
OJ	Official Journal of the European Communities
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on Law of the Treaties
WTO	World Trade Organization

INTRODUCTION

Since the end of the cold war in 1989, the United Nations Security Council (UNSC) has been able to fulfill its assigned tasks more effectively.[1] According to Article 24 UN Charter, the Security Council is responsible for the maintenance of international peace and security, while Chapters VI and VII of the UN Charter indicate the various possible measures the UN Security Council can take if the international peace is threatened.[2]

One of these measures entails the imposition of economic sanctions[3] against a state.[4] Since 1990 the UN Security Council has increasingly used sanctions to respond to serious political crises such as for example in the 1991 Gulf war against Iraq and in the Balkan wars against the former Yugoslavia (FRY). However, more recently the UN Security Council – but also the EU - is using sanctions as a weapon in the 'war against terror' by targeting specific individuals and private organizations that are suspected of being involved in terrorist activities.[5]

In the last decade, economic sanctions have become a major instrumentality of the UN Security Council in the struggle against terrorism and violence endangering peace. During this struggle the United Nations no longer enacts its security policy only within the framework of a "State-centered" paradigm, that is, with regard to nations which are hostile to or dangerous for the maintenance of peace. The activity of the United Nations has also been directed against threats to peace initiated by private individuals and private organizations. A long series of UN Security Council resolutions enact sanctions against individuals.

---

[1] Nicolaos Lavranos, "Judicial Review of UN Sanctions by the Court of First Instance", *European Foreign Affairs Review* 11: 471-490, 2006.
[2] UN Charter, Art. 39.
[3] UN Charter, Art. 41.
[4] David Schweigman, (2001), **"**The authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice", The Hague ; Boston : Kluwer Law International.
[5] See, for example: UN Security Council Resolutions 1333 (2000), 1373 (2001), 1566 (2004), 1611 (2005), all available at <www.un.org/terrorism/sc.htm>; Council Common Position 2005/427/CFSP of 6.6.2005 updating Common Position 2001/931/CFSP [2005] OJL 144/54; Common Position 2001/931/CFSP [2001] OJ L 344/93; Common Position 2001/154/ CFSP [2001] OJ L 57/1; Council Regulation No. 2580/2001 [2001] OJ L 344/70.

The recent international fight against terrorism is an illustrative example of how the individuals can be confronted with sanctions at the international level because of being blacklisted as a terrorist and thus as a threat to international peace and security. In 1999 sanctions were announced against the Taliban in Afghanistan, and after this, they were extended to Osama Bin Laden and Al-Qaida. After 11 September 2001, sanctions came into force against a mixed collection of terrorists. Often the reason why the person concerned has been included on such a list and where he can successfully contest his inclusion on the list is not clear. The fact is that present international cooperation against terrorism takes place at various levels. The start of the chain of measures is usually a binding Resolution by the Security Council of the United Nations adopted under Chapter VII[6] of the United Nations Charter. (Herein after "the Charter") States are obliged to implement these Resolutions on the grounds of Articles 25 and 48 and, moreover, on the basis of Article 103, with priority over other international obligations not based on the Charter.[7]

Consequently the European Union (EU) feels obliged to implement the UN Resolutions. To do this, it uses a mix of legal instruments that in their turn oblige its member states to implement them. The member states then ensure that there is concrete implementation with regard to the citizen in question who has been included on one list or another, if need be by amending or implementing national legislation.

This paradigm shift[8] from the focus on nation States to a policy of sanctions also directed at individuals creates a number of issues and problems which can be summarized as lack of transparency, participation, inclusiveness during the process and the possibility of shielding the individuals effectively at the level of the United Nations through a mechanism of judicial protection. At present, individual persons cannot enjoy direct judicial protection against resolutions of the Security Council.

---

[6] Chapter VII of the UN Charter is entitled 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'.

[7] Article 103 UN Charter reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail.'

[8] Martin Nettesheim**.** "U.N. Sanctions against Individuals - A Challenge to the Architecture of European Union Governance", *Common Market Law Review,* New York: Jun 2007. Vol. 44, Iss. 3; p. 567, 34 pgs.

While further considering the mechanism of this form of combating terrorism with weapon of targeted sanctions which are directed against individuals, the question arises whether or not this is in conflict with a number of fundamental rights. To mention a few as examples: Are property rights infringed when all financial assets are frozen on the basis of such a listing? Are individuals not being hampered in the expression of their right to freedom of expression and of meeting? And what about the *presumption innocentia* if an international list published on the internet describes people as terrorists who should be punished? And what is the relationship of such a public list to the right of privacy and the protection of personal information?[9] While these questions compose the subject of this study, the main argument shall be whether there a possibility of contesting inclusion on a list of terrorists? Is there a court that can check the legitimacy of inclusion on the lists or compatibility with fundamental rights? Is there any form of legal procedure or remedy available to those on the lists?

In principle, individuals have no standing in international courts. These deficits in judicial protection are by now subject to intense scholarly and political discussion especially in terms of human rights protection. According to this inclination one of the most important judgment late in 2008 the European Court of Justice delivered on the subject of the relationship between the European Community and the international legal order.[10] The case was involving a challenge by an individual to the EC's implementation of a UN Security Council Resolution which had identified him as being involved with terrorism and had mandated that his assets be frozen. The Court of Justice delivered a powerful judgment annulling the relevant implementing measures, and declaring that they violated fundamental rights protected by the EC legal order.

This study advances several propositions. Firstly, the UN Security Council should be considered generally bound by customary international human rights norms and should, moreover, be encouraged to incorporate, certain basic rights into the

[9] Over these questions see the contribution to the International Conference of Jurists held in Paris on 10 November 2004 by Bowring B., Korff D., Terrorist Designation with regard to European and International law: the case of the PMOI, http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf

[10] Cases C-402/05P and C-415/05P, Kadi and Al Barakaat, judgment of the Court (Grand Chamber) of 3 September 2008.

constitutional framework governing the conduct of the UN – maybe with a judicial body to review the decisions of the UN organs. In the second place, the relation between the European legal order and that of the UN is not hierarchical, but marked by multiple competing claims of authority. And finally, that this pluralist relationship should be managed by mutual engagement on constitutional as well as international human rights and the legal protection of the individuals, who has no locus standi before the international law, should be provided in all the levels of law.

This dissertation proceeds in 2 chapters and 4 sections. First chapter analyses UNSC decisions in EC law in general. Section 1 discusses the UN system and the tasks of the UNSC and the implementation of the UNSC decisions in the Community legal order. Section 2 describes the jurisprudence of the European Court of First Instance (CFI) and European Court of Justice (ECJ) on restrictive measures. This section critically analyses the case law of the court focusing on the question of EC competences, the general relation between UN and Community law.

Second chapter deals with the human rights concerns on the Security Council Resolutions. Section 3 deals with the International law aspect of the UN sanction cases and the judicial remedies while Section 4 specifically focuses on the human rights protection in European Law, in terms of Community Courts and European Court of Human Rights. The study is closing with a brief conclusion in section 5.

This thesis is written according to the law that is in force by January 1, 2009.

CHAPTER I

UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

IN EUROPEAN COMMUNITY LAW

I. UNITED NATIONS AND COMMUNITY LAW

A. United Nations and Security Council: An Overview

The United Nations (UN) is an international organization founded in 1945 after the Second World War by 51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Due to its unique international character, and the powers vested in its founding Charter, the Organization can take action on a wide range of issues, and provide a forum for its 192 Member States to express their views, through the General Assembly, the Security Council, the Economic and Social Council and other bodies and committees.

The Organization works on a broad range of fundamental issues, from sustainable development, environment and refugees protection, disaster relief, counter terrorism, disarmament and non-proliferation, to promoting democracy, human rights, gender equality and the advancement of women, governance, economic and social development and international health, clearing landmines, expanding food production, and more, in order to achieve its goals and coordinate efforts for a safer world for this and future generations.[11]

Main bodies of the UN are General Assembly (GA), Security Council (SC), Economic and Social Council, Trusteeship Council, International Court of Justice (ICJ) and the Secretariat.

The **General Assembly** is the main deliberative organ of the UN and is composed of representatives of all Member States. Established in 1945 under the Charter of the United Nations, the General Assembly occupies a central position as the

[11] www.un.org, access on 12.07.2010.

chief deliberative, policymaking and representative organ of the United Nations. Comprising all 192 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter.

It also plays a significant role in the process of standard-setting and the codification of international law. The Assembly meets in regular session intensively from September to December each year, and thereafter as required.

Each Member State in the Assembly has one vote. Votes taken on designated important issues, such as recommendations on peace and security and the election of Security Council members, require a two-thirds majority of Member States, but other questions are decided by simple majority.[12]

The **Economic and Social Council** (ECOSOC), established by the UN Charter, is the principal organ to coordinate the economic, social and related work of the United Nations and the specialized agencies and institutions. Voting in the Council is by simple majority; each member has one vote.

The **Trusteeship Council** was established in 1945 by the UN Charter to provide international supervision for 11 Trust Territories placed under the administration of 7 Member States, and ensure that adequate steps were taken to prepare the Territories for self-government and independence. By 1994, all Trust Territories had attained self-government or independence. Its work completed, the Council has amended its rules of procedure to meet as and where occasion may require.

The **Secretariat** carries out the day-to-day work of the Organization. It services the other principal organs and carries out tasks as varied as the issues dealt with by the UN: administering peacekeeping operations, surveying economic and social trends, preparing studies on human rights, among others.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United

[12] http://www.un.org/ga/about/background.shtml , access on 12.07.2010.

Nations and began work in April 1946. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

The Court is composed of 15 judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. It is assisted by a Registry, its administrative organ.[13]

B. The Legal Structure and Functions of the Security Council

The Security Council has primary responsibility, under the Charter, for the maintenance of international peace and security. It is so organized as to be able to function continuously, and a representative of each of its members must be present at all times at United Nations Headquarters.

When a complaint concerning a threat to peace is brought before it, the Council's first action is usually to recommend to the parties to try to reach agreement by peaceful means. In some cases, the Council itself undertakes investigation and mediation. It may appoint special representatives or request the Secretary-General to do so or to use his good offices. It may set forth principles for a peaceful settlement.

When a dispute leads to fighting, the Council's first concern is to bring it to an end as soon as possible. On many occasions, the Council has issued cease-fire directives which have been instrumental in preventing wider hostilities. It also sends United Nations peace-keeping forces to help reduce tensions in troubled areas keep opposing forces apart and create conditions of calm in which peaceful settlements may be sought. The Council may decide on enforcement measures, economic sanctions (such as trade embargoes) or collective military action.

A Member State against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly on the recommendation of the

[13] http://www.icj-cij.org/court/index.php?p1=1. Access on 12.07.2010.

Security Council. A Member State which has persistently violated the principles of the Charter may be expelled from the United Nations by the Assembly on the Council's recommendation.

Under the Charter, the functions and powers of the Security Council are:

- to maintain international peace and security in accordance with the principles and purposes of the United Nations;
- to investigate any dispute or situation which might lead to international friction;
- to recommend methods of adjusting such disputes or the terms of settlement;
- to formulate plans for the establishment of a system to regulate armaments;
- to determine the existence of a threat to the peace or act of aggression and to recommend what action should be taken;
- to call on Members to apply economic sanctions and other measures not involving the use of force to prevent or stop aggression;
- to take military action against an aggressor;
- to recommend the admission of new Members;
- to exercise the trusteeship functions of the United Nations in "strategic areas";
- to recommend to the General Assembly the appointment of the Secretary-General and, together with the Assembly, to elect the Judges of the International Court of Justice.

1. Committees of the Security Council

There are three Standing Committees at present, and each includes representatives of all Security Council member States.

- Security Council Committee of Experts
- Security Council Committee on Admission of New Members
- Security Council Committee on Council meetings away from Headquarters

The Security Council also establishes Ad Hoc Committees comprising all Council Members whenever needed.

- Governing Council of the United Nations Compensation Commission established by Security Council resolution 692 (1991)
- Committee established pursuant to resolution 1373 (2001) concerning Counter-Terrorism
- Committee established pursuant to resolution 1540 (2004)

Moreover the Security Council also includes Sanctions Committees. The Current sanctions committees are as follows:

- Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia
- Security Council Committee established pursuant to resolution 918 (1994) concerning Rwanda
- Security Council Committee established pursuant to resolution 1132 (1997) concerning Sierra Leone
- Security Council Committee established pursuant to resolution 1267 (1999) concerning Al Qaida and the Taliban and associated individuals and entities
- Security Council Committee established pursuant to resolution 1518 (2003)
- Security Council Committee established pursuant to resolution 1521 (2003) concerning Liberia
- Security Council Committee established pursuant to resolution 1533 (2004) concerning The Democratic Republic of the Congo
- Security Council Committee established pursuant to resolution 1572 (2004) concerning Côte d'Ivoire
- Security Council Committee established pursuant to resolution 1591 (2005) concerning The Sudan
- Security Council Committee established pursuant to resolution 1636 (2005)
- Security Council Committee established pursuant to resolution 1718 (2006)

- Security Council Committee established pursuant to resolution 1737 (2006)

The Security Council Committee established pursuant to Resolution 1267 (1999) on 15 October 1999 is also known as "the Al-Qaida and Taliban Sanctions Committee". The sanctions regime has been modified and strengthened by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008) and 1904 (2009) so that the sanctions measures now apply to designated individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban wherever located.[14]

The above-mentioned resolutions have all been adopted under Chapter VII of the United Nations Charter and require all States to take the following measures in connection with any individual or entity associated with Al-Qaida, Usama bin Laden and/or the Taliban as designated by the Committee:

- freeze without delay the funds and other financial assets or economic resources of designated individuals and entities [**assets freeze**],

- prevent the entry into or transit through their territories by designated individuals [**travel ban**], and

- prevent the direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types, spare parts, and technical advice, assistance, or training related to military activities, to designated individuals and entities [**arms embargo**].

C. The Security Council Resolutions taken under Chapter VII

Under Chapter VII of the Charter, the Security Council can take enforcement measures to maintain or restore international peace and security. Such measures range

[14] http://www.un.org/sc/committees/1267/narrative.shtml.

from economic and/or other sanctions not involving the use of armed force to international military action.

The use of mandatory sanctions is intended to apply pressure on a State or entity to comply with the objectives set by the Security Council without resorting to the use of force. Sanctions thus offer the Security Council an important instrument to enforce its decisions. The universal character of the United Nations makes it an especially appropriate body to establish and monitor such measures.

The Council has resorted to mandatory sanctions as an enforcement tool when peace has been threatened and diplomatic efforts have failed. The range of sanctions has included comprehensive economic and trade sanctions and/or more targeted measures such as arms embargoes, travel bans, financial or diplomatic restrictions.

As a reply to the UN sanction cases and the critics on the human rights protection in the listing procedure the Security Council, on 19 December 2006, adopted resolution 1730 (2006) by which the Council requested the Secretary-General to establish within the Secretariat (Security Council Subsidiary Organs Branch), a focal point to receive de-listing requests.

D. The UN Resolutions concerning Al Qaida and the Taliban

At the coming into being of the recent sanctions against terrorists and in particular the freezing of financial resources, there stand, apart from an UN Treaty, a number of important Resolutions of the UN Security Council accepted under Chapter VII of the UN Charter and directed towards the Afghan Taliban, on the one hand, and, on the other, Osama Bin Laden and Al-Qaida who are under their protection.

First, the so-called *Taliban Resolution*, Resolution 1267 (1999) on the freezing of the financial assets of the Taliban and economic sanctions imposed on them because of their hospitality to Osama Bin Laden in Afghanistan. This Resolution set up a committee, the *1267 Committee*[15] or the *Taliban Sanction Committee* that monitors the implementation of the resolution and at the same time draws up an up to date list of the

[15] Security Council Committee was established pursuant to Resolution 1267 (1999).

persons and entities attached to the Taliban and Al-Qaida whose financial assets should be frozen.[16]

Then Resolution 1333 (2000) on the freezing of all financial assets of Osama Bin Laden himself and persons and entities associated with him, namely Al-Qaida.

Finally, Resolutions 1390 (2002) and 1455 (2003) which stipulate that the freezing of the assets of the Taliban, Osama Bin Laden and Al-Qaida, as required under Article 8 under c of Resolution 1333 (2000) must be continued.[17] When the United States was hit by the attacks of 11 September 2001, the Security Council adopted an important Resolution on 28 September 2001: the so-called *11 September Resolution*, UN Resolution 1373 (2001).[18] This obliges States to freeze all assets and other economic and financial resources of those who commit acts of terrorism or attempt to commit them or who take part in them or who facilitate the carrying out of these acts. Furthermore, States have to take steps which both forbid assets and other economic and financial resources being made available to these persons as well as other financial and allied services being provided to them. This Resolution also set up a committee, the *Counter-Terrorism Committee* (CTC), which supervises compliance with the resolution, but does not itself compile lists of terrorist persons and organizations.[19]

1. The "1267 Committee lists"

On the basis of Article 6 of Resolution 1267 (1999) - the so-called *Taliban Resolution* - a committee was set up - the *1267 Committee* (or the *Taliban Committee*) – consisting of all the members of the Security Council which carries out certain tasks in

[16] The new consolidated list of individuals and entities belonging to or associated with the Taliban and Al-Qaida organisations as established and maintained by the 1267 Committee. http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm
24 Resolution 1333 (2000) Adopted by the Security Council at its 4251st meeting on 19 December 2000.
[17] Resolution 1390 (2002) Adopted by the Security Council at its 4452nd meeting, on 16 January 2002; Resolution 1455 (2003) Adopted by the Security Council at its 4686th meeting, on 17 January 2003. http://www.un.org/Docs/sc/ (10 May 2010).
[18] Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001. http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement
[19] "Resolution 1373 established the Counter-Terrorism Committee (known by its acronym: the CTC), made up of all 15 members of the Security Council. The CTC monitors the implementation of resolution 1373 by all States and tries to increase the capability of States to fight terrorism. The CTC is not a sanctions committee and does not have a list of terrorist organizations or individuals." http://www.un.org/Docs/sc/committees/1373/

connection with compliance with the Resolution. The Committee works closely with the *Counter-Terrorism Committee* which was set up by the UN *11 September* 1373 Resolution (2001).[20] UN Resolution 1333 (2000) gives the *1267 Committee* the power to draw up a list of persons and entities associated with Osama Bin Laden 'based on information provided by States and regional organizations'' (Article 16 sub. b) and to keep this list up to date. This is not an exceptionally precise description of the procedure. On the basis of Article 2 of Resolution 1390 (2002) the Committee keeps the list up to date.[21] Of importance is that the Committee has drawn up its own Guideline.[22] The Guideline includes rules on inclusion on the list (Article 5), revising the list (Article 6), but also on the delisting of persons or entities so that a possible wrongful inclusion can be rectified (Article 7). This delisting procedure can be initiated by a State whose nationality the person involved possesses or where he is resident. Names are placed on the list on the basis of *relevant information* (Article 4b, 5a and 5d). If possible, this should be accompanied by a description of the information which justifies the imposition of a sanction on the basis of the Resolutions (Article 5b), together with relevant and specific information which simplifies the identification of those involved by the authorized authorities (Article 5c). Decision-making within the Committee is by consensus (Article 9a) and where the Committee is unanimous, the decision making takes place in writing during which the members of the Committee may raise objections. Despite this in itself clear procedure, it is in the nature of things that the body's actual method of working is not particularly transparent to the outside world; one may only speculate on how inclusion on the list does in fact come about.

[20] See Art. 3 Resolution 1455 (2003). Resolution 1455 (2003) Adopted by the Security Council at its 4686th meeting, on 17 January 2003, http://daccessdds.un.org/doc/UNDOC/GEN/N03/214/07/PDF/N0321407.pdf?OpenElement (10 May 2010).

[21] The list is accessible to the public, see: The new consolidated list of individuals and entities belonging to or associated with the Taliban and Al-Qaida organisations as established and maintained by the 1267 Committee: http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm (10 May 2010). See for the Committees of the SC-UN the website http://www.un.org/Docs/sc/ under: 'Subsidiary Bodies'.

[22] Security Council Committee established pursuant to Resolution 1267 (1999). Guidelines of the Committee for the conduct of its work. http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf

E. Implementation of Security Council Resolutions in Community Legal Order

1. The EU approach to implementing UN sanctions against individuals

For several years now, UN sanctions against individuals have been implemented primarily through EU measures. In part, this is the result of external pressures on the EU; in part, it is the result of its own initiatives. EU law itself has no explicit basis for the implementation of such sanctions against individuals. Since the ratification of the Maastricht Treaty, however, EU primary law has provided a basis on which the EU may pursue coercive measures against third States. [23] To this effect, the Second Pillar of the EU structure (Common Foreign and Security Policy - CFSP) is intertwined with the First Pillar (EC) in such a manner that a CFSP common position is typically issued together with an EC regulation with direct applicability. This system has been created to permit coercive measures against States within the classic paradigm of transnational politics. The EU is now also utilizing these competences to effect economic sanctions against individuals suspected of terrorism and criminal activities, in fulfillments of the duties of its Member States in their capacity as members of the UN to implement UN decisions.

The sanctions that have gained the greatest prominence are those the EU has imposed in the process of implementing UN Security Council Resolution 1373/2001. In two regulations (2580/2001/EC and 881/2002/EC) the EU established a prohibition against providing assets and financial services to specifically named (or listed) terrorist organizations and individuals, both within the EU and its Member States and outside. It is a characteristic of these sanctions that they focus on economic aspects and business contacts of the listed individuals and organizations. To ensure that no prohibited business contacts occur, the regulations contain extensive control and supervision mechanisms. The prohibitions of the regulations address all persons participating in the economy. The Member States must enforce the regulations - for instance, in Germany

[23] Sebastian Bohr, "Sanctions by the United Nations Security Council and the European Community", 4 EJIL (1993), p. 256.

they involve criminal sanctions through section 34 of the Foreign Trade Act (Aussenwirtschaftsgesetz).[24]

However, the coercive measures of the EU are now no longer limited to the implementation of UN sanctions. In a number of cases, the EU pursues its own autonomous goals, for example in fighting terrorist organizations in some of its Member States.[25] Not all EU coercive measures are thus based on UN sanction decisions.

2. UN Security Council Resolutions in the Community Legal Order

The EU, while not being a member of the UN, has since the beginning of the 1990s, been implementing most UN Security Council resolutions. The reason for the implementation of UN Security Council resolutions which impose economic and financial sanctions by the EC can he found in the exclusive competence of the EC in external trade matters.[26] Indeed, since the entry into force of the Maastricht Treaty in 1993, the implementation of UN Security Council resolutions imposing economic sanctions has heen formalized in the EU and EC Treaty in a two-step procedure.

In a first step - within the Common Foreign and Security Policy (CFSP) decision-making process - the EU Memher States reach a common position (Article 15 TEU) or agree on a joint action.[27]

In a second step the Council of the EC adopts the appropriate legal measures (mostly a regulation) on the basis of Article 301 EC Treaty and, if the sanctions touch on financial issues, on the basis of Article 60 EC Treaty. The EC regulation is then published in the *Official Journal of the EU* and is from that moment on directly applicable in all EU Member States. Accordingly, UN Security Council resolutions are first implemented by European legislation before they enter the domestic legal order of the EU Member States. In other words, a communitarization of UN Security Council

[24] Nettesheim, p. 569.
[25] Regulation No. 2580/2001 empowers the Council to amend the list of persons to whom sanctions apply. The Council decides unanimously on the basis of "precise information or material which indicates that a decision has been taken by a competent authority". Affected persons are not notified of the evidence or reasons that led to their inclusion in the list.
[26] Article 133 EC.
[27] Article 14 TEU.

resolutions takes place. As a consequence thereof, the classic legal relationship 'UN sanctions-national law' is modified in the sense that a third legal layer (EC/EU law) is inserted between the international and national law level, thereby transforming the classic legal relationship into a new EC-law-transformed legal relationship of "UN sanctions-EC/EU law-national law."[28]

II. THE JURISPRUDENCE OF THE EC COURTS ON UN SANCTIONS

A. Judicial Review of UN Sanctions by the CFI

It is generally accepted that every developed legal system must have a mechanism to review the legality of measures adopted by its institutions. In several striking judgments as *Yusuf*[29], *Kadi*[30], *Ayadi*[31] and *Hassan*[32], the Euroepan Court of First Instance (hereinafter CFI) examined how and to what extent international sanctions against individuals should be observed under European law.[33] The court, on the one hand, rejected the applicants' claim that '[a]s a legal order independent from the United Nations, governed by its own rules of law, the European Union must justify its actions by reference to its own powers and duties vis-à-vis individuals within that order'[34] and refrained from exercising full review of European sanction instruments. On the other hand, the Court of First Instance almost assumed the role of an international legislator by creatively defining the role of the European courts in relation to United Nations (UN) law and by laying down new rules of judicial review of acts implementing UN law. Additionally, it explored new grounds in identifying the legal basis for the disputed

[28] Nicolaos Lavranos, "Judicial Review of UN Sanctions by the Court of First Instance", European Foreign Affairs Review 11: 471- 490, 2006. p. 472.
[29] CFI, Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II-3533.
[30] CFI, Case T-315/01, Yassin Abdullah Kadi v Council and Commission [2005] ECR II-3649.
[31] CFI, Case T-253/02, Chafiq Ayadi v. Council, judgment of the Court of First Instance of 12 July 2006;
[32] CFI, Case T-49/04, Faraj Hassan v. Council and Commission, judgment of the Court of First Instance of 12 July 2006.
[33] *Yusuf* and *Kadi* judgments are essentially identical in their relevant parts. Citations are therefore taken randomly from one or both judgments.
[34] *Kadi*, para. 140.

community competence to adopt sanctions against individuals. Appeals were filed against the cases before the European Court of Justice (ECJ).[35]

In this study the main issues will be discussed principally with regard to the *Kadi* case, the other cases will be mentioned on basis of differences and only to the extent that such differences become important to the discussion.

1. Facts and Legal Backround of the Cases

After the attacks on the US embassies in Nairobi and Dar-e-Salaam in 1998 the UN Security Council had, in a series of resolutions,[36] requested the Taliban regime in Afghanistan to extradite Usama bin Laden, to close all the terrorist training camps and to stop providing sanctuary for terrorists on its territory. After the Taliban ignored all requests for cooperation, the Security Council unanimously approved Resolution 1267[37] reinforcing those requests and calling, amongst other things, upon all states to freeze all funds and other financial and economic resources either directly belonging to the Taliban, or from which they might benefit in any way.

On 8 March 2001 the Sanctions Committee published the first list of individuals and entities who must be subjected to the freezing of funds pursuant to Resolutions 1267 and 1333. The list has been constantly amended and supplemented since. On 19 October 2001 the Sanctions Committee included Mr Kadi's name and city of origin on its list. On 9 November 2001 the name of Mr Yusuf his address and date of birth, as well as the name and seat of Al Barakaat International Foundation has taken place for the first time on the list published by the Sanctions Committee. The information leading to the listings was produced by the UN Member States. The Sanctions Committee itself does not have any body verifying that information. [38]

---

[35] C-402/05P, *Kadi v Council and Commission*, application of 11 February 2006 [2006] OJ C36/19; C-415/05P, *Yusuf and Al Barakaat International Foundation v Council and Commission*, application of 25 February 2006, [2006] OJ C48/11.

[36] UN Security Council documents S/RES/1189 (13 August 1998); S/RES/1193 (28 August 1998); and S/RES/1214 (8 December 1998).

[37] UN Security Council document S/RES/1267 (15 October 1999).

[38] Christina Eckes, "Judicial Review of European Anti-Terrorism Measures—The Yusuf and Kadi Judgements of the Court of First Instance", European Law Journal, January 2008. Vol. 14, No. 1, pp. 74–92.

In order to comply with the Security Council Resolutions adopted in the fight against terrorism, the Council adopted a series of legal instruments, including 27 May 2002 Common Position 2002/402/CFSP and Regulation (EC) 881/2002. Both instruments include an annex listing the applicants' names and details. Following Resolution 1452[39] providing for a number of derogations from and exceptions to the freezing of funds and economic resources, an additional Article 2a was added in Regulation 881/2002, allowing some exceptions for means to cover basic living expenses.[40]

The applicants in the two cases here discussed were Mr Yusuf, a Swedish citizen of Somali origin, Al Barakaat, which is Somalia's largest money transfer system, and Mr Kadi, an international businessman of Saudi Arabian citizenship. All the financial interests of the three plaintiffs, Mr Yusuf, Mr Kadi and Al Barakaat within the European Community (EC) were frozen first by Regulation 467/2001[41] and then by the contested Regulation 881/2002.[42] The freeze was ordered without any limitation of time or quantity; and, furthermore, the EC did not and does not provide any means for those people to prove that they are innocent of any wrongdoing. The applicants allege that they had never been involved in terrorism, nor had they financially supported terrorism in any form. The applicants in both cases were sanctioned as a consequence of the UN sanctions regime in the fight against terrorism in general, and more specifically against Al-Qaida.

Mr Yusuf and Al Barakaat, as well as Mr Kadi, brought an action[43] for annulment of the Community sanctions regulation.[44] They argued that the Council acted

[39] Resolution 1452 (20 December 2002).
[40] Council Regulation (EC) No 561/2003 of 27 March 2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban [2003] OJ L82/1.
[41] Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 [2001] OJ L67/1.
[42] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 [2002] OJ L139/9.
[43] The two cases were joined by Order of the President of the Second Chamber of 18 September 2003.
[44] Initially, the applicants brought an action against Regulation 467/2001 and redirected it then to Regulation No 881/2002, repealing the former.

ultra vires in adopting the sanctions and that the measures further infringe Article 249 EC and breach their fundamental rights.[45]

The Ayadi and Hassan cases can be seen as the second string of judgments of the Court of First Instance on the individuals targeted by the restrictive measures imposed by the European Union.[46]

Samely, Resolution 1267 (1999) of the Security Council of the United Nations ordered all States to freeze funds and other financial resources related to the Taliban, as designated by the Sanctions Committee established pursuant to the said Resolution and to ensure that no funds or financial resources so designated were made available except on the grounds of humanitarian need. These sanctions were strengthened by Resolution 1333 (2000) of the Security Council requiring the States to freeze without delay funds and other financial assets of Usama bin Laden and of individuals and entities associated with him as designated by the Sanctions Committee and to ensure that no funds or financial resources were made available, by their nationals or by any persons within their territory, directly or indirectly, for the benefit of Usama bin Laden or individuals and entities associated with him, including the Al-Qaida organization and pursuant to Resolution 1333 (2000) the Sanctions Committee was maintained an updated list, based on information provided by States and regional organizations, of the individuals and entities designated by the Committee as being associated with Usama bin Laden. The resolution further called upon all States and all international and regional organizations to act strictly in accordance with the provisions of the resolution, notwithstanding the existence of any rights or obligations imposed by any international agreement. The measures imposed by Resolutions 1267 (1999) and 1333 (2000) were maintained and improved by subsequent Security Council Resolutions 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004) and 1617 (2005). In particular, Resolution 1452 (2002) provided for a number of derogations from and exceptions to the freezing of funds, to be granted

[45] In particular their right to a fair hearing, their right to respect for property and their right to effective judicial review.

[46] Joni Helikoski, "Case T-253/02, Chafiq Ayadi v. Council, judgment of the Court of First Instance of 12 July 2006; Case T-49/04, Faraj Hassan v. Council and Commission, judgment of the Court of First Instance of 12 July 2006", *Common Market Law Review*. New York: Aug 2007. Vol. 44, Iss. 4; p. 1143, 15 pgs.

by the Member States on humanitarian grounds, subject to the consent of the Sanctions Committee.

The list of entities and individuals to be subject to the freezing of funds maintained by the Sanctions Committee was subject to regular updates. On 19 October 2001, the name of Chafiq Ayadi identified as a person associated with Usama Bin Laden, was included in the list. In an addendum adopted by the Committee on 12 November 2003 the name of Faraj Hassan was identified as a person associated with the Al-Qaeda organization.

In the European Union, Resolution 1333 (2000) of the Security Council was implemented by Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP[47] and by Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan and repealing Council Regulation (EC) No 337/2000.[48] These measures provided the freezing of funds and other financial resources belonging to persons, entities and bodies designated by the Sanctions Committee, those persons, entities and bodies being listed in Annex I to Regulation 467/2001. Under Article 10(1) of the Regulation, the Commission was empowered to amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee. The name of Chafiq Ayadi was added, for the first time, to Annex I to Regulation 467/2001 by Commission Regulation (EC) No 2062/2001, amending, for the third time, Council Regulation (EC) No 467/2001.[49]

Subsequent to the adoption of Resolution 1390 (2002) of the Security Council, the above-mentioned measures were updated by Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organization and the Taliban and other individuals, groups, undertakings and entities associated with them[50] and by Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with

[47] O.J. 2001, L 57/1.
[48] O.J. 2001, L 67/1.
[49] O.J. 2001, L 277/25.
[50] 11. O.J. 2002, L 139/4.

Usama bin Laden, the Al-Qaeda network and the Taliban.[51] Mr Chafiq Ayadi was maintained in Annex I to Regulation 881/2002 listing persons, groups or entities designated by the Sanctions Committee. Pursuant to Commission Regulation (EC) No 2049/2003 amending for the 25th time Regulation 881/2002; the name of Faraj Hassan was included, for the first time, in Annex I to Regulation 881/2002.[52]

In order to implement Resolution 1452 (2002) of the Security Council and, in particular, to take account of the derogations from and exceptions to the freezing of funds that may be granted on humanitarian grounds in accordance of the said Resolution, the Council adopted Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP[53] and Council Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Council Regulation (EC) No 881/2002.[54] Essentially, Article 2a of Regulation 561/2003 provided for the exemption from restrictive measures of certain funds or economic resources, provided that a Member State has determined the funds or resources in question to be of a certain nature and provided that the Sanctions Committee either has not objected to or, in some cases, has approved the determination made by the Member State.

In *Ayadi* and *Hassan* cases, the CFI, has followed the judgments delivered by the Court of First Instance on 21 September 2005 in Yusuf and Kadi. In those cases, the CFI dismissed the actions as involving a challenge of the validity of the restrictive measures imposed against the applicants by Regulation 881/2002. The pleas of the claimants will be discussed in the following parts.

[51] O.J. 2002, L 139/9.
[52] O.J. 2003, L 303/20.
[53] O.J. 2003, L 53/62.
[54] O.J. 2003, L 82/1.

2. Competence of the EC to Implement UNSC Resolutions

a. An Overview

The European Courts recent decisions regarding the conformity of EU measures to implement UN sanctions against individuals with EU primary law supposed to be a radical change from the traditional understanding. There is no doubt that the current EC Treaty expressly provides the Community with the power to impose economic sanctions on third countries. The question is the extent to which the Community may impose such measures on individuals, especially in the light of the fact that the Treaty of Lisbon would settle this issue in favour of the Community.[55] This may also explain why every judicial opinion (whether the CFI, the Advocate General, or the full Court) in one way or another found that the Community had the requisite power under existing Treaty provisions.

Accordingly, the first question raised in the concerned cases was related with the legal basis of the Regulations ordering the freezing of the funds and assets of the applicants. The applicants claimed the incompetence of the Council to adopt Regulation 881/2002[56] by referring the attributuion of powers doctrine.[57] Before this regulation, the implementing measures of the UN Security Council decisions concerning the flight ban or freeze of funds and other financial resources in respect of Afghanistan and Taliban regime was adopted as regulations by the Council on the legal bases of Art. 60[58] and

[55] The Lisbon Treaty was not in force at the time of the cases.
[56] Regulation 881/2002 hereinafter 'contested regulation'.
[57] Art. 5 EC states that; "the Community shall act within the limits of the power conferred upon it by this Treaty and of the objectives assigned to it therein".
[58] Article 60 EC Treaty as follows:
1. If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.
2. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.
The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.

301[59] EC Treaty and the scope was limited to persons only holding official position in a state structure, including their family members.[60]

But, according to the applicant, Regulation No 467/2001 was no longer aimed at a country but at individuals, and no matter the objective of the measures were combating to international terrorism and those measures did not fall within the competence of the Community, unlike the trade embargo measures against Iraq examined by the CFI in *Dorsch Consult Case.*[61] The applicant also claimed that interpretation of Art.60 and Art. 301 EC Treaty that amounted to treating Community nationals like third countries' is contrary to the principle of lawfulness as expressed in Art.5 and Art. 7 EC Treaty, and to the principles that the Community legislation must be clear and definite and its application must be foreseeable by those subject to it.[62]

Regulation No 467/2001 abbrogated by the contested regulation adopted under Art.60, 301 and 308 EC Treaty. Therefore, according to the applicants' pleas Art.308 EC Treaty[63] taken alone or together with Art.60 and 301 EC Treaty, does not confer on the Council the power to impose sanctions, direct or indirect, on citizens of the EU since such a power given to the Council could not be considered as necessary in order to attain one of the objectives of the Community and also freezing of the funds has no logical connection with avoiding distortion of competition as referred to in the fourth recital in the preamble to the contested regulation.[64] Furthermore it was also claimed that since the contested regulation does not tend to access any objective of the EC Treaty, the reference to Art.308 was not authorized either.

---

[59] Article 301 EC Treaty as follows :
Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.
[60] Eckes, p. 77.
[61] *Yusuf,* para.82; Case T-184/95 Dorsch Consult v. Council and Commission, [1998], ECR II-667
[62] *Yusuf,* para.83.
[63] Article 308 EC Treaty as follows:
If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.
[64] *Yusuf,* para.84.

Before examining the claims of the defendants it should be underlined that Art.301 arranges the practice established under European Political Cooperation until the Maastricht Treaty concerning the implementation of sanctions by the European Economic Community, in general imposed by the UNSC, against third countries. Whenever the Member States took the political decision to execute economic sanctions to a certain contry, this would be realized by a Council decision on the basis of Art.133 EC Treaty. Samely, Art.60 EC Treaty authorizes the EC to implement financial sanctions against third countries decided under the CFSP and the Art.308, so called flexibility clause, provides a legal base for a Community action if there is no legal base for the action. But the concerned action ought to be necessary to achieve one of the objectives of the Community for the operation of the common market.[65] In their defenses, defendants claimed that Art.308 EC Treaty cannot be used as a base for amending the Treaty. However, the Council argued that those provisions contain an objective of economic and financial coercion which is, in its review, an objective of the EC Treaty as the Community objectives are not only defined in Art.3 EC Treaty.[66] Furthermore, United Kingdom and the institutions claimed in their defense that the wording of Art.60 and 301 EC Treaty do not imply any restriction on adoption of economic sanctions directed at individuals or organizations established in the Community. Because such measures are intended to interrupt or to reduce, in part or completely, economic relations with one or more countries and the citizens of the MS may supply funds and resources to third countries or to factions within them, therefore the articles contain inviduals as well as states, claimed the UK.[67] Besides, according to the Council, articles in concern have defined the tasks and activities of the Community concerning economic and financial sanctions and this also constructs a legal basis for an express transfer of powers to the Community in order to achieve them. Furthermore, preservation of peace and strengthening the international peace and security in accordance with the UN Charter principles as it is one of the objectives of the CFSP.[68] As a consequence economic and financial coercion for reasons of policy, especially in

[65] Daniel Halberstam & Eric Stein,"The United Nations, The European Union, and The King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order", *Common Market Law Review,* New York: Feb 2009. Vol. 46, Iss. 1; p. 13, 60 pgs.
[66] *Kadi*, para.65-66.
[67] *Yusuf*, para.85.
[68] *Kadi*, para. 67.

implementing a binding decision of the SC, constitutes an express and legitimate objective of the EC Treaty, even if that objective is linked only indirectly to the main objectives of EC Treaty, in particular those concerned with the free movement of capital and establishment of a system ensuring that competition in the internal market is not distorted, and linked to the Treaty on EU.[69] Moreover, the Council presented some examples in which Art.308 was used before to attain one of the objectives of the EC Treaty such as equal treatment under social policy, self employed persons and members of their families under the free movement of persons and the establishment of European Monitoring Center on Racism and Xenophobia[70] as confirmed by the ECJ in *Delbar* Case.[71] The defendants also stated that Community legislature has in past referred to the legal basis of Art.308 EC Treaty in the fields of sanctions when the measures went beyond the limit of the common commercial policy or effected natural or legal persons within the Community, as in particular of Council Regulation (EEC) No. 3541/92 regarding the prohibitions on Iraq.[72] The defendants also claimed that the implementation of sanctions imposed by the SC could fall, in whole or in part, within the scope of the EC Treaty, either under the common commercial policy or in connection with the internal market[73] since the measures at issue were necessary to ensure uniform implementation and application to preserve the free movement of capital within the Community and to avoid distortion of competition. [74]

As a further discussion, the Commission stated that promotion of international security ought to be considered as forming part of the general framework of the provisions of the EC Treaty by referring to Art.3 and 11 Treaty on EU and preamble of the EC Treaty. According to these articles, Member States confirmed to act in accordance with the principles of the UN Charter and declared themselves resolved to strengthen peace and liberty which leads to ensuring peace and security as one of the general objectives of the Community and of which Art.60 and 301 EC Treaty are specific indicators, while they are also specific indicators of the Community's

[69] *Kadi*, para. 68.
[70] *Kad,i* para. 71, *Yusuf*, para.95.
[71] *Yusuf*, para. 96; Case C-114/88 *Delbar* [1998] ECR 4067.
[72] *Kadi,* para.73.
[73] *Kadi*, para.74.
[74] *Kadi*, para.75.

competence in regulations on the movement of capital, internally and externally.[75] Furthermore, as no specific power is conferred under the free movement of capital to the Community, Art.308 of EC Treaty has been used as an additional legal basis in order to ensure that the Community should be able to impose the restrictions in question, especially for individuals, in accordance with the common position adopted by the Council.[76]

Defendants continued underlining the fact that actions to implement SC resolutions should be performed in the Community level in order to provide the uniform application on the free movement of capital in the Community and to prevent differences in the application of the freezing of assets in Member States that may cause a risk of distortion of competition.

b. The Ruling of the CFI on Competence

The Court chose to review Regulation No.467/2001 and 881/2002 separately since they were adopted partly on different legal bases. Therefore, according to the Court, applicants' claims for Regulation No. 467/2001 could not have succeeded. The Court stated that nothing in the wording of Art.60[77] and 301[78] makes it possible to exclude the adoption of restrictive measures directly affecting individuals or organizations, whether or not established in the Member States, in so far as such measures actually seek to reduce, in part or completely, economic relations with one or more countries.[79] According to the CFI, as the institutions acted according to its established practice and successively considered that Art.60 and 301 allow it to take restrictive measures against entities which or persons who physically controll part of the territory of a third country and against entities which or persons who affectively in a relation with such a person or entity to provide financial support.[80]

---

[75] *Kadi,* para.76.
[76] *Kadi,* para.77.
[77] Article 60 EC authorizes EC implementation of a Common Foreign and Security Policy call for "measures ... as regards the third countries concerned".
[78] Article 301 EC similarly authorizes implementation of a CFSP call for measures "to interrupt or reduce . . . economic relations with one or more third countries".
[79] *Yusuf*, para. 112.
[80] *Yusuf,* para.114.

By comparing the position of Usama bin Laden to Milosevic, the CFI declared that even though the regime has changed in Afghanistan, Usama bin Laden is still effective on the territory and a safe home is provided to him and his Taliban associates. Also the aim of the measures at issue was to prevent the Taliban regime from obtaining financial support from any source, therefore if the sanctions did not affect the individuals who thought to support that regime, then the sanctions might be hindred.[81]

As to the issue of the proportionality, CFI stated that since the measures are taken in accordance with the principle of proportionality, they may not go beyond what is appropriate and necessary to the attainment of the objective (that is to exert effective pressure on the rulers of the country concerned, while restricting as far as possible the suffering endured by the civilian population) pursued by the Community legislation imposing them.[82] Therefore, the CFI ruled that the Council was indeed competent to adopt Regulation No. 467/2001 on the basis of Art.60 and 301 EC Treaty.[83]

The CFI then examined whether Articles 60 and 301 EC together or Article 308 in itself were a sufficient legal basis to adopt the contested regulation. All parties, as well as the court, agreed that Articles 301[84] and 60 EC did *not* qualify as a legal basis for Regulation 881/2002. The Council explicitly submitted that the insufficiency of Articles 301 and 60 EC as the sole legal basis was the reason why it supplemented them with Article 308 EC 'to make it possible to adopt measures not only in respect of third countries but also in respect of individuals who and non-State bodies which are not necessarily linked to the governments or regimes of those countries'.[85] Concerning the legal basis of Regulation No. 881/2002, Resolution 1390 (2002) adopted after the collapse of the Taliban regime, therefore it was not aimed directly at Usama bin Laden, the Al- Qaeda network and the persons and entities associated with them, unlike Resolution 1333 (2000) which specifically referred to the Taliban regime. The Court of

---

[81] *Yusuf*, para.118-121.
[82] *Yusuf*, para.122-123.
[83] *Yusuf*, para.124.
84 Article 301 EC provides: 'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more *third countries*, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission'.
[85] *Kadi*, at 60.

First Instance picked up the Council's argument and took it further by explaining in detail that the change from Articles 301 and 60 EC reflected 'the developments of the international situation' and was a necessary reaction to 'the collapse of the Taliban regime'.[86] The 'expressly established link' with the Afghan territory controlled by the Taliban regime at the time was, according to the court, the reason why the Council considered Articles 301 and 60 EC still sufficient to adopt Regulation 467/2001. The Council had already adopted regulations containing 'smart sanctions' as it calls sanctions targeting individual persons and entities.[87] Yet, all the preceding sanctions instruments were adopted on the basis of Articles 301 and 60 EC only and limited to persons holding official positions in a state structure, including their family members. As to the political decision leading to the adoption of Community sanctions, all Community measures, including the contested regulation, are preceded by a Common Position adopted under the Common Foreign and Security Policy (CFSP). Since, however, the actions legally possible under the CFSP are virtually unlimited, the legal basis of those Common Positions remained the same irrespective of any territorial link.

The court correctly held that the contested regulation cannot be based on Article 301 EC. It then went on to analyse whether the contested regulation could be based on Article 308 EC. However, the measures in question were not considered as having the objective of establishing common commercial policy under Art.3 of the EC Treaty by the Court; since there is no relation with a third country in concern, the Community does not have the power adopt trade embargo measures under Art.133 of the EC Treaty which also makes the claim of distortion of competition unconvincing as no explanation has been put forward regarding how competition might be affected by the implementation.[88] Though, as Art.58[89] allows Member States to take measures on

---

[86] *ibid*, at 87–97.

[87] Council Regulation (EC) No 337/2000 of 14 February 2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2000] OJ L43/1 and Regulation 467/2001, n 4 *supra*.

[88] *Kadi,* para.104-106.

[89] Article 58 EC Treaty:
1. The provisions of Article 56 shall be without prejudice to the right of Member States:
(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

the movement of capital and payments on ground of public security which contains Member States' internal and external security, in so far as those measures are keeping with Art.58 EC Treaty and do not go beyond what is necessary to attain one of the objectives pursued and compatible with the rules of free movement of capital and payments and with the rules on free competition laid down by the EC Treaty.[90]

According to the Court, since the regulations in concern are precise and clear and not open to different interpretations, implementation of the SC resolutions in question by Member States rather than by the Community, do not raise serious danger of changes between each other.[91] Additionally, the references made by the Council related to the other fields that Art.308 was used to attain one of the objectives of the EC Treaty and to the EC case law, in particular the *Delbar* Case, were rejected by the Court.[92] Moreover, the Court also rejected the argument that imposition of financial sanctions and freezing of funds, in respect of individuals or entities suspected of contribution to the funding of terrorism, cannot be regarded as fulfilment of obligations under Art.2 and 3 EC Treaty and also the general objective of ensuring peace and security as stated in the preamble of the EC Treaty cannot serve as a base.[93] Furthermore, the court admitted that even though the objectives of the Union shall inspire the actions by the Community in the sphere of its own competence, this does not constitute a sufficient base for the adoption of measures under Art.308 EC Treaty, in the areas where the competence is marginal and exhaustively defined in the Treaty.[94]

Finally, regarding the application of Art.308 EC Treaty, since the Community and the Union are seperate legal orders, the Court stated that the concerned article cannot be interpreted in a way giving the institutions general authority to use the article as a general basis to achieve one of the objectives of the Treaty on EU. The court

---

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
2. The provisions of this chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.

[90] *Kadi,* para.110.
[91] *Kadi,* para.115.
[92] *Kadi,* para.116-118.
[93] *Kadi* para. 119
[94] *Kadi* para. 119.

concluded correctly that Article 308 EC does not constitute of itself a sufficient legal basis for the contested regulation either.[95]

c. The Court's Article Mixture

The CFI has dismissed the applicants' claims by making a negative definition of the articles[96] by explaining why Art.60, 301 together and Art.308 EC Treaty alone cannot be the sufficient bases for the contested regulation. At this point, the court constructed a joint legal basis combining Articles 301, 60 and 308 EC claiming that a combination of all three can sustain the contested regulation. The CFI read Articles 60 and 301 EC as providing a general "bridge" between EU objectives and the EC Treaty, whereby the Community may act to advance the common foreign and security objectives of the Union. If the specific Community powers are insufficient to serve these particular purposes, the Community may resort to Article 308 EC as an "additional" legal basis to serve the CFSP objectives, which are imported via Article 301 EC into the Community pillar. Therefore, in the CFI's view, Articles 60, 301, and 308 EC together support the contested regulation.

Furthermore, for the sake of consistency and continuity of the attained objectives under Art.3 of Treaty on EU, the Court drew attention to the fact that the Union is obliged to ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies which Council and Commission are responsible of ensuring the implementation of these policies, each in accordance with its respective powers.[97] And the Court followed with stating that Art.60 and 301 EC may prove to be insufficient to allow the institutions to attain the objectives of the CFSP, under the Treaty on EU, in view of which those provisions were specifically introduced into the EC Treaty and which leads to the fact that additional legal basis of Art.308 EC Treaty is justified for the sake of the requirement of consistency laid down in Art.3 of Treaty on EU, when those provisions

---

[95] *ibid*, at 157.
[96] Mustafa Tayyar Karayigit, "The Yusuf and Kadi Judgments: The Scope of the EC Competences in Respect of Restrictive Measures", *Legal Issues of Economic Integration*, 33(4), 2006, pp.379-404 in p.381.
[97] *Kadi,* para.126.

do not give the community institutions the necessary power, in the field of economic and financial sanction, to act for the purpose of attaining the objective pursued by the Union under the CFSP.[98]

Therefore, according to the Court, under the *cumulative legal bases* of Art.60, 301 and 308 EC, it is possible to adopt economic and financial sanctions measures that go beyond the Art. 60 and 301 EC by a common position or a joint action adopted under CFSP. This *cumulative legal bases* makes it possible to achieve the objective inquired under CFSP by the Union and Member States, even though the Community has no express power to impose economic sanctions on individuals or entities with no sufficient connection to a given country.[99]

d. Critics and Comments

Although many scholar criticized the decision, first official criticism regarding the justifications of the Court about the Community's power to adopt contested regulation on the joint basis of Art.60, 301 and 308 EC Treaty, was made by Advocate General (AG) Maduro in his opinion on the appeal of the judgment by Kadi to the ECJ.[100] AG Maduro defended the fact that Art.60 and 301 of EC have provided sufficient legal bases for the adoption of the contested regulation. He stated that it is difficult to harmonize the wording and the purpose of those provisions in concern when they are accepted as supplying the sufficient base to apply sanctions to the third country governments but not individuals or entities. Moreover, Art.60 with Art.301 EC Treaty authorize the Council to take measures with respect to the movement of capital and on payments as regards the third countries concerned and he also underlines the fact that EC Treaty does not regulate what shape the measures should take or who should be the target or bear the burden of the measures.[101]

Additionally, according to the opinion, Art.301 EC should be interpreted widely as that gives the necessary power to the Council to adopt measures to impose

[98] *Kadi,* para.127-128.
[99] *Kadi,* para.129-130.
[100] AG Maduro, para.11-16.
[101] AG Maduro, para.12.

economic sanctions not only to third countries but everyone who associates with terrorist activities.[102] Also, Art.308 EC should not be treated like a bridge between pillars since it only provides the means but not the objective and if any act to interrupt economic relations with non-state actors in accordance with CFSP cannot be done under Art.301, it also cannot be done under Art.308 as a base that broadens the scope of the latter.[103]

The reviews of the scholars on the issue are quite supporting the CFI's point of view and however, some concluded differently like AG Maduro. According to *Tomuschat*, the reasoning of the CFI is persuasive enough that in the appeal ECJ will conserve the maintained position as otherwise the EU with its three pillar structure would be impeded from discharging its obligations vis-à-vis the UN, a consequence which would unleash a new constitutional crisis.[104] Additionally, *Karayigit* also accepted the applicability of the cumulative basis of Art.60, 301 and 308 EC Treaty.[105] However, according to *Eckes*, the CFI blurred the distinction between action by the Community and action by the Union in allowing the combined use of Art.60, 301 and 308 EC Treaty to pursue Union objectives and by applying Art.308 with 301 EC Treaty the Court extended competence although the special structure of Art.60 and 301 regarding the economic sanction and Art.301 establishes clear outlines for a permissible action.[106] Moreover, *Eckes* also touches upon the fact of different nature of the sanctions against countries and sanctions against individuals as the individuals need special care more than states because of their incapability of representation in front of the international community and their vulnerability which may cause infringement of human rights. She also claimed that the judgment endangered the power balance between Community and the MS and disregarded the constitutional boundaries of the

[102] AG Maduro, para.13.
[103] AG Maduro, para.13-14.
[104] Christian Tomuschat, "Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, judgment of the Court of First Instance of 21 September 2005; Case T-315/01, Yassin Abdullah Kadi v. Council and Commission, judgment of the Court of First Instance of 21 September 2005", *Common Market Law Review*. New York: Apr 2006. Vol. 43, Iss. 2; p. 537, 15 pgs.
[105] Karayigit, p. 385-386.
[106] Eckes, p.79.

Treaty, in particular the principle of conferred powers and the principle of subsidiarity.[107]

However, it must be underlined that, as there was not any smart sanction like the ones which are the subject of these cases –individually targeted regardless of any connection with the territory- during the *travaux preparatoire* of the Maastricht Treaty, the wording of the article was constructed according to the international developments of that time which led to specify the interruption and reduction of economic relations with one or more *third countries*. As a consequence thereof, Art.308 EC Treaty should be added as an additional basis for the adoption of regulation, as Art.301 and 60 EC Treaty do not create express or implied power on the subject matter and not because of CFSP considerations but attainment of good functioning of common market and avoiding distortion of competition between Member States Art.308 is necessary, which has also been said by ECJ in the Appeal. Therefore, by finding a *legal base* in the treaties lessened the complications in the application of the SC Resolutions in Community legal order. However, by doing so maybe Court has explained the power of the Community and compatibility of its actions with its powers.

3. The Scope of Judicial Review

The court dedicated much consideration to the scope of the judicial review that it must carry out according to international law and Community law.[108] Accepting the reasoning that the Community is bound by UN law as a matter of Community law, the Court of First Instance concluded that its own jurisdiction is limited and it does not have the 'authority to call in question, even indirectly, the lawfulness of the Security Council resolutions in the light of Community law'.[109] It consequently considered the challenged regulation to fall outside the limit of its judicial review powers.

[107] Eckes, p. 76-78
[108] *Kadi*, at 209.
[109] *Yusuf*, at 276.

a. The Relationship between UN Law and EC Law- Hierarchy of Norms

The sanctions cases urged the European Community to confront with the complexities of a world system of governance composed of three levels; the United Nations level, represented primarily by the Security Council, the Community level and lastly the national level, where the relevant measures - the freezing of funds and other financial resources, in practice mainly bank accounts - were to be carried out.[110]

From the establishment of the European Coal and Steel Community, there has always been a contention between the Community legal order and the domestic legal orders of the Member States. This has mainly been settled by the principle of primacy of Community law over national law.

But when it comes to the relations between the United Nations which, in a limited field, is also empowered to issue decisions which are binding on the Member States of the world organization and require full compliance the issue became more complicated. Under Chapter VII of the UN Charter, the Security Council is authorized to adopt resolutions for the maintenance or restoration of international peace and security, and Article 25 of the Charter urges UN member states to "accept and carry out" its decisions.

The problem occurs when the requirements of UN law, on the one hand, and those of Community law, on the other, conflict without being reconcilable. Also the question of which rule should prevail has to be answered.

The legal system of the United Nations is somewhat different from the European Community. Although the Charter of the UN describes the International Court of Justice as the "principal judicial organ of the United Nations"[111], it has not been entrusted with powers enabling it to review the lawfulness of the acts of the political organs of the world organization. No remedy is available to a State which feels

[110] Earlier cases: Case C-84/95, Bosphorus, [1996] ECR 1-3953; Case T-184/95, Dorsch Consult, [1998] ECR 11-667, C-237/98 P, Dorsch Consult, [2000] ECR 1-4549.
[111] Charter, Art. 92.

that its rights under the Charter have been infringed, and individuals have no locus standi before the ICJ.[112]

Review of the lawfulness of controversial measures may only be achieved in an indirect way through an advisory opinion of the ICJ[113]. Even in this advisory procedure way the alleged victim cannot set that procedure in motion. Only the General Assembly and the Security Council are entitled to request an advisory opinion.

(1) Primacy of United Nations Law - Innovative features in the Community Legal Order

One of the most interesting passages of the judgments concerns the explanations which the Court gives of its understanding of the relationship between the legal order of the United Nations and that of the Community.[114] The judgment contains the words "the domestic or Community legal order", which can be understood as the Community system constitutes just a "domestic" regime, therefore the general rules which generally regulate the relationship between international law and national law can be applied. In this regard, three classes of norms have been used by the Court. First of all, the rule that under general international law no State may refer to its domestic law to justify non-compliance with its treaty obligations[115] which form a key element of the Vienna Convention on the Law of Treaties[116] has been stated. Second, the Court refers to Article 103 of the Charter, which regulates the principle of primacy of the obligations under the Charter[117]. This primacy extends also to obligations resulting from the binding resolutions of the Security Council. Thus, the Court reached the conclusion that the obligations set forth in the relevant resolutions of the Security Council were binding on the Member States of the Community, which are all at the same time members of the United Nations.

---

[112] Statute of the ICJ, Art. 34.
[113] Charter, Art. 96.
[114] *Kadi*, paras. 181- 208.
[115] *Kadi,* para. 182.
[116] Art. 27. Of 23 May 1969, UNTS 1155, p. 331.
[117] *Kadi*, para. 183.

In the third place, the Court demonstrates that even the EC Treaty itself acknowledges the primacy of the UN Charter. It first refers to Article 307 EC[118], specifically dealt with commitments existing for the founding Member States in 1958 before they established the European Economic Community, leaving those commitments unaffected. It stated that, the United Nations constitutes the overarching structure of a world order system of governance in which the Community forms a regional sub-system, hierarchically inferior to the fundamental principles and rules enshrined in the Charter. Five of the six original members were already members of the United Nations in 1958 while Germany had specifically pledged to live up to the commitments set forth in the Charter.[119] As far as the States are concerned which joined the EEC/EC at later stages, Article 307 makes explicit provision for their needs. Lastly, the Court draws attention to Article 297[120], with the specific purpose of enabling Member States to discharge their commitments under the UN Charter.[121]

After deciding that the resolutions of the UN are binding on the Member States, the court puts explicitly the question as to whether the Community as such is bound as well. Here, it distinguishes between a binding effect coming from the Charter itself, and a binding effect that might result from the EC Treaty. The first alternative was rejected by following its (own) earlier judgment in Dorsch Consult.[122] The Court argued that being bound by any obligations arising from a multilateral treaty- The Charter- is dependent on being a member to that treaty - which the Community is not. At this point the Court refers to the GATT jurisprudence of the Court of Justice which held that the obligations of the Member States resulting from GATT were now incumbent upon the Community itself since the Community had assumed all the responsibilities of the Member States in the field covered by GATT.[123] In particular, the

[118] Originally as Article 234 EEC
[119] *Kadi,* para. 187.
[120] EEC Treaty Article 224.
[121] Tomuschat, p. 541.
[122] Cited supra note ??,
[123] Joined Cases 21/72 to 24/72, International Fruit Company and Others ("International Fruit"), [1972] ECR 1219, para 11.

court argues that the EC Member States, which were all bound by the Charter, could not transfer more powers to the Community than they themselves possessed.[124]

(2) The Drastic Change in the Hierarchy of Norms

The Court of First Instance took the position that the Community was bound by the obligations under the UN Charter in the same way as its Member States; however, since the Community is not a member of the UN itself, it was bound by the EC Treaty rather than the UN Charter.[125] But the Council and the Commission argued on the basis of the UN Charter[126] that UN law prevails over any other obligation and creates an 'effect of legality',[127] the court relied additionally on Articles 307 and 297 EC and referred to the ECJ's case-law[128] for its conclusion. Article 103 of the UN Charter stipulates that any obligation of the UN Member States under the Charter will prevail over any other legal obligation coming from an international agreement. In the *Kadi* and *Yusuf* cases the institutions declared that they had 'acted under circumscribed powers' and that Article 103 of the UN Charter gives UN law primacy over all other forms of international law,[129] including the Member States' and the Community's obligations flowing from the ECHR. The applicants strongly contested this. They claimed that the Community institutions cannot abdicate their responsibility[130] by hiding behind UN law.

The Court of First Instance found the institutions' view correct to the extent that Article 103 of the UN Charter binds the Member States. It inferred from a combination of this Article and of Article 27 of the Vienna Convention on the Law of Treaties that the UN Charter, and thereby also the Security Council resolutions,[131] prevails over domestic law. The mentioned Article states that "a state can not rely on its internal excuses for the failure to perform its duties under an international agreement" which is a reflection of a generally- accepted customary international law rule *pacta sunt servanda*. However, it is equally accepted that this rule remains at the level of

[124] *Kadi*, para. 195.
[125] *Kadi*, at 193; *Yusuf*, at 243.
[126] Articles 24(1), 25, 48(2) and 103 of the UN Charter.
[127] *Kadi*, at 156.
[128] Joined Cases C-21-24/72, International Fruit Company NV and Others v Produktschap voor Groenten en Fruit [1972] ECR 1219.
[129] *Kadi*, at 156–159.
[130] *ibid*, at 150.
[131] *ibid*, at 184.

international law and does not carry the same significance in domestic law.[132] Contrary to that understanding, the Court of First Instance decided that the Member States are bound to give precedence to their UN law obligations over every other obligation of both domestic and international law.[133]

With regard to the relationship between UN law and Community law obligations, the court looked to the Treaties. Continuing its argument on the basis of Articles 297 and 307 EC, the Court of First Instance concluded that the Member States are also bound, as a matter of Community law, to disregard their Community law obligations. It pointed out that "...pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations".[134]

However, Articles 297 and 307 EC do not make UN law, an EC law obligation for the Member States. On the contrary, they point out that a Member State has a residual competence to comply with "obligations it has accepted for the purpose of maintaining peace and international security" and allow for derogation from Community obligations to comply with prior international agreements, such as the UN Charter.

The Court of First Instance explicitly stated that the obligations flowing directly from the Charter and those created by Security Council resolutions are equally binding.[135] The individual decision to list a specific person is, according to the court, taken *by the Security Council through the Sanctions Committee*.[136] Therefore, the court considered all three forms of law to enjoy the same supremacy over any other type of law. The UN Sanctions Committee was the first body to list publicly the applicants as terrorist suspects and it remained the only one at the UN level. Despite the fact that it is

[132]Eckes, p. 84.
[133] *ibid*, at 181.
[134] *Yusuf,* at 240.
[135] ibid, at 234.
[136] ibid, at 271.

forced to do so by the Security Council and that its membership is the same as the membership in the Security Council, it is only a subsidiary organ of the same. But the Court of First Instance read Article 103 of the UN Charter in a different way. First, it held that UN law takes primacy not only over international law, but also over national law. Second, it indirectly accepted the decisions of the Sanctions Committee to fall under the scope of Article 103 of the UN Charter. The court referred to the status of SC resolutions in terms of traditional EC law concepts by stating that they take "primacy" over any other law obligation as a matter of international law.[137]

One of the most problematic aspect of the CFI judgments in *Kadi/Yusuf* is the failure or unwillingness of the court to apply the hierarchy of norms that is normally applicable in the Community legal order. The hierarchy of norms in the Community legal order according to the jurisprudence of the ECJ from highest to lowest is as follows:

- Primary EC law (EC Treaty, including ECHR)
- International agreements/decision of International Organizations
- Secondary EC law (regulations/directives)
- National (constitutional) law.

This hierarchy of norms means that both the EC regulation implementing the UN Security Council resolution as well as the resolution itself (if it is accepted that the resolution is also integral part of EC law) would have to be reviewed as to their compatibility with the highest norm, which is the EC Treaty and the fundamental rights as protected by the ECHR. Applying the generally accepted principle in law – rule of law- that the lower norm must always be compatible with the higher norm, the CFI was simply required to examine whether the EC regulation complies with fundamental principles of Community law, namely, that every Community act must be reviewable, and compatible with fundamental rights of the EC. Consequently, the issue of reviewing the UN Security Council resolution as such and the possible trespassing of the Security Council prerogatives' is not relevant for the CFI when determining the compatibility of

[137] *Yusuf*, at 131–134.

the EC regulation with primary EC law. In other words, there would have been no problem for the CFI to review the EC regulation implementing the UN sanctions if it would have applied the rule of law. But the court has decided to establish a new hierarchy of norms in the Community legal order which can be formulated as:

- Jus cogens
- International agreements/decision of IOs (UN Charter, including UNSC resolutions)
- Secondary EC law (regulations implementing UNSC resolutions)
- Primary EC law (including ECHR)
- National (constitutional) law[138]

This is a hard modification of the hierarchy of norms and not seems to be compatible with the general system of Community law. Moreover, while this hierarchy of norms may seem acceptable and even preferable from the point of view of international law - at least regarding the supremacy of jus cogens and international treaties/decisions of IOs - it should not be forgotten that Community law is a distinct legal order from international law with its own hierarchy of norms.[139]

As a matter of fact, international law has two components: customary international law and treaty law. While customary international law is binding on all states, treaties are binding only on the ones that are parties to them. Therefore the rules of customary international law may be changed by treaties, subject to the limits set by jus cogens. Accordingly, the EC (and the EU) was created by a treaty. Thus, all forms of Community law - including the extent of the jurisdiction of the CFI/ECJ - depend for their validity on the EC Treaty. In turn, the validity of the EC Treaty depends on international law. However, the fact that the validity of the Community legal order depends on international law does not mean that it is *subordinated* to international law. Indeed, international law permits a group of states to enter into a treaty that lays down

[138] Nicolaos Lavranos, "Judicial Review of UN Sanctions by the Court of First Instance", *European Foreign Affairs Review* 11: 471-490, 2006, p. 478. (hereinafter Lavranos II).
[139] See, for example Case 294/83 *{Les Verts* v. *EP)* [1986] ECR 1339; Case C-260/89 (ERT) [1991] ECR 1-2925; as well as Art. 6(2) TEU in conjunction with Art. 46(d) TEU

rules of law. These rules displace customary international law as far as those states are concerned. Accordingly, when the EC Member States signed the E(E)C Treaty, they had the power under international law to create a self-contained legal system that would apply under the EC Treaty (and EU Treaty). In fact, from the very beginning of the existence of the EC, the ECJ has emphasized that the EC Member States created a new legal order when the ECJ stated that 'by contrast with ordinary international treaties, the EEC created its own legal system".[140] Therefore, EC law must be regarded as a separate legal order that does not belong to the international or national legal order. Rather, it is a sui generis legal order. As a consequence thereof, it could not be argued that EC law is subordinate to international law, rather the Community legal order stands side by side and on the same level with the international legal order, but as a self-contained legal order that applies internally its own hierarchy of norms. Therefore the international legal order cannot superimpose itself on the Community legal order but rather has to accept the supremacy of Community law over international law that is applied within the EC and its Member States.[141]

Moreover, it is important to emphasize that the EC/EU is not a member of the UN and therefore formally not bound by UN Security Council resolutions - at least not in the same way as the EC Member States that are also members of the UN. While Articles 103, 25 in conjunction with 48(2) UN Charter may impose some sort of legal obligation on the EC/EU to implement UN Security Council resolutions, it does not - or at least not in the same way - impose a supremacy of UN law upon non-UN members such as the EC/EU. As consequence thereof, the CFI cannot be considered to be part of the UN machinery and therefore is able - and indeed required by virtue of EC law - to exercise its task of providing judicial review.

b. Indirect Review of UNSC Resolutions

After emphasizing the primacy of the UN legal order, the Court moved on to decide as to whether it is authorized to examine by implication the lawfulness of the

[140] Case 26/62 *{Van Gend & Loos)* [1962] ECR 95, stating that the Community constitutes a *new legal order of international law,* whereas in Case 6/64 *{Costa v. ENEL)* [1964] ECR 685, the ECJ stated that the EEC Treaty has created *its own legal system.*
[141] Lavranos II, p. 480.

relevant resolutions of the Security Council.[142] Even though the resolutions were not before the Court, the regulations themselves were almost word for word the resolutions. Therefore, review of the challenged regulations as to their substance would have amounted to indirect review of the resolutions adopted under Chapter VII of the Charter, the court claimed. It is clear that the Court of First Instance has no power directly to review SC resolutions. This, however, was not the issue in the cases of *Yusuf* and *Kadi*, since the review was based on a community instrument. Indirectly, the court admitted that its review is limited to the European implementation measure and does not contain the procedure at the UN level, when it refused to look more closely at the compliance with the right to a fair hearing at the UN level.[143]

(1) Can the Security Council Resolutions be reviewed before the CFI?

The Court of First Instance for the first time adjudicated on UN sanctions implemented by the EC and its Member States which directly target individuals and private organizations.[144] In essence, the CFI argued that it is legally bound by the UN Security Council resolutions in the *same way as the EC Member States,* which prevents it from providing judicial review regarding their compatibility with Community law and fundamental rights as protected by EC law and the European Convention on Human Rights (ECHR). The only exception is - according to the CFI – the violation of "jus cogens"- which is this case regarding a possible violation of property rights.

Although the Court clearly stated that, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order[145], in principle, UN sanctions (or rather EC and/or national acts implementing UN sanctions) can be reviewed before the CFI/ECJ, the ECrtHR and the domestic courts of the EC Member States that are also contracting parties to the ECHR. As a consequence of this multiple access to these courts and the fact that all these courts are formally and/or informally interacting with other, raises a number of procedural aspects for individuals

[142] *Kadi*, paras. 209-225.
[143] *Kadi*, at 272.
[144] Tomuschat, p.539.
[145] *Kadi*, para. 338.

that have been affected by UN sanctions and wish to obtain judicial review. Accordingly, in the following sections the possibilities for judicial review before the CFI is examined on the basis of recent jurisprudence.

(2) Is There a Limit to the Jurisdiction of the CFI?

The Court of First Instance argued that it can not review the contested regulation. However, the wording of the Treaties itself provides for a scope of review by the European courts just as broad as the substantial obligations laid down in Community law. Article 220(1) EC confers on the European courts the task to ensure that in the interpretation and application of the EC Treaty the law is observed. The term 'law' in this Article clearly includes EC law and thereby fundamental rights as they are protected under European law as well as general principles of Community law.[146] Article 230(2) EC does not provide for any differentiation based on the type of (international) legal obligation concerned[147] and Article 46 EU restricts the jurisdiction of the ECJ for the area of EU law, but does not set out any limitation of the court's jurisdiction for Community law.

Samely, the case-law of the ECJ does not impose limitations on the jurisdiction of the Court of First Instance either. Since the ECJ had not ruled on the binding force of UN law at that time;[148] the Court of First Instance based its judgment on the case of *International Fruit Company*.[149] In this case, the ECJ dealt with the question of whether a Community regulation was invalid for breaching the General Agreement on Tariffs and Trade (GATT). It concluded that the GATT law was binding on the Community, but it has no direct effect.[150] Therefore since the parties could not rely on GATT/WTO law, the concerned Community regulations could not be found invalid, no matter the GATT/WTO law was binding or not.

---

[146] T. Tridimas, "The General Principles of EC Law", Oxford University Press, 1999, at 9–10.
[147] R. Uerpmann, International Law as an Element of European Constitutional Law: International Supplementary Constitutions, Jean Monnet Working Paper 9/03, at 22.
[148] Piet Eeckhout, External Relations of the European Union—Legal and Constitutional Foundations, Oxford University Press, 2004, at 437.
[149] Joined Cases C-21-24/72, n 67 *supra*.
[150] And has done so ever since: Case 70/87, *Fediol v Commission* [1989] ECR 1781, paras 19–22; Case C-69/89, *Nakajima v Council* [1991] ECR I-2069, para 31; Case C-149/96, *Portugal v Council* [1999] ECR I-8395, para 49.

The reference to *International Fruit Company* in order to support that international law obligations limit the scope of jurisdiction of the European courts caused surprise, since regarding the jurisdiction of the European courts, the ECJ clearly stated that it cannot accept a limitation of its jurisdiction because of international law obligations.[151]

The Court of First Instance essentially based its argument that since it is 'in the same position as the Member States of the UN' it only has a limited review. The court held that the Community is not directly bound by UN law,[152] but that it is 'bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it'.[153] In *International Fruit Company*, since all the Member States were bound by the GATT by the time the Community came into existence, the ECJ found the GATT to be binding on the Community. It argued that, the Member States could not withdraw from their obligations under international law by creating the Community; therefore, they could not transfer more powers to the Community than they had. The court claimed that this is equally true for the UN.

However, even it is accepted that the UN is binding on the Community for the same reasons as the GATT,[154] this would not result in a limitation of the Court of First Instance's jurisdiction. The question of whether UN law is binding is different from the question of whether it can prevent the courts from reviewing Community measures.

Afterwards, the Court of First Instance referred the *Centro-Com* case,[155] which also concerned UN restrictive measures. In this case the ECJ ruled that the Member States keep powers in the field of foreign and security policy, but that they must exercise these powers coherent with Community law.

---

[151] *International Fruit*, n 67 *supra*, para 5.
[152] The Court of First Instance here referred to its earlier case-law: Case T-184/95, *Dorsch Consult v Council and Commission*, [1998] ECR II-667, para 78. *Kadi*, at 192; *Yusuf*, at 242.
[153] *Yusuf*, at 243; *Kadi*, at 193.
[154] There are other fundamental differences between the relationship between the EEC and the GATT and the EC and the UN, see Piet Eeckhout at 436–444.
[155] Case C-124/95, *R v HM Treasury and Bank of England ex parte Centro-Com Srl* [1997] ECR I-81, paras 54.

In a second step, the court then analyzed whether Member States can rely on Article 307 EC to justify measures that are contrary to the Common Commercial Policy. In this context, the Court of First Instance relied on Article 307 EC as one of the provisions supporting its understanding that the Community is compelled by the European Treaties to comply with UN law in order to justify the limitation of its jurisdiction.[156] The Court applied Article 307 EC to UN law. Then why would Member States have to derogate from a Community measure if the Community itself is bound by UN law? Then it can be argued that EC law should be accurate for being interpreted in conformity with UN law obligations for many events. Further, in a decision on the legality of a Member State's derogation under Article 307 EC, the court would indirectly have to rule on whether EC law is in compliance with UN law since the contrary result in a declaration of illegality of Community law.[157]

In two other cases concerning UN sanctions, the cases of *Bosphorus Airways*[158] and *Ebony Maritime*,[159] the ECJ behaved in a different manner than the CFI by not accepting the primacy of the UN law. In *Bosphorus*, even if the ECJ ruled that EC regulations must receive a literal interpretation in the light of the concerned SC resolution, the court examined whether the regulation was in conformity with general principles of Community law.[160] However, with regard to the case-law of the ECJ it must be acceded that it is easier to interpret state sanctions consistently with the relevant SC Resolution since the State sanctions leave a margin of discretion for their implementation. On the other hand individual sanctions are simply a literal copy of the names listed in the SC resolution which do not require any further interpretation.

To sum up, it should be stated that neither the European Treaties, nor the case-law of the ECJ, require the Court of First Instance to limit its jurisdiction. Under the light of this information it can be claimed that the court may have chosen a totally

---

[156] *Kadi*, at 223.
[157] Lavranos, p. 476.
[158] *Bosphorus Airways*, n 77 *supra*, concerning the interpretation of Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14 intended to implement certain aspects of sanctions imposed against the Federal Republic of Yugoslavia by SC Resolution 820 (1993).
[159] Case C-177/95, *Ebony Maritime and Loten Navigation v Prefetto della Provincia di Brindisi and Others* [1997] ECR I-1111, equally dealing with the implementation of SC Resolution 820 (1993) by Regulation No 990/93.
[160] *Bosphorus*, n 77 *supra*, at 24 and 25.

different approach firstly by taking the EC regulation implementing the UN resolution as the only relevant instrument for review. Clearly, the CFI has no competence to review the UN Resolution since this issue is the task of the ICJ. However, the CFI has the competence to review the compatibility of any secondary EC measure with primary EC law, that is, the EC Treaty, including fundamental rights as contained in the ECHR.

In the second place, it would not have been necessary for the CFI to examine and determine whether or not the listing of the names of the suspected individuals and organizations was correct, rather the CFI could have invalidated the EC regulation purely because of the failure of the Community legislator to include in the regulation an appropriate mechanism for reviewing complaints of affected individuals by an independent (judicial) body, thereby failing to provide basic minimum procedural rights.[161]

At this point some scholars claim that the Court could have argued that it was incumbent upon Member States to discharge the commitments owed by them to the United Nations, while the Community as a third person was not directly responsible for implementing the relevant resolutions of the Security Council. But such an approach would danger the monist theory which has ruled the relationship between the Community legal order and the international legal order. Therefore in order to achieve full harmony between the requirements of the UN system and the legal position within the Community system, the Court accepted the primacy of the UN system without any general restrictive caveats - with one exception "jus cogens".

4. CFI Limitation for Fundamanetal Rights Review: Jus Cogens

a. Definition

Jus cogens can mainly be defined as the technical name given to the basic principles of international law, which can not be disregarded by the states. The major

[161] Lavranos, p. 477.

distinguishing feature of *jus cogens* norms is their general acceptance by the international community like a customary rule.[162]

The only references to peremptory norms in international texts are found in art.53 of Vienna Convention on Law of the Treaties (VCLT) which follows as:

"[...] For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[163] *During the preparatory work on art.53 VCLT no agreement was possible on which international norms belong to jus cogens*[164] *and in its commentary the ILC had to confess that 'there is no simple criterion by which to identify a general rule of international law as having the character of jus cogens in addition to the fact that it is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of jus cogens.* [165]

In order to acquire the quality of *jus cogens* a norm should be defined in the chategory of the 'general international law' and it also must be 'accepted and recognized' as a peremptory norm by the international community of states as a whole.[166] Even though there is not a certain scala of jus cogens norms, it can mainly be said that human rights, all humanitarian norms (human rights and the laws of war), or separately, the duty not to cause trans boundary environmental harm, freedom from torture including the rules to use force by states, self-determination, and genocide are the subject of general agreement as jus cogens.

Additionally, it is accepted that a rule of jus cogens can be derived from customary law and treaties. For example in the *Nicaragua Case*[167] the ICJ clearly proceeded on the assumption that the peremptory rule prohibiting the use of force was

[162] Christian Tomuschat & Jean Marc Thouvenin, "The fundamental rules of the international legal order: Jus Cogens and obligations Erga Omnes", Leiden; Boston: Martinus Nijhoff Publishers, 2006. Hereinafter Referred as Tomuschat II.
[163] VCLT Art.53
[164] Tomuschat II, p. 214-17.
[165] ibid, p. 214.
[166] ibid, p. 215.
[167] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986, ICJ REP. 14 (Judgment of June 27)

based not on some exotic source, but on the two most commonly used and established sources of law, namely treaty and custom.[168]

However, while the existence of *jus cogens* in international law is an increasingly accepted proposition, its exact scope and content remains uncertain since there is not a precise list of human rights norms with a peremptory character.

b. *Jus cogens*- Human Rights Relation

Before examining the ruling of the CFI on the *jus cogens*, its relation with the human rights should be clearified first. In order to understand the relationhip between the jus cogens and the human rights, international human rights law should be explained briefly. At this point the main legal instrument on the international law, the UN Charter, Art.1(3) states that one of the purposes of the UN is the achievement of "international co-operation in... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". But on the other hand, the Charter did not impose any concrete human rights obligations on the UN member states.[169]

Under the obligation to cooperate for the promotion of human rights, the main legal instruments that were originated from the UN can be shown as the Universal Declaration of Human Rights of 1948 which was followed, including the two International Covenants on Human Rights in 1966, which together with the human rights provisions of the UN Charter and the Universal Declaration, constitute the International Bill of Rights. It should also be noted that in international instruments terms human rights, fundamental human rights, fundamental freedoms, rights and freedoms, human rights and fundamental freedoms are generally used interchangeably which suggest that there is no substantive or legal definable difference between these terms.[170] Additionally, the term of fundamental rights, which inspired the development of international human rights, originated in national constitutions as it is commonly

[168] Tomuschat II, p. 214-17.
[169] Ian Brownlie. "Principles of Public International Law", Oxford; New York: Oxford University Pres, 2003.
[170] ibid, p.602.

used.[171] Lastly The European Convention on Human Rights is the first regional system for the protection of human rights which was followed by the inter-American and African systems, and all three of the existing systems, by providing protective mechanisms suited to their regions. But none of these mentioned legal instruments has any definiton or a list for jus cogens.

c. The *jus cogens* Limit of the CFI on Human Rights Review

The Yusuf/ Kadi cases were also noteworthy in terms of the limitation that the Court of First Instance brought to the fundamental right review: *jus cogens.* It argued that the limit to the SC resolutions 'effect of legality' are 'fundamental peremptory provisions'[172] and that any UN law obligation contrary to *jus cogens* could not have binding force.[173] This finding extends the Court of First Instance's role beyond the protection of the Treaties to being the judge of the more fundamental question of whether UN resolutions comply with *jus cogens*.[174]

In the past national courts have commented on *jus cogens*; usually, however, not in order to replace the review on the basis of national law, but in order to establish obligations which did not exist in national law[175] or to justify a derogation from a binding international treaty.[176] Many scholars like *Tomuschat* claim that actions taken by the international community through the UN must be judged in a different stage than actions of states or supranational organisations. Since the SC is not bound by the large number of widely ratified human rights treaties, no matter whether those treaties are ratified by all members of the SC, it can be said that the SC can do what the UN member states cannot when acting alone. Decisions taken at such a high level with such immunity and huge consequences possess an extraordinary legitimacy beyond the legitimacy of state action.[177]

---

[171] ibid, p. 587.
[172] *Kadi*, at 226.
[173] ibid, at 230; *Yusuf*, at 272.
[174] *Kadi*, at 226.
[175] Tomuschat, p. 552.
[176] ibid. p. 553.
[177] Tomuschat, p.553.

In the cases that were discussed above[178], the Court determines a barrier "jus cogens" which the Security Council may not overstep.[179] The Court can be right in emphasizing that "in particular, the mandatory provisions concerning the universal protection of human rights" must be respected by the Security Council and also insisting on that there are inalienable human rights which must be respected under any circumstances. The Security Council is an institution of the international community for which observance of human rights is a parameter the core of which must never be sacrificed. Through the statutes of the currently existing international criminal tribunals, specific examples of jus cogens violations have been codified. It was clear that the regime of the regulations challenged in the cases annotated here did not reach the gravity of an international crime. Nonetheless, the Court examines whether any of the three complaints that had been raised fell within the scope of jus cogens.

In the first place, the Court examines whether the alleged infringement of property rights and the principle of proportionality may amount to a violation of jus cogens.[180] The court here made a reference to the Universal Declaration of Human Rights of 1948[181] which is a resolution having the legal value of a simple recommendation. On the other hand the Court could have asked whether the right to property has acquired the quality of customary law during the last decades. In 1966, when the two International Covenants on human rights were adopted by the General Assembly, there was obviously no agreement on the protection which property should enjoy as a human right. Indeed, none of the two Covenants even mentions property - apart from the collective dimension constituted by a people's right to its own natural resources.[182] After that the European Convention on Human Rights guaranteed the "peaceful enjoyment of [one's] possessions" under its First Protocol of 20 March 1952.[183] The American Convention on Human Rights followed the trend in 1969 by setting forth the right of everyone "to the use and enjoyment of his property".[184]

[178] Kadi, Yusuf, Hassan and Ayadi cases.
[179] *Kadi*, para. 231.
[180] Kadi, paras. 234-252.
[181] Kadi, para.241.
[182] Art. 1 (2).
[183] Art. 1.
[184] Art. 21.

Thereafter, the African Charter of Human and Peoples' Rights of 1981 also proclaimed "the right to property"[185] Consequently, it can be claimed that the right to property has evolved as a right under customary law. But it is not certain that such a customary right might qualify as a rule of jus cogens. It can be said that the life and the physical integrity of human beings are placed under the protection of jus cogens. But their belongings pertain to a different class of social goods which need permanent adjustment to life in society.

However, it should be reminded that the Court of First Instance was not asked to rule on the legality of the actions of the Security Council. Furthermore the indirect review of the Security Council decisions would place the CFI in a position which the ICJ has denied up to this point. The International Court of Justice states that “the court does not possess powers of judicial review or appeal in respect to the decisions taken by the United Nations organs concerned”.[186] On the other hand the Court of First Instance has gone much further. It declared whether the SC complied with *jus cogens*, which are accepted to be the limits of its competences. If it had reached the conclusion that the EC regulation copying the SC resolution had been incompatible with *jus cogens* this would have amounted to a declaration that the SC had acted *ultra vires*. However, the court is in principle contested that a review of the EC regulation constitutes an indirect review of the underlying UN resolution.

Furthermore, the court stated that, it is not the task of the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council's prerogatives under Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question

[185] Art. 14.

[186] South West Africa case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order No 1 of 26 January 1971, [1971] ICJ Rep 3, at 45)

whether an individual or organization poses a threat to international peace and security, like the question of what measures must be adopted vis-à-vis the persons concerned in order to stop that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security.[187]

The court also paid attention to the fact that since there is no judicial remedy available to the applicants, the Security Council should establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee.[188] Furthermore the court considers that the absence of an international court itself contrary to jus cogens. And the court concludes that in this absence to provide an opportunity for the applicants to apply to the Sanctions Committee in order to have any individual case re-examined, by means of a procedure involving both the 'petitioned government' and the 'designating government'[189] may constitute another reasonable method of affording convenient protection of the applicants' fundamental rights as recognized *by jus cogens*.

Besides the fact that a violation of norms of *jus cogens* is conceivable only in rare cases, the problems for individuals affected by UN sanctions begins already at the stage of filing a claim, namely, meeting the conditions of locus standi before the CFI/ECJ. According to established case law of the ECJ, individuals have locus standi only if the measure is of direct and individual concern to them.[190] These conditions are hardly ever met in case of regulations which by their nature are aimed for general application.[191]

In other words, since UN sanctions are normally implemented by EC regulations, affected individuals must first meet the locus standi requirements and then - in addition - have to prove that norms of jus cogens have been violated before the CFI is

[187] *Kadi*, para. 339.
[188] *Kadi*, para. 340.
[189] *Kadi*, paras. 310- 311.
[190] Case 25/62 *(Plaumann)* [1963] ECR 95; Case C-50/00 P *(UPA)* [2002] ECR 1-6677; Case C-263/02 P *(Jego-Quere)* [2004] ECR 1-3425.
[191] Lavranos, p. 477.

prepared to review EC measures implementing UN sanctions. It is obvious that in practice these conditions are almost impossible to meet, which means that no actual judicial review before the CFI against regulations implementing UN sanctions is available. Clearly, this conclusion is hardly reconcilable with the fundamental Community law principle of effective legal remedies.[192]

On the other hand while the authority of the CFI to review the SC resolutions indirectly has been argued, whether human rights constitutes *jus cogens* or not constituted another discussion. Mostly, the main problem of acceptance of fundamental human rights as *jus cogens* is the immunity of the States since states usually claim that these matters are included in the exclusive discretion of a sovereign state. At this point the scholars examined the case law of the other tribunals.

On the other hand the main court on international law, ICJ acted more cautiously in interpreting fundamental human rights or any *jus cogens* norm. For example, in *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda Case,* ICJ has preferred to use a phrase as "intransgressible principles of humanitarian law" rather than referring the norm as *jus cogens* in its *Advisory Opinion on the Legality of Use of Nuclear Weapons Case*.

Therefore, the indirect review of SC Resolutions from the *jus cogens* perspective by the CFI has gathered so much attention by the scholars. Although the intention was courageous, the Court concluded that it has no power to review the SC Resolutions according to human rights protection in the EC legal order. According to

[192] Or by the words of the CFI itself:
"In this connection, the Court of Justice has stated that access to justice is one of the constitutive elements of a Community based on the rule of law and is guaranteed in the legal order based on the EC Treaty in that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions" (Case 294/83 Les Verts V Parliament [1986] ECR 1339, paragraph 23). The Court of Justice uses the constitutional traditions common to the Member States and Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a basis for the right to obtain an effective remedy before a competent court (Case 222/84 Johnston [1986] ECR 1651, paragraph 18).
122. The right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has, moreover, been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1). Although this document does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order."

AG Maduro, there is no need to depart from usual interpretation of fundamental rights and the standard of protection afforded should not be changed since it can not turn its back on the fundamental values that lie at the basis of the Community legal order and which has the duty to protect. [193] Moreover it can also be claimed that *jus cogens* review is not necessary in practice since the Court should apply definite EC legal standards of judicial review. *Bosphorus* Case can be a good example to this inclination in which ECJ reviewed the lawfulness of Regulation No. 990/93 implementing the SC sanctions at the EC level, exclusively in the light of fundamental rights and principle of proportionality as guaranteed by the EC legal order.[194]

Moreover, in the appeal ECJ stated the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental human rights, and that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[195]

This part of the judgment is the most controversial one as the CFI has chosen to decide its right to review under an internationally controversial norm namely the *jus cogens*. Although, the Court's willingness and pioneering efforts to make a review under *jus cogens* should be acclaimed, as the content of *jus cogens* is still open to many questions Court should not be bound only by it. Therefore, the *jus cogens* review will not be limit of the review if the Community's supranational principles accepted to protect fundamental rights is also applied. Such a combined review will supply the adequate base for the fulfilment of the international obligation and it will also preserve the *sui generis* structure of the Community legal order. Moreover, this double coverage will defeat any kind of accusation against Community for being careless or negligent on protection of fundamental rights that might be raised in national courts or ECHR.

[193] AG Maduro para.44-46.
[194] Tomuschat II, p. 217.
[195] The Appeal para.285

Finally, the review on the basis of *jus cogens* is contrary to UN law itself. When SC resolutions are adopted as part of a series, they must be interpreted within this series. In Resolution 1456 the SC declared explicitly that '[s]tates must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights.. law'.[196] This resolution was adopted on 20 January 2003, which is approximately one year after the applications in *Yusuf* and *Kadi*[197] and after the adoption of the contested regulation.[198] This also explains why Article 9 of Regulation 881/2002 formulates to the contrary, that '[t]his Regulation shall apply notwithstanding any rights conferred or obligations imposed by any international agreement signed…'. Yet, under the annulment procedure, Article 230 EC, the European courts declare the law as it stands at the moment of pronouncing the judgment, not at the moment of application. In the words of the Court of First Instance: the court must take 'account of events that effect the actual substance of the dispute during the course of the proceedings, such as the repeal, extension, replacement or amendment of the contested act'.[199] Therefore, based on the Court of First Instance's assumption that the Community is bound by SC resolutions as a matter of European law, the Court of First Instance was, at the moment the *Kadi* and *Yusuf* judgments were given, obliged to take Resolution 1456 into account as a means of interpretation. Hence, it had to examine the compliance with international human rights law.

In its examination the court actually excluded the applicants' right to a fair hearing[200] and limited their right to a judicial remedy[201] because the European institutions did not take a discretionary decision, but simply adopted a simple copy of the UN sanctions list.[202] At this point, the Court of First Instance dedicated much

[196] SC Resolution 1456 (20 January 2003), at para 6.
[197] The original application in the Yusuf case was launched on 10 December 2001 ([2002] OJ C44/27); Kadi launched his application on 18 December 2001 ([2002] OJ C56/16).
[198] Regulation 881/2002, n 5 *supra*.
[199] *Kadi*, at 236, referring to Case 14/81, *Alpha Steel v Commission* [1982] ECR 749, para 8; Joined Cases 351/85 and 360/85, *Fabrique de Fer de Charleroi and Dillinger Huttenwerke v Commission* [1987] ECR 3639, para 11; Joined Cases T-46/98 and T-151/98, *CEMR v Commission* [2000] ECR II-167, para 33; Case C-123/92, *Lezzi Pietro v Commission*, Order of 8March 1993 [1993] ECR I-809, paras 8–11.
[200] *Kadi*, at 256–260.
[201] *Kadi*, at 279.
[202] *ibid*, at 257 and 258; *Yusuf*, at 327 and 328. This is the main reason why the Court of First Instance agreed to review autonomous European sanctions in OMPI case.

consideration to the question whether the applicants' rights to a fair hearing and to a judicial remedy were satisfied at the UN level. However, it did not finally judge on the matter but fled into the obvious observation that the issue before the court was not the procedure before the SC but in the EU.[203] Yet, if the court had examined the listing procedure in the UN in the light of *jus cogens*, the outcome would have been less sure. The convincing argument has been made that individual sanctions infringe even peremptory norms at the UN level.[204]

With regard to the right to property, the Court of First Instance's examination on the basis of *jus cogens* was limited to the question whether the sanctions submit those sanctioned to 'inhuman or degrading treatment'[205] or whether they were an 'arbitrary deprivation'[206] of the applicants' property. The court answered both questions to the negative and stressed the importance of the campaign against terrorism and the assumption that the freezing of funds is a temporary precautionary measure.

The Court of First Instance came to the conclusion that it 'carried out a complete review of the lawfulness of the contested regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions'.[207]

5. Diplomatic Protection within the EC Legal Order

The cases that have been explained until now -UN sanction cases- are also distinguishable in terms of new jurisprudential developments. "Diplomatic protection" is one of these developments. Even though the EC has created its own legal system, the CFI recourse to general international law in order to remedy the lack of protection of fundamental rights at the Community level for an action for annulment of a Community act based on UN law. The CFI introduced the diplomatic protection within the EC legal

[203] *Kadi*, para. 272.
[204] Eckes, p. 87.
[205] *Kadi*, para. 240.
[206] ibid, at 242.
[207] ibid, at 279.

order as a solution for the judicial deficiency at the Community level in *Ayadi*[208] and *Leonid Minin*[209] rulings.

a. The Definition of Diplomatic Protection

In International law, diplomatic protection (or diplomatic espousal) is a means for a State to take diplomatic and other action against another State on behalf of its national whose rights and interests have been injured by the other State. Diplomatic protection, which has been confirmed in different cases of the Permanent Court of International Justice and the International Court of Justice, is a discretionary right of a State and may take any form that is not prohibited by international law. It can include consular action, negotiations with the other State, political and economic pressure, judicial or arbitral proceedings or other forms of peaceful dispute settlement.

Diplomatic Protection has been recognised as customary international law by international courts and tribunals as well as scholars. After the Second World War, with the use of force being outlawed as an instrument of international relations, diplomatic protection usually takes other forms, such as judicial proceedings or economic pressure.

Traditionally, Diplomatic Protection has been seen as a right of the state, not of the individual that has been wronged under international law. An injury to an alien is considered to be a direct injury to his home country and in taking up his case the State is seen as asserting its own rights. This means that a State is in no way obliged to take up its national's case and resort to diplomatic protection if it considers this not to be in its own political or economic interests.

Customary international law recognizes the existence of certain requirements that must be met before a State can validly espouse its national's interest. The two main requirements are exhaustion of local remedies and continuous nationality. Diplomatic espousal of a national's claims will not be internationally acceptable unless the national in question has given the host State the chance to correct the wrong done to him through

[208] Case T-253/02 *{Ayadi* v. *Council),* judgment of the CFI of 12 July 2006, available under <curia.europa.eu>.
[209] Case T-362/04, Leonid Minin, recitals 91-104.

its own national remedies. Exhaustion of local remedies usually means that the individual must first pursue his claims against the host State through its national courts up to the highest level before he can ask the State of his nationality to take up those claims and that State can validly do so.

The second important requirement is that the individual who has been wronged must maintain the nationality of the espousing state from the moment of injury until at least the presentation of the claim by way of diplomatic espousal. If the nationality of the individual in question changes in the meantime, the State of his former nationality will not be able validly to espouse his claims. The claim by a state on behalf of its national may also be dismissed or declared inadmissible if there is no effective and genuine link between the national concerned and the state that seeks to protect him[210].

b. The new approach: New rights for affected individuals: Diplomatic Protection

The *Ayadi* and *Hassan* cases can be accepted as the second string of CFI judgments on UN sanctions which allowed the court to re-examine its approach adopted in the *Yusuf* and *Kadi* cases. The arguments put forward by the applicants in *Ayadi* and *Hassan* were to a considerable degree the same as the ones which the CFI had already addressed in *Yusuf* and *Kadi.* However, new arguments were also put forward. Accordingly, while the CFI essentially confirmed its main findings of its *Yusuf/Kadi the* CFI still considered it necessary to make several different remarks regarding other possible rights of affected individuals to challenge their listing or request a de-listing.

The CFI turned its attention in particular to the so-called Guidelines for the Sanctions Committee that were adopted by the UN Security Council. According to the CFI, the Security Council intended with the adoption of the Guidelines to take into account as far as possible the fundamental rights, in particular the right to be heard, of the persons listed by the Sanctions Committee.

[210] See the International Court of Justice judgment in the *Nottebohm* case, Liechtenstein v Guatemala, [1955] ICJ Reports 4.

The Guidelines do not confer a right to the affected persons to be heard directly by the Sanctions Committee; instead they contain only procedures on how affected persons have to address their own state to request a re- examination of the listing and how the requested state has to address the Sanctions Committee in order to start the re-examination procedure.[211] In other words, it is essentially part of the diplomatic protection afforded by a state to its own nationals. Despite the fact that such a request to the Sanctions Committee is entirely in the discretion of the state and does not, in principle, grant any rights to individuals, the CFI has given great importance to the Guidelines in two ways.

First, the CFI started off by arguing that the member states of the Sanctions Committee are under a legal obligation to act in good faith during the re-examination procedure and are required to cooperate fully with the Sanctions Committee.[212] More specifically, the petitioned government, which is best suited to ensure the effectiveness of the procedure for removal from the list, is - according to the CFI - obliged to review all relevant information supplied by the affected person and then has to approach the other UN member states.[213] Since the diplomatic protection can only be activated with the bond of nationality, the court urged the Member States to exercise diplomatic protection. On the other hand the issue that European citizenship does not fulfill all the requirements of nationality should also be underlined.[214] Therefore the court has given the burden onto the Member States: "the Member States are required to act promptly to ensure that such person's cases [diplomatic protection] are presented without delay and fairly and impartially."[215] Moreover, in *Hassan*[216], the CFI stated that if the individuals consider that the competent national authorities have infringed their right to request their removal from the list, they should avail themselves of the opportunities for judicial remedy offered by domestic law.[217] The CFI accordingly imposed an obligation on the

[211] Lavranos, p. 481.
[212] *Ayadi*, para. 142.
[213] ibid., para. 143.
[214] Bjorn Kunoy, Anthony Dawes, "Plate Tectonics in Luxembourg: The ménage à Trois Between EC Law, International Law and The European Convention on Human Rights following the UN Sanctions Cases", Common Market Law Review. New York: Feb 2009. Vol. 46, Iss. 1; p. 73- 107.
[215] *Ayadi*, para 148 (emphasis added).
[216] Hassan, para.122.
[217] ibid, paras 122-123.

Member States to exercise diplomatic protection if the listing of one of its nationals was contrary to fundamental rights of the citizen.

Moreover, the CFI went on, particular obligations are imposed on the EC Member States.[218] Indeed, since EC regulations implement UN sanctions, the CFI qualified the possibility of presenting a request of re-examination to one's own government referred to in the Guidelines as 'a right guaranteed not only by those Guidelines but also by the Community legal order.[219] In addition, this right also comes from the ECHR.[220]

As consequence thereof, EC Member States must ensure as far as possible that affected persons can present their case before the competent authorities of the petition state, while at the same time Member States are not allowed to refuse to initiate the re-examination procedure solely because the person affected could not provide all relevant information.[221] Moreover, EC Member States are obliged to act promptly to ensure that a case is presented without delay and impartially to the Sanctions Committee.[222] In other words, the CFI imposed several concrete legal obligations on the Member States to ensure that listed persons and organizations are effectively able to make a request to their home state, while at the same time that state is obliged to ensure that such a request is properly examined and brought before the Sanctions Committee.

Second, the CFI apparently derived from the Guidelines of the Sanctions Committee in conjunction with Community law and ECHR law, a legal right for the affected persons and organizations against their home state to get a re- examination procedure started before the Sanctions Committee. Indeed, the CFI reminded us that affected persons have the possibility to bring an action for judicial review based on the domestic law of the petitioned states, "indeed even relying directly on the contested [EC] regulation and the relevant resolutions of the Security Council which that [EC] regulation puts into effect, against any wrongful refusal by the competent national

[218] *Hassan,* para. 144.
[219] ibid, para. 145.
[220] ibid, para. 146.
[221] ibid, paras. 147-148.
[222] ibid, para. 149.

authority to submit their cases to the Sanctions Committee for re-examination and, more generally, against any infringement by that national authority of the right of the persons involved to request the review of their case".[223] Moreover, in line with the general jurisprudence of the ECJ, in the absence of Community procedural law, national procedural law cannot be less favorable than those governing rights which originate in national law and that they cannot render virtually impossible or excessively difficult the exercise of rights conferred by Community law.[224] In other words, affected individuals must have the possibility to let a refusal of a petitioned government to make a request for a de-listing to the Sanctions Committee be reviewed by a domestic court.[225]

Some authors pay attention to the fact that with these findings the CFI go a further step than general international law in which the exercise of diplomatic protection in favor of its nationals is not an obligation incumbent on a State. Also the ICJ case law states clearly that international law does not impose a positive obligation on States to exercise diplomatic protection with respect to one of its nationals: "within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit."[226]

Thus, the CFI attempted to compensate the obvious and acknowledged lack of effective judicial review at the international and European law level by imposing specific legal obligations on the Member States to handle any petition for requesting a delisting from the Sanctions Committee properly and by ensuring that affected persons can turn to domestic courts to review the way diplomatic protection was afforded. While the approach of the CFI should be praised for looking and having found additional means for helping affected persons to request - indirectly through their home state - a proper re-examination of their listing, there is still no formal right for them to obtain a review of their listing by an independent (judicial) body. After the findings of the Court, it can be argued that the CFI considers the right to diplomatic protection as

[223] ibid, para. 150.
[224] ibid., para. 151.
[225] Lavronos, p. 482.
[226] Barcelona Traction, Light and Power Co., Ltd, Judgment (Belgium v. Spain), ICJ Rep. 1970, p. 44, para 78.

"functionally equivalent to a judicial body."[227] But, when the real nature of the listing procedure is exercised, it is easily seen that the success of the diplomatic protection depends to a large extent on the concerned State's diplomatic relations with the United States, since more than 95% of the listed people are determined by the US government.[228] Therefore, the de-listing procedure is carried out according to a consensus rule in which the diplomatic relations with the United States is an important element. It is also important to remember that while the ECJ's obligation to protect fundamental rights extends to all subjects within the Community's jurisdiction, the bond of nationality is a prerequisite to the exercise of diplomatic protection. Under the light of these findings the new solution of the CFI, the judicial remedies as a requirement that Member States exercise diplomatic protection over its own nationals seems inefficient. One of the plaintiffs *Kadi,* for instance, is a Saudi Arabian national and the Community Courts cannot either require the Member States to exercise diplomatic protection on behalf of nonEU citizens or third countries on behalf of their own nationals.

On the other hand when it comes to decide on the exercise of the diplomatic protection, the concerned citizen has no direct subjective right as the CFI stated in *Ayadi* case. "the exercise of diplomatic protection confers no right directly on the persons concerned themselves to be heard by the Committee, the only authority competent to give a decision, on a State's petition, on the re-examination of their case, with the result that they are dependent, essentially, on the diplomatic protection afforded by the States to their nationals".[229] Also the international law arranges the protection as the same way with the CFI. The ICJ in Barcelona Tractions states that the State is the "sole judge to decide whether its [diplomatic] protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature."[230]

Since the exercise of the diplomatic protection is a discretionary power for the Member States, to remedy the lack of judicial review of the legality of sanctions, the CFI considered that the exercise of diplomatic protection should, where necessary, be

[227] Helikoski, p. 1152.
[228] ibid, p. 1153.
[229] CFI, *Ayadi*, para 141.
[230] Barcelona Traction, p. 45, para 79.

made compulsory for Member States. But there are substantive problems with this approach. The main reason of this the difference of citizen status in Community legal order and the international legal order.[231] Even though the status of citizens as direct subjects in the Community legal order, when exercising diplomatic protection the State is exercising its own right and not the right of the private person in the domestic legal order. It should also be noted that the ICJ held in Barcelona Traction ruling that regional instruments were better equipped to protect against denials of justice than the exercise of diplomatic protection. The ICJ held that "with regard more particularly to human rights ... it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has to be sought . . . the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim."[232]

It is therefore hard to understand why the CFI accepted that the exercise of diplomatic protection in international law to remedy the UN sanctions when the ICJ, 35 years earlier, had explicitly held that where regional instruments are available, they are more appropriate for the protection of such rights than the exercise of diplomatic protection. Although not conferring the legal or natural person a subjective right, in order to ensure the enforcement of these fundamental rights of the citizen at the Community level, the CFI held that the exercise of diplomatic protection "is not, however, to be deemed improper in the light of the mandatory prescriptions of the public international order."[233] However, this reasoning of the CFI stands in contrast to the main constitutional principles which are the underlying basis of the EC legal order, namely Member State nationals are direct subjects in the EC legal order, in the words of

[231] Helikoski, p. 1154.
[232] ICJ, Barcelona Traction, p. 47, para 91
[233] *Ayadi*, para 141.

the ECJ, "the subjects of [the EC legal order] comprise not only Member States but also their nationals."[234]

Therefore the new solution of the CFI "diplomatic protection" to remedy the victims of the Security Council resolutions seems inconvenient and they do not confer any rights to affected individuals. Similarly, it seems doubtful whether an individual could actually rely directly on UN Security Council resolutions or the Sanctions Guidelines. Thus, the *Ayadi* ruling of the CFI does not create any real new rights for listed persons and organizations that would allow them to challenge effectively their listing. Hence, the approach adopted by the CFI in its *Yusuf/ Kadi* rulings has not fundamentally changed with the *Ayadi* judgment[235].

B. Judicial Review of UN Sanctions by the ECJ

In the 1990s, the European Court of Justice (ECJ) dealt several times with the implementation of UN Security Council resolutions within the EC and its Member States. In the *Bosphorus*[236]*, Centro-Com*[237] and *Ebony*[238] cases, the ECJ essentially emphasized the importance of the aims pursued by UN sanctions and the implementing of EC regulations. Consequently, the ECJ stated that while it is for the Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by Article 133 EC[239] The ECJ also made clear that substantial limitations of the exercise of fundamental rights must be accepted for the sake of effective implementation of UN sanctions. [240]

More recently, the Court of First Instance (CFI) issued its judgments in the *Yusuf* and *Kadi* cases in which the CFI for the first time adjudicated on UN sanctions

[234] Case 26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1
[235] Lavranos, p. 481.
[236] Case C-84/95 *(Bosphorus)* [1996] ECR 1-3953.
[237] Case C-124/95 *{Centro-Com)* [1997] ECR 1-81.
[238] Case C-177/95 *{Ebony Maritime)* [1997] ECR I-1111.
[239] Case C-84/95 *{Bosphorus)* [1996] ECR 1-3953, paras. 22-23.
[240] Lavranos II, p. 476.

implemented by the EC and its Member States which directly target individuals and private organizations. On Sep 3, 2008 the European Court of Justice (ECJ) set aside the judgments of the Court of First Instance of the European Communities of Sep 21, 2005 in the Kadi and Yusuf and Al Barakaat cases and annulled Council Regulation (EC) No. 881/2002 of May 27, 2002 imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, in so far as it concerned Mr Kadi and the Al Barakaat International Foundation. As for the content of the rights invoked, the ECJ focused on the principle of effective judicial protection, as a general principle of Community law arising from the common constitutional traditions of Member States, and enshrined in Articles 6 and 13 ECHR.

1. The Background to the Court's Judgment

The case concerns the annulment of a Council regulation adopted in order to give effect, within the Community, to a Council Common Position[241] aimed at the implementation in the space of the European Community of a number of United Nations Security Council Resolutions (1267 of 1999, 1333 of 2000 and 1390 of 2002) adopted in connection with the fight against international terrorism, and specifically aimed at the freezing of funds belonging to certain persons and entities associated with Usama bin Laden, the AI-Qaeda network and the Taliban.

On 21 September 2005 the Court of First Instance (CFI) rejected the actions brought respectively by Mr Kadi and Al Barakaat, and Mr Yusuf against the Council and the European Commission in relation to Regulation (EC) No. 881/2002 of 27 May 2002 imposing restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, in so far as that act related to them.

In support of their claims, the applicants had claimed that the Council was not competent to adopt the contested Regulation and alleged the breach of their fundamental human rights. The CFI rejected all the pleas in law raised by the applicants. First, the Court ruled that the Council was competent to impose economic

[241] Council Common Position 2002/402/CFSP (O.J. 2003, L 53/62).

and financial sanctions against individuals such as those envisaged by the contested Regulation, on the combined basis of Articles 60, 301 and 308 EC, in direct connection with the Common Position 2002/402 adopted under the Common Foreign and Security Policy (CFSP). Secondly, the Court of First Instance decided to frame the alleged breach of the applicants' fundamental rights within a broader assessment of the relationships between United Nations law and legal orders of the Community and its Member States. For that purpose, the Court decided to look first for the basis of its competence to perform a judicial review of acts implementing a Security Council resolution, before turning to the merits of the alleged breaches of fundamental rights. The CFI found that the EC was not a direct addressee of the Security Council Resolution 1267 of 1999, but it was nevertheless bound to it by operation of Article 307 EC.[242] For that reason the CFI declined its jurisdiction with the notable exception for the case that the Regulation would violate peremptory norms of international law.[243] Nevertheless, it concluded that the freezing of funds provided for by the contested Regulation did not infringe the applicants' fundamental rights, as these were not protected by *jus cogens*.

The applicants brought appeals against those judgments before the Court of Justice, pleading both the incompetence of the Community to adopt the contested Regulation and the violation of their fundamental human rights. In a cross-appeal, the United Kingdom maintained that the Court of First Instance erred in concluding that it was competent to consider the legality of the contested Regulation in relation to jus cogens violations. The Netherlands, Spain and France also intervened in the case in support of the Council.

[242] Kadi (CFI) cited supra note 4, paras. 193- 204. Prior to the CFI's judgment, the question whether the EC was directly bound by Security Council resolutions had been raised by A.G. Jacobs in the Bosphorus case, para 35, but left unanswered. In the legal literature the possibility of applying a similar succession argument as that adopted by the ECJ in International Fruit Company with regard to GATT (Joined Cases 21/72 & 24/72, [1972] ECR 1219) had been raised but answered in the negative. See Nettesheim and Tomuschat.
[243] *Kadi* (CFI), para 230.

2. The Opinion of the Advocate General

Advocate General Poiares Maduro delivered identical Opinions on Kadi and Al Barakaat on 16 January and 23 January 2008.

With regard to the legal basis of the contested Regulation, the Advocate General Maduro took a different approach, agreeing with the Commission that Articles 60 and 301 EC alone suffice as the legal basis for the contested regulation. In Maduro's view, economic relations with third countries are inextricably intertwined with economic relations with individuals and groups within that third country. To argue otherwise would be "to ignore a basic reality of international economic life."[244] In the eyes of the Advocate General, Article 301 EC therefore should not be read to demand a connection between a country's governing regime and the targeted individual or group residing or operating within that country at all. The Advocate General observed that the only requirement of Article 301 is that the aim of the "urgent measures" to be taken is to interrupt or reduce economic relations with third countries, and that the Article does not regulate what shape the measures should take, or who should be the target or bear the burden. Therefore the reference to Article 308 made by the CFI was, in his view, unnecessary and also wrong, to the extent that the CFI construed it as a "bridge" between the EC and the Second Pillar of the EU. The Opinion thereby leaves open the question about competence to impose sanctions against individuals who do not reside in, or operate from within, a third country, although it may reach individuals who are providing funds to recipients who reside within a third country.[245]

3. The Judgment of the Court

a. The Legal Basis of the Contested Regulation

The ECJ discussed the legal basis of the Regulation in a substantial part of its decision. (paras. 121-236) This inclination of the Court may be understandable for a number of reasons. First, the contested Regulation was directed against individuals and

[244] Case C-402/05 P, Kadi v. Council (Opinion of A.G. Maduro), Opinion delivered 16 Jan. 2008, at para 13.
[245] The opinion of the AG Maduro on human rights will be explained below in p.

non-State entities and not, as in previous cases such as *Bosphorus*[246], *Centro-Com*[247], *Ebony*[248], *Racke*[249] or *Dorsch Consult*[250] against third countries and only indirectly against individuals linked to them. A second reason might be seen in the interest of EC institutions and Member States to see the scope of Articles 60 and 301[251] pending the entry into force of the Treaty of Lisbon (at that time) with the new Article 215 TFEU, which in its paragraph 2 spells out the EU competence to adopt restrictive measures also against natural or legal persons and groups or non-State entities.[252] Third, the case at hand gave the Court another opportunity, shortly after the recent "Proliferation of light weapons" case Commission v. Council[253], to assess the cross pillars tensions and coherence in the field of external relations for the time left before the reshuffling of the entire institutional framework provided for in the Lisbon Treaty.[254]

---

[246] Case C -8 4/95, Bosphorus Hava Yollari ve Ticaret ASv. Minister for Transport, Energy and Communications, Ireland and the Attorney General, [1996] ECR 3953. see Eeckhout, p. 426.

[247] Case C- 124/95, The Queen ex parte Centro-Com SrI v. HM Treasury and Bank of England, [1997] ECR 1-81. See annotation by Vedder and FoIz in35 CML Rev. (1998), 209 ; see Eeckhout, p. 431 .

[248] Case C- 177/95, Ebony Maritime SA and Loten Navigation Co. Ltd. v. Prefetto della Provincia di Brindisi and Others, [1997] ECR 1-1111.

[249] Case C-1 62/96, Racke, [1998] ECR 1-3655.

[250] Case C-237/98P, Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission, [2000] ECR 1-4549.

[251] The two Articles were inserted in the EC Treaty in 1992 in order to permit the translation into EC law of the measures decided in the framework of the CFSR Art. 301 reads: "Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission".

[252] Art. 215 (ex Art. 301 EC): "1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. 3. The acts referred to in this Article shall include necessary provisions on legal safeguards".

[253] Case C-91/05, Commission v. Council, judgment of 20 May 2008, nyr. The Court annulled Decision 2004/833/CFSP of 2 Dec. 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons. The Court found that the Decision had encroached upon Community competences, in particular upon the Commission's competence on development cooperation policy and therefore infringed Art. 47 TEU.

[254] Andrea Gattini,"Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008, nyr" Common Market Law Review. New York: Feb 2009. Vol. 46, Iss. 1; pg. 213, 27 pgs.

As was mentioned above, the CFI had maintained that it had been legitimate for the Regulation to be adopted on the joint basis of Articles 60, 301 and 308 EC and in order to achieve the objectives of EC Treaty on the common market and the EC Treaty on external relations Art. 308 EC is compulsory.

In his first ground of appeal Mr. Kadi claimed that since the regulation was directed against individuals and non- State entities not linked with any third country, Articles 60 and 301 EC could not constitute even a partial legal basis for the contested Regulation. In particular Mr. Kadi contested the construction of Article 301 as a "bridge" to the Second Pillar of the EU Treaty, maintaining that that Article in no circumstances includes the power to take measures intended to attain an objective of the EU Treaty. Finally he argued that recourse to Article 308 was also unavailable in order to attain an irrelevant objective of the EC Treaty.

Opposing Kadi's first two arguments, the Council, and the governments of France, the UK and Spain stated that the rationale of Article 301 is precisely to give the Community the power to adopt restrictive measures intended to attain an objective of the EU Treaty, and that recourse to Article 308 was in any event appropriate to impose economic and financial sanctions. However, the Council and the intervening governments disagreed with the CFI's finding that Article 308 EC could also be used in order to attain an objective external to the Community. (As one related to the CFSP)

The full Court, acting in its Grand Chamber formation, ultimately found a different way to sustain the Community's power to implement economic sanctions against individuals that are unconnected to a governing regime or particular country. The Grand Chamber sided with the CFI (and against the Advocate General) on the limitations of Articles 60 and 301 EC, and also agreed that Article 308 EC could not, standing alone, serve as the legal basis to implement the smart sanctions regime. But it disagreed with the CFI that Article 301 EC could be used as a general bridge to import CFSP objectives wholesale into the Community pillar. Instead, in the Grand Chamber's view, Articles 60 and 301 EC imported a far narrower objective into the Community Pillar:

"Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC"[255]

According to the Grand Chamber, economic sanctions bear the requisite connection to the common market (as further demanded by Art. 308 EC), given that the multiplication of unilateral measures implementing the UN Security Council resolution might well affect the functioning of the common market. Thus, the Grand Chamber held that Articles 60, 301, and 308 EC can serve as the combined legal basis for the sanctions against Mr Kadi.

The Court stated that the Commission's interpretation on the "third country" of Articles 60 and 301, according to which "the mere presence of persons or entities in a third country or their association therewith would suffice" goes against the wording of those provisions and would confer on them "an excessively broad meaning".[256] The second argument of the Commission was dismissed by recalling that the choice of the legal basis for any Community measure must rest on judicially assessable, objective factors, taking into particular account the aim and the content of the measure.[257] The purpose and content of the common commercial policy provided for in Article 133 is to promote, facilitate and govern international trade, as is made clear from the wording of its first paragraph. The fact that a regulation intended to combat international terrorism provides a series of restrictive measures of an economic and financial kind and these can not shift the parameters of interpretation. Neither can the provisions of the EC Treaty on free movement of capital supply the necessary legal basis. On the one hand Article 60(1) can not be read in isolation from Article 301. On the other hand the restrictive measures imposed by the contested Regulation do not fall within the

[255] *Kadi* (Grand Chamber), para 226.
[256] ibid, para 168.
[257] ibid, para 182.

categories of Article 57(2), the only other Article providing for restrictive measures in that chapter.[258]

With regard to the legal basis, the court stated that Articles 60 and 301 can not be held as a sufficient legal basis of the contested Regulation, because of their "limited ambit ratione materiae" does not mean that the Regulation does not fall under the legitimate scope of those Articles at all. The scope of those Articles is not just to translate into EC law the restrictive measures of an economic and financial nature decided on under the CFSP, but, at a deeper level of analysis, their "implicit underlying objective" is that "of making it possible to adopt such measures through the efficient use of a Community instrument".[259] In the Court's view it is exactly that objective which may be regarded as constituting an objective of the Community for the purpose of Art. 308 EC.

b. Return to the traditional paradigm - Reaffirmation of the autonomy of the EC legal order towards all forms of international law

The ECJ, in line with the Opinion of Advocate General Maduro, found that the CFI had erred in concluding that the Community Courts have no jurisdiction to review the lawfulness of Community measures, even where such measures constitute the implementation of UN law obligations that leave the Community no "autonomous discretion" to act in any other way.

The ECJ thereby reaffirms the autonomy of the EC legal order vis-à-vis all forms of international law and reinstates the Community courts as the ultimate judges of the compatibility of Community legislation with fundamental rights.

On appeal, both the Advocate General and the Grand Chamber of the ECJ managed largely to avoid the fundamental question of the Community's legal obligations under principles of public international law. Without addressing whether the EC is bound to implement the UN Security Council Resolution to freeze individuals' assets, the Advocate General and the Grand Chamber focused solely on the question

[258] Gattini, p. 216.
[259] Judgment, para 226.

whether such implementation could be asked to ignore fundamental rights review at the Community level.

In answering this question, the Opinion of the Advocate General and judgment of the Court, defined the European Community as an "autonomous legal order." The court also referenced to the Community's "municipal" legal order,[260] and to giving "municipal" legal effect[261] to international legal obligations within the Community, thus using the classic international law term hitherto reserved for a State's domestic legal system for the first time in the history of published opinions. Although it is not the first time the European Court of Justice has acted as if it were a "domestic" court[262] but the clarity with which the Advocate General and the Grand Chamber defend the primacy of the European legal order vis-à-vis international law is remarkable.[263]

It is important to understand the basis of the ECJ's decision did not set aside the CFI's judgments. The ECJ did not find that the CFI had erred as a matter of international law. In fact, neither Court accepted, albeit for different reasons, that international law requires that the UN Charter take precedence over Community law or imposes structural limits on the judicial review powers of the Community Courts. The CFI considered that this was because the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law[264] while the ECJ stated that this was because the Charter of the United Nations does not impose the choice of a particular model for the implementation of Security Council resolutions adopted by the Security Council but rather leaves its Members a free choice among the various possible models for transposition of those resolutions into their domestic legal order.[265]

[260] Kadi (A.G. Opinion), cited supra note 102, at para 22.
[261] ibid. at para 23.
[262] See Case C-104/81, Hauptzollamt Mainz v. Kupferberg, [1982] ECR 3641 (treaties).
[263] Halberstam, p. 42.
[264] CFI, *Kadi*, para 192, and *Yusuf and Al Barakaat*, para 242.
[265] ECJ, *Kadi and Al Barakaat*, para 298.

c. Legal Status of the Charter and the SC Resolutions in the Community Legal Order

The CFI stated in *Kadi*[266] and *Yusuf and Al Barakaat*[267] that it does not have jurisdiction to review indirectly the lawfulness of a decision according to the standard of protection of fundamental rights as recognized by the Community legal order, as this would be "incompatible with the undertakings of the Member States under the Charter of the United Nations, especially Articles 25, 48 and 103 thereof, and also with Article 27 of the Vienna Convention on the Law of Treaties." Furthermore the CFI clearly stated that this finding is based on both However, as the CFI makes it clear in *Kadi* and *Yusuf and Al Barakaat* that, its finding is based on international law and Community law both, not just on international law.

For the CFI, the EC legal order allows UN law to impose limits on the fundamental rights guaranteed by the EC legal order. First, the CFI considered that in light of the theory of substitution developed by the ECJ in the International Fruit case[268] and since in the areas covered by the EC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the Charter,[269] the provisions of the UN Charter which cover those same areas have the effect of binding the Community. Consequently, not only may the Community not infringe or impede the performance of the obligations imposed on the Member States by the UN Charter but the Community must go further and adopt all necessary measures to enable its Member States to fulfill those obligations.[270]

---

[266] *Kadi*, para.222.
[267] *Kadi*, para. 272.
[268] In Joined Cases 21/72 to 24/72 International Fruit Company and Others, [1972] ECR 1219, the ECJ stated that where the Community has assumed the powers previously exercised by Member States in an area governed by international law, the provisions of that agreement have the effect of binding the Community.
[269] CFI, *Kadi*, para 203, *Yusuf and Al Barakaat*, para 253, *Ayadi*, para 116, *Hassan*, para 92 and *Minin*, para 67.
[270] CFI, *Kadi*, para 204, *Yusuf and Al Barakaat*, para 254, *Ayadi*,, para 116, *Hassan*, para 92 and *Minin*, para 101.

Second, the CFI considered that the claim that the Community Courts could have jurisdiction to review the lawfulness of Community measures which constitute the implementation of UN obligations that leave the Community no "autonomous discretion" is contrary to several provisions of the EC Treaty, including in particular Articles 5 EC[271], 10 EC[272], 297 EC[273] and 307(1) EC,[274] the Treaty on European Union, in particular Article 5 EU[275], and the general principle of Community law that the Community's powers must be exercised in compliance with international law.[276] Therefore, the CFI adopted an internationalist perspective, viewing the EC legal order as any other "domestic"[277] order vis-à-vis the UN legal order, all of which are subordinated to the UN Charter, which is at the apex of this hierarchy of norms.

By contrast, the ECJ dismissed the notion that its review of the contested Regulation would lead to an indirect review of the underlying Security Council resolution. In so doing, it reaffirmed the distinction which it has traditionally drawn between the review of the legality of an international agreement, which the Community courts are not competent to undertake and the review of the legality of Community measures intended to give effect to the international agreement, something which the Community courts are competent to undertake since the annulment of a Community measure intended to give effect to an international law measure does not entail any challenge to the primacy of that measure in the international legal order. If the EC Treaty has established a complete system of legal remedies and procedures which ensures that all acts of the institutions are subject to judicial review, then it must be the

[271] This article establishes the principle of subsidiarity.
[272] This article establishes the principle of loyal cooperation.
[273] This article permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security.
[274] This article provides that the rights and obligations arising from international agreements concluded with third countries before the accession of each Member State to the EU shall not be affected by the provisions of the EC. However, to the extent that such agreements are not compatible with the EC Treaty, each Member State shall take all appropriate steps to eliminate the incompatibilities established.
[275] This article provides that the Community judicature is to exercise its powers under the conditions and for the purposes provided for by the provisions of the EC Treaty and the Treaty on European Union.
[276] CFI, *Kadi*, para 222, *Yusuf and Al Barakaat*, para 273, *Ayadi,* para 116, *Hassan*, para 92 and *Minin*, para 101. See case C-1 62/96 Racke [1998] ECR 1-3655, para 45. However, all these previous cases only concerned the interaction between secondary EC law and international law, not between primary EC law and international law.
[277] CFI, *Kadi*, para 181, *Yusuf and Al Barakaat*, para 232, *Ayadi*, para 116, *Hassan*, para 92 and *Minin*, para 101

case that all Community measures must be subject to the same degree of review, regardless of their underlying legal origin.[278]

The ECJ also considered while the Community must respect international, and in particular UN law in the exercise of its powers[279], there is no basis in the EC Treaty to support the contention that measures taken for the implementation of Security Council resolutions benefit from immunity from judicial review. While Articles 297 EC and 307 EC may justify certain derogations from primary law, "they cannot be understood to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union."[280] The review by the Community Courts, in the context of the internal and autonomous Community of the validity of a Community measure in the light of fundamental rights, is a constitutional guarantee coming from the EC Treaty which cannot be overridden by the provisions of any international agreement including the UN Charter. In that regard, it can be said that the ECJ treats the UN Charter in the same way as any other international treaty and this inclination is in line with the traditional position that the EC and international legal orders operate on separate planes and that the relationship between international and Community law is governed solely by the Community legal order itself. Therefore, there is no reason why the UN Charter, in the same way as national constitutional norms, should be able to call into question or affect the nature, meaning or primacy of the fundamental rights guaranteed by the EC legal order.

Finally, even if the EC legal order were to grant resolutions of the Security Council a certain limited form of primacy over EC law, such primacy would extend over acts of secondary Community law and not to primary law and to general principles of which fundamental rights form a part. The ECJ therefore re-establishes the traditional hierarchy of norms within the EC legal order which the CFI's judgment had unjustifiably modified.[281]

---

[278] Kunoy, p. 82.
[279] ECJ, *Kadi and AI Barakaat*, para 291 .
[280] ECJ, *Kadi and AI Barakaat*, para 303.
[281] Kunoy, p. 87.

d. Assessment on the Alleged Breaches of Fundamental Rights

Even though the Advocate General has defined the part of the judgment dealing with the question of whether the contested Regulation infringes the appellants' fundamental rights as the "principal aspect of the case"[282] the Court has given fewer place for it. In the first place the Court recalled that the EC legal order is based on the rule of law and that fundamental rights form an integral part of the general, indeed constitutional, principles of EU law before evaluating the alleged violations of the rights of property, the right to be heard and the right to effective judicial review.

Furthermore the Court stated that a "constitutional guarantee stemming from the EC treaty as an autonomous legal system" cannot "be prejudiced by an international agreement", regardless of whether those international obligations derive from the UN Charter or from any other treaty. This categorical statement led the ECJ to the conclusion that the CFI erred in law when it ruled that the contested Regulation aiming at the implementation of a Security Council resolution adopted under Chapter VII of the United Nations Charter should in principle be immune from judicial review. At any rate, the Court made the point that the annulment of a regulation implementing a UN Security Council resolution because of its incompatibility with EC constitutional norms does not challenge the primacy of that Resolution under international law.

As for the content of the rights invoked, the ECJ focused on the principle of effective judicial protection, as a general principle of Community law arising from the common constitutional traditions of Member States, and enshrined in Articles 6 and 13 ECHR. The Court acknowledged that the specific mechanism established by the contested Regulation necessarily implies a restriction of the rights of defense, since the Community authorities cannot be required to communicate the grounds giving rise to the restrictive measures to the persons or entities concerned, before the name of that person or entity is included in the list for the first time. To state otherwise would corrupt the very objective pursued by that Regulation, which is based on a "surprise effect" and must apply with immediate effect. However, according to the Court, the principle of effective judicial protection requires the Community authorities to communicate the

[282] Gattini, p. 218.

grounds of their decisions as swiftly as possible in order to enable the person or entity concerned to consider exercising their right to bring an action. The Court recognized that "overriding considerations" related "to the conduct of the international relations of the Community or of its Member States" may oppose the disclosure of certain documents. Nonetheless, the Court found, relying on the 1996 Chahalv. United Kingdom decision by the European Court of Human Rights (ECtHR),[283] that it was its own task, in the course of the judicial review, to adopt techniques apt to accommodate security concerns about the nature and sources of information taken into account in the adoption of the act concerned with the need to provide "a sufficient measure of procedural justice".[284] The Court observed that the contested Regulation does not provide for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the list, and that no step had been taken in that direction by the Council in the specific case. The Court was therefore unable to undertake any review of the lawfulness of the Regulation, and also for that reason it found that the right to an effective judicial protection had been infringed.

Further, the ECJ discussed the right to property, also qualified as a general principle of Community law. It is worth mentioning that with regard to the right to property, like the right to effective judicial protection, the Court relied on the jurisprudence of the ECtHR. The Court's main purpose was to verify whether the contested Regulation amounted to "disproportionate and intolerable interference" impairing the very core of the right to property. On the one hand, the Court conceded that the restrictive measures implied by the Regulation can in principle be justified in consideration of the general interest of the fight against the threats to international peace and security posed by acts of international terrorism. Nevertheless, the Court found that the opportunity to bring the case before the competent authorities constitutes a procedural requirement which is inherent in Article 1 of Protocol 1 to the ECHR.[285] The

[283] ECrtHR, Chahalv. United Kingdom, [1996] ECHR-V, 1831, at para 131.
[284] Judgment, para 344.
[285] The ECJ referred to the ECtHR's judgment in the Case, Jokela v. Finland, [2002] ECHRIV, 1, at para 45.

acknowledgement that Mr. Kadi had been deprived of such an opportunity led the Court to conclude that the right to property had also been infringed.[286]

(1) The Community Courts as the ultimate judges of fundamental rights

The ECJ judgment clearly reinstates the Community courts as the ultimate judges of the compatibility of Community legislation with fundamental rights.

First, the judgment means that the level of review by the Community courts of measures which implement international law obligations into the Community legal order no longer depends on whether or not the EC institutions have exercised discretion. Following the CFI's judgments in *Kadi, Yusuf* and *Al Barakaat, Ayadi, Hassan, Minin*, *OMPI*[287], *KONGRA-GEL*[288], *PKK*[289], *Al-Aqsa*[290] and *Sison*[291], the extent of the Community Courts' jurisdiction to review Community measures imposing sanctions on individuals suspected of associating with terrorism was artificially affected by whether the Community measures imposing such sanctions merely reproduced lists agreed on at UN level or whether they were autonomously adopted by the Community. While the legality of sanctions imposed on individuals subject to Community measures based on listings of UN Sanction Committees was only exposed to indirect review in light of *jus cogens*, individuals who were the subject of autonomous sanctions adopted by the Community could claim a greater degree of procedural, if not substantive, protection of their rights. The ECJ's judgment in Kadi and Al-Barakaat therefore ensures that all economic sanctions imposed on individuals by the EC are subject to the same level of review by the Community courts, regardless of whether the EC has exercised discretion or not.[292]

---

[286] Judgment, paras. 368-369.
[287] Cases T-228/02, Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council [2006] ECR 11-4665, T-256/07, People's Mojahedin Organization of Iran v. Council, judgment of 23 Oct. 2008, nyr and T-284/08, People's Mojahedin Organization of Iran v. Council, judgment of 4 Dec. 2008, nyr.
[288] Case T-253/04, KONGRA-GEL, judgment of 3 April 2008, nyr.
[289] Case T-229/02, Osman Ocalan on behalf of PKKv. Council, judgment on 3 April 2008, nyr.
[290] Case T-327/03, Stichting Al-Aqsa v. Council, [2007] ECR 11-79.
[291] Case T-47/03, Sison v. Council, [2007] ECR 11-73.
[292] Kunoy, p. 87.

Second, the judgment rejects the notion that that there are "political questions"[293] over which the Community Courts do not have jurisdiction. An argument to that effect had been raised by the Commission, the Council and the United Kingdom who contended that issues pertaining to the maintenance of international peace and security did not lend themselves to judicial review. The CFI's judgment in OMPI had already suggested that the limitations on the Community Courts' power to review the validity of Community measures which constitute the implementation of UN Security Council resolutions were solely based on the fact that such a review could not in any event lead the institution to review its position and not because the specific subject matter of sanctions are not suitable for judicial review.

While the ECJ's judgment does not comment on this argument, it does implicitly dismiss it when it states that "the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law."[294] All Community measures, regardless of their subject-matter, must therefore be subject to the same standard of review in light of fundamental rights.

The ECJ also rightly rejects the claims made by the Commission and the United Kingdom that the Court's review of UN sanction measures should be limited to establishing whether a "breach of human rights was particularly flagrant and glaring"[295] or "only of the most marginal kind". When a Community measure imposes severe restrictions on the fundamental rights of individuals on the basis of extraordinary risks to public security, the need for the Community courts to exercise full and careful review over such measures increases.

Finally, in overturning the CFI's judgments in *Kadi* and *Yusuf and Al Barakaat*, the ECJ has ensured that the uniformity of Community law will not be jeopardized. Some authors[296] had expressed fears that if the ECJ had upheld the CFI's

[293] Opinion of A.G. Maduro, paras. 33-34.
[294] ECJ, *Kadi and Al Barakaat*, para 326.
[295] ECJ, *Kadi and Al Barakaat*, para 272.
[296] Karayigit, at 379-404; Lavranos, at 471-490; and Kunoy, at 36-37.

findings, thereby affording Community measures based on UN resolutions, immunity from judicial review, national courts would have been tempted to intervene and provide judicial review themselves instead of the Community courts. As the Bundesverfassungsgericht (German Federal Constitutional Court) made clear in its famous Solange(TM) and Banana judgments, it reserves the right to review the legality of Community measures with the German Basic law if the level of protection of fundamental rights guaranteed by the EC legal order was to fall below a minimum level which is required by the Basic Law. This anxiety was compounded by the fact that, because the ECrtHR had refused in Bosphorus to review EC law against the Convention unless the protection afforded to Convention rights by the EC was to be found "manifestly deficient' , there was no effective judicial review of EC measures implementing UN sanctions under both EC law and the Convention.[297]

As a consequence of the above, the ECJ annulled the Council Regulation 881/2002 insofar as it freezes Mr. Kadi and Al Barakaat's financial assets, deciding however to maintain the effects of the Regulation for a maximum period of three months, in order to allow the Council to remedy the infringements found.

At this point the second procedures on UN sanction cases; Hassan and Ayadi cases should be examined. The actions for annulment of the contested Regulations brought before the Court of First Instance by Mr Hassan and Mr Ayadi were dismissed on 12 July 2006.[298] In so doing, the Court of First Instance relied, in the main, on its judgments in *Yusuf* and *Kadi*[299] in which it held, in particular, that the Community judicature had, in principle, no jurisdiction (save with regard to certain overriding fundamental rights recognized in international law as falling within the ambit of *jus cogens*) to review the lawfulness of the regulation in question because, according to the terms of the Charter of the United Nations, an international treaty which prevails over Community law, the Member States are bound to comply with resolutions of the Security Council. In September 2006 Mr Hassan and Mr Ayadi brought appeals before the Court of Justice against those judgments. In September 2008 the Court of Justice

[297] This issue will be explained in detail later in Chapter II.
[298] Cases T-253/02 Ayadi v Council and Case T-49/04 Hassan v Council and Commission.
[299] Case T-306/01 Yusuf and Al Barakaat International Foundation v Council and Commission and Case T-315/01 Kadi v Council and Commission.

ruled on the appeal brought against the judgments in *Yusuf* and *Kadi* at first instance[300] It held that the Community judicature does have jurisdiction to review the measures adopted by the Community to give effect to resolutions of the United Nations Security Council. Thus it set aside the judgments of the Court of First Instance. Then it annulled the fund-freezing regulation, considering that the latter had been adopted in breach of the fundamental rights of the persons concerned, but maintaining its effects for a period of tree months to allow the Council to remedy the infringements found as it was stated above in detail.

On 13 October 2009 the Commission adopted a new regulation[301] amending the fund-freezing regulation by which the decisions to include Mr Hassan and Mr Ayadi in the fund-freezing list were replaced by new decisions confirming their inclusion. According to the preamble to this Regulation, the Commission adopted that regulation in the light of the Court's decision in *Kadi* on appeal, after apprising Mr Hassan and Mr Ayadi of the grounds for their inclusion in the list, as provided by the Sanctions Committee and after examining the comments made by the appellants concerning those grounds. That regulation, which entered into force on 15 October 2009, applies with retroactive effect as from the original inclusion of Mr Hassan and Mr Ayadi in the list. That regulation has not been challenged in these proceedings.

The Court considers that the adoption of Regulation No 954/2009 cannot be regarded as equivalent to annulment pure and simple of the contested regulation. In conclusion, the Court finds that the appeals have not become devoid of purpose and that it is necessary for the Court to adjudicate on them.

On the substance of the cases, the Court finds that, inasmuch as the grounds in law of the judgments under appeal are the same as those relied on in *Yusuf* and *Kadi* at first instance, which have been set aside by the Court, those judgments are marred by the same error in law and must, therefore, be set aside. Next, the Court points out that

---

[300] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission*.

[301] Commission Regulation (EC) No 954/2009 of 13 October 2009 amending for the 114th time Regulation No 881/2002 (OJ L 269, p. 20).

the actual circumstances giving rise to the inclusion of Mr Hassan and Mr Ayadi's names in the fund-freezing list are identical to those of Mr Kadi. The Court's conclusion in *Kadi* on appeal, that the rights of defence – in particular, the right to be heard and the right to effective judicial review of observance of those rights – and the fundamental right to property had not been respected must, therefore, also be reached in these cases. In those circumstances, the Court annuled the Council regulation in the version before the regulation of 2009 was adopted in so far as it freezes Mr Hassan and Mr Ayadi's funds.

To sum up, by reinstating the Community Courts as the ultimate guardian of the fundamental rights guaranteed by the EC legal order, the ECJ's judgment removes any temptation the national courts may have felt to unilaterally review the legality of Community measures in light of their own corpus of fundamental rights. Moreover, some scholars were expecting an answer to the question that was asked in the Hassan appeal, whether the ECJ had the possibility to remove any lingering doubts national courts may have about the level of protection afforded to fundamental rights by the EC legal order as it has been asked to rule on whether the UN sanctions committee regime can be said to protect fundamental rights in a manner equivalent to that afforded by the EC legal order. In light of the ECJ's judgment in Kadi and Al Barakaat, it is submitted that the ECJ is unlikely to make such a finding as the current level of protection of such rights by the UN Sanctions Committee appears to fall below the minimum level required by the EC legal order. But this question has been unanswered.

(2)Consequences and effects of the judgment

The ECJ allowed the EC to maintain the regulation for a period of three months in order to allow the Council of the EU time to remedy the infringements found. By doing so, the ECJ sought to prevent the Appellants from avoiding the application of the measures against them, given that the measures may prove justified.[302] Although the judgment, in the words of the ECJ, does not defy the primacy of the relevant UNSC

[302] *Kadi*, (Grand Chamber), para. 374-76.

resolutions in international law,[303] it does indirectly affect the implementation of the resolutions in question.

This case is important for five reasons. First, this case marks the first time that the ECJ confirmed its jurisdiction to review the lawfulness of a measure giving effect to the UNSC resolutions. Second, the case constitutes the first time the ECJ quashed an EC measure giving effect to a UNSC resolution for being unlawful. Third, no other international or regional court has held that sanctions imposed by the UNSC resolutions in the fight against terrorism infringe certain fundamental rights. Fourth, the decision confirms that the powers of the UNSC are not unlimited. Fifth, the judgment illustrates the important role played by the EU Courts in delineating the limits of the UNSC's powers.[304]

[303] ibid, para. 288.
[304] Miša Zgonec-Rozej, "*Kadi & Al Barakaat v. Council of the EU & EC Commission*: European Court of Justice Quashes a Council of the EU Regulation Implementing UN Security Council Resolutions", ASIL, Volume 12, Issue 22. October 28, 2008, access on 25.02.2010.

CHAPTER II

UNITED NATIONS SECURITY COUNCIL RESOLUTIONS AND PROTECTION OF HUMAN RIGHTS

I. HUMAN RIGHTS PROTECTION REGARDING UNSC RESOLUTIONS IN INTERNATIONAL LAW

A. An overview

The UN Charter, Art.1(3) states that one of the purposes of the UN is the achievement of "international co-operation in... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". But on the other hand, the Charter did not impose any concrete human rights obligations on the UN member states.[305]

Under the obligation to cooperate for the promotion of human rights, the major effort by the Member States of UN was the Universal Declaration of Human Rights of 1948 which was followed, including the two International Covenants on Human Rights in 1966, which together with the human rights provisions of the UN Charter and the Universal Declaration, constitute the International Bill of Rights. Although the Universal Declaration was adopted as a nonbinding UN General Assembly resolution, its preamble states that "a common understanding" of the human rights and fundamental freedoms mentioned in the Charter, it has come to be accepted as a normative instrument in its own right which is together with the Charter, is now considered to spell out the general human rights obligations of all UN member states.[306]

After the Cold War, the UN Security Council has become more active than ever before. The size of UN peacekeeping forces are three times what it was at any time before the fall of the Berlin wall[307], the peacekeeping budget has expanded twenty- fold

[305] Tomuschat II, p. 223.
[306] ibid, p. 224.
[307] Global Policy Forum, Size of UN Peacekeeping Forces: 1947-2007, www.globalpolicy.org/security/peacekpg/data/pcekprs.htm (access on 25 March 2010).

since 1989,[308] and the number of vetoes in the Security Council is at an all time low.[309] The UN has established international courts to try individuals for genocide in Rwanda and in the former territory of Yugoslavia and created an International Criminal Court to prosecute individuals for war crimes more generally. And the UN has begun to assert jurisdiction over the behaviour of non-State actors even when they are unconnected to any governing regime, and to regulate their behavior through the imposition of sanctions that freeze individuals' assets.[310]

The newly extended reach of the Security Council has raised questions as to the legal limits on the Council's enforcement powers under Chapter VII. Especially in light of the UN's extensive powers under Chapter VII, as well as the precedence accorded under Article l03 of the Charter to a State's UN treaty obligations,[311] the problem is that many other fundamental values, including human rights, are in danger of being ignored. Thus two scholars examining the UN's development of economic sanctions against States, for example, have stated that the Security Council has a record of "almost complete failure to consider international law standards…"[312]

The problem becomes particularly serious in the case of decisions imposing targeted sanctions on individuals. These sanctions and also the process by which the decisions on sanctions are reached should be appropriate to fundamental rights. Furthermore, individuals have generally limited recourse against the decisions of the Security Council. Given the general lack of "judicial review" of Security Council actions at the UN level the targets of these sanctions must generally engage the diplomatic services of their nationality or residence to vindicate their interests that were adversely affected by UN Security Council action.

---

[308]Global Policy Forum, Peacekeeping Operations Expenditures: 1947-2005, wwwglobalpolicy.org/flnance/tables/pko/expend.htm (access on 25 March 2010).
[309] Global Policy Forum, Changing Patterns in the Use of the Veto in the Security Council, www.globalpolicy.org/security/data/vetotab.htm (access on 25 March 2010).
[310] Halberstam, p. 71.
[311] Art. 103 UN Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
[312] Reisman & Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes," 9 EJIL (1998), 126 from Halberstam, p. 72.

1. Is Security Council unlimited?

A strong argument can be made that the Security Council is subject both to the provisions of its own Charter and, as a general matter, to international law - including customary international human rights law. This argument is based on textual and contextual interpretation of the Charter, the Opinions of the International Court of Justice, scholarly views, as well as international practice.

a. Restraint by the Charter

The most important source of Security Council restraint derives from the United Nations Charter itself. The Preamble to the United Nations Charter regulates a general commitment on part of the UN signatories "to reaffirm faith in fundamental human rights [and] in the dignity and worth of the human person" and to "establish conditions under which justice ... can be maintained." These general commitments are transposed elsewhere in the Charter into operative purposes, principles, and rules that govern both the UN and its Members. Most of its provisions are well known, but some of the more important passages relevant to this subject are worth repeating here nonetheless.

As laid out in Article 1, the "Purposes" of the UN include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 2 further sets general "principles" that are designed to guide the organization, including that Members shall "fulfill in good faith the obligations assumed by them in accordance with the present Charter" and that Members shall assist the United Nations "in any action it takes in accordance with the present Charter."

These principles and purposes of Articles 1 and 2 figure prominently in more specific obligations of Members and of the UN under later provisions. So, for example, Article 55 creates a specific mandate that the UN "shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 then provides the corresponding commitment on the part of Members to "pledge themselves to take joint

and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. " The Security Council, in particular, is subject to the same general constraints of the Charter. According to Article 24 of the Charter, the Security Council must act "in accordance with the Purposes and Principles of the United Nations."

The various provisions of the Charter indicate a commitment for the UN and the Security Council to remain within the constitutional bounds of the Charter, which includes general respect for international human rights. Also, the various provisions similarly impose a corresponding duty on the Members to cooperate with the UN only insofar as the UN remains within these bounds, including respect for human rights. This means that Chapter VII measures cannot legally disregard the concerns embodied in basic international human rights and humanitarian law: "[Humanitarian law and human rights norms, rather than establishing precise limits to Chapter VII powers, form guidelines in the exercise of those powers. Since they form part of the Purposes of the Organization as set out in Article 1(3) of the Charter, the [Security Council] 's complete disregard for them would violate the Charter. However, it is up to the [Security Council] to strike the concrete balance between humanitarian and human rights concerns and the goal of maintaining peace..."[313]

International tribunals seem to confirm this view. The International Court of Justice recognized over thirty years ago that the Security Council was bound by the Purposes and Principles in Articles 1 and 2 of the Charter.[314] More recently, the Appeals Chamber of the International Court for Yugoslavia held that even when acting under Chapter VII, the Security Council's considerable discretion "does not mean that its

[313] Halberstam, p. 14.

[314] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 57, para 131. The ICJ also held that "to deprive human beings of freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." Para. 115. (noting that Security Council decisions were in conformity with the Principles and Purposes of the Charter and were "consequently binding on all States Members of the UN, which are thus under obligation to accept and carry them out.")

powers are unlimited."[315] As "an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization" the Security Council is "subjected to certain constitutional limitations."[316] As the Appeals Chamber put it: "[N]either the text nor the spirit of the Charter conceives of the Security Council as legibus solutus" (unbound by law). This would suggest that even when acting under Chapter VII, the Council must adopt only such measures as are appropriate for removing a threat or suppressing a breach of international security.

b. Restraint by International Law

The Security Council can be further seen as bound by international law in two ways. Firstly as a body of the UN, a legal person in the international legal order,[317] the Security Council is bound to observe international law. To be sure, the UN is not bound by international human rights treaties, as it has not been a signatory to such treaties. But the UN is bound by customary international law as well as general principles of law, at least to the extent that the UN Charter does not provide otherwise.

As for customary international human rights law, however, the Charter seems only to reaffirm their importance to the operation and international legitimacy of the UN. And while many norms of customary international law and general principles of law have traditionally been applied to the actions of States, the UN finds itself increasingly bound by such norms, since the general point about the basic applicability of these norms to the UN as an actor with international legal personality remains.

In the second place, States cannot simply avoid international human rights law by bringing to life an international organization and charging it with tasks that would

[315] Prosecutor v. Tadic, Case No. IT-94-1, International Criminal Tribunal for Yugoslavia Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 Oct. 1995), para 28, www.un.org/icty/tadic/appeal/decision-e/51002.htm (last visited 30 Oct. 2009).
[316] Advisory Opinion, [1948] ICJ Rep. 57, 64 ("The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.")
[317] Reparation for Injuries Suffered in the Service of the United Nations , Advisory Opinion, [1949] ICJ Rep. 174, 179.

violate human rights standards if undertaken by the members of that organization themselves.[318]

2. ICJ Review of Security Council Decisions

The question of judicial review of the decisions of the major political organs of the United Nations, and in particular, review of Security Council decisions by the International Court of Justice (ICJ), is well illustrated by the Lockerbie case.[319] Although the case was finally dismissed in late 2003 without a decision on the merits,[320] it remains a model for analyzing the question of judicial review with respect to the decisions of the United Nation's major political organs, and in particular, review of Security Council decisions by the ICJ. This case involved on the one side, Libya, and on the other side, the United States and the United Kingdom.[321]

The Lockerbie case arose out of the destruction of a U.S. airliner, Pan American Airlines Flight 103, over the town of Lockerbie, Scotland in December 1988. After a period of intense investigation by U.S. and British authorities, indictments were brought down in both the United States and the United Kingdom against two Libyan intelligence officers who were alleged to have planted the bomb that destroyed the aircraft.[322] The United States and the United Kingdom immediately demanded that Libya turn over these individuals for trial in either one of their jurisdictions.[323]

---

[318] Halberstam, p.16.

[319] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.). The application, pleadings, and orders in the case may be found online at www.icjcij.org.

[320] On September 10, 2003, the case was discontinued by agreement of the parties, following Libyan compliance with the requirements of the Security Council and the lifting of U.N. sanctions against Libya. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K; Libya v. U.S.), 2003 I.C.J. Nos. 88-89 (Sept. 10, 2003), available at http://212.153.43.18/icjwww/idocket/iluk/ilukord/iluk_iorder_20030910.PDF;http://212.153.43.18/icjwww/idocket/ilus/ilusorder/ilus_iorder_20030910.PDF (last visited Apr. 8, 2004) [hereinafter Order of Sept. 10, 2003].

[321] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.), 1992 I.C.J. 114 (Request for Indication of Provisional Measures Order of Apr. 14) [hereinafter Libya v. U.S. (Order of Apr. 14)].

[322] Libya v. U.S. (Order of Apr. 14), 1992 I.C.J. at 122-23.

[323] ibid, at 123.

Realizing, however, that Libya was highly unlikely to act on its own, the two States then asked Security Council for an action that would compel Libya to turn over the suspects. In January 1992, the Security Council adopted a resolution urging Libya to respond to these demands, but not requiring such action.[324] The United States and the United Kingdom did intend to ask the Security Council to take the next step-using its mandatory authority under Chapter VII of the UN Charter-to compel Libya to turn the suspects over. Libya, of course, was interested in trying to deter or prevent the Security Council from taking such action, therefore it filed a case based on the Montreal Convention, which provides for investigation and prosecution of incidents of air sabotage[325] against the United States and the United Kingdom before the ICJ.[326]

Libya alleged that the United States and the United Kingdom had denied Libya's rights under the Convention to investigate and possibly prosecute the incident itself. Specifically, Libya pointed to the provision of the Convention, which provides that a State in which persons who were alleged to have committed such acts of aircraft sabotage were found has the obligation to prosecute or extradite.[327] In addition, the Convention provides that such a State is entitled to ask other parties for their fullest measure of cooperation in its investigation and possible prosecution.[328] Libya, asserted that the concerned two states refused to cooperate.

Libya alleged, therefore, that the United States and the United Kingdom violated the Montreal Convention. Libya initially attempted to persuade the ICJ to issue so-called provisional measures, which are essentially interim steps that the ICJ may take to preserve the rights of the parties, pending a final decision in the case.[329] Libya specifically asked that the United States and the United Kingdom be enjoined from taking any measures designed to compel Libya to surrender the individuals.[330]

---

[324] U.N. SCOR, 47th Sess., 3033d mtg., U.N. Doc. S/RES/731 (1992).
[325] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Montreal Convention].
[326] The Libyan Application was filed on March 3, 1992.
[327] Montreal Convention, Art. 7, 24 U.S.T. at 571, 974 U.N.T.S. at 182.
[328] Montreal Convention, Art. 11(1), 24 U.S.T. at 572, 974 U.N.T.S. at 183.
[329] See Statute of the International Court of Justice, June 26, 1945, art. 41, 59 Stat. 1055, 1061.
[330] Libya v. U.S. (Order of Apr. 14), 1992 I.C.J. at 119.

Implicitly, this was a reference to the fact that the United States and the United Kingdom were trying to persuade the Security Council to take such measures.

In the meantime, the Security Council was considering the request of the United States and the United Kingdom for more binding and drastic measures. Basically, the Security Council disregarded the fact that the case was before the ICJ and proceeded to adopt a decision under Chapter VII, requiring Libya to respond to the U.S. and U.K. demands for the surrender of the individuals and imposing a variety of sanctions on Libya.[331] The sanctions would apply until Libya did comply and surrender the persons accused. The matter then went back to the ICJ, which had to decide whether to grant Libya its request for provisional measures. The ICJ declined to do so on the basis that the Security Council had now adopted a mandatory decision under Chapter VII, which on its face appeared to be inconsistent with Libya's request as it directed Libya to surrender the individuals for trial elsewhere.[332] The ICJ assumed that this was a valid decision of the Council, superseding any inconsistent provisions in the Montreal Convention.[333]

Libya's initial attempt to divert the Security Council therefore failed. The case then continued through the lengthy process by which the ICJ decides such cases. The United Sates and United Kingdom filed preliminary objections to the Court's jurisdiction over the Libyan complaint and to its admissibility, which the ICJ rejected.[334] The parties then filed two rounds of pleadings on the merits of the case, but Libya did not press for an immediate hearing on the merits.[335] Meanwhile, negotiations continued among Libya, the United States, the United Kingdom, and the representatives of the families of the Pan Am 103 victims for the purpose of resolving other aspects of the case. In the end, Libya agreed to comply with the Security Council's other requirements, including accepting responsibility for the bombing and paying

[331] See U.N. SCOR, 47th Sess., 3063d mtg. 1-2, U.N. Doc. S/RES/748 (1992). These sanctions were finally lifted in September 2003, following Libyan compliance with the Council's requirements. U.N. SCOR, 58th Sess., 4820th mtg., U.N. Doc. S/RES/1506 (2003).
[332] Libya v. U.S., 1992 I.C.J. at 126-27.
[333] ibid. at 42-43.
[334] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1998 I.C.J. 115, 120-21 (Preliminary Objections Order of Feb. 27) [hereinafter Libya v. U.S. (Feb. 27)].
[335] ibid. at 133-34.

appropriate compensation to the families. As a result, in September 2003 the Security Council terminated sanctions against Libya[336] and, pursuant to agreement between the parties, the ICJ terminated the cases against the United States and United Kingdom.[337] Accordingly, the ICJ never ruled on the merits of Libya's case.

Had the case proceeded to a decision on the merits, the ICJ would have been faced with the question of whether it had the authority to review and possibly invalidate decisions of the Security Council under Chapter VII of the Charter. Specifically, the United States and United Kingdom had relied on decisions of the Security Council as part of its defense against the Libyan complaint, and Libya challenged the validity of those decisions.[338] Some of the Libyan challenges were procedural in character. Libya claimed that the vote that adopted the resolution was improper because France, the United States, and the United Kingdom voted when, according to Libya, they should abstained.[339] Libya contended that the Security Council should have exhausted other peaceful remedies before going on to these measures.

Libya also challenged the substance of the Security Council's actions, claiming that the Council had no basis for finding that there was a threat to the peace, which is the predicate for its decisions under Chapter VII, and that the actions actually taken by the Council were in fact not directed at, nor did they have any effect in, restoring the peace. Libya also alleged that the Security Council has no authority to intervene in a criminal process and require surrender of individuals for prosecution.[340] Libya also claimed that the Security Council was intruding in the domestic jurisdiction of a member state, contrary to the Charter, and made other arguments relating to the substance of the Council's action.[341] Because of these arguments, then, the ICJ was theoretically presented with the issue of the degree to which it can review decisions of the Security Council, one of the major UN political organs.

---

[336] S.C. Res. 1506, U.N. SCOR, 58th Sess., 4820th mtg., U.N. Doc. S/Res/1506 (2003), available at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/498/81/PDF/N0 349881.pdf.
[337] See Order of September 10, 2003.
[338] Counter-Memorial of the United States (Libya v. U.S.), 1999 I.C.J. Pleadings 50-84 (Mar. 31, 1999).
[339] Libyan Observations and Submissions (Libya v. U.S.), 1999 I.C.J. Pleadings 4.34 (Dec. 22, 1995).
[340] ibid. 4.16 et seq.
[341] ibid. 6.84 et seq.

Under the UN Charter the Security Council and certain other political bodies are co-equal to the ICJ.[342] The drafters of the Charter assumed that the Security Council would be making its own judgments on legal issues that might arise in its work, and did not find it necessary to give the ICJ any right of review over Security Council decisions.[343] The Charter refers to the ICJ as the supreme judicial body in the U.N. system, even though it is argued that the ICJ should have the right to review the validity of the acts of political organs, at least whenever such an act is relevant to a case before the Court, it is clear that the framers of the Charter did not intend to provide for a process of ICJ review of the actions of political decisions. Such a solution was proposed but not accepted at the time of the Charter's drafting.[344]

3. Judicial Remedies for Restrictive Measures in International Law

Although the Charter of the UN describes the International Court of Justice as the "principal judicial organ of the United Nations" (Charter, Art. 92), it has not been entrusted with powers enabling it to review the lawfulness of the acts of the political organs of the world organization. No remedy is available to a State which feels that its rights under the Charter have been infringed, and individuals have no locus standi before the ICJ.[345]

On many occasions, UN members were convinced that their statutory rights had been encroached upon. South Africa was of the view that its exclusion from participation in the work of the General Assembly in 1974[346] was incompatible with its membership rights, Israel complained of the setting up of the Committee on the Exercise of the Inalienable Rights of the Palestinian People in 1975,[347] and Iraq found that the sanctions imposed on it after the end of the second Gulf War against Kuwait

---

[342] Article 7 of the U.N. Charter established six "principle organs of the United Nations: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat." UN Charter Art. 7, para. 1. These organs have a "horizontal" relationship in that they are independent bodies which are not subordinate to one another.

[343] See Import of the Special Subcommittee of Committee IV/2 on the Interpretation of the Charter, U.N. Doc. 750, IV/2/B/1, 13 U.N.C.I.O. Docs. , 831-32 (1945).

[344] See Summary Report of Fourteenth Meeting of Committee IV/2, Doc. 873, IV/2/37, 13 U.N.C.I.O. Docs. 653, (1945).

[345] Statute of the ICJ, Art. 34.

[346] General Assembly (GA) Resolution 3206 (XXIX), 30 Sept. 1974, and decision of the President of the General Assembly, Buteflika, 12 Nov. 1974.

[347] GA resolution 3376 (XXX), 10 Nov. 1975.

went far beyond the powers of the Security Council.[348] However, the three States found no judge willing to hear their grievances. Review of the lawfulness of controversial measures may only be achieved in an indirect way through an advisory opinion of the ICJ (Charter, Art. 96). Yet the alleged victim cannot set that procedure in motion. Only the General Assembly and the Security Council are entitled to request an advisory opinion. A State which feels unjustly treated may attempt to muster a majority in one of those two bodies for the purpose of initiating such an advisory procedure. In fact, however, this has never happened. Individual States have never been able to build up a broad coalition willing to challenge decisions of one of the main political bodies of the United Nations. The Lockerbie case which has been discussed above[349] is a good example to this inclination. In this case, the International Court of Justice implied that it had the power to hold a Security Council decision "ultra vires" although it ruled that in this instance the Security Council action was valid by operations of the "supremacy clause" in Art. 103 of the Charter, which trumped Libya's right under a treaty.[350]

But both of these procedures -the Advisory opinion and the case- are generally beyond the reach of an individual or a group, because only States have access to the Court and requests for Advisory Opinions are confined to UN organs.

Furthermore no direct action can be introduced against the United Nations before courts and tribunals of the UN Member States. This immunity derives from Article 105(1) of the Charter and has been particularized in the Convention on the Privileges and Immunities of the United Nations.[351]

At the level of the United Nations, the only way in which a person may have his or her name removed from the list is provided by the procedure set out in the Guidelines of the Sanctions Committee for the conduct of its work. However, the situation of individuals targeted by sanctions based on a prior designation is deemed to have been improved by Security Council Resolution 1730 (2006) of 19 December 2006.

---

[348] Security Council resolution 687 (1991), 3 April 1991.
[349] Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), [1992] ICJ Rep. 3, at 114 (Provisional Measures of 14 Apr.).
[350] ibid.
[351] Of 13 Feb. 1946, UNTS 1, p. 15.

While in the past a petitioner has always had to act through his or her national government, it has now become possible for petitioners to lodge requests for de-listing directly to a "focal point" established by the Secretary-General pursuant to Resolution 1730 (2006). However, the de-listing still requires consensus of the Committee's members. Needless to say, any form of judicial control of the decisions of the Security Council seems so far away.[352]

Summing up, if one compares the situation under the Charter with similar situations in any given State, it emerges that the rule of law is not as fragmentary under the auspices of the United Nations as it might appear at first glance. Within an ordinary domestic system, legislation to combat the financing of terrorism can as a rule be enacted by the competent parliamentary bodies as a matter of routine. No specific authorization is needed. The requisite power is simply provided by the concept of national sovereignty. Only the fact that the United Nations has come into existence as an international organization on the basis of a multilateral treaty has led the drafters of the Charter to circumscribe the powers of the Security Council in a specific manner (Charter, Arts. 24, 39). However, the task of maintaining and restoring international peace and security is a world order function which requires a broad scope. Nowhere within a national legal order would constitutional judges arrogate to themselves the power to ascertain whether certain threats which impelled the national legislature to act were indeed as real and concrete as contended. Generally, and with good reasons, constitutions refrain from setting forth political conditions for the exercise of legislative powers. Consequently, there are no yardsticks that would permit the assessment of the expediency of a legislative statute in that regard. By analogy, it would also appear to be unsuitable, in principle, to control the lawfulness of Security Council resolutions with respect to the specifications of Chapter VII (Art. 39) of the Charter. To assess whether a threat to international peace and security exists means essentially discharging a political function which judges are unable to perform with the same degree of authoritativeness. It remains, however, that the mechanism established to protect the human rights of persons targeted individually by the Security Council does not live up to legitimate expectations. Currently, no better alternative can be envisioned. If the Security Council

[352] Helikoski, p. 1157.

continues to act as an administrative agency that directly interferes with individual rights, reforms must be introduced for a better protection of such rights.

Although the UN procedures for placing individuals or groups on the list of terrorists or supporters have been progressively improved, there remains a danger of innocent victims being included and deprived of their basic rights. As the UN's Analytical Support and Sanctions Monitoring Team sums up the problem:

"The Committee has made a series of incremental improvements to its procedures which have addressed many of the concerns expressed about the fairness of the sanctions but one major issue remains: the suggestion that listing decisions by the Committee be subject to review by an independent panel. It is difficult to imagine that the Security Council could accept any review panel that appeared to erode its absolute authority to take action on matters affecting international peace and security, as enshrined in the Charter."[353]

The root of the difficulty, then, seems to be the UN Security Council's current understanding of the "absolute" nature of its authority under the Charter.

As it was discussed in this piece, there are several potential avenues along which the UN in general, and the Security Council, in particular, might be legally bound to observe fundamental principles of fairness in meting out draconian measures on individuals. One idea is that to the extent the Security Council's discretionary powers and scope of operations expand, the Council might create its own fundamental rights principles by constitutional absorption, that is, by incorporating some of the principles that underpin the legitimacy of its Members (both domestically and internationally) into the governing law of the UN Charter. That avenue of fundamental rights protection, however, still remains largely speculative. At the present time, more traditional considerations may ground the UN's requirement to abide by internationally recognized human rights. As it is generally argued, whether by virtue of the Charter itself, UN international legal personality, or some version of functional succession, the United Nations Security Council is already now legally bound to observe customary

[353] Eighth Report of the Analytical Support and Sanctions Monitoring Team, U.N. Doc. S/2008/324 (14 May 2008), at 17.

international human rights law. The Security Council operates within a considerable margin of appreciation under Chapter VII, but it must remain within the outer bounds of human rights law nonetheless.

II. HUMAN RIGHTS PROTECTION REGARDING UNSC RESOLUTIONS IN EUROPEAN LAW

A. Review of UN Sanctions before the European Court of Human Rights

The European Convention on Human Rights is the first regional system for the protection of human rights which was followed by the inter-American and African systems, and all three of the existing systems, by providing protective mechanisms suited to their regions make codifications and take necessary measures to supplement the human rights efforts of the UN.[354]

The European human rights protection structure under Council of Europe is now getting support from many states, as it is a modern body of human rights law to which other international, regional, and national institutions frequently inspired when interpreting and applying their own human rights instruments. Especially, after 1998 they became more important after giving individuals standing to file cases directly in the appropriate tribunal. Over time, the European Court of Human Rights for all practical purposes has become Europe's constitutional court in matters of civil and political rights and the ECrtHR itself has acquired the status of domestic law, in most of the states parties in which it can be invoked as a part of legal rules in the courts.[355]

1. The European Court of Human Right's Bosphorus Judgment

Prior to the *Bosphorus*[356] judgment"' of the ECrtHR, individuals who did not obtain effective judicial remedies before the CFI/ECJ could turn to the ECrtHR to review national measures implementing Community law acts, which results in an indirect review of EC law.[357] Indeed, since the judgment of the ECrtHR in the

[354] Tomuschat II, p. 243.
[355] ibid, p. 244 et seq.
[356] ECrtHR, *Bosphorus* v. *Ireland,* judgment of 30.6.2005.
[357] Lavranos II, p. 478.

Cantoni[358] and *Matthews*[359] cases and the almost rendered judgment in the *Senator Lines*[360] case, it is accepted that[361] the ECrtHR is – in principle - prepared to review incidentally but de facto the conformity of Community law acts with the ECHR. On this background, the *Bosphorus* case, which shall be discussed mainly was the next major test case.

In 1993 the UN Security Council adopted sanctions against the then Federal Republic of Yugoslavia (FRY) involving inter alia the complete ending of airline services between the FRY and third countries.[362] Bosphorus is a Turkish airline that rented one plane from JAT, the state-owned Yugoslav airline before the imposition of sanctions, for the purpose of using that plane for flights between Turkey and other destinations - but not to or from the FRY. The EC adopted regulations in order to implement the UN sanctions.[363] In turn, Ireland seized the plane of Bosphorus when it was serviced at an Irish airport behaving in conformity with the UN sanctions and EC regulation. Bosphorus appealed against that measure before Irish courts up to the Irish Supreme Court, claiming that JAT had nothing to do with the daily operation of the plane and thus the sanctions were targeted against an innocent party. The Irish Supreme Court as the highest domestic court requested from the ECJ a preliminary ruling on the legality of the Irish measure, in particular in view of the fact that JAT, while being owner of the plane, was not involved in the daily operations of the plane by Bosphorus. The ECJ ruled that substantial restrictions of property rights and the right to exercise economic activities must be accepted in order to give full effect to UN sanctions.[364] As a result, the Irish measure as well as the EC regulation was thus considered to be in conformity with Community law and fundamental rights. Obviously, Bosphorus was not happy with the ECJ ruling and therefore instituted proceedings against Ireland before the ECrtHR for violating Article 1 Protocol 1 of the ECHR on enjoyment of

[358] ECrtHR, *Cantoni v. France,* judgment of 15.11.1996.
[359] ECrtHR, *Matthews* v. *UK,* judgment of 18.2.1999.
[360] ECrtHR, *Senator Lines v. 15 EU Member States,* judgment of 10.3.2004.
[361] Lavranos, p.483.
[362]UN Security Council Resolution 820 (1993), available at <daccessdds.un.org/doc/UNDOC/GEN/N93/222/97/IMG/N9322297.pdf>.
[363] O.J. [1993] L 102/14, Regulation 990/93.
[364] Case C-84/95 *{Bosphorus)* [1996] ECR 1-3953, paras. 21-27.

property. After the ECrtHR admitted the case in September 2001,[365] it took almost 4 years before the ECrtHR rendered its ruling.[366]

First, the ECrtHR reaffirmed its competence to review indirectly Community law acts in its *Bosphorus judgment* again. Second, the ECrtHR stated that the level of fundamental rights protection available within the EC is 'comparable'- though not 'identical' - with the one of the ECHR,[367] so that the ECrtHR would exercise its jurisdiction only in cases in which the fundamental rights protection within the EC is "manifestly deficient".[368] Therefore, the ECrtHR evaluated the procedures before the Irish courts and the ECJ, and then found it not necessary to provide for judicial review. This means that, in principle, private parties (like Bosphorus) who are affected by UN sanctions or rather European and domestic implementing measures are unable to obtain judicial review from the ECrtHR in order to assess their conformity with the ECHR and the related jurisprudence of the ECrtHR.[369] More specifically, the ECrtHR applies a *so lange* ('as long as') test regarding the review of Community law acts or domestic acts implementing EC law similar to the one applied by the German Federal Constitutional Court[370] concerning the conformity of Community law with German constitutional law.[371] According to the *so lange* test, the BVerfG will not review EC law acts as long as the level of fundamentals rights protection of the EC does not - generally - fall below the absolute minimum level as provided for by the German constitution.

Similarly, *as long as* the ECJ/CFI provide for a level of fundamental rights protection that is not "manifestly deficient", the ECrtHR will not review Community law acts or domestic acts implementing EC law. Consequently, the ECrtHR cannot be used any more as a de facto 'fourth instance' to obtain judicial review.

In any case, the system of judicial review within the Community legal order as applied and interpreted by the ECJ/CFI – prior to the *Yusuf/Kadi* ruling of the CFI –

---

[365] ECrtHR, *Bosphorus* v. *Ireland,* decision on admissibility of 13.9.2001, application no. 45036/98.
[366] ECrtHR, *Bosphorus* v. *Ireland,* ECrtHR judgment of 30.6.2005 (Grand Chamber), application no. 45036/98.
367 ECrtHR, Bosphorus v. Ireland, ECrtHR judgment of 30.6.2005, para. 155.
[368] ibid., para. 156.
[369] Lavranos, p. 485
[370] *Bundesverfassungsgericht,* abbreviated to BVerfG.
[371] ECrtHR, *Bosphorus* v. *Ireland,* ECrtHR judgment of 30.6.2005, paras. 162-163.

does not meet the conditions of being 'manifestly deficient'. Hence, the ECrtHR also does not provide for effective judicial review against UN sanctions that have been implemented by the EC and its Member States – except in very unusual circumstances. Whether the ECrtHR would come to the same conclusion after the CFI's *Yusuf/Kadi* ruling remains to be seen.

While the attitude of the European courts is to a certain extent understandable considering the political and diplomatic repercussions that would be caused by a ruling of one of the European courts in which the legality or validity of measures implementing UN sanctions is challenged, this hands-off policy raises serious doubts as to the conformity with Article 6 ECHR (access to court) and the relevant jurisprudence of the ECrtHR. Therefore it can be said that no effective judicial review is available on the European level and that this result is in clear violation of Article 6 ECHR.

Since the national courts are bound by the judgments of the ECJ/CFI as well as by the judgments of the ECrtHR, their hands-off policy also has implications for the national courts of the EC Member States that are also contracting parties to the convention.

Moreover, it is important to note that the ECrtHR explicitly certified the limited access of individuals to the ECJ caused by the restrictive locus standi conditions within Article 230(4) EC as being in conformity with ECHR law. Therefore, from a procedural point of view it appears that both the ECJ/CFI and the ECrtHR have developed a jurisprudence that coordinates their approach towards UN sanctions in the sense of establishing a hands- off policy. In other words, UN sanctions and their European and domestic implementing measures are off-limits for the European courts. As a result, judicial review for affected individuals against measures implementing UN sanctions is practically unavailable both before the ECJ/CFI and the ECrtHR.

2. Behrami/Saramati cases before the European Court of Human Rights

The *Behrami/Saramati* judgment brings together two different factual scenarios involving the United Nations Interim Administration Mission in Kosovo, (UNMIK) and the UN-authorised security presence in Kosovo (K-FOR), following the forced

withdrawal of Federal Republic of Yugoslavia (FRY) forces and the conflict between Serbian and Albanian forces in Kosovo in 1999.[372] The UN Security Council had provided for the establishment of K-FOR, by a Resolution[373], composed of troops "under UN auspices", with "substantial NATO participation" but under "unified command and control".[374] By the same Resolution, the Security Council decided on the establishment of UNMIK, which would coordinate closely with KFOR, and provided for the appointment of a Special Representative to control its implementation.

The *Behrami* complaint was brought before the European Court of Human Rights by the father of two children, one of whom was killed and the other severely injured and disfigured by unexploded cluster bombs in the area where they were playing. The Behrami family was of Albanian origin. KFOR had apparently been aware of the unexploded CBUs for months but decided that they were not a high priority, and an UNMIK Police report in March 2000 concluded that the incident amounted to "unintentional homicide committed by imprudence".[375] The exact division of responsibility as between the military wing (KFOR) which had originally been responsible for de-mining in the area and the civilian wing (UNMACC, the UN Mine Action Coordination Centre in Kosovo) which formally took over responsibility in August 1999 was disputed, but it seemed that both authorities were required to cooperate and to work closely together. Behrami complained to the ECrtHR of violation of Article 2 of the Convention concerning the right to life.

On the other hand, the *Saramati* complaint involved a Kosovo national of Albanian origin who was arrested by UNMIK police on April 24, 2001 on suspicion of attempted murder and illegal possession of a weapon. After being brought before an investigating judge, he was detained until 4 June 2001 when his appeal was allowed and his release ordered by the Supreme Court. In mid July 2001 he was again arrested by UNMIK police and detained for a month. When his legal advisors questioned the legality of the detention they were told that KFOR had authority under Resolution 1244

[372] Behrami and Saramati v France, Norway and Germany; judgment of the European Court of Human Rights of 2 May 2007 (Appl 71412/01, 71412/01&. 78166/01)
[373] UNSC Resolution 1244 of 10 June 1999.
[374] Behrami, n. 42 para 3.
[375] ibid., para 6.

to detain him since it was necessary "to maintain a safe and secure environment" and to protect KFOR troops, as they had information about his alleged involvement with armed groups operating between Kosovo and the FRY.[376] Following several further extensions of his detention and appearances for trial, and despite the Supreme Court having ordered his release in June 2001, he was convicted in January 2002 of attempted murder. This conviction was subsequently quashed by the Supreme Court in October 2002 and his release from detention was ordered. No retrial had been set by the time the ECtHR gave judgment in July 2007. Saramati complained to the ECtHR that his detention by KFOR breached Articles 5 and 13 of the ECHR concerning liberty, security and the right to an effective remedy.

Both applicants claimed that responsibility for the violation lay with KFOR, and that in events at issue took place outside the territory of the States involved and outside the 'legal space' of the Convention on Human Rights at the time, and under the auspices of the UN, this raised the question of the extra-territorial application of the Convention[377] and of the jurisdiction of the Court over the actions impugned. The judgment focused primarily on the question of the Behrami's case the responsibility for the de-mining operation lay with France, whereas in Saramati's case responsibility for the prolonged detention lay with Norway. Given that the attributability of the acts complained of to the respondent states, and hence on the question of the international responsibility under the ECHR of those states for the human rights violations alleged. Ultimately, in a chain of reasoning that has already attracted significant criticism, the Court ruled that since the acts of both KFOR and UNMIK were under the 'ultimate control' of the UN, they were attributable to the UN and not to the individual states involved in the actual operations. The Court concluded that even though there was no direct operational command from the UN Security Council, there was ultimate control sufficient for the 'delegated model' of missions under Chapter VII of the UN Charter,[378] and the level of operational control by contributing country forces was not such as to

[376] *Behrami and Saramati*, para 11.
[377] The Federal Republic of Yugoslavia at the time was not a member of the Council of Europe, and hence not a signatory to the European Convention on Human Rights. Serbia and Montenegro, the two successor states to the FRY have since become signatories to the ECHR, but the status of Kosovo itself is not yet settled.
[378] *Behrami*, paras 133-136

affect the unity of NATO command or to detach them from the international mandate.[379] As far as UNMIK was concerned, the Court ruled that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that its impugned inaction was, in principle, "attributable" to the UN in the same sense as KFOR.[380]

UN Actions before the ECrtHR – UN- EU Comparison

Having concluded that the acts challenged were attributable to the UN, the question for the Court was whether it had jurisdiction to examine the alleged violations of the Convention. The first and most obvious point noted by the Court was that the UN is not a contracting party to the ECHR. On the other hand, the Court of Human Rights has been faced with an analogous situation in cases which were brought before it by applicants challenging acts adopted by a different international organization - the European Community and the European Union. Like the UN, neither the EC nor the EU is a party to the ECHR, and yet the Court of Human Rights agreed to rule on human rights challenges brought against states which were implementing mandatory EC and EU legislation.[381] In such cases the ECrtHR developed an approach, even if a somewhat awkward and unsatisfactory one,[382] to enable it to hear indirect challenges against an international organization which is not a party to the Convention and which otherwise has no formal relationship with the ECHR. In short, the approach adopted by the Court of Human Rights to deal with such challenges to EU measures is to say that insofar as the EU maintains a functioning system of human rights protection which is at least equivalent to that provided by the ECHR, the Court of Human Rights will presume that the EU measures are compatible with the Convention, unless there is evidence of some

[379] Id, paras 137-140.
[380] Id. para 143.
[381] Most importantly *Bosphorus Airways v Ireland*, Appl 45036/98, judgment of the ECtHR 7 July 2005, but see also *Senator Lines GmbH v the 15 Member States of the European Union* (Appl. no. 56672/00), decision on admissibility of 10 March, 2004, *Emesa Sugar v the Netherlands,* Application no. 62023/00, judgment of 13 January 2005; and *SEGI v the 15 member states of the European Union*, Appl no. 6422/02, (2002). For different kinds of challenges where there was arguably discretion on the part of the Member State whether or not to enter into or concerning how to implement the EC measures, see *Cantoni v France, Appl.* 17862/91 (decision of the Commission of 29 May 2005) and *Matthews v UK*, Appl. no. 24833/94, judgment of the ECtHR of 18 February 1999.
[382] For critical comment on *Bosphorus* see Sionaidh Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*" Common Market Law Review, Vol. 43, pages 629- 665 (2006)

dysfunction in the control mechanisms or a manifest deficiency in the protection of human rights.[383]

In Behrami, however, the ECrtHR rejected the possibility of adopting such an approach towards organs of the UN, and rejected any possibility of exercising jurisdiction over acts of states which were carried out on behalf of the UN. The Court began by recognizing that all contracting parties to the ECHR are also members of the UN, and that one of the Convention's aims is precisely the 'collective enforcement of rights in the Universal Declaration of Human Rights". This meant that the ECHR had to be interpreted in the light of the relevant provisions of the UN Charter, including Articles 25 and 103 as interpreted by the ICJ.[384] In other words, the Court of Human Rights emphasized both the commonality of objectives and shared values underpinning both the ECHR and the UN Charter, as well as emphasizing its own fidelity to the provisions of the Charter as interpreted by the ICJ. The ECtHR however drew a distinction between the legal orders of the UN and that of the EU for these purposes. For the Court of Human Rights, the commonality in values underpinning the ECHR and the UN Charter – in terms of protection for human rights - provided one of the reasons for deference on the part of the ECrtHR to the actions and decisions of the UN and its organs. The other reason, however, emphasized the distinctive mission of the UN and its unique powers to pursue this: "While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace.., the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII to fulfill this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force"[385]

Since the acts by UNMIK and KFOR which were challenged arose from coercive measures authorized by UN Security Council Resolution 1244, and adopted under Chapter VII of the Charter, they were according to the Court necessarily

[383] *Bosphorus Airways v Ireland*, Appl 45036/98, judgment of the ECtHR 7 July 2005, paras 18-21
[384] *Behrami*, para 147. For the content of Articles 25 and 103 of the UN Charter see n. above.
[385] *Behrami*, para 148.

"fundamental to the mission of the UN to secure international peace and security".[386]Reasoning in a broadly instrumental manner, the Court ruled that if it were to interpret the ECHR in such as way as to exercise jurisdiction over acts or omissions of the state contracting parties which were carried out in the course of missions authorized by UNSC resolutions, this would interfere with the fulfillment of the UN's key mission and with the effective conduct of its operations.

Deferring further to the political authority of the Security Council, the Court argued that if it were to exercise such review, it would effectively be imposing conditions on the implementation of a SC Resolution which were not provided for within the resolution itself. The fact that member states chose to vote for the resolution and were not acting under any prior UN obligation at the time of voting was deemed irrelevant by the Court, because the states' action was crucial to the effective fulfillment by the UNSC of its Chapter VII mandate and the imperative aim of collective peace and security.[387]

The reasons given by the ECrtHR for its unwillingness to extend its Bosphorus approach[388] to the context of the UN were surprisingly formal, given the non-textual and deeply instrumental arguments for deference to the UN which the Court had already provided. Towards the end of its judgment, the ECrtHR suddenly introduced the question of territoriality which it had not otherwise discussed in the judgment, declaring that the reason the Bosphorus approach was not appropriate to the UN was that the acts in Bosphorus had been undertaken by a contracting state to the ECHR (i.e. Ireland) within the territory of that same state, together with the fact that the acts in Behrami were ultimately attributable to the UN. This return to its unconvincing reasoning on attributability and international responsibility was followed by a final sentence which more openly articulated and reiterated the animating rationale of the judgment as a whole:

---

[386] ibid, para 149
[387] Para 149.
[388] The *Bosphorus* approach, described above n. 55, adopts a rebuttable presumption that the international organization in question protects the same shared, basic fundamental rights in an equivalent way, subject to ECrtHR review being triggered where there is evidence of a manifest deficiency or dysfunction of control.

"There exists, in any event, a fundamental distinction between the nature of the international organization and of the international cooperation with which the Court was there concerned and those in the present cases". As far as the acts of UNMIK and KFOR were concerned, the Court ruled: "their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective".[389] In other words, while the ratio decidendi of Behrami was that;

(1) The Court of Human Rights lacks jurisdiction over actions which are ultimately attributable to the UN Security Council, and

(2) It would be inappropriate to extend the Bosphorus approach to acts of an international organization which occurred outside the territorial space of the Convention, neither of these conclusions is particularly convincing.

The attributability reasoning has been widely criticized already as unconvincing, and the territoriality conclusion against using a Bosphorus approach is weak because the point was not argued or discussed at any length in the judgment. Instead, the real heart of the judgment and the reason underlying the adoption of these conclusions seems to be the Court's desire to avoid an open conflict with the UN Security Council and to defer to the 'organization of universal jurisdiction fulfilling its imperative collective security objective'.

3. Judicial Remedies for Restrictive Measures before the ECrtHR

Member States' human rights resolve might be strengthened at the regional, "all-European" level of the Council of Europe, where applicants could sue the State committing or transposing the alleged violations in the European Court of Human Rights in Strasbourg (ECrtHR). Applicants could claim that, by freezing their funds in response to the Security Council Resolution, a State has violated rights guaranteed by the European Convention on Human Rights which was accepted by all 47 members of the Council of Europe. To be sure, the ECrtHR will not take jurisdiction over claims against the UN or over actions that are directly attributable to the UN, or State decisions

[389] *Behrami*, para 151

taken within UN bodies. So, for example, the ECrtHR has declined jurisdiction over claims against a State that is exercising delegated power from the UN Security Council or lending troops to a subsidiary organ of the UN. But if the decision to freeze an individual's funds is attributable to a State - even as action taken in an effort to implement a Security Council resolution - the individual can lodge a complaint at the ECrtHR after exhausting all judicial remedies (including at the EC level). Accordingly, the ECrtHR accepted jurisdiction over a claim that Ireland had violated the ECHR when it carried out its legal obligations under an EC regulation that, in turn, implemented a Security Council Resolution. On the substance, however, the human rights court's review was rather cautious. The ECrtHR rejected the applicant's claim by noting that Ireland had acted pursuant to EC law, that following EC law was an important interest, and that, in any event, the EC-EU standard of protection of human rights was comparable to that assured by the Convention.[390]

Therefore after the judgment of the European Court of Human Rights in Bosphorus[391] the persons individually targeted by sanctions imposed by the Security Council may find little comfort in the protection provided by the European Convention of Human Rights. In that judgment the European Court of Human Rights found that since the protection of fundamental rights by EC law could be considered "equivalent"[392] to that of the Convention system and since the protection of the applicant's Convention rights could not be regarded as "manifestly deficient" in the instant case, the impoundment of the aircraft concerned did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention. It has been suggested that if the conclusions of the Court of First Instance in *Yusuf* and *Kadi* (and *Ayadi* and *Hassan*) are accepted, the result is the absence of effective legal protection also within the framework of the European Convention.

---

[390] Bosphorus v. Ireland, cited supra note 36, 1, at 437 and also Canor, "Can Two Walk Together, Except They Be Agreed?" 35CMLRev. (1998), 137.
[391] Bosphorus v. Ireland, application no. 45036/98.
[392] In the sense of the so-called M. & Co. Case law where the Court had held that State action taken in compliance with obligations flowing from its membership of an international organization to which it has transferred part of its sovereignty is justified as long as the relevant organization is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. See M. & Co. v. the Federal Republic of Germany, application no. 13258/87, Decisions and Reports 64, p. 138.

On the other hand there are some optimisitc opinions claiming that, the Strasbourg Court also agreed to examine whether the protection in the individual case is 'manifestly deficient'. Accordingly, since a review in the light of *jus cogens* cannot be considered equivalent or even comparable to the ECHR standard in the sanction cases, then the ECrtHR shall have jurisdiction to review the UN sanction cases.[393] Moreover, if ECJ had not overruled CFI's judgment on the subject matter or so if the Community did not fulfill necessary requirements in three months in accordance with fundamental human rights protection of the Community, it would be more likely for applicants to bring his action to the ECHR as all the possible legal remedy means are exhausted. In this case as the ECHR as respected as the protector of the human rights and would find a violation unless it finds a way to avoid its jurisdiction on the subject matter.

B. Review of UN Sanctions before the Community Courts

1. Fundamental Rights in the European Community

The ECSC (1951) and the EEC (1957) were formed as economic entities, and as such they offered individuals and undertakings economic rights, without providing for an explicit and comprehensive regime for human rights protection. In the late 1960s the general conjuncture showed that the Community must consider the fundamental rights in order to provide the integrity, therefore the respect for human rights became an integral part of the general principles of the Community by the case law.[394] The grounding of the protection of human rights in general principles of EC law rather than in national or international law assisted the ECJ in asserting its own institutional autonomy vis-à-vis national courts and in reinforcing the normative supremacy of Community law.[395]

The EU legal order includes as one of its basic tenets the protection of human rights. Article 6(2) of the Treaty of the European Union (TEU) specifies that the Union

[393] Tomuschat, p. 542.
[394] Case 29/69, Stauder v. Ulm, [1969] ECR 419, para 7; Case 11-70, Internationale Handelsgesellschaft mbH "v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1125, para 4.
[395] Ahmed and de Jesús Butler, op. cit. supra note 3, at 775.

shall respect fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States.

It was not until the Maastricht Treaty of 1992, that Article 6(2) (ex Article F) TEU was inserted into the Treaties. And only with the Amsterdam Treaty of 1997 was it formally clarified that the jurisdiction of the European Court of Justice (ECJ) under the Treaty of the European Community (TEC) applies to Article 6(2) TEU with regard to action of the EU institutions (Article 46(d) TEU).[396]

These recent Treaty revisions were the first (incomplete) attempts to codify the EU fundamental rights doctrine, which has gradually been developed by the Court since 1969. It falls outside the scope of this paper to give a general account of current EU human rights law or its history. In the context of the Charter, it will suffice to briefly highlight three of the major horizontal issues: [397]

(1) The relationship between the supremacy doctrine and the fundamental rights doctrine, including the level-of-protection discussion;

(2) The expanding reach and relevance of the Court's human rights powers vis-à-vis Member States; and

(3) The relationship to the ECHR, including the possibility of EU/EC accession to this Convention.

a. Level of protection and the connection to supremacy

The Court's creation of a Community human rights doctrine is often explained as motivated by a wish to protect the well-established, but sometimes challenged, ambition of Community law to reign supreme over any norm of national law, including constitutional human rights norms. The idea is that the Court could not expect full respect for the supremacy principle from national courts unless acts of the Community institutions were subject to human rights review by the Court. To reduce the risk of

[396] Liisberg, Jonas Bering "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?", Jean Monnet Working Paper 4/01.

[397] This section is primarily based on Liisberg, Jonas Bering "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?", Jean Monnet Working Paper 4/01.

conflicts between Community law and national constitutions, the Court says that it will "draw inspiration from the constitutional traditions common to the Member States." Some scholars have suggested that this ought to mean that the Court should base its human rights jurisprudence on the strictest standards and highest levels of protection found among the Member States. This is not the approach of the Court, however. When it comes to national constitutions, the Court merely draws "inspiration" from "traditions." Current case law focuses more on the ECHR. The Court sees its constitutional role as defining an autonomous level of protection within the Community sphere.[398]

b. Scope and depth of the Court's human rights jurisdiction.

The tension between Community and national standards of protection is related to the question to what extent Member State measures are subject to human rights review by the Court. Over the years, the Court has gradually extended its review to include not only acts of the institutions, but also acts of the Member States when they act under EU law as the executive arm of the Union or when they invoke Community derogation rules relating to the fundamental economic freedoms such as the free movement of goods. It is still a condition, however, that the national measures fall "within the scope of Community law".[399] The problem is that "the scope of Community law" is a rather vague, amorphous concept and varies according to the specific situation of the individual invoking fundamental rights. Moreover, the scope of Community law is constantly expanding and incrementally through Community legislation, the legal bases of which are not precisely delimited. The depth of the Court's human rights scrutiny of *Member State* measures is not always identical with its human rights scrutiny of *Community* measures; the Court seems, for instance, to provide only rather

[398] The two most important cases involving human rights review of Community measures of a legislative nature are Case 4/73, *Nold v. Commission*, [1974] ECR 491, and Case 44/79, *Hauer*, [1979] ECR 3727, both originating in Germany and both concerning the right to property.
[399] The important cases are Case 5/88, *Wachauf*, [1989] ECR 2609 (implementation measures), Case C-260/89, *ERT*, [1991] ECR I-2925, and Case C-368/95, *Bauer Verlag*, [1997] ECR-I 3689 (measures restricting common market freedoms based on treaty provision and case law doctrine, respectively).

general guidance to the national court when dealing with the human rights compatibility of national measures derogating from the fundamental economic freedoms.[400]

c. The relationship to the ECHR.

The ECHR is an essential source of law in the EU human rights jurisprudence, even if the EU/EC is not a Contracting Party to the Convention. The Court generally adheres to the ECHR human rights provisions as a minimum level of protection, and often delves into close examinations of the Convention and, more recently, the case law of the European Court of Human Rights.

The first specific references by the ECJ to the ECHR can be found in *Nold* (1973), where the ECJ held that in searching for the common constitutional standards it would look to treaties and conventions entered into by the Member States, and in particular, to the ECHR.[401] The link between the two Regimes was thus established, the Luxembourg Regime drawing inspiration and guidance from the Strasbourg Regime. Subsequently, in *Rutili* (1975) the ECJ referred to the ECHR as "guidelines which should be followed within the framework of Community law".[402] Since then the ECJ has been referring to the ECHR and to the case law of the Strasbourg Court in an ever-growing number of cases, ascribing "special significance" to the ECHR.[403]

First, in the Preamble to the Single European Act (1987) the EC referred to the ECHR as a source of fundamental rights recognized by the Community.[404] Later the EU planned to accede to the ECHR but such attempt was found by the ECJ to be ultra vires.[405] Subsequently, the EU Treaty (1991) accorded the ECHR its first formal, treaty-

[400] See, *e.g., ERT*, note 13 above, para. 42, and note 160 below, and J.H.H. Weiler, note 7 above, pp. 124-126.
[401] Case 4/73, NoId v. Commission, [1974] ECR 491.
[402] Case 36/75, Roland Rutili v. Minister for the Interior, [1975] ECR 1219.
[403] Cases 46/87 & 222/88, Hoechst AG v. Commission, [1989] ECR 2859, para 13; Case C-260/89, ERTv. DEP, [1991] ECR 1-2925, para 41, reaffirmed in Opinion 2/94, Re the Accession of the Community to the European Human Rights Convention, [1996] ECR-I- 1759, para 33.
[404] See the Single European Act 1986 (HMSO, Cmnd 9758) which stipulated that the Member States are "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".
[405] Opinion 2/94.

based recognition.[406] Article 6 TEU enshrined human rights protection as a General Principle and epitomized the above link between the two Regimes.[407] Thus viewed from the Institutions of the EU in Brussels, and according to the jurisprudence of the Luxembourg Court and the provisions of the EU Treaty, the Strasbourg Regime provides guidance for the EU when it develops and adjudicates issues of human rights. Article 7 TEU inserted by the Amsterdam Treaty of 1997 - established a politically-based mechanism aimed at sanctioning any Member State responsible for a serious and persistent breach of the above principles enshrined in Article 6, including (ECHR-inspired) human rights,[408] while Article 49 TEU referred to these principles as preconditions for EU accession. Thus indirectly the ECHR became not only a human rights benchmark for existing Member States, but also for potential, acceding countries.

The EU Charter of Fundamental Human Rights [409] attempted to further specify and formalize the interface between the two Regimes, and between the two Courts, calling upon the Luxembourg Court to rely in certain instances on the jurisprudence of the Strasbourg Court:[410] Article 52(3) of the Charter provides that insofar as it contains rights which correspond to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down" by the ECHR. Article 53 buttresses the interpretive bridge between the two systems by stipulating that nothing in the Charter shall be interpreted as "restricting or adversely affecting human rights as recognized", inter alia, by "…international agreements to which the Union or all the

[406] See Art. F(2) of the Common Provisions of the Treaty on European Political Union 1992.
[407] Art. 6 provides: "1 . The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law... 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms., .and as they result in the constitutional traditions common to the Member States, as general principles of community law".
[408] See consolidated versions of the Treaty on European Union.
[409] Charter of Fundamental Human Rights of the European Union (O.J. 2000, C 363/01), 18 Dec. 2000.
[410] See the preamble of the Charter which attempts to create a normative bridge between the two Regimes and the two Courts: "This Charter reaffirms. . .the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights"

Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms..".[411]

However, the Charter, which was designed to have a binding force, was at first accorded a mere declaratory status. The renewed attempts to grant it a formal binding force by the EU Constitutional Treaty (which "cut and pasted" the Charter) failed, due to the rejection of the Constitutional Treaty by the French and Dutch voters.[412] The Lisbon Reform Treaty, which recognized the Charter as having a binding legal force (and which ordered the accession of the EU to the ECHR),[413] was rejected by the Irish electorate in June 2008.[414]

The rights protected by the ECHR may thus be seen as an integral part of the EC legal order. Some scholars would go so far as to argue that rulings of the Strasbourg Court can have a binding effect on the EC.[415] The ECJ is resolute, however, in dismissing that last argument. Similarly, it rejects the argument that the ECHR may impose duties on the EC institutions, or that the interpretations offered by the Strasbourg Court to the ECHR are binding upon it. Instead it insists that it is free to offer its own, divergent jurisprudence of EU law, and there are indeed a few cases in which the ECJ has departed from the verdicts of the Strasbourg Court.[416]

---

[411] Charter of Fundamental Human Rights of the European Union, cited supra note 59.
[412] See Treaty establishing a Constitution for Europe, O.J. 2004, C 310/01 .
[413] See Art. 6 TEU as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 Dec. 2007, O.J. 2007, C 306/01.
[414] At this point the most important legal instrument concerning human rights in Community today is "The European Union Charter of Fundamental Rights" which came into force in 1 December 2009 with the Treaty of Lisbon. This Charter sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU. The rights are arranged under the sections of "Dignity, Freedoms, Equality, Solidarity, Citizens' rights and Justice. They are based, in particular, on the fundamental rights and freedoms recognized by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties. But since Charter was not valid during the UN sanction cases that have been discussed above the EU Charter on fundamental rights will not be discussed in this dissertation.
[415] See Ahmed and de Jesus Butler, op. cit. supra note 3, at 784-788, who advance the following line of argument: Community law, by virtue of Art. 307 EC, cannot be considered to override any human rights obligations incurred by Member States before they accede to the EU. It may thus be argued that although the EU has not acceded to the ECHR, the obligations incurred by its Member States by virtue of their ECHR membership impose obligations on the EU per se.
[416] Harpaz, p. 108.

The proceedings before the CFI and the ECJ in the *Kadi* dispute pertaining to EC implementing measures of UN anti-terror sanctions serve as a vivid example of this judicial approach.

On the other hand, the parties,[417] Advocate General Maduro,[418] the CFI,[419] and the ECJ all relied extensively on the ECHR and its case law.[420] The ECJ in particular referred to the ECHR to substantiate its findings regarding the appropriate scope of judicial review of UN sanctions (i.e. indirect judicial review of the EC implementing measures, but no direct review of acts attributed to the UN).[421] It also held that in protecting human rights it draws inspiration from guidelines supplied by ECHR, which has "special significance" within the EC legal order.[422] The ECJ referred to the ECHR and to the Strasbourg case law in order to address allegations of infringements of the right to effective judicial protection[423] and the right to property.[424] In the latter context it explicitly relied on the ECHR jurisprudence and on its principle of margin of appreciation in holding that the EC has wide discretion in choosing the means by which it would limit the right of properly for the sake of advancing public interest.

Thus the *Kadi* proceedings illustrate that the ECJ relies on ECHR provisions and follows the judgments of the Strasbourg Court. On the other hand, the ECJ stressed in *Kadi* that it is not bound by interpretation of the ECHR offered by the Strasbourg Court, but that is free to offer its own, divergent jurisprudence of EU law, reiterating the fundamental, inherent differences between the two regimes.[425]

---

[417] See, for example, the arguments of Kadi according to which the re-examination procedure before the UN Sanctions Committee, based on diplomatic protection, does not afford protection of human rights equivalent to that guaranteed by the ECHR as construed by the case law cited.
[418] Opinion of A.G. Poiares Maduro of 16 Jan. 2008 in Case C-402/05 P, Yassin Abdullah Kadi v. Council and Commission, especially paras. 36-37, available curia.europa.eu.
[419] Kadi, paras. 210, 234 and 287.
[420] See, Gattini, Halberstam, Kunoy.
[421] Judgment, paras. 310-314.
[422] ibid, para. 283.
[423] ibid, para. 335.
[424] ibid, para. 356.
[425] Harpaz, p. 109.

2. Review of UN Sanctions before the European Court of First Instance

The UN sanction cases of the CFI are mostly criticized in terms of human rights protection. In this part of the study; the cases will be examined regarding the alleged breaches of human rights.

After deciding on its power to review SC Resolutions indirectly and implementing measures directly under *jus cogens* norms in *Kadi* case, the CFI proceeded to decide on the position of the alleged breaches from the European constitutional law perspective. In this part of the judgment the Court ruled on breaches of right to make use of/ respect for property and principle of proportionality, right to be heard/a fair hearing and right to an effective judicial remedy. Therefore, in this dissertation hereunder, each allegation would be examined separately analogous to the Court's decisions. The important point in this part of the judgment is CFI changed usual way of compatibility check done by Community Courts in case of human rights issues and made its interpretation taking *jus cogens* as a compatibility check point.

a. Right to Make Use of/Respect for Property and Principle of Proportionality

This alleged infringement aroused exclusively from freezing of the applicants' funds which has been decided by the Sanctions Committee and applied without any discretion by the institutions with the contested regulation. First of all, it should be underlined that although their allegations based on the same Regulation, the contested regulation, both of the parties has chosen different sources for their pleas regarding their freezed funds. In the *Kadi Case*, applicant plead, breach of his right to respect for property guaranteed under the First Additional Protocol to ECHR and breach of the principle of proportionality guaranteed as a general principle of Community Law.[426]

However, applicants in the *Yusuf Case* preferred to plea breach of their right to make use of property protected by the Community legal order.[427] However, this difference in the bases of the allegations did not affect the reasoning of the Court at all

[426] *Kadi,* para.234.
[427] *Yusuf*, para.285

in its assessment made regarding the compatibility of implementing measures with human rights taking *jus cogens* norms into account. Taking into account the amendments made by Regulation No 561/2003, a possibility given to the listed person and entities upon their request to obtain funds necessary to cover basic expenses including payments for foodstuff, rent, medicines and medical treatment, taxes or public utility charges by declared authorization of national authorities, unless the Sanctions Committee expressly objects or to obtain funds necessary for any extraordinary expenses by the express authorization of the Sanctions Committee.[428] According to the Court, as these express provisions of possible exemptions and derogations regarding the freezed funds, shows that measures can not be assessed as inhuman or degrading treatment.[429]

After underlining that fact, the Court made a reference to Art.17 of the Universal Declaration of Human Rights[430], for the right to own property alone or in association with others which should not be deprived arbitrarily.[431] According to the Court the right to property is regarded as a part of mandatory rules of general international law only and only arbitrary deprivation shall be regarded as contrary to *jus cogens*[432]; however this is not the matter in these cases.[433] Moreover, the CFI stated that taken measures would not be considered arbitrary, inappropriate or disproportionate because of four reasons. Firstly, the measures in question pursue an objective of fundamental public interest for the international community. Secondly, these measures have precautionary nature and not affecting the very substance of the property but the usage. Thirdly, the SC has provided means of reviewing after certain periods the overall system of sanctions and fourthly a procedure exits for persons concerned to present their case to the Sanctions Committee through the MS of their nationality or residence.[434]

[428] ibid, para.290.
[429] ibid, para.291
[430] Universal Declaration of Human Rights, UN General Assembly, 10 December 1948.
[431] *Yusuf*, para.292.
[432] ibid, para.293; *Kadi*, para.242.
[433] *Yusuf,* para.294; *Kadi,* para.243.
[434] *Yusuf,* para.295-302.

Therefore, the Court rejected the applicants' arguments alleging breach of their right to make use of/respect for property and the general principle of proportionality.[435]

According to *Tomuschat*, reference made to Universal Declaration of Human Rights which is no more than a General Assembly resolution having the legal value of simple recommendation is an abortive starting point as this right evolved and had a place under customary law after various regional conventions or charters, however the customary nature of the right is not enough for considering it as a part of *jus cogens*.[436]

For the right in concern it should be said that this right is classified as a right that a person can fully enjoy without any restriction and if restrictions on it were proportionate and done for protection of greater values of public considerations, it could be comprehensible. However, as it has been explained above, before and even after the amendments allowing funds for the basic expenses and delisting procedure is depending on paramount efforts of the MS, the period of deprivation from the right is not easy to presume. On the one hand, if the seriousness of the act tried to be averted is taken into consideration, some measures restricting the right can be deemed acceptable. However, all these ambiguities of the process might cause inevitably disproportionate results for the measures which also might endanger the credibility of the institutions involved in the process. On the other hand, in accordance with AG Maduro's view as the freezing assets for several years without time limit is an obstacle for peaceful enjoyment of property with potential devastating consequences. Therefore, the Court should have kept an eye on the procedures' probable side effects on the rights, while underlining the consequential negative effects of the terrorism.[437]

b. Right to be Heard/ a Fair Hearing

First of all, the CFI reasoned its judgment same in both cases with minor differences. In the light of the allegations Court's assessment could be considered as consisting of two sections. In one part, it evaluated applicants' right to be heard by the Sanctions Committee before inclusion to the list and in other part evaluated right to be

[435] *Yusuf,* para.303; *Kadi,* para.252.
[436] Tomuschat, p.547.
[437] AG Maduro para.46-47

heard by the Council in connection with the contested regulation's adoption.[438] The Court, on right to be heard by the Sanctions Committee before inclusion to the list emphasized that resolutions in question do not provide such an opportunity, and stated that no mandatory rule exists in public international law imposing the right to be heard before the acts of SC under Chapter VII of the UN Charter and in this present situation such a possibility would jeopardize the effectiveness of the sanctions and would be against the public interest pursued, since measures in concern would be more effective if they applied with immediate effect.[439] Moreover, the Court accepted that delisting procedure presented for the person concerned in the Guidelines of the Committee for the code of Conduct of its Work is enough for the protection of the right and when it is interpreted jointly with affords of the SC for the full application of the procedure in concern by its Member States although this procedure does not confer direct hearing by the Sanctions Committee as administrative procedure as such is in conformity with the complexity of the decision making process.[440] Furthermore, the opportunity of the concerned person in bringing an action for judicial review in domestic courts against any wrongful refusal of the competent national authority to submit their case to the Sanctions Committee for re-examination is also another reason to accept that the right in concern protected. Also, the Court pointed out the successful affords of the Swedish Government in removal of original applicants of the *Yusuf Case*, Messrs Aden and Ali, from the list.[441] Additionally, temporary nature of the measures does not require the facts and evidence adducted against them to be communicated to them, once the SC or its Sanctions Committee is of the view that there are grounds concerning the international community's security that hinder against it.[442]

Therefore, the CFI rejected the applicants' arguments alleging breach of their right to be heard by the Sanctions Committee in connection with their inclusion in the list of persons whose funds must be frozen pursuant to the resolutions of the SC.[443] The Court's assessment on right to be heard by the Council before the adoption of the

[438] *Yusuf*, para.305; *Kadi*, para.254.
[439] *Yusuf*, para.306-308
[440] ibid, para. 309-315
[441] ibid, para.318.
[442] *Yusuf* para.320.
[443] *Yusuf* para.321; *Kadi* para.275.

contested regulation started with mentioning the fact of settled case law as observance of the right to a fair hearing is, in all proceedings initiated against person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceeding at issue with the requirement of presenting the opportunity to the person whom a penalty may be imposed to make known his views on the evidence on the basis of which the sanction is imposed.[444]

However, respect for procedural rights guaranteed by the Community legal order in this issue is correlated to the exercise of discretion by the authority which is the author of the act at issue and as the procedures for the examination and re-examination fell wholly within the purview of the SC and its Sanctions Committee and no any other power presented to any other institution, Community law relating to the right to be heard cannot be applied in this circumstances.[445] As the Community institutions were not obliged to hear the applicants before the adoption of contested regulation, applicants' allegations in concern for the right to a fair hearing is rejected by the Court.[446]

c. Right to have Effective Judicial Review/Remedy

The CFI examined applicants' allegations on breach of right to effective judicial review by taking into account the considerations of a general nature in connection with the examination of the extent of the review of lawfulness, in particular with regard to fundamental rights, which it falls to the Court to carry out in respect of Community acts giving effect to resolutions of the SC adopted pursuant to Chapter VII of the UN Charter.[447] Court firstly underlined the right of the applicants to bring an action for annulment before the CFI pursuant to Art.230 EC Treaty. The Court reviewed the lawfulness of the contested regulation with regard to observance of the rules of jurisdiction and the rules of external lawfulness and the fulfillment of essential procedural requirements by the institutions as well as reviewing by taking into account the appropriateness, internal consistency and proportionality of the regulation to

[444] *Yusuf* para.325.
[445] i*bid,* para.327-328.
[446] *ibid,* para. 329-331; *Kadi* para.276.
[447] *Kadi* para.277.

resolutions.[448] After this, Court once more emphasized its jurisdiction to review indirectly the lawfulness of SC Resolution at issue within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person, but it will not make review in compatibility of the SC Resolutions with fundamental rights scheme of the Community legal order.[449]

Furthermore, although there is no judicial remedy available to the applicant at the UN level, according to the Court such a lacuna is acceptable under the state immunity doctrine, as the right to access to the court is not absolute according to international treaties and therefore, Chapter VII resolutions of the SC enjoy immunity from jurisdiction in member states.[450] Therefore, immunity of SC decisions is justified by the nature and the legitimate objective pursued by them. According to the Court reexamination process in certain periods and the very substance of the procedure is an adequate protection of the right in concern under *jus cogens*.[451] Thus, Court dismissed the arguments of the applicants.[452]

At this point some scholars like *Lavranos* claim that the CFI may invalidate the EC regulation because of the lack of minimum procedural and fundamental rights standards of Community law, in particular as regards the availability of a review of the listing of the names by an independent (judicial) body. Since the EC regulation does not arrange a remedy procedure, the only conclusion the CFI could have drawn would be to invalidate the EC regulation for this reason. Furthermore he claims that, the fact that there is no judicial review available on the international plane that would enable individuals to challenge the legality of being put on the 'freezing list' - as the CFI itself acknowledged in its *Yusuf/Kadi* judgments - should have been a very strong argument for the CFI to exercise its jurisdiction." This would in no way prejudice the answer to the question whether or not the listing of the names was wrong nor would it question the legality of the UN Security Council resolution itself. The CFI would simply come to the conclusion that the automatic listing of names as ordered by the UN Sanctions

[448] *ibid,* para.278-280.
[449] *ibid,* para.281-283.
[450] *ibid,* para.284-288.
[451] *Kadi,* para.289-290
[452] *Kadi,* para.292; Yusuf para.347.

Committee must be coupled - at least within the EC and its Member States - with an appropriate, independent and effective review mechanism, either at the EC level or at the national level in the EC Member States, in order to be compatible with primary EC law and ECHR law. In this way, the CFI would have been able to invalidate the EC regulation because of its incompatibility with Community law - without the need to refer to UN law.

Moreover, the CFI would have stayed within the normally applicable hierarchy of norms of the Community legal order and would have sufficiently protected the fundamental rights of the suspected individuals and organizations. [453]

Since the CFI has not done any of these, consequently, it can be said that the judgment of the Court of First Instance provided a free area for the Security Council, which already acts in any event outside the reach of any judicial control at the UN level. By the judgment The Resolutions of the SC became immune not only in international area but also (beyond *jus cogens*) at the European level and the national level. [454]

3. Review of UN Sanctions before the European Court of Justice

The internationalist approach of the CFI and the various, more domestically minded approaches of the Advocate General and Grand Chamber lead in predictably different directions on fundamental rights review. As the CFI searches for fundamental rights norms in public international law, the Advocate General and the Grand Chamber exclusively apply the Community's own principles of fundamental rights. None of these opinions, however, takes an approach that seriously engages international human rights law. Although each path taken leads to some remarkably strong assertions of judicial review and the protection of rights, each also misses an important opportunity to engage in a cross-system dialogue on international human rights with the United Nations.

[453] Lavranos, p. 483.
[454] Lavranos II, p. 487.

a. Assesments of the ECJ on UN Sanction cases Before the *Kadi*

In this part of the dissertation comparative analysis shall be made between the CFI's judgments and other courts' possible assessments on the subject matter as well as other judgments given by Community Courts on this issue.

(1) The Bosphorous Case

Firstly, many cases were litigated in courts of the Community regarding the implementation of UNSC Resolutions or actions taken at Community level in fight against terrorism. The *Bosphorus Case*[455] is the most well known one, in which Court faced with the question of methods of interpretation, especially applicability of Community interpretation methods to UN Resolutions as again the subject matter of the case is an EC Regulation implementing an UN Resolution.[456] Applicant Bosphorus Airways is a Turkish charter company which leased – before sanctions were imposed against the Federal Republic of Yugoslavia for a period of 4 years two aircrafts owned by the national Yugoslav airline JAT. The leases were themselves are not in breach of the sanctions, the agreement between Bosphorus Airways and JAT was entirely *bonafide*, and Bosphorus Airways operated the aircrafts for its charter operations, flying between Turkey and various EU Member States as well as Switzerland.[457] In April 1993 one of the aircraft of the Bosphorus Airways was flown to Dublin Airport for the maintenance which at that point Irish authorities impounded the aircraft after having consulted the UN Yugoslavia Sanctions Committee in implementation of article 8 of the UN SC Regulation 820.[458] The UN SC Resolution 820 was implemented in the Community legal order by Regulation 990/93.[459] The EC Regulation 990/93 is based on former Art. 113 EC Treaty[460] intended to implement certain aspects of sanctions imposed against the Federal Republic of Yugoslavia by the UN SC Resolution 820 that provides in paragraph 24:

---

[455] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS*, 1996 E.C.R. I-3953, paras. 11-18.
[456] Conor, p. 140.
[457] Eeckhout, p.426.
[458] ibid, p.426-427
[459] Conor, p.140-141; Council Regulation(EEC) No.990/93 of 26 Apr. 1993, O.J. [1993] L 102/14, concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montengro).
[460] Art.133 EC Treaty.

"[…]all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the FRY […]".[461]

Art. 8 of Regulation 990/93 contains the same wording:

"All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States."[462]

The main issue was whether the term 'majority or controlling interest' was applicable in the present case where Bosphorus Airways was solely responsible for the day-to-day operations of the leased aircrafts, while JAT remained owner of the planes without being involved in the operation of them. The ECJ after emphasizing the importance of the aims pursued by the UN SC Resolution 820 and the Regulation 990/93, it applied a broad interpretation of the term 'majority or controlling interest' and concluded that Art. 8 of Regulation 990/93 is applicable also in the present circumstances.[463]

The *Bosphorus Case* established a number of important principles, firstly the '*sanction*' Regulations in particular those adopted as implementation of the UNSC Resolutions must be interpreted literally, in light not only of their own wording but also in light of the corresponding resolution.[464] Secondly, uniform application is clearly paramount, as it is one of the main rationales for EC involvement in the adoption of sanctions.[465] Thirdly, maybe most importantly this case also put the legal status of the UNSC Resolutions and of opinions of Sanction Committees established by such resolutions in the spotlight but the ECJ has not felt compelled fully to clarify that legal status.

[461] Conor, p.141
[462] ibid, p.141.
[463] ibid, p.155.
[464] Eechout, p.428.
[465] ibid, p.428

(2) The Ebony Case

The ECJ in the *Ebony Case*[466] again reviewed the implementation of UN SC Resolution within the Community by a EC Regulation.[467] The UN SC Resolution 820 and Regulation 990/93 required MS to detain all vessels within their territory that might violate the embargo and a vessel flying the Maltese flag that was on its way to the Federal Republic of Yugoslavia was detained by Italian authorities in international waters. The main issue in this case was whether the action on international waters was covered by the sanctions laid down in the SC Resolution 820 and the Regulation 990/93 in which ECJ concluded that effective implementation of the sanctions would be achieved if all traffic in Yugoslavian waters must be prevented, which includes also attempted entries into those waters by vessels that are still in international waters. The most important result of this case concerning the subject of this dissertation is, in this case ECJ ruled that measures adopted by the SC under Chapter VII of the Charter were binding on all UN Member States and in the event of the conflict between obligations under the Charter and any other international agreement the former prevailed.[468]

(3) The Centro- Com Case

The issue in *Centro-Com Case*[469] was the implementation of UNSC Resolution 757 by EC Regulation 1432/92 prohibiting Serbian or Montenegrian funds deposited in UK territory from being released in order to pay for goods exported to those areas. With preliminary ruling under Article 234 of the EC Treaty the ECJ was asked whether the UK has some residual competence to adopt such measures after the EC had adopted Community law measures implementing SC Resolution 757. Although ECJ accepted that MS has retained competence in the field of the foreign and security policy, it also emphasized that national competences of the MS had to be exercised in a manner consistent with Community law.[470] Although the fact that the MS are required to abide by the UN SC Resolutions and with the Charter under international law, and that they

---

[466] Case C-177/95 Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others, Ebony Case', [1997] ECR I-1111; [1997] 2 C.M.L.R. 24 (ECJ)
[467] Eeckhout, p.428
[468] ibid, p.430.
[469] Case C-124/95 *Reg. v HM Treasury*, '*Centro-Com Case*', [1997] Q.B. 683; [1997] ECR I- 81 (ECJ).
[470] Eeckhout, p.432.

retain some competences in the area of foreign and security policy, they can no longer act outside of the EC law framework when once a comprehensive sanction regulation has been adopted.[471] Therefore, the MS cannot take national measures that can cause an effect of restriction or prevention on the common commercial policy on the ground that they had foreign and security policy objectives.[472] And unfortunately, the Court showed more interest in promoting Community interests than protecting individual rights.[473]

The past case law shows that Court preferred to remain abstain on the position of the SC Resolutions in Community legal order but acted more courageous in interpreting the UN SC Resolutions itself. However, in the judgments assessed subject to this dissertation, CFI placed the UNSC Resolutions almost above every rule of the Community legal order and limited itself only by *jus cogens* norms while reviewing the Resolutions indirectly.

After examining the facts of the past cases related to the implementation of UNSC Resolutions, the most recent case-law related to implementation of UNSC Resolution on terrorism in Community legal order would be assessed. However, it should be underlined that the Court evaluated differently the cases according to the applicants' inclusion in a sole EU list or UN Sanctions Committee list. Firstly, the outcomes of the cases were same in the cases litigated by the people listed in Sanctions Committee based list, such as *Ayadi*[474] and *Hassan*[475] *Cases* and some are still pending like in *Othman.*[476] On the other hand in *OMPI Case*[477], CFI preferred to punish human rights violations as the Council was deciding inclusion of the names in the list but not

---

[471] ibid, p.435.
[472] İbid,p.435
[473] Conor, p.182.
[474] Case T-253/02, *Chafiq Ayadi vs.Council of the European Union*, 12 July 2006, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0253:EN:HTML accessed on: 12.08.2009
[475] Case T-49/04, *Faraj Hassan v Council of the European Union and Commission of the European Communities*, 12 July 2006, available at: http://eur-lex.europa.eu/Notice.do?val=440177:cs&lang=en&list=436906:cs,433214:cs,440177:cs,401727:cs,357470:cs,335828:cs,355993:cs,353972:cs,352089:cs,352066:cs,&pos=3&page=1&nbl=20&pgs=10&hwords=Hassan~ accessed on:12.08.2009
[476] Case T-318/01,*Omar Mohamed Othman vs. the Council of the European Union and the Commission of the European Communities*, 17 December 2001, please see: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:068:0013:0013:EN:PDF accessed on: 12.08.2008
[477] Case T-228/02,*Organisation des Modjahedines du peuple d'Iran vs. Council of the European Union*, 12 December 2006 available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:C2006/331/63: (12.08.2009)

the UN Sanctions Committee[478] because of the margin of discretion matter, since in this case, the Council has full competence for making the list.

b. KADI/ YUSUF/ AYADI / HASSAN CASES BEFORE THE ECJ

(1) The Opinion of the Advocate General Maduro

The Advocate General's Opinion and the Grand Chamber's judgment avoid the debate about international human rights law by considering only the fundamental rights of the Community's domestic legal order. This makes the substantive questions regarding the fundamental rights violations far easier than those the CFI chose to confront under its *jus cogens* analysis. The Advocate General's Opinion and the Grand Chamber's judgment both look to the domestic legal order of the Community for the regulation of both the relationship with international law as well as the fundamental rights protection that govern all Community action.[479] As the Advocate General puts it: "The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community."[480]

The AG avoids exploring the most delicate question whether the UN and the Security Council are bound by fundamental rights and whether the UN Security Council resolution must be interpreted to accord with those rights. And he avoids the ultimate question concerning the clash of multiple, overlapping legal systems, that is, whether the Member States or the Community have an international legal obligation to implement UN Security Council sanctions that would violate principles of Community law.

In reviewing the fundamental rights claim, the Advocate General takes significant steps toward acknowledging the pluralist approach among the Community's legal order and international law: "In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims.

---

[478] For more details on different terrorist lists see: TAPPEINER, Imelda, "The fight against terrorism. The lists and the gaps", Utrecht Law Review, http://www.utrechtlawreview.org/ September 2005.Vol. 1, Iss. 1, p. 97-125.
[479] *Kadi* (A.G. Maduro Opinion), at para 24.
[480] ibid, para 37.

As a result, the Court cannot always assert a monopoly on determining how certain fundamental rights interests ought to be reconciled." The Advocate General indeed acknowledges that the Security Council may "sometimes [be] better placed to weigh those fundamental interests." Such deference, however, will only apply in a situation of a "shared understanding of these values" and a "mutual commitment to protect them."[481]

The Advocate General thus implicitly invokes the "Solange" paradigm under which Member States allowed the Community to become effective within their domestic legal systems. After the stand-off between the German Federal Constitutional Court and the European Court of Justice regarding fundamental rights review, the German court ultimately gave in and deferred to the European Community on fundamental rights issues given that the Community had developed an adequate record of rights protection. The German court announced that it would continue to defer to the European Court of Justice "as long as" (in German, "so lange") the latter maintained this practice of protecting rights. In the case of targeted sanctions, the Solange predicate was not satisfied at the level of the United Nations, however, and so the Advocate General recommended striking down the Community's regulation that gave effect to the UN Security Council's resolution.[482]

AG Maduro's analysis mainly focused on the jurisdiction of the Community Courts to determine whether the contested Regulation breached fundamental rights. The Advocate General challenged the exclusion of jurisdiction by the Court of First Instance to fully review the Regulation under reference. In particular, he contested the argument of the Council, the Commission and the United Kingdom that measures taken by the Commission for the implementation of Security Council resolutions should as a matter of principle enjoy immunity from judicial review. His main argument was that the Court should not confine its assessment to the violation of *jus cogens*, but it should review the Regulation applying its settled case law and its normal judicial standards on the protection of fundamental human rights, as part of the Community constitutional legal

[481] ibid. para 44
[482] In the words of A.G. Maduro: "Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order." ibid. para 54.

order.[483] The Advocate General came to the conclusion that the applicants' claims concerning the infringement of their fundamental rights, in particular the right to be heard and the right to effective judicial review, were well founded.

The Advocate General's Opinion omitted any mention of the judgment by the CFI in the OMPI case of 12 December 2006.[484] A distinct case, Organisation des Modjahedines du peuple dlran (OMPI), which shall be mentioned only in passing, involved the EC's administration of the UN Security Council's more general anti-terrorist sanctions Resolution 1373. As mentioned above, Resolution 1373 does not identify individual targets, but relies instead on separate Member State and EU identification regimes. Here, the CFI itself upheld OMPI's claim to be removed from the EU Council's list.[485] When the UK authorities and the EU Council (in a new decision) failed to comply with the Court's ruling, the targeted group filed another application and largely prevailed again.[486] In that judgment the Court had affirmed the pre-eminence of the right to a fair hearing and annulled with regard to the applicant a Council decision implementing Regulation (EC) 2580/2001, which had established specific restrictive measures directed against certain persons and entities with a view to combating terrorism and which had set up an autonomous EC list of suspected terrorist individuals and groups.11 Although that case presented far less difficulties, because no UN listing was involved, since the Regulation was adopted by the EC under the general heading of SC Resolution 1373/2001 - which branded all terrorist activities as a threat to international peace and security, but did not establish any further specific sanction - still the Advocate General could have pointed at the fact that a different treatment of the two sets of sanctions, which had the same material consequences for the targeted individuals and entities, was hard to justify in the light of the fundamental principle of judicial review.

[483] Opinion of the A.G., paras. 42-43.
[484] Case T-228/02, Organisation des Modjahedines du peuple d'Iran, [2006] ECR 11-4665.
[485] Id. For similar decisions regarding other individuals and organizations, see T-253/04, Kongra-Gel v. Council, judgment of 3 April 2008, nyr; T-229/01, Ocalan v. Council, judgment of 3 April 2008, nyr.
[486] T-256/07, Peoples Mojahedin Organization of Iran v. Council, judgment of 23 Oct. 2008, nyr.

(2) The Assessment of the ECJ

The Grand Chamber similarly relies on the "basic constitutional charter" that is the EC Treaty as providing the relevant fundamental rights constraints to Community action.[487] Also, the Grand Chamber specifically rejects the idea that Community courts have jurisdiction to rule on the latter question, even if only confined to review of *jus cogens*.

Moving to the substance, the Grand Chamber holds that the Council Regulation violated the appellants' rights of defense, by failing to communicate any grounds for the listing either before or after the fact.[488] By the same token, the appellants' right of effective legal remedy has been violated because the Court was unable to conduct any meaningful review of the listing decision.[489] Although the restrictions on appellants' properly might be justifiable in principle, these procedural shortcomings undermine the legality of the property deprivation as well.[490] The Grand Chamber thus annuls the contested regulation, although it allows it to remain in effect for three months in order to prevent potentially "serious and irreversible prejudice to the effectiveness of the restrictive measures imposed by the regulation."[491]

4. Judicial Remedies for Restrictive measures Before the Community Courts

At a personal level, Kadi's story illustrates the inadequacy of the United Nations procedure to protect basic rights, at least as that procedure existed before the 2006 amendment of the Guidelines and most likely as it continues to this day.

The CFI's internationalist approach, however, does not provide effective access to justice. The restriction of the scope of review to jus cogens makes the internationalist approach ineffective.

The CFI applied nearly the same standards that govern the relationship between the Community legal order and the domestic legal orders of the Member States

[487] *Kadi* (Grand Chamber), at para 281.
[488] ibid, paras. 331-48.
[489] ibid, paras. 349-51.
[490] ibid, paras. 354-71.
[491] ibid, paras. 373-76.

also to the relationship between the UN system and the Community system[492] by referring to its seminal judgment in Internationale Handelsgesellschaft[493] where the Court of Justice had stated clearly that fundamental rights under a national constitution cannot affect the validity of a Community act. However, it should not be forgotten in Internationale Handelsgesellschaft,[494] the existence of fundamental rights as an integral element of the Community legal order was affirmed; furthermore, there existed a judicial procedure through which individuals who were victims of Community measures could assert rights which had allegedly been infringed. On the other hand none of these measures can currently be found in the UN legal system. Therefore, the rivalry between UN system and the European System completely different from the issue between the EU and the Member States since the latter both have developed human rights protection satisfying the legitimate needs of individuals.

Furthermore, in its recent judgment in the *MOX Plant* case[495], the ECJ strongly emphasized that "an international agreement cannot affect the allocation of responsibilities defined in the [EC/EU] Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC."[496]

In this sense, the CFI was required by of virtue Article 220 EC to protect the autonomy of the Community legal order by reviewing the EC regulations implementing UN sanctions and their compatibility with the highest norm, i.e. the EC Treaty and the ECHR.

Accordingly, the CFI could and should have reviewed the compatibility of EC implementing measures with the EC Treaty and fundamental rights without reviewing the legality of UN Security Council resolutions as such. Indeed, the fact that there is no judicial review available on the international plane allowing individuals to challenge the legality of being listed – as the CFI itself acknowledged in its *Yusuf/Kadi/Ayadi*

[492] *Kadi*, para. 224.
[493] Case 11/70, [1970] ECR 1125, para 3.
[494] ibid., para 4.
[495] Case C-459/03 *Commission* v. *Ireland*, judgment of 30 June 2006, available at www.curia.europa.eu/jurisp/cgi-bin/form.pl?lang en
[496] ibid, para. 123.

judgments – should have compelled the CFI to exercise its jurisdiction, in particular in view of the paramount importance of access to judicial review as one of the fundamental rights ensured within the Community legal order.

In this context, it is important to note that the CFI was not required to 'delist' Yusuf, Kadi and Ayadi when exercising its jurisdiction but to conclude that by failing to include an effective system of review of listed suspects, EC Member States failed to meet minimum fundamental rights standards as protected by the EC Treaty and the ECHR. Thus, while the Member States remain obliged by virtue of UN law to implement UN sanctions, they are at the same time obliged by virtue of EC law and ECHR law to ensure that the decision of being listed must be open to review by an independent body – be it the CFI, ECJ or any other suitable court. In other words, the point is not whether or not the Member States are obliged to implement UN sanctions through the EC/EU but how the Member States do it, in particular how they ensure that minimum procedural rights – which are generally applicable within the EC – are also applied to the implementation of UN sanctions. Therefore, there is no conflict between the obligations of EC Member States arising out of UN law and EC law. Consequently, relying on the argument that Article 307 EC[497] would be applicable and thus would enable EC Member States to set aside EC law, i.e. fundamental rights, is irrelevant in this context. The only problem that would arise for EC Member States is that they would have to explain to the UN Sanctions Committee that its decisions on who is listed are subject to judicial review at the European level and if that causes diplomatic problems for the EC Member States, it is their responsibility to ensure that a system of review is established at the UN level. Therefore, it must be concluded that the CFI

[497] Article 307 EC reads as follows:
"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

failed to respect and effectively guarantee the fundamental right to judicial review and thus not only violated primary EC law but also ECHR law.[498]

Indeed, with its most recent judgment in case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council*, of 12 December 2006, the CFI seems to have returned partly back to the right track of protecting fundamental rights more effectively. In that judgment the CFI distinguished this case from the previous *Yusuf/Kadi/Ayadi*-cases by arguing that in this case the EU institutions and the EU Member States determined who should be placed on the freezing list rather than the UN Sanctions Committee itself. Accordingly, the CFI argued that in such circumstances UN law does not enjoy supremacy over the Community legal order, which allows for the full application of fundamental rights in this case. Consequently, the CFI considered itself competent to provide – for the first time – to applicants that have been placed on a UN freezing list for judicial review against UN sanctions. Of course, while the CFI must be praised with this step, it created at the same time a discrimination by making the availability of judicial review dependent on the fact whether the name on the UN freezing list was added by the EU institutions or EU Member States or by the UN Sanctions Committee, whereas the UN Sanctions Committee in any case receives the names by the UN member states. Evidently, fundamental rights protection cannot depend on that kind of futile distinctions which are moreover completely irrelevant for the affected individuals and organizations.

Therefore, it is hoped that in the next cases that are due to be decided by the CFI in the very near future, the CFI will go the extra mile and provide judicial review in all cases. Thereby, ending this anomalous situation within the European legal order that is supposed to be based on the rule of law since as noted above, the ECrtHR also does not find a solution for judicial remedy.

The Court clearly stated in its *Bosphours* case that it will only provide for judicial review if fundamental rights protection within the EC is 'manifestly deficient'. The *Bosphours* case concerned the situation of classic sanctions against a Member State. Whether the ECrtHR would be more willing to provide for judicial review in the

[498] Lavranos, II, p. 479.

case of 'smart' sanctions directed against individuals remains to be seen since individuals have access to the CFI (and on appeal to the ECJ) to challenge UN sanctions implemented by the EC/EU. The only problem is that the CFI limited its competence to cases in which *jus cogens* is violated, which is obviously very difficult to prove. So, in theory judicial review is available but in practice it will hardly ever succeed. Thus, it seems unlikely that the ECrtHR would conclude that the fundamental rights protection within the EC is 'manifestly deficient'. Although, in the *SEGI* appeals case before the ECJ concerning 'EU autonomous sanctions', i.e. sanctions adopted by the EU independently from the UN Security Council, Advocate-General (AG) Mengozzi argued in his opinion that:

> *"86. In particular, from the point of view of observance of the obligations undertaken by the Member States when they signed the ECHR, it is entirely improbable that the European Court of Human Rights would extend to the third pillar of the Union the presumption of equivalence in the protection of the fundamental rights that it has established between the ECHR and Community law, or the 'first pillar' of the Union, and which leads that Court to carry out only a 'marginal' review of the compatibility of acts adopted by the Community institutions with the ECHR. On the other hand, it is highly likely that, in the course of a full examination of the compatibility of acts adopted by the institutions under Title VI of the EU Treaty with the ECHR, the European Court of Human Rights will in future rule that the Member States of the Union have infringed the provisions of that Convention, or at least Articles 6(1) and/or 13."*[499]

Whether the ECrtHR will actually follow AG Mengozzi on this remains to be seen. In any case, at this point, it can be concluded from the analysis above that judicial review against UN sanctions is in practice very difficult to obtain from the ECJ/CFI. Moreover, the ECrtHR seems not eager to step into this lacuna. In essence, it seems that the ECrtHR applies a sort of '*so lange*' (as longs as) test regarding the review of Community law acts, which is quite similar to the one the *Bundesverfassungsgericht* applies concerning the review of the constitutionality of Community law with German constitutional law.[500]

This '*so lange*' test means that as long as the EC/EU provides a level of fundamental rights protection that is comparable to the protection provided by the ECHR, which is currently the case, the ECrtHR will – in principle – not review

[499] Case C-354/04 P *Gestoras et al.* and C-355/04 P *SEGI*, Opinion of AG Mengozzi of 26 October 2006.
[500] Lavranos II, p. 486.

(indirectly) Community law acts. Therefore there seems no judicial remedy available for the affected individuals in the European level of fundamental rights protection.

After all, the lacuna of rights protection (and rights review) proposed by the CFI would be the same as rejecting the mutual arrangement with the Member States under the Solange compromise. The Advocate General's Opinion and the Grand Chamber judgment, by contrast, seem to recognize this fact as they support the autonomy of the Community's legal order. The Advocate General and the Grand Chamber clearly underlined the autonomy of the Union. By rejecting the CFI's subordination of the EU/EC's legal order to that of the UN and suggesting that the Union will uphold the protection of rights in the event of a real clash, the Advocate General and the Grand Chamber place fundamental rights at the apex of the Community's legal order. In so doing, they help ensure the protection of individual rights as well as Member State adherence to Community law more generally.

5. Judicial Remedies for Restrictive Measures in National Courts

If the outcome of the appeal in ECJ was different, MS Court's would be more ready than the CFI in protection of human rights as it has been thought that Community measures for the protection and fulfillment of the human rights remained inadequate.

First of all, MS are sovereign and democratic having national obligations against the citizens which are usually determined under their constitutional traditions besides international obligations. Secondly, the principle of "one can cede more than it has to one another" is applied to states as well as it applied to legal entities with a difference of the authorizing power as it is not another person but the public itself. Therefore, even though they yielded powers to an international or *sui generis* supranational organization by a charter or a treaty, as we have seen through the *jurisprudence* history of the national courts after the establishment of the Communities that they can be highly sensitive on the issues where there is an ambiguity in power or deficiency in the act of the Community regarding the human rights. Consequently, as stated by German Constitutional Court in famous *Brunner Case*[501] an international

[501] Judgment of 12 October 1993, the German Bundesverfassungsgericht , *Brunner Case*, 89, VBerfGE.

obligation cannot in anyway diminish the existing protection of basic rights available against States' powers.[502] Also as the Italian Constitutional Court has taken reservation as to the supremacy of EU law over their national constitution in *Frontini Case*[503], it is more likely to expect from national courts to take an action against the CFI judgments for the protection of these rights covered as in their constitutions unless as long as equal human rights protection as guaranteed by their constitutions applied by the European Courts with the influence of *Solange* I-II decisions of the German Constitutional Court.[504]

Like *Karayigit, Tappeiner,* also claims that the applicants might find protection in the national judiciaries,[505] where national implementation measures are usually subject to judicial control. But this seems inconvenient since the supremacy of Community law limits all the national courts and urges them to obey the rulings of the Court of First Instance's. Also Community law must be given full effect in national law and it cannot directly be challenged in national courts.[506]

On the other hand limited remedies exist in domestic courts. Any attempt to sue the United Nations for acts of the Security Council would be barred by the immunity defense. Although no comprehensive database appears available, anecdotal evidence suggests that, in general, appeals to domestic courts have failed to provide relief.[507] Thus for instance an English court, in dismissing the application against the UK Government, held that Security Council Resolutions have qualified any obligations of the U.K. under human rights law except for jus cogens, an approach followed by the EC Court of First Instance as well. A similarly negative outcome has prevailed in the

---

[502] Karayigit, p.401-402

[503] Lusberg, Jonas Bering, " Does the EU Charter of Fundamental Rights threaten the Supremacy of Community Law" , *NYU School of Law Jean Monnet Center Working Paper*, available at: http://www.jeanmonnetprogram.org/papers/01/010401.html, fn.11 (emphasis added) accessed on: 12.07.2009.

[504] Karayigit, p.401.

[505] Tappeiner, at 97.

[506] Case 314/85, *Foto Frost* [1987] ECR 1129.

[507] 15 law suits were filed in the national courts in Belgium, U.K., Germany Italy, Switzerland, The Netherlands, Pakistan, Turkey and the United States, most without success. See Third Report of the Analytical Support and Sanctions Monitoring Team, Annex II, U.N. Doc. S/2005/572 (9 Sept. 2005), 48-49 (hereinafter Third Report) and Fourth Report of the Analytical Support and Sanctions Monitoring Team, Annex, U.N. Doc. S/2006/154 (10 March 2006), 45-47. From *Daniel Halberstam*, *Eric Stein*. Common Market Law Review. New York: Feb 2009. Vol. 46, Iss. 1; pg. 13, 60 pgs.

Federal Republic of Germany, in Irish courts, and in Switzerland. Cases are pending in Pakistan, Turkey, and the United States. As an exception, a Brussels Court threatened the imposition of a heavy daily penalty upon the government unless it promptly blocked the funds owned by the plaintiff who was unjustly accused of terrorist support.[508]

[508] In response, the Belgian Government initiated a delisting request to the Sanctions Committee. See Third Report, cited supra note 79, at 48-49; from *Daniel Halberstam*, *Eric Stein*. Common Market Law Review. New York: Feb 2009. Vol. 46, Iss. 1; pg. 13, 60 pgs.

CONCLUSION

In today's plural world order, a diverse array of jurisdictions and levels of governance increasingly raise competing claims of ultimate legal authority. In these clashes, institutions and actors situated within particular regimes are called upon to confront fundamental questions of public legitimacy that may make sense only from a more universal perspective. The difficulty, then, lies in arriving at an approach that can mediate productively between the universal and the particular without losing sight of certain fundamental values, such as human rights.

The UN sanctions cases, in general, and *Kadi* case, in private both in what the various actors do and in what they fail to do, illustrates this tension well. Whereas the Court of First Instance would largely capitulate to the universal in virtual disregard of human rights, the Grand Chamber vindicates rights largely from the perspective of the particular. And while the Advocate General strives to mediate between the two, he leaves out important aspects of the universal as well.

Never the less each of the three pronouncements in the *Kadi* case the judgment of the Court of First Instance, the Opinion of the Advocate General, and the judgment of the Grand Chamber of the European Court of Justice - contains a different element of the jagged mosaic for the productive engagement with the international legal order. After a rather strained interpretation of Community powers, the Court of First Instance engaged in the indirect review of the Security Council Resolution for compatibility with *jus cogens*; the Advocate General suggested the possibility of the European Court of Justice's jurisdictional restraint if adequate safeguards were developed at the UN level; and the Grand Chamber interpreted the Security Council Resolution charitably to avoid a conflict with the protection of fundamental rights within the EU. Each of these reflects a bold and valuable view. And yet, in their partial perspectives, each of these was also incomplete: whereas the Court of First Instance appeared to abandon the autonomy of the Community legal order, the Advocate General and the Grand Chamber seemed overly focused on Community law alone. In one way or another, (aside from the CFI's consideration of jus cogens) customary international human rights law seemed to drop out of sight.

The final judgment of the European Court of Justice must be commended for protecting fundamental rights. And yet, the European Court of Justice, in our view, might have acted not only as a court of the Community, but also as a court of the international legal system while considering the legality of the Community's implementing actions. As guardian of the legal order of the European Union, the European Court of Justice sits at the intersection of domestic and international legal systems like no other court in the world.[509] Therefore, the European Court of Justice might have chosen an avenue of broader dialogue. The Court could have challenged the United Nations on its lack of protection of fundamental rights in the spirit of Solange, and done so by looking not only to Europe's domestic bill of rights but also to customary international law. In so doing, the Court would have led the way beyond European particularism toward a more productive engagement with international law for all. And also would have declared the lack of judicial remedy in international law.

As it was examined detail above, the International Court of Justice (ICJ) has not established any direct power of judicial review of the validity of Security Council acts. As one observer notes: "To date the ICJ has been successful in avoiding a straightforward answer" to the question "whether [it] has jurisdiction to decide on the legality of the [Security] Council's acts." The ICJ did, however, consider the legality of these and other UN acts incidentally in the context of judging a dispute submitted to it by one or more States or in responding to a request for an Advisory Opinion.[510] But both of these procedures are generally beyond the reach of an individual or a group, because only States have access to the Court and requests for Advisory Opinions are confined to UN organs. Also inaccessible to the targets of smart sanctions is the indirect review that an international tribunal might conduct in the course of hearing a case brought directly against the individual, as in the prosecution of Dusko Tadic. As for the State driven system of review, in which the individual figures only as a marginal actor,

[509] Halberstam, p. 73.
[510] In the Lockerbie case, for example, the International Court of Justice implied that it had the power to hold a Security Council decision ultra vires \ although it ruled that in this instance the Security Council action was valid by operations of the "supremacy clause" in Art. 103 of the Charter, which trumped Libya's right under a treaty. Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), [1992] ICJ Rep. 3, at 114 (Provisional Measures of 14 Apr.).

Simma aptly concludes: "Certainly, an organization based on rule of law indeed cannot, in principle, exempt itself from judicial control. But . . . one should not expect too much of it because such judicial control, if it were undertaken at all, would in most cases come too late, and political pressure on all participants would remain pervasive." The individual, in short, has little recourse at the UN level.

Limited remedies exist in domestic courts. Any attempt to sue the United Nations for acts of the Security Council would be barred by the immunity defense. Member States' human rights resolve might be strengthened at the regional, "all-European" level of the Council of Europe, where applicants could sue the State committing or transposing the alleged violations in the European Court of Human Rights in Strasbourg (ECrtHR). Applicants could claim that, by freezing their funds in response to the Security Council Resolution, a State has violated rights guaranteed by the European Convention on Human Rights which was accepted by all 47 members of the Council of Europe. To be sure, the ECrtHR will not take jurisdiction over claims against the UN or over actions that are directly attributable to the UN, or State decisions taken within UN bodies. So, for example, the ECrtHR has declined jurisdiction over claims against a State that is exercising delegated power from the UN Security Council or lending troops to a subsidiary organ of the UN. But if the decision to freeze an individual's funds is attributable to a State - even as action taken in an effort to implement a Security Council resolution - the individual can lodge a complaint at the ECrtHR after exhausting all judicial remedies (including at the EC level). Accordingly, the ECrtHR accepted jurisdiction over a claim that Ireland had violated the ECHR when it carried out its legal obligations under an EC regulation that, in turn, implemented a Security Council Resolution. On the substance, however, the human rights court's review was rather cautious. The ECrtHR rejected the applicant's claim by noting that Ireland had acted pursuant to EC law, that following EC law was an important interest, and that, in any event, the EC-EU standard of protection of human rights was comparable to that assured by the Convention.

This, then, brings us to the conceptually difficult level of action: the regional, but "core-European" level of the European Union, which is as an actor between the

Member State and the United Nations. As a matter of procedure, the applicant can challenge EC action implementing a Security Council resolution. If the action is of direct and individual concern, as is the case when one's name is placed on a list of individuals whose assets are to be frozen throughout the EU, the individual may bring suit in the Court of First Instance (CFI) to annul the EC implementing regulation as it concerns him, as exemplified by the Kadi case.[511] But the substantive picture is more complicated.

By transforming the UN Security Council Resolution into operative EC law, Member States find themselves not only under obligations of international law, but under an added legal obligation of implementation that derives from the EC. The possibility, of course, would remain that Member States will break with their tradition of deference to the EC and invoke their original jurisdiction over fundamental rights. In the light of Member State's general responsibility to carry out EC law, however, Member States might, instead, set aside their own review of legality in deference to EC protection of fundamental rights.[512]

On the issue of the alternatives of the Courts, it can be said that the Community measure at issue was intended to give effect to a CFSP Common Position, which, in turn, was specifically intended to give effect to the international legal obligations of the Member States in light of the Security Council Resolution. Under these circumstances, it would, in our view, have been entirely proper for the Court to extend its review indirectly to the applicable rules of international law as governing the legality of the EC's implementation measure. Furthermore, as we pointed out earlier, these rules in one way or another should be understood to include the principles of customary international human rights law.

---

[511] Another alternative would be an action at the same Court for damages caused by the fund blockade and/or loss of business. Several applicants did follow this latter route, albeit without success. See Case C - 3 54/04 P, Gestoras Pro Amnistía v. Council, [2007] ECR 1-1579, para 48; Case T-49/04, Hassan v. Council, [2006] 11-52, Case T-338/02, Segi v. Council, [2004] ECR 11-1647; Case T-1 84/95, Dorsch Consult v. Council, [1998] ECR 11-667, para 73 (holding that the UN, but not the EC, is responsible for damages caused by an EC regulation implementing a UN resolution).

[512] Cf. Bosphorus, supra note 85

A more palatable option for the cause of international human rights law would have been for the Court, while still proceeding from a strict dualist approach, to have followed the path of the celebrated "Solange" jurisprudence of the German Federal Constitutional Tribunal, also adopted by the ECrtHR in the same Bosphorus case previously referred to. It was the Advocate General who had suggested to the Court this less drastic approach and to affirm its jurisdiction only to the extent, and so long as the UN did not organize a judicial or quasi-judicial system of review of the decisions of the Sanctions Committee. The Court was apparently reluctant to take this middle way. Only at the end of the part of the judgment dealing with the infringement of fundamental rights, and in a quite perfunctory way did the Court confront the argument of the Commission, which had maintained that "so long as" under the UN system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through the administrative review mechanism, the Court should not intervene. This positive wording of the "Solange" theory, bluntly advanced by the Commission, was clearly unacceptable to the Court, with regard to the current status of the UN review mechanism. However, through its cursory dismissal of a procedure "still in essence diplomatic and inter-governmental",[513] the Court missed once again a major opportunity to restate the principle of the advisability, if not the duty, of states to provide all possible diplomatic assistance for at least their nationals submitting a request for removal from the UN list.[514]

The most radical, but actually unrealistic, alternative would be to abolish the 1267 Committee and the terrorist listing altogether. Security Council Resolution 1373 would then constitute a sufficient legal basis for national listing procedures, which would (hopefully) respect the basic requirements of due process. A second alternative would be to do nothing at all, letting the EC Regulation lapse, and counting on the willingness of States to continue the national implementation of the sanctions regime. This option, however, as the Special Rapporteur perhaps too pessimistically (or rather optimistically) foretold, would present the risk of a wave of domestic litigation which

[513] Judgment, para. 323.
[514] Art. 19 of the Draft Articles on Diplomatic Protection adopted by the UN International Law Commission in 2006 (Off Records of the General Assembly, Sixty-first session, Suppl No. 10 (A/Gl/10).

would bring about legal uncertainty and discredit to the UN.[515] A more modest and practical alternative would be for the UN Sanctions Committee to provide to the EU institutions, to the Governments and to the targeted persons and entities more information on the grounds for the listing. This alternative too presents some irksome problems. If the purpose is to enable the concerned individuals and entities to share the same level of information of governments in order to better prepare their case before national courts and the ECJ, as the Special Rapporteur said, this solution is to be expected to encounter a fiery resistance by some, if not all, Members of the UN 1267 Sanctions Committee, which draws the bulk of its information from highly reserved intelligence and law-enforcement sources. [516]

From the previous sections, the answer to the question raised in the beginning must be that the current complete lack of effective judicial review against UN sanctions before European courts (ECJ, CFI and ECrtHR) cannot be reconciled with the fundamental right to judicial review that is to be ensured by European courts. Until current jurisprudence is modified to the advantage of affected individuals, national courts of Member States are seemingly the last hope.

Similarly, since the European courts (ECJ, CFI and ECrtHR) apparently only provide judicial review in extremely limited cases, national courts are called upon to take up this task and fulfil the legal obligations arising out of the ECHR. Indeed, AG Mengozzi explicitly pointed towards the obligation of national courts to fill up any lacuna that may be created by the inability of the ECJ/CFI to provide for effective judicial review.

This issue surely deserves further detailed analysis. On a more general level, the analysis of the CFI's *Kadi/Yusuf/Ayadi* rulings shows that the CFI was clearly

[515] According to the 8th Report of the Analytical Support and Sanctions Monitoring Team pursuant to Res. 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities (S/2008/324), besides the cases pending before the CFI, the ECtHR and the UN Human Rights Committee, there is an action brought by the Al Rashid Trust now pending before the Supreme Court of Pakistan on the Government's appeal, an action brought by Mr. Kadi pending before the Turkey's Administrative cases Bureau, and the case of Al-Haramain Foundation (USA) which returned to a federal district court in Oregon, after that the Appellate Court for the 9th Circuit upheld on 16 Nov. 2007 the Government's defence on State secrets privilege (Al-Haramain Islamic Foundation v. Bush, 507 F. 3d 1190, 1202).
[516] Gattini, p. 227.

mistaken – from the point of view of Community law – to assume that the EC/EU is bound by UN Security Council resolutions in the same way as Member States. Similarly, the CFI was equally wrong to place UN law at the top of the hierarchy of the Community legal order and thereby assuming supremacy of UN law over primary EC law. The bottom line remains that the EC/EU is not a Member of the UN; therefore, it is able – and indeed required by its own indispensable basic principles – to ensure that fundamental rights and the rule of law are always respected. This task is obviously entrusted first and foremost to the CFI/ECJ and subsequently to the ECrtHR.

To sum up, the systemic viewpoints of the two systems which were at loggerheads in the instant case are perfectly understandable. The Security Council - more precisely: its Member States - holds that in the fight against terrorism it is unavoidable to proceed, as appropriate, not only against persons whose involvement in terrorist activities can be proven by clear and irrebuttable evidence, but also against suspects whose involvement is no more than highly probable, according to intelligence reports which cannot be publicly disclosed. Furthermore, ordinary logic dictates that measures such as the freezing of bank accounts must be taken swiftly lest the persons concerned counter the strategy pursued in preventing the financing of terrorism, by withdrawing their funds from the institutions where they are deposited. On the other hand, a system based on the rule of law would seem to require that persons whose guilt is not proven should not be the victims of measures severely affecting them. In fact, to be deprived all of a sudden of the necessary means of subsistence can mean a true personal catastrophe. On the other hand, it is the key element of police action to protect society against any threats which carry the risk of grave damage. Prevention is also a component of the rule of law in that it implements the "duty to protect", which has become a guiding principle even in international human rights law. Obviously, adequate solutions can only be found by carefully weighing the interests in issue. Society must be protected against terrorist threats, but the rights and interests of the persons in the focus of intelligence services may not be sacrificed arbitrarily.

BIBLIOGRAPHY

Books

Albors- Llorens, Albertina, (1996), Private parties in European Community Law – Challenging Community Measures, Claredon Press, Oxford.

Blanke, Hermann-Josef. (2006),"Protection of Fundamental Rights afforded by the European Court of Justice in Luxembourg", Blanke, Hermann- Josef & Mangiameli, Stelio (eds), *Governing Europe Under a Constitution- The Hard Road from the European Treaties to a European Constitutional Treaty*, Springer, pp.265- 278.

Brownlie, Ian. (2003), "Principles of Public International Law", Oxford; New York: Oxford University Pres.

Craig, Paul & De Búrca, Gráinne. (2003), "EU LAW Text, Cases, and Materials", Oxford, 3rd edt.

Cremona, Marise, (1999), "External Relations and External Competence: The Emergence of an Integrated Policy", Craig, Paul & De Burca, Grainne. (eds) *The Evolution of EU Law*, Oxford University Pres, Oxford, p. 137-75.

Eeckhout, Piet, (2004), External Relations of the European Union- Legal and Constitutional Foundations, Oxford University Press.

Gijlstra, D.J., Schermers, H. G., Völker, E.L.M. & Winter, J.A. (2003), Leading Cases and Materials on the Law of the European Communities, Europa Institute University of Amsterdam, Kluver, The Netherlands.

Hartley, Trevor C. (2004), European Union Law in a Global Context Text, Cases and Materials, Cambridge.

Hartley, Trevor C. (1998), The Foundations of European Community Law, Oxford University Press, 4th edition.

Jacqué, Jean Paul, (1993), "The Convention and the European Communities", Macdonald, R. St. J., Matscher, F. & Petzold, H. (eds) "*The European System for the Protection of Human Rights*", Martinus Nijhoff Publishers.

Kapteyn, P. J. G., Van Themaat & P. Verloren. (1998), Introduction to the Law of the European Communities, Gormley Laurance W. (eds), Kluver Law International, London.

Kent, Penelope. (2001), Law of the European Union, Longman, 3rd ed.

Koh, Jae- Myong, (2006), Suppresing Terrorist Financing and Money Loundering, Springer.

Koutrakos, Panos. (2006), EU International Relations Law, Hart Publishing, Oxford; Portland, Hart.

Lasok, KPE & Lasok, D. (2001), Law and The Institutions of the European Union, Butterwoods Publications, 7th ed.

Menėndez, Agustin José. (2006), "Some Elements of a Theory of European Fundamental Rights", Menėndez, Agustin José & Eriksen, Erik Oddvar. (eds) *Arguing Fundamental Rights*, Springer, pp. 155-85.

Mathijsen, P. S. R. F. (1999), A Guide to European Union Law, Sweet & Maxwell, London, 7.th ed.

Ovey, Clare & White, Robin C.A. (2002), European Convention on Human Rights, Jacobs & White, Oxford, 3 rd edt.

Pernice, Ingolf. (2008), "The Treaty of Lisbon and Fundamental Rights", GRILLER, Stefan & Ziller, Jacques (eds.) *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty,* Springer Wien, New York 2008, pp. 235-54.

Plender, Richard & Usher, John, (1980), Cases and Materials on the Law of the European Communities, The Macmillan Press.

Ress, George. (2006), "The legal relationship between the European Court of Human Rights and the Court of Justice of the European Communities according to the European Convention on Human Rights", Blanke, Hermann-Josef & Mangiameli, Stelio (eds), *Governing Europe Under a Constitution-The Hard Road from the European Treaties to a European Constitutional Treaty, Srpinger, pp.* 279- 298.

Schweigman, David, (2001), The authority of the Security Council under Chapter VII of the UN Charter: Legal limits and the role of the International Court of Justice, The Hague; Boston: Kluwer Law International.

Stemer, Josephine, Woods, Lorna & Twigg- Flesner, Christian. (2003), "Textbook on EC Law", Oxford University Press, 8.th ed.

Tomuschat, Christian & Thouvenin, Jean Marc, (2006), The fundamental rules of the international legal order: Jus Cogens and obligations Erga Omnes, Leiden ; Boston : Martinus Nijhoff Publishers. (Referred as Tomuschat II)

Tridimas, T., (1999), The General Principles of EC Law, Oxford University Press.

Weatherill, Stephan & Beaumont, Paul. (1999), EU Law – The Essential Guide to the Legal Workings of the EU, Penguin Books.

Articles

Ahmed, Tawhida & Butler, Israel de Jesús, (2006), "The European Union and Human Rights: An International Law Perspective", *The European Journal of International Law*, Vol. 17 No. 4, 771–801.

Anonymous. (2005), "Relations between international courts and Community courts: Mutual deference or subordination?", *Common Market Law Review*. New York: Jun 2005. Vol. 42, Iss. 3; p. 581, 5 pgs.

Aust, Helmut Philipp, (2008), "Between Self Assertion and Defense: European Courts and Their Assesment on UN Security Council Resolutions", *Anuario Mexicano de Derecho Internacional*, vol. VIII, 2008, pp. 51-57. http://www.bibliojuridica.org/estrev/pdf/derint/cont/8/art/art2.pdf

Besselink, Leonard F M, (2004), "Human Rights and the End of Empire: Britain and the Genesis of the European Convention", *Common Market Law Review*. New York: Feb 2004. Vol. 41, Iss. 1; p. 261, 3 pgs.

Bohr, **Sebastian,** (1993), "Sanctions by the United Nations Security Council and the European Community", *EJIL*,1993, Vol.4, p. 256.

Bronkers, Marco, (2007), "The Relationship of the EC Courts with other International Tribunals: Non- Committal, Respectful or Submissive?, *Common Market Law Review*. New York: Jun 2007. Vol. 44, Iss. 3; p. 601, 27 pgs.

Cecco, Francesco, (2006), "Room to Move? Minimum Harmonization and Fundamental Rights", *Common Market Law Review,* 43: 9-30.

Cremona, Marise, (2003), "The Draft Constitutional Treaty: External Relations and External Action", *Common Market Law Review.* New York: Dec 2003. Vol. 40, Iss. 6; p. 1347

Cremona, Marise, (2004), "The Union as a Global Actor: Roles, Modes and Identity", *Common Market Law Review*, New York: Apr 2004. Vol. 41, Iss. 2; p. 553, 21 pgs.

De Búrca, Gráinne, (2009), "The European Court of Justice and the International Legal Order after Kadi", Jean Monnet Working Paper 01/09.

De Hert, Paul, (2005), "Balancing security and liberty within the European human rights framework. A critical reading of the Court's case law in the light of surveillance and criminal law enforcement strategies after 9/11", *Utrecht Law Review*, September 2005, Vol. 1, Iss. 1, pp. 68-96. http://www.utrechtlawreview.org/

Douglas-Scott, Sionaidh, (2006), "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis", *Common Market Law Review*, New York: Jun 2006. Vol. 43, Iss. 3; p. 629, 37 pgs.

Eckes, Christina, (2008), "Judicial Review of European Anti-Terrorism Measures—The Yusuf and Kadi Judgments of the Court of First Instance", January 2008, *European Law Journal*, January 2008. Vol. 14, No. 1, pp. 74–92.

Fromuth, Peter, (2009), "The European Court of Justice *Kadi* Decision and the Future of UN Counterterrorism Sanctions", October 30, 2009, *ASIL Insight*, Volume 13, Issue 20.

Gattini, Andrea, (2009), "Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, Judgment of the Grand Chamber of 3 September 2008", *Common Market Law Review*, New York: Feb 2009. Vol. 46, Iss. 1; p. 213, 27 pgs.

Groussot, Xavier, (2007), "Fundamental Rights in the European Union – Towards higher law of the Land? A study of the status of fundamental rights in a broader constitutional setting", *Common Market Law Review*. New York: Oct 2007. Vol. 44, Iss. 5; p. 1531, 3 pgs.

Halberstam, Daniel & Stein, Eric, (2009), "The United Nations, The European Union, and The King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order", *Common Market Law Review,* New York: Feb 2009. Vol. 46, Iss. 1; p. 13, 60 pgs.

Harpaz, Guy, (2009), "The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherance and Legitimacy", *Common Market Law Review*, New York: Feb 2009. Vol. 46, Iss. 1; pg. 105, 37 pgs

Helikoski, Joni, (2007), "Case T-253/02, Chafiq Ayadi v. Council, judgment of the Court of First Instance of 12 July 2006; Case T-49/04, Faraj Hassan v. Council and Commission, judgment of the Court of First Instance of 12 July 2006", *Common Market Law Review.* New York: Aug 2007. Vol. 44, Iss. 4; p. 1143, 15 pgs.

Hoffmeister, Frank, (2007),"Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies", *Common Market Law Review,* New York: Feb 2007. Vol. 44, Iss. 1; p. 41, 28 pgs.

Jacobs, Francis G, (2004), "The Evolution of the European Legal Order", *Common Market Law Review*, New York: April 2004. Vol. 41, Iss. 2, p. 303.

Kuijer, Martin, (2003), "Fundamental rights in Europe - The ECHR and its Member States, 1950 – 2000", *Common Market Law Review*, New York: Aug 2003. Vol. 40, Iss. 4; p. 1015.

Kuijper, Pieter Jan & Bronkers, Marco, (2005), "WTO Law in the European Court of Justice", *Common Market Law Review*, New York: 42; p. 1313-55.

Kunoy, Bjorn & Dawes Anthony, (2009), "Plate Tectonics in Luxembourg: The ménage à Trois Between EC Law, International Law and The European Convention on Human Rights following the UN Sanctions Cases", *Common Market Law Review,* New York: Feb 2009. Vol. 46, Iss. 1; p. 73- 107.

Lavranos, Nicolaos, (2006), "Judicial Review of UN Sanctions by the Court of First Instance", Euroepan Foreign Affairs Review, 11: 471- 490, Kluver Law International.

Lavranos, Nicolaos, (2007), "UN Sanctions and Judicial Review", *Nordic Journal of International Law*, 76, p. 1-17. (Referred as Lavranos II.)

Lusberg, Jonas Bering, (2001), " Does the EU Charter of Fundamental Rights threaten the Supremacy of Community Law" , *NYU School of Law Jean Monnet Center Working Paper*, available at: http://www.jeanmonnetprogram.org/papers/01/010401.html

Matheson, Michael J, (2004), "ICJ Review of Security Council Decisions". *George Washington International Law Review*, The. FindArticles.com http://findarticles.com/p/articles/mi_qa5433/is_200401/ai_n21353198/ access on 27.01.2010

Nettesheim, Martin, (2007), "U.N. Sanctions against Individuals - A Challenge to the Architecture of European Union Governance", *Common Market Law Review,* New York: Jun 2007. Vol. 44, Iss. 3; p. 567, 34 pgs.

Tappeiner, Imelda, (2005), "The fight against terrorism. The lists and the gaps", *Utrecht Law Review*, http://www.utrechtlawreview.org/ September 2005.Vol. 1, Iss. 1, p. 97-125.

Timmermans, Christiaan. W. A., (2002), **"**The Constitutionalisation of the European Union", 21 *Yearbook of European Law* 9.

Timmermans, Christiaan. W. A., (2004), "The European Union's Judicial System", *Common Market Law Review*, New York: April 2004. Vol. 41, Iss. 2, p. 393.

Tomuschat, Christian, (2005), "Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, judgment of the Court of First Instance of 21 September 2005; Case T-315/01, Yassin Abdullah Kadi v. Council and Commission, judgment of the Court of First Instance of 21 September 2005", *Common Market Law Review*, New York: Apr 2006. Vol. 43, Iss. 2; p. 537, 15 pgs.

Uerpmann, R., (2003), "International Law as an Element of European Constitutional Law: International Supplementary Constitutions", Jean Monnet Working Paper 9/03.

Weiler, J.H.H. & Fries, Sybilla C., (1999), "A Human Rights Policy for the European Community and Union: The Question of Competences", Harvard Jean Monnet Working Paper 4/99.

Wouters, Jan & Naert, Frederik, (2004), "Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appaisal of the EU's Main Criminal Law Measures against Terrorism after 11 September", *Common Market Law Review*. New York: Aug 2004. Vol. 41, Iss. 4; p. 909, 27 pgs.

Zgonec-Rozej, Miša, (2008), "*Kadi & Al Barakaat v. Council of the EU & EC Commission***:** European Court of Justice Quashes a Council of the EU Regulation Implementing UN Security Council Resolutions", ASIL, Volume 12, Issue 22**.** October 28, 2008.

Other Resources

Bowring B., Korff D., (2004), "Terrorist Designation with regard to European and International law: the case of the PMOI", http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf, access on 09.06.2010.

Cremona, Marise. (2006), "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law", Report of Community Rapporteur Professor Marise Cremona, 15 May 2006, http://www.fide2006.org/GENERAL%20REPORT,%20TOPIC%203.pdf

http://curia.europa.eu/

http://www.echr.coe.int

http://www.eubusiness.com

http://www.eucaselaw.info/

http://www.icj-cij.org/

http://www.statewatch.org/

www.un.org

TABLE OF CASES

Court of First Instance

Case T-184/95 Dorsch Consult v. Council and Commission, [1998], ECR II-667.

Case T-318/01, Omar Mohamed Othman vs. the Council of the European Union and the Commission of the European Communities, 17 December 2001.

Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II-3533.

Case T-315/01, Yassin Abdullah Kadi v Council and Commission [2005] ECR II-3649.

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

CFI, Case T-49/04, Faraj Hassan v. Council and Commission, judgment of the Court of First Instance of 12 July 2006.

Cases T-228/02, Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council [2006] ECR 11-4665,

Case T-47/03, Sison v. Council, [2007] ECR 11-73.

Case T-327/03, Stichting Al-Aqsa v. Council, [2007] ECR 11-79.

Case T-229/02, Osman Ocalan on behalf of PKKv. Council, judgment on 3 April 2008.

Case T-253/04, KONGRA-GEL, judgment of 3 April 2008.

Case T-256/07, People's Mojahedin Organization of Iran v. Council, judgment of 23 Oct. 2008.

Case T-284/08, People's Mojahedin Organization of Iran v. Council, judgment of 4 Dec. 2008.

European Court of Justice

Case 25/62 *Plaumann* [1963] ECR 95.

Case 26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1

Case 6/64 Flaminio Costa v. ENEL [1964] ECR 585

Case 29/69 Stauder [1969] ECR 419

Case 11/70 Internationale Handelsgesellschaft mbH v. Einfur-und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

Joined Cases C-21-24/72, International Fruit Company NV and Others v Produktschap voor Groenten en Fruit [1972] ECR 1219.

Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal SPA [1978] ECR 629

Case 294/83 Parti ecologiste 'Les Verts' v. European Parliament, [1986] E.C.R. 1339

Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199

Case 5/88 Wachauf [1989] ECR 2633

Case C-260/89 (ERT) [1991] ECR 1-2925

Opinion 1/94 WTO Agreement [1994] ECR I-5267

Opinion 2/94 Accession of the European Communities to the European Human Rights Convention, [1996] ECR 1759

Case C -84/95, Bosphorus Hava Yollari ve Ticaret ASv. Minister for Transport, Energy and Communications, Ireland and the Attorney General, [1996] ECR 3953

C- 124/95, The Queen ex parte Centro-Com SrI v. HM Treasury and Bank of England, [1997] ECR 1-81

Case C- 177/95, Ebony Maritime SA and Loten Navigation Co. Ltd. v. Prefetto della Provincia di Brindisi and Others, [1997] ECR 1-1111.

Case C-1 62/96, Racke, [1998] ECR 1-3655.

Case C-114/88 *Delbar* [1998] ECR 4067.

Case C-237/98P, Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission, [2000] ECR 1-4549.

Case C-50/00 P *(UPA)* [2002] ECR 1-6677;

Case C-263/02 P *(Jego-Quere)* [2004] ECR 1-3425

Case C-459/03 *Commission* v. *Ireland*, judgment of 30 June 2006

Joined Cases C-402/05P and C-415/05P, Kadi and Al Barakaat, judgment of the Court of Justice of the European Communities (Grand Chamber) of 3 September 2008.

Joined Cases C-399/06 P and C-403/06 P, Hassan and Ayadi, Judgment of the Court of Justice of the European Communities (Grand Chamber) of 3 December 2009.

European Court of Human Rights

Belgian Linguistic Case (no 2) (1968) 1 EHRR 252

Airey v Ireland (1979) 3 EHRR 592

Chahalv. United Kingdom, [1996] ECHR-V, 1831

Cantoni v. France, judgment of 15.11.1996.

Van Raalte v Netherlands (1997) 24 EHRR 14

Matthews v. UK, judgment of 18.2.1999.

Thlimmenos v Greece (2000) 31 EHRR 15

SEGI v the 15 member states of the European Union, 2002. (Appl no. 6422/02)

Jokela v. Finland, [2002] ECHRIV, 1

Willis v UK (2002) 35 EHRR 21

Senator Lines v. 15 EU Member States, judgment of 10.3.2004.

Wessels-Bergervoet v Netherlands (2004) 38 EHRR 793

Emesa Sugar v the Netherlands, judgment of 13 January 2005.(Appl. 62023/00)

Bosphorus v. Ireland, judgment of 30.6.2005. (Appl 45036/98)

Behrami and Saramati v France, Norway and Germany; judgment of the European Court of Human Rights of 2 May 2007 (Appl 71412/01, 71412/01&. 78166/01)

International Court of Justice

Advisory Opinion, [1948] ICJ Rep. 57, 64

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, [1949] ICJ Rep. 174, 179.

Nottebohm case, Liechtenstein v Guatemala, [1955] ICJ Reports 4.

South West Africa case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order No 1 of 26 January 1971, [1971] ICJ Rep 3, at 45)

Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986, ICJ REP. 14 (Judgment of June 27)

Prosecutor v. Tadic, Case No. IT-94-1, International Criminal Tribunal for Yugoslavia Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 Oct. 1995)

Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K; Libya v. U.S.), 2003 I.C.J. Nos. 88-89 (Sept. 10, 2003).