MARMARA UNIVERSITY
EUROPEAN UNION INSTITUTE
DEPARTMENT OF EUROPEAN UNION LAW

THE IMPLICATIONS OF YUSUF (T-306/01) AND KADI (T-305/01) JUDGMENTS ON THE EU LEGAL ORDER

Master Thesis

SEVAL ARZU IZ

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ABSTRACT

THE IMPLICATIONS OF YUSUF (T-306/01) AND KADI (T-315/01) JUDGMENTS ON THE EU LEGAL ORDER

From the very beginning of the EC until today, the EC Courts have given many judgments which were milestones of EU Law. In these judgments, the Community Courts acted in a activist way in order to establish the structure of the Community legal order according to their certain idea of that legal order. However, the judgments of Yusuf (T-306/01) and Kadi (T-315/01) seem as a contrast to this evolution. In 2005 with the judgments given by the CFI the Yusuf and Kadi Cases a new bold precedent was established concerning the EC's powers in order to implement the UN Security Council Resolutions to adopt economic and financial sanctions against individuals/entities and the scope of Community Court's jurisdiction with respect to review of legality of UN Security Council Resolutions and implementing EC Regulations under fundamental human rights. Thus, in thesis the approaches behind these precedents are evaluated and examined with their possible implications.

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ÖZET

YUSUF (T-306/01) VE KADI (T-315/01) KARARLARININ AB HUKUKU ÜZERİNDEKİ ETKİLERİ

AT' nin kuruluşundan günümüze kadar, Topluluk Mahkemeleri AB Hukuku açısından dönüm noktası sayılabilecek birçok karar vermişlerdir. Bu kararlarda Topluluk Mahkemeleri aktivist bir şekilde davranarak Topluluk hukuk düzenini şekillendirmek istedikleri görüşlere uygun olarak oluşturmuşlardır. Fakat, Yusuf (T-306/01)ve Kadı (T-315/01)bu oluşuma tezat oluşturmuşlardır.2005 yılında, İlk Derece Mahkemesi Yusuf ve Kadı davalarında AT'nin Birleşmiş Milletler Güvenlik Konseyi'nin kararlarını kabulü, kişilere ve kurumlara ekonomik ve finansal yaptırımlar uygulanması ve Topluluk Mahkemelerinin temel insan hakları açısından Birleşmiş Milletler Güvenlik konseyi kararları ile bunları uygulayan Topluluk Regülasyonları hukuksal incelemesinin ne kadar Mahkemenin yetki alanına girdiği hakkında yeni bir cüretkar karar vermiştir. Bu tezde söz konusu hususlarda, bu kararların altında yatan sebepler değerlendirilip kararların etkileri incelenmiştir.

ABBREVIATIONS

AG	:	Advocate General
art.	:	Article
CFI	:	Court of First Instance
CFSP	:	Common Foreign and Security Policy
CMLR	:	Common Market Law Review
EC	:	European Community
ECHR	:	European Court of Human Rights
ECR	:	European Court Reports
ECtHR	:	European Charter of Human Rights
edt.	:	Edited
EU	:	European Union
GATT	:	General Agreement of Tariffs and Trade
ICJ	:	International Court of Justice
ICLQ	:	International and Comparative Law Quarterly
ILC	:	International Law Commission
MS	:	Member States
OJ	:	Official Journal of the European Communities
p.	:	Page
para.	:	Paragraph
SC	:	Security Council
UN	:	United Nations
VCLT	:	Vienna Convention on Law of the Treaties

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THE IMPLICATIONS OF YUSUF (T-306/01) AND KADI (T-315/01) JUDGMENTS ON THE EU LEGAL ORDER

I) INTRODUCTION

From the very beginning of the European Community (the 'EC') until today, the EC Courts have given many judgments which were milestones of European Union ('EU') Law in which EC Courts acted judicially in activist way.

However, on the 21st September 2005 the second chamber of the Court of First Instance of European Communities (the 'CFI') gave judgments in the cases of *Yassin Abdullah Kadi* [1] and *Ahmed Ali Yusuf and Al Barakaat International Foundation* [2] which bring forth highly controversial discussions amongst scholars. In these judgments the CFI was asked to decide on the balance between the two core issues. One of them is the place of the United Nations (the 'UN') Security Council's (the 'SC') decisions adopted under Chapter VII in the EU legal order concerning to freezing the funds and other financial sources persons, groups, entities which are connected to international terrorism and imposing certain specific restrictive measures against them. The second one to decide in the case is if these decisions and their implementing measures infringe

[1] Judgment of the Court of First Instance 21 September 2005 on *Yasin Abdullah Kadi against Council of European Union and Commission of the European Communities* Case T-315/01 2005/C 281/32

[2] Judgment of the Court of First Instance 21 September 2005 on *Ahmed Ali Yusuf and Al Barakaat International Foundation against Council of European Union and Commission of the European Communities* Case T-306/01 2005/C 281/31

fundamental human rights of the applicants, under what conditions it can review the legality of these decisions and their implementing measures including their scopes. Therefore, the CFI was forced to decide on the issue from the EC's perspective, to favour security concerns in fighting against the terrorism or fundamental human rights and values developed so far. The decision of the CFI at this point has a crucial importance as its judgment on the issue would have great significance to show where Community stands on the fight against terrorism and protection of the fundamental rights.

I would like to emphasize the fact that the decisions of the CFI on *Yusuf*[3] and *Kadi*[4] have been appealed to the ECJ on November 2005 and after on 3 September 2008 the judgment[5] was delivered pursuant to Advocate General Poiares MADURO's opinion on 16 January 2008.[6]

It should be kept in mind that although the judgments of the CFI have been put aside by the ECJ's decision, in many perspectives these judgments still have a great importance. Firstly, these judgments still should be assessed because of the controversial nature of the justifications and their restraining nature. Secondly, even though the current litigation process is finalized, new phase has just started as the ECJ annulled Regulation No. 881/2002 in so far as it concerns the applicants and obliged the EC institutions to make necessary adjustments. Therefore, the EC Institutions while making these changes within three months after the decision, should take into consideration CFI's and ECJ's judgments which show the things to be done and not to be done. Thirdly, those judgments are also important to show that with the correction of the ECJ, what negative implications are overcome on the European Legal order.

Thus, as this dissertation is restricted to the implications of the of the CFI's judgments only, so unless required, the judgment of the ECJ will be ignored. Thus, in

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[3] C-415/05 P, 23.November. 2005, OJ C 48, 25.2.2006, p. 11–12
[4] C-402/05 P, 17.November. 2005, OJ C 36, 11.2.2006, p. 19–20
[5] *Yasin Abdullah Kadi v. Council and Commision*, Joint Cases ,C-415/05 P, available at: http://eur-lex.europa.eu/Notice.do?checktexts=checkbox&checktexte=checkbox&val=478012%3Acs&pos=1&page=1&lang=en&pgs=10&nbl=6&list=478012%3Acs%2C463008%3Acs%2C422153%3Acs%2C417178%3Acs%2C412273%3Acs%2C267982%3Acs%2C&hwords=kadi%257E&action=GO&visu=%23texte accessed on:03.09.2008 *hereinafter* 'Appeal '
[6] Opinion of Advocate General Poiares Maduro in Case C-402/05 P, 16 January 2008

this dissertation the approaches behind these CFI judgments would be examined and evaluated for the reason that the possible impact of these precedents is far beyond the existing EU law. Through these evaluations and examinations it should be taken into consideration that because of the very same nature of the disputes, the cases would be held mostly jointly[7] but with references to the differences.

Therefore, in this dissertation, after giving short background information about the cases firstly, some information will be given regarding the UN, SC, Sanctions Committee and their acts that are relevant to the case. Secondly, the competence of the Council to adopt the contested regulation based on SC Resolutions will be evaluated. This section will be followed by the assessment of CFI's judicial scope of review of SC Resolutions and implementing measures. After giving necessary information about the jus cogens and fundamental human rights, allegations on breaches of fundamental rights will be assessed by the order of right to respect for property and principle of proportionality the right to have fair hearing and rights to have effective judicial remedy. And in the final part of the dissertation the possible assessments by other European Courts will be taken under scope with regard to their case law, in addition to the ECJ's judgment regarding the appeals.

A) Background Information and Case Histories

The applicant Ahmed Ali Yusuf who is a Somali originated Swedish citizen born in 20 November 1974 and Al-Barakaat International Foundation, which is the largest financial network system of Somalia, were included into the blacklisting on 12 November 2001 by Commission Regulation (EC) No.2199/2001. On the other hand Yassin Abdullah Kadi, who is a international business man resident in Saudi Arabia in 19 October 2001 by Commission Regulation (EC) No 2062/2001 was included in

[7] Both judgments are essentially identical in their relevant parts therefore citations taken randomly from one or both judgments.

Regulation No. 467/2001[8]. Both regulations are legislated to apply specific restrictive measures against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and Taliban. However, in order to explain how and why they were added to the list and the effects of being in the list, the source giving it a cause should be examined. It is vital to under stand the structure UN, SC and procedure of the Sanction Committee listing as it is directly induced applicants to raise their allegations in these cases.

1) Structure of United Nations and UN Security Council

The UN may be shortly defined as an organization of independent states, which have accepted the obligations contained in the United Nations Charter[9] signed on June 26, 1945 at San Francisco.[10] In article 1 of the Charter the purposes of the UN are indicated primarily as an organization for maintaining peace and security with the additional functions of developing friendly relations among nations, of achieving international co-operation in economic, social, cultural and humanitarian matters developing respect for human rights and fundamental freedoms and of providing a means for harmonizing international actions to attain these aims.[11] These general objectives can be regarded as embodying rules of law authorizing its organs and member states to take action not specifically provided for in the operative articles of the Charter.

In article 2 of the Charter the principles of the UN are indicated which is the organic observance of the UN itself, namely, that the bases of the UN shall be the sovereign equality of all its members and it shall not intervene in matters essentially within the domestic jurisdiction of any state. Other principles are set down for observance by Member States, namely, that they should fulfill their obligations under the Charter, settle their disputes by peaceful means not threaten or use force against the

[8] Repealed by Council Regulation (EC) No.881/2002, 27 May 2002 but the names of the applicants reiterated.
[9] The United Nations Charter *hereinafter* 'the Charter'
[10] **STARKE**,J.G., '*Introduction to International Law*' , 1972, Butterworths, p.593
[11] **STARKE**, p.597

territorial integrity or political independence of any state and give assistance to the UN while denying such assistance to any State against which preventive or enforcement action is being taken.[12]

According to art.4 of the Charter, membership in the UN is only open to states which are peace-loving and accepting the obligations contained in the Charter and, able and willing to carry out these obligations which its admission will be effected by a decision of the General Assembly upon the recommendation of the SC.[13] It can be said that UN is an international organization which is formed by majority of the nations to preserve peace and security amongst and on behalf of them.

The powers of UN are being distributed among its six different major organs[14] and one of them is the SC. The SC is a continuously functioning body, consisting of fifteen member states two of the five permanent members are also EU Member States. The SC has been given primary responsibility under the Charter for maintaining peace and security in order that as a small executive body which can take effective decisions to ensure prompt action by the UN. According to article 25 of the Charter the member states agreed to abide by and to carry out the Security Council's decisions. Although the SC has primary responsibility for maintaining peace and security which is not exclusive, on one view the SC has general overriding powers for maintaining peace and security not limited to the specific expressed powers in Chapters VI or VII as like other international organs it has such implied powers as necessary and requisite for the proper fulfilment of its functions.[15] According to the preparatory works of the Charter, the SC is designed as a political organ which acts as a dispute settler under Chapter VI and as a peace enforcer under Chapter VII.[16] The SC is empowered to determine the existence of any treat to the peace, breach of the peace, act of aggression and to make

[12] **STARKE**, p.597
[13] The Charter art.4
[14] 1.General Assembly, 2.The Security Council, 3.Economic and Social Council, 4.Trusteeship Council, 5.The International Court of Justice, 6.The Secretariat. As the primary concern of this paper is the Security Council, the other organs of the UN will not be explained in this paper. For detailed information regarding the other organs of the UN; **STARKE,** p.599-627
[15] **STARKE**, p.610
[16] **BIANCHI**, Andrea, "Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion", *EJIL*, 2006,17, pp.881-908 p.883

recommendations or decide what enforcement measures are to be taken to maintain a restore peace and security.[17]

The SC uses its powers to pass various resolutions under Chapter VII, which include sanctions. Sanctions are economic measures that are taken on mostly basis of political consideration with legal terms and hence are measures, which clearly illustrate the almost inevitable breakdown of the theoretical demarcation between, economic and foreign affairs issues[18]. Also, the term economic sanction is used in international relations to denote any economic deprivation inflicted on a state by another state, group of states or international organizations.[19] The main type of economic sanction is the embargo; that is a government-initiated ban on its nationals trading with another State, which may concern the import or export of goods, capital or services, for reasons pertaining to foreign relations, and in reaction to illegal or politically undesirable acts of the recalcitrant State as it is provided for the Security Council in article 41 of the Charter.[20]

During the 1990s the SC expanded, by way of interpretation, the scope of the notion of 'threat to the peace'[21] which changed the content of the Chapter VII resolutions which gave a rise to more 'targeted' and 'smart' sanctions.[22] The 'targeted sanctions' took place of the classical 'economic sanctions' as an appropriate response of the SC to the threats to international peace and security aiming persons as targets who involved in the regime of the state and imposed in order to ensure that the addressee

[17] The Charter art.39

[18] **CANOR**,Iris, "Can two walk together, except they be agreed? The relationship between international law and European law: The incorporation of UN Sanctions against Yugoslavia into European Community law through the perspective of the ECJ", *CMLR*, 1998,Vol.35, Kluwer Law Int., pp.137-187, p. 138

[19] **CANOR**, p.138 fn.5

[20] **BOHR**, Sebastian, "Sanctions by the United Nations Security Council and the European Community", *EJIL*,1993, Vol.4, p. 256

[21] **BIANCHI**, p.884

[22] "The first targeted UN Security Council Resolution was Resolution 1127(1997) directing sanctions were against officials of the UNITA in Angola and their family members", **TAPPEINER**, Imelda, "The fight against terrorism. The list and the gaps", *Utrecht Law Review*, Vol.1, Issue 1, 2005, p. 97-125 at p.99; Sanctions are economic measures which are normally taken on the basis of political considerations and hence measures which clearly illustrate the almost inevitable breakdown of the theoretical demarcation between economic and foreign affairs issues the term economic sanctions is used in international relations to denote any economic deprivation inflicted on a state by another state, group of sates or international organizations, **CANOR**, p.138 and fn.5

changes its behaviours in accordance with its obligations under international law. [23] Also the practice of smart sanctions seemed more effective and provides fair means for the SC to bring about compliance of individuals and entities with its prior resolutions, without unduly affecting the civil population of a state. [24] In the year of 2005 there were currently ten sanction regimes imposed by the SC under Chapter VII of the Charter, in March 2005 one established concerning Sudan and the oldest one established in 1992 at Somalia and eight of the ten sanction regimes were designating individuals and entities as a target of the sanctions and in five of the eight sanction regimes, list have been established with the names of designated individuals and entities. [25] Therefore, although Chapter VII of the Charter was originally designed for actions against states that pose a threat to international peace and security this does not prevent the SC making use of its powers to adopt financial sanctions which are individuals as their target.[26] At this point, I think it is essential to give some details regarding the Sanctions Committee and its rules of procedure which has a vital importance to understand the core of these judgments.

2) UN Sanctions Committees

In its fight against terrorism, because of its global reach and primary responsibility within the UN system for maintaining international peace and security, as well as its ability to impose obligations on all UN Member States, the SC is expected to play a leading and unique role in this global fight.[27] The SC's strategy to fight against terrorism can be divided into four prongs; condemnation of discrete acts of terrorism, imposition of binding counterterrorism obligations on all states, capacity building, and

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[23] **BULTERMAN**, Mielle, "Fundamental Rights and the United Nations Financial Sanctions Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities", *Leiden Journal of International Law*, 19, 2006, pp.753-772 p.764

[24] **BIANCHI**, Andrea, "Security Council's Anti-Terror Resolutions and their Implementation by Member States", Journal of International Criminal Justice 4 5, pp.1044-1073 p. 1045 *hereinafter* **BIANCHI II**

[25] **FASSBENDER**, Bardo, "Targeted Sanctions and Due Process", p. 4, available at http://www.un.org/law/counsel/Fassbender_study.pdf , accessed at: 20.05.2007

[26] **BULTERMAN**, p.763-764

[27] **ROSAND**,Eric, "The Security Council's Efforts to Monitor The Implementation of Al Qaeda/Taliban Sanctions", *AJIL*, Vol.98, No.4, 2004, pp.745-763 in p.745

imposition of sanctions.[28] Therefore, under the forth prong, on 15 October 1999 the SC adopted Resolution 1267 (1999), in which it *inter alia* condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts and with the fact that the Taliban continued to provide safe haven to Usama bin Laden with his associates to operate terrorist camps in Afghanistan as a base from which to sponsor international terrorist operations and demanded that the Taliban should without further delay turn Usama bin Laden over to the appropriate authorities.[29] In order to ensure compliance with that demand, according to which all the States must, in particular, freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban. To facilitate that according to the paragraph 6 of the Resolution 1267 SC decided to establish a committee consists of all its members, the so called '*Sanctions Committee*' or '*1267 Committee*', responsible of ensuring the implementation of the Resolutions in the UN Member States, designating the funds and other financial resources and considering requests for exemption from the measures imposed.[30] Therefore, by any undertaking owned or controlled by the Taliban, as designated by the Committee established, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.[31]

The SC, in December 19, 2000, via Resolution 1333 sanctions were expanded to arms embargo, broadened the asset freezing by including financial assets of Usama bin Laden, Al-Qaeda with the supporters included in the Sanctions Committees Consolidated List[32] by the information provided by the member states and regional organizations and also decided that the imposed measures were established for 12

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[28] **ROSAND**, p.745

[29] Security Council Resolution 1267, S/Res/1267 (1999), 15 October 1999, available at: http://daccessdds.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement accessed on:16.06.2008, Operative para.1-4

[30] Security Council Resolution 1267, Operative para.6

[31] Security Council Resolution 1267, Operative para.4(b)

[32] **ROSAND**,Eric "The Security Council's Efforts to Monitor The Implementation of Al Qaeda/ Taliban Sanctions", p.747

months which would be extended for a further period on the same conditions. [33] Moreover, on September 28, 2001 by the adoption of the Resolution 1373, the SC declared that terrorism is a threat to international peace and security, imposed binding obligations on UN member states to combat terrorism and established a committee called '*Counter Terrorism Committee*' (the 'CTC') consists of the members of the SC, to monitor implementation of the Resolution 1373. [34] Furthermore, in January 2003, the SC by Resolution 1455 called states to strengthen implementation of the aforementioned measures and sharpened the SC's ability to determine which state were failing to live up to their obligations and afterwards in January 2004 adopted Resolution 1562 which placed a greater emphasis on compliance, largely through reinforcing the committee's ability to oversee how states were implementing them. [35]

The mandate and method of working of the Sanctions Committee related to the cases can be summarized as follows according to the Guidelines of the Committee for the code of Conduct of its Work:

- as a subsidiary organ of the SC it consists of Members of the SC

- it may invite members of UN, Secretariat, Analytical Support and Sanctions Monitoring Team or other persons to attend its meetings where appropriate

- it shall make decisions by the consensus of its members, incase of not having unanimity it shall report the matter to the SC

- updates regularly the Consolidated List when it has agreed to include relevant information received from Member States or international or regional organizations either directly or through the Monitoring Team

- reviews the de-listing requests, without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the Committee's

[33] Resolution 1333 para. 23
[34] **ROSAND**, Eric, " Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism", AJIL, Vol.97/2, 2003, pp.333-341, in p.333-334 (emphasis added)
[35] **ROSAND**, "The Security Council's Effords to Monitor The Implentation of Al Qaeda/Taliban Sanctions" p.747

consolidated list) may petition the government of residence and/or citizenship to request review of the case

- decides de-listing of an individual or entity under the condition of the consensus between its members after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Sanctions Committee

- provides written and oral assessments about the implementation of the resolutions in member states

- considers and approves, if appropriate, requests by Member States for extraordinary expenses as provided for in paragraph 1(b) of Resolution 1452 (2002) [36]

In further chapters more relevant information shall be supplied regarding the Sanctions Committee. Even though the guidelines for the listing of individuals and entities have been adopted with a view to ameliorating the process, errors may occur [37]; so the Sanctions Committee besides drawing up the list of persons and entities associated with Usama Bin Laden and keeping the list up to date, the Committee delists persons or entities included in the list because of some kind of inaccuracy. Besides the inefficiency and difficulties of the delisting procedure which shall be examined in a latter stage, on 26 August 2006 the Sanctions Committee decided to remove the persons known as Abdi Abdulaziz Ali and Abdirisak Aden from the list of the persons to whom and groups and entities to which the freezing of funds and other economic recourses must apply[38] as they were included to the Sanctions Committee list on 9 November 2001. [39] Therefore, as Abdi Abdulaziz Ali and Abdirisak Aden have no longer any

[36] Security Council Committee Established Pursuant To Resolution 1267 (1999) Concerning Al-Qaida And The Taliban And Associated Individuals And Entities Guidelines Of The Committee For The Conduct Of Its Work available at: http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf accessed on: 07.07.2008
[37] **BIANCHI**, "Security Council's Anti-Terror Resolutions and their Implementation by Member States" p.1049
[38] Yusuf para.33
[39] Yusuf para.24

particular and individual interest in pursing their action[40] in accordance with art.99 of the Rules of Procedure, they have discontinued to the case. [41]

If we look at the Security Council decisions in concern, we will see that on December 20, 2002 by Resolution 1452 the SC provided a number of derogations from and exceptions to the freezing of funds and economic resources imposed in Resolutions numbered 1267(1999), 1333(2000) and 1390(2002) which may be granted by the Member States on humanitarian grounds, on that the Sanctions Committee gives its consent. [42] In addition to these by Resolution 1455(2003) besides improving the implementation of the measures in Resolutions numbered 1267(1999), 1333 (2000), 1390 (2002), Resolution 1455 emphasized that the measures are again to be improved after 12 months or earlier if necessary. [43] These changes have importance in regard to the humanitarian concerns as indeterminate time limit for restrictions and no access to assets and not even supplying minimum living standards have been condemned by the community. Besides the literature about the cases in concern these sanctions are highly protested and criticized by many scholars from many perspectives, mainly regarding the ambiguity of inclusion and ineffectiveness of de-listing procedures and their negative effects on fundamental rights[44] which shall be discussed below under the title of judicial review of the fundamental rights.

3) EC Implementation of SC Resolutions in Concern

In order to analyze the background of the decisions, the actions taken for the implementation of the aforementioned SC resolutions by the Council and the Commission should be reviewed. First and foremost, the common positions of the CFSP contain instructions to the EC on the implementation of the obligations which were originally laid down in UN Resolutions and followed by regulations which are

[40] Yusuf para.59
[41] Yusuf para.69
[42] Yusuf para.36
[43] Yusuf para.37
[44] For detailed information please read; **TAPPINER**,I.; **PAPASTRAVRIDIS**, Efthymios, "Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis", ICLQ 56, 1, 2007,Oxford University Press, p.83-107

directly applicable in MS. With respect to this fact, the first action taken by the Community was on 15 November 1999, thus the Council adopted Common Position 1999/ 727/ CFSP, to implement Resolution 1267(1999) that concerns restrictive measures against Taliban prescribing the freezing of funds and other financial resources held abroad by the Taliban. And on 14 February 2000 Regulation (EC) No 337/ 2000 was adopted under art.60 and 301 EC Treaty that concerns a fight ban and a freeze of funds and other financial resources in respect of Taliban of Afghanistan.

After the Resolution 1333(2000) of the SC, taking the view that action necessary in order to implement that resolution, on 26 February 2001 the Council adopted Common Position 2001/ 154/ CFSP concerning additional restrictive measures against Taliban and amending Common Position 96/ 746/ CFSP. According to the art.4 of the Common Position, as designated by the Sanctions Committee, funds and assets of Usama Bin Laden and individuals and entities associated with him, will be frozen, and funds and other financial resources will not be made available under the conditions set out in Resolution 1333. [45] Therefore, on March 6, 2001 the Council adopted Regulation (EC) No 467/ 2001 again on the basis of art.60 and 301 EC Treaty, as the measures provided for by the Resolution 1333 (2000) fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decision of the SC as far as the territory of the Community is concerned. [46] This regulation also identified the scope of the funds[47] and freezing of funds as well as mapping out the application of Resolution

[45] Yusuf para.17
[46] Yusuf para.19
[47] According to the Art.1 of the Council Regulation (EC) No 467/2001; 'Funds' means: financial assets and economic benefits of any kind, including, but not necessarily limited to, cash, cheques, claims on money, drafts, money orders and other payment instruments; deposits with financial institutions or other entities, balances on accounts, debts and debt obligations; publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures, derivatives contracts; interest, dividends or other income on or value accruing from or generated by assets; credit, right of set-off, guarantees, performance bonds or other financial commitments; letters of credit, bills of lading, bills of sale; documents evidencing an interest in funds or financial resources, and any other instrument of export-financing; and 'Freezing of funds' means: preventing any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the use of the funds, including portfolio management. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:067:0001:0023:EN:PDF accessed on: 07.07.2008

1333(2000). Thus, according to art.2 of the regulation all funds and other financial resources belonging to any natural or legal person, entity or body designated in the Annex I by the Sanctions Committee list shall be frozen and no funds or other financial resources shall be made available directly or indirectly to or for the benefit of them. However such a restriction would be ineffective if the Sanctions Committee has granted an exemption that shall be obtained through the competent authorities of the MS listed in Annex II. [48] Additionally, the Commission was empowered to amend or supplement Annexes I, III, IV, V, and VI on the determination based by either UN SC or Sanctions Committee and it shall maintain all necessary contacts with the Sanctions Committee for the purpose of the effective implementation of the Regulation, without prejudice to the rights and obligations of the MS under the UN Charter. [49] Therefore, Annex I of the Regulation is to be amended and supplemented by the Commission in accordance with the SC Resolutions for the implementation. First consolidated list was published on 8 March 2001[50], and the name of the applicant Yassin Abdullah Kadi was added to the list in the third amendment made on 19 October 2001[51] and the names of the Ahmet Ali Yusuf and Al Barakaat Foundation were added on the forth amendment made on 12 November 2001[52] by the Commission.

Other important development was made on 27 May 2002 by adoption of Council Regulation (EC) No 881/2002 under art.60, 301 and 308 EC Treaty. Firstly, the regular bases art.60 and 301 EC Treaty used by the Council in adoption of Resolutions in to the EC legal order were supported by art.308 of EC Treaty as well. Secondly, although the meanings of the terms and restrictions preserved as it was in Regulation No 467/ 2001, there was a change in art.2 of the Regulation in terms of exemptions as it does not state anymore about the exemptions granted by the Sanction Committee but instead states that;

> 'No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions

[48] Council Regulation (EC) No 467/2001 art.2
[49] Council Regulation (EC) No 467/2001 art.10
[50] Yusuf para.23
[51] Kadi para.24
[52] Yusuf para. 25

Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.'

Moreover, Annex I of the Regulation No 881/ 2002 was still containing the names of the applicants Yassin Abdullah Kadi, Ahmed Ali Yusuf and Al Barakaat Foundation.

On 27 February 2003 by the Common Position 2003/ 140/ CFSP was adopted to implement SC Resolution 1452 (2002) concerning application of the developments made on exception to restrictions by the SC under humanitarian concerns, therefore on 27 March 2003 the Council adopted Regulation (EC) No 561/ 2003 amending Regulation 881/ 2002 as regards exception to the freezing of funds and economic resources to adjust the measures imposed on the Community in view of the Resolution 1452 (2002). Therefore art.2a was inserted in Regulation No. 881/ 2002 which states that:

'Article 2a

1. Article 2 shall not apply to funds or economic resources where:

(a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are:

(i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;

(ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;

(iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or

(iv) necessary for extraordinary expenses; and

(b) such determination has been notified to the Sanctions Committee; and

(c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of notification; or

(ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination.'[53]

[53] Council Regulation 561/2003 of 27 March 2003, L 82/1

As a result, in brief, the case filed for annulment of the originally first, 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 (OJ 2001 L 67, p. 1) and, second, Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25) for the *Kadi Case* and Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the forth time, Regulation No 467/2001 (OJ 2001 L 295, p. 16) for the *Yusuf Case* , subsequently, for the annulment of 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-Qaeda network and the Taliban, and repealing Regulation No 467/ 2001 (OJ 2002 L 139, p. 9), in so far as those acts concern the applicants.

II)EVALUATION OF THE COURTS FINDINGS

A) The Competence of The Community to Adopt The Contested Regulation

After explaining the details of the acts behind the judgments it would be appropriate to present the claims put forward by the applicants with the responses of the defendant with examining the implications of the Court's findings. The annulment grounds put forward by the applicants could be summarized as:

- the incompetence of the Council to adopt Regulation 881/2002[54]
- infringement of art.249 EC Treaty
- breach of fundamental rights [55]

In this dissertation, firstly the competence of the Community shall be examined as much as its implication which will also include briefly the allegation of infringement of art.249 EC Treaty. However, this dissertation would be mainly focusing on the Court's findings about the review of the contested regulation for the breach of fundamental rights which also touches upon to the question of the scope of review of the legality.

1) Applicants' Pleas

As it is explained in the former part of the dissertation, SC resolutions were implemented by EC and adopted to the EC legal order. Therefore, the first question raised in the cases was related with the legal basis of the Regulations ordering the freezing of the funds and assets of the applicants. In order to annul or not the contested

[54] Regulation 881/2002 *hereinafter* 'contested regulation'
[55] Yusuf para.78

regulation, the Court ought to examine under what power the Community is competent to adopt the contested regulation. The principle which regulates the situation in concern referred as attribution of powers which has been framed in art.5 EC Treaty. Article in concern 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'. Therefore, As it has been mentioned above, before the contested regulation, the regulations based on SC Resolutions 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[56] and 301[57] EC Treaty, in other words the sanctions were adopted under art.60 and 301 of EC Treaty only and limited to persons holding official position in a state structure, including their family members. [58] However, according to the applicant, Regulation No 467/2001 was no longer aimed at a country but at individuals, although with the objective of combating to international terrorism and such 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.*[59] The applicant also claimed that interpretation of art.60 and 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 7 EC Treaty, and to the principles that the

[56] 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.
[57] 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.
[58] **ECKES**, Christina, "Judicial Review of European Anti-Terrorism Measures- The Yusuf and Kadi Judgments of the Court of First Instance", *European Law Journal*, 14(1), 2008, pp.74-92, p. 77
[59] Yusuf para.82; Case T-184/95 *Dorsch Consult v. Council and Commission*, [1998], ECR II-667

Community legislation must be certain and its application must be foreseeable by those subject to it. [60]

Regulation No 467/2001 repealed by the contested regulation adopted under art.60, 301 and 308 EC Treaty. Therefore, according to the applicants' allegations art.308 EC Treaty [61] 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 as such a power could not be considered as either implied or necessary in order to attain one of the objectives of the Community and also alleged that freezing of the funds has nothing to do with avoiding distortion of competition as referred to in the fourth recital in the preamble to the contested regulation. [62] In that respect, it is also claimed that recourse to art.308 was not authorized either, since the contested regulation does not seek to attain any objective of the EC Treaty, but merely CFSP objectives under the Treaty on EU. [63] Even though the Treaty on EU expressly refers to the objective of respect of human rights, the ECJ held that art.308 did not permit the Community to accede to ECHR in its *Opinion 2/94*. [64]

2) ***Defendants' Pleas***

Before further explanations it would worth to mention that art.301 codifies 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 UN SC, against third countries; as firstly, the Member States took the political decision to subject a specific country to economic sanctions and afterward this political decision has been implemented by a Council decision on the

[60] Yusuf para.83
[61] 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.
[62] Yusuf para.84
[63] Kadi para.85
[64] Kadi para.86; In Opinion 2/94, the ECJ asked by Council of Ministers to present its opinion on EC accession to ECHR and its compatibility with EC Treaty. Please see: *Opinion 2/94 on Accession to the ECHR* [1996] ECR I-1759

basis of art.133 EC Treaty. 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 this action is necessary to attain, in course of the operation of the common market, one of the objectives of the Community and if there is no legal basis for this action in the EC Treaty. [65] In their defenses, defendants laid down that art.308 EC Treaty cannot be used as a base for amending the Treaty. However, the Council argued that those provisions pursue 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] Additionally, United Kingdom and the institutions claimed in their defense that the wording of art.60 and 301 EC Treaty does not imply any restriction on adoption of economic sanctions directed at individuals or organizations established in the Community and as such measures are intended to interrupt or to reduce, in part or completely, economic relations with one or more countries since citizens of the MS may supply funds and resources to third countries or to factions within them.[67] Also, they claimed that there is also a link between measures laid down in Regulation No. 467/2001 and Afghanistan, because of the link existing between Usama bin Laden, Al-Qaeda and the Taliban regime. [68] Besides, according to the Council, articles in concern have defined the tasks and activities of the Community in the domain of economic and financial sanctions and have offered a legal basis for an express transfer of powers to the Community in order to attain them. Therefore as those powers are expressly linked to and dependent on the adoption of an act pursuant to the provisions of Treaty on EU in the field of CFSP and also according to art.11(1) of the Treaty on EU 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. [69] As a consequence thereof, economic and financial coercion for reasons of policy, especially in implementing a binding decision of the SC, constitutes an express and legitimate objective of the EC Treaty, even if that objective is marginal, linked only indirectly to

[65] **BULTERMAN**, p.762
[66] Kadi para.65-66
[67] Yusuf para.85
[68] Yusuf para.86
[69] Kadi para. 67

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.[70] 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[71] as confirmed by the ECJ in *Delbar Case.* [72]

The defendants continued their plea stating that Community legislature has in past resorted to the legal basis of art.308 EC Treaty in the fields of sanctions when the measures went beyond the ambit of the common commercial policy or concerned natural or legal persons within the Community, as in particular of Council Regulation (EEC) No. 3541/92 regarding the prohibitions on Iraq.[73] Moreover, they 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[74] as 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. [75] As an another argument, the Commission stated that promotion of international security must be regarded 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, MS confirmed that solidarity binds Europe and overseas countries 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 emanations, while at the same time they are also specific emanations of the Community's competence in

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

regulations on the movement of capital, internally and externally. [76] 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 those vis-à-vis individuals, in accordance with the common position adopted by the Council.[77]

Moreover, defendants continued underlining the fact of essentiality of the creation of an internal market having uniform application on the free movement of capital in the Community, and action that has not been taken at the Community level to implement SC resolutions could create danger of differences in the application of the freezing of assets in MS causing a risk of distortion of competition. Defendants also added that as actions regulating capital movements by individuals with a view to interrupting economic relations with international terrorist organizations is a matter for which the Treaty has not provided specific powers and whilst such action requires resort to art.308 EC Treaty, it cannot be considered to go beyond the general framework of the Treaty. [78]

3) Court's Ruling on the Subject Matter

The answer of the Court to these claims and pleas is very long as it firstly preferred to explain from a negative perspective that on what these regulations can not be based. The Court chose to review Regulation No.467/2001 and 881/2002 separately as they were adopted partly on different legal bases. Therefore, according to the Court, applicants' claims for Regulation No. 467/2001 could not have succeeded. First and foremost, nothing in the wording of art.60 and 301 makes it possible to exclude the adoption of restrictive measures directly affecting individuals or organizations, 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

[76] Kadi para.76
[77] Kadi para.77
[78] Kadi para.79-81
[79] Yusuf para. 112

established practice and successively considered that art.60 and 301 allowed it to take restrictive measures against entities which or persons who physically controlled 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] It is also approved by the Court that art.60 and 301 EC Treaty would not provide an efficient means of applying pressure to the rulers with influence over the policy of a third country, if the Community could not adopt these measures in question to the individuals regardless of their nationality[81] which could be justified both by consideration of effectiveness and humanitarian concerns in accordance with art.60 and 301 EC Treaty. [82]

Second of all, by comparing the position of Usama bin Laden to Mr. 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 haven is provided to him and his associates by Taliban. The measures at issue were indeed intended to interrupt or reduce economic relations with third country, in connection with the international terrorism and more specifically, against Usama bin Laden and the Al-Qaeda network. [83] And finally, 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 pursued by the Community legislation imposing them. [84] 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. [85]

For the contested regulation, the Court agreed to the fact that after the collapse of the Taliban regime, the resolution no longer aimed at the fallen regime, but rather directly at Usama bin Laden, the Al-Qaeda network and the persons and entities associated with them; so regulations based solely on art.60 and 301 or only to art.308 by itself did not constitute a sufficient legal base for the contested regulation. [86] Therefore, the Court pointed out several conditions for applicability of art.308 EC

[80] Yusuf para.114
[81] Yusuf para. 115
[82] Yusuf para.116; Kadi para.91
[83] Yusuf para.118-121
[84] Yusuf para.122-123
[85] Yusuf para.124
[86] Yusuf para. 128-134

Treaty as it is only applicable when there is no other treaty provision giving the institutions the necessary power to adopt the measure to attain one of the Community objectives. [87] Firstly, as there is no specific provision of the EC Treaty providing for the adoption of measures of the kind laid down in the contested regulation relating to the campaign against international terrorism and, more particularly, to the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, where no connection whatsoever has been established with the territory or governing regime of a third state, the first condition is therefore satisfied in the instant case. [88] Secondly, as well as stated in the recital of the contested regulation, it is possible to connect the campaign against international terrorism and, the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, as it is one of the objectives which the Treaty entrusts to the Community in addition to avoiding distortion of competition in the Community. [89]

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; therefore, as 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 between undertakings could be affected by the implementation. [90] Though, as art.58 [91] allows MS to take

[87] Kadi para.99
[88] Kadi para.100
[89] Kadi para.101-102
[90] Kadi para.104-106
[91] 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;
(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.

measures on the movement of capital and payments on ground of public security which compasses MS's 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. [92] Consequently, for the CFI, if a mere finding of a risk of disparities between the various national rules and a theoretical risk of obstacles to the free movement of capital or payments or of distortions of competition liable to result there from were sufficient to justify the choice of art.308 EC Treaty as a legal basis for a regulation together with art.3(1)(c) and (g) EC Treaty, not only would the provisions of Chapter 3 of Title VI of the EC Treaty be rendered ineffective, but also review by the Court of the correctness of the choice of the proper legal basis might be rendered wholly ineffective. Therefore, according to the Court, such a situation would be contrary to the Community judicature's obligations entrusted to it by Article 220 EC of ensuring that the law is observed in the interpretation and application of the Treaty. [93]

However, according to the Court implementation of the SC resolutions in question by MS rather than by the Community, is not capable of giving rise serious danger of discrepancies between each other. This is firstly because, those regulations are precise and clear and not open to any different interpretations, secondly, the importance of the measures they call for, with a view to their implementation, does not appear to be such that there is reason to fear such a danger which leads to the fact that the measures at issue in these cases cannot find authorization in the objective referred to art.3(1) (c) and (g) EC Treaty. [94] 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. [95] Moreover, the Court also rejected the argument that imposition of financial

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3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.

[92] Kadi para.110
[93] Kadi para.111
[94] Kadi para.113-114
[95] Kadi para.115

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, as it is a reference of creating an ever closer union in regard of past failures. [96] 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, above all in spheres in which Community competence is marginal and exhaustively defined in the Treaty. [97] Finally, regarding the application of art.308 EC Treaty the Court stated that that article cannot be interpreted in a way giving the institutions general authority to use as a basis with a view to attaining one of the objectives of the Treaty on EU, as the Community and the Union are integrated but separate legal orders. It also does not empower either institution or MS to rely on art.308 EC Treaty to mitigate the fact that the Community lacks competence necessary for achievement of one of the Union's objectives and so any interpretation against this would be contrary to the pillared structure and the characteristic of their specified instruments. [98]

In the following part of the judgments the CFI listed why art.60, 301 together and art.308 EC Treaty solely cannot be the sufficient bases for the contested regulation, in other words, the Court dismissed the applicants arguments by making a negative definition of the article components. [99] However, it accepted that art.308 in conjunction with art.60 and 301 EC Treaty, give the power to adopt Community regulation relating to the battle against international terrorism imposing economic and financial sanctions on individuals in that end, without establishing any connection whatsoever with the territory or governing regime of a third country. [100] Firstly, taking into consideration the fact of the bridge established at the time of Maastricht revision between Community

[96] Kadi para.116-118
[97] Kadi para. 119
[98] Kadi art.120
[99] **KARAYIGIT**, Mustafa Tayyar, "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
[100] Kadi para.122; Yusuf para.158

actions imposing economic sanctions under art.60 and 301 EC Treaty and the objectives of the Treaty on EU in the sphere of external relations, the CFI stated that, those articles are wholly special provisions that contemplate situations in which action by the Community may be proved to be necessary in order to achieve not only the objects of the Community but also one of the objectives assigned in art.2 of Treaty on EU for the implementation of CFSP. [101] Moreover, for the sake of consistency and continuity of the attained objectives under art.3 of Treaty on EU, the Court underlined 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. [102] And the Court followed with stating that art.60 and 301 EC Treaty 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 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. [103]

Therefore, according to the Court it is possible for a common position or a joint action adopted under CFSP requiring the Community to adopt measures imposing economic and financial sanctions going beyond art.60 and 301 EC Treaty, under the *cumulative legal bases* of art.60, 301 and 308 EC Treaty that makes it possible to attain, in the sphere of economic and financial sanctions, the objective pursued under CFSP by the Union and its MS, despite the lack of express powers to the Community to impose economic sanctions on individuals or entities with no sufficient connection to a given country. [104] The Court also underlined that according to the Union's objectives defined in art.11 of Treaty on EU the fight against international terrorism and its funding is an

[101] Kadi para.122-123
[102] Kadi para.126
[103] Kadi para.127-128
[104] Kadi para.129-130

objective, even where it does not apply specifically to third countries or their rulers. [105] As a consequent thereof, sanctions provided for by Common Position 2002/402, on the joint basis of art.60, 301 and 308 EC Treaty gives the Council competence to adopt the contested regulations and therefore the Council has not widened the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and in particular by those that defined the tasks and activities of the Community which is in accordance with the international developments. [106]

4) Critics on the Subject Matter

Although many scholar criticized the decision, first official criticism regarding the justifications of the Court about the Community's power to adopt contested regulation the joint basis of art.60, 301 and 308 EC Treaty, was made by AG Maduro in his opinion on the appeal of the judgment by Kadi to the ECJ. [107] AG Maduro defended the fact that art.60 and 301 of EC Treaty have provided sufficient legal bases for the adoption of the contested regulation. He stated that it is difficult to reconcile the wording and the purpose of those provisions in concern with accepting them supplying the efficient 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 the EC Treaty does not regulate what shape the measures should take or who should be the target or bear the burden of the measures. [108] Moreover, Mr. Maduro argued that sanctions targeting individuals or entities will indirectly affect the country that they are having a relation to as a result of international characteristic of the economics. [109] Additionally, according to the opinion, art.301 EC Treaty should not be interpreted narrowly but on the contrary, as that gives the necessary power to the Council to adopt measures to impose economic sanctions not only to third countries but everyone who associates with terrorist activities.

[105] Kadi para. 131
[106] Kadi para.133-135
[107] AG Maduro para.11-16
[108] AG Maduro para.12
[109] AG Maduro para.13

Additionally, art.308 EC Treaty should not be accepted as it establishes a bridge between pillars but conversely it is an strictly enabling provision like art.60 EC Treaty which only provides the means but not the objective and if any act to interrupt economic relations with non-sate actors in accordance with CFSP cannot be done under art.301, it cannot be also done under art.308 as a base that broadens the scope of the art.301 EC Treaty. [110]

Before giving details about the literature I would like explain the ECJ's decision on the subject matter. Firstly, ECJ concluded that there is not need to examine Regulation No 467/2001 as it is repealed and replaced by the contested regulation. [111] Then it followed by rejection of Commissions arguments on acceptance of art.60, 301 EC Treaty as appropriate and sufficient legal bases for the contested regulation especially because of the lacking link with the governing regime of a third country. [112] Regarding the acceptance as joint bases of art.60, 301 and 308 EC Treaty for contested regulation, ECJ stated that with such an interpretation judgments under appeal would be vitiated by an error of law. [113] Although ECJ agreed with the CFI that a bridge has been constructed between the actions of the Community involving economic measures under art.60 and 301 EC Treaty and the objectives of the EU Treaty in the sphere of external relations, including CFSP, neither the wording nor the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to art.308 EC Treaty. [114] However, ECJ accepted the inclusion of art.308 with art.60 and 301 as legal bases for the contested regulation like CFI did although with different arguments. According to ECJ, firstly, as art.60 and 301 EC Treaty do not provide any express or implied powers[115] of action to impose sanctions against individuals and entities do not have a direct relationship to the governing regimes of a third country, that lack of power could be made by having recourse to art.308 EC Treaty as a legal basis for that regulation in

[110] AG Maduro para.13-14
[111] The Appeal para.159-162
[112] The Appeal para.163
[113] The Appeal para.196
[114] The Appeal para.197
[115] For details regarding express and implied powers under the EC Treaty please see: **EECKHOUT**, Piet, *'External Relations of the European Union: Legal and Constitutional Foundations*', Oxford Uni. Press, 2004, p.101

addition to art.60 and 301 EC Treaty and within their *ratione materiae.* [116] Secondly, ECJ stated in its judgment that as the multiplication of these measures a national level could have an effect on operation of the common market which might also cause distortion of competition between member states justifies the legal bases of art.60,301 and 308 EC Treaty for contested regulation. [117] Therefore, as contested regulation could legitimately be regarded as designated one of the objectives of the common market with in the meaning of art.308 EC Treaty and as addition of art.308 EC Treaty enables the European Parliament to take part in the decision making process, ECJ declared that art.60, 301 and 308 EC Treaty constituted the legal basis of the contested regulation and appeal must be dismissed in their entirety as unfounded. [118]

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. [119] Additionally, *Karayigit* also accepted the applicability of the cumulative basis of art.60, 301 and 308 EC Treaty. [120] 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 wholly special structure of art.60 and 301 regarding the economic sanction and art.301 establishes clear outlines for a permissible action. [121] 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

[116] The Appeal para.216
[117] The Appeal para.219-234
[118] The Appeal para.235-236
[119] **TOMUSCHAT**, Christina, "Case Law", *CMLR*, 43, 2006, pp.537-551 p.540
[120] **KARAYIGIT**, p. 385-386
[121] **ECKES**, Christina, "Judicial Review of European Anti-Terrorism Measures-The *Yusuf* and *Kadi* Judgments of the Court of First Instance". *European Law Journal*,14(1),2008, p.74-92 p.79

human rights, she also claimed that the judgment endangered the power balance between Community and the MS and disregarded the constitutional boundaries of the Treaty, in particular the principle of conferred powers and the principle of subsidiarity.[122]

It should be emphasized that although the arguments raised by AG Maduro can be accepted as convincing, art.301 gives a legal bases as in its very wording to adopt necessary means for the fulfillment of the CFSP objectives by necessary measures, since the context of CFSP common positions are comprised primarily of legal norms and rules expressing an opinion about a situation and stating specific purposes to be achieved rather with more specific measures; so most of the common positions require additional Community measures on the basis of art.301 and 60 EC Treaty as they refer in one way or another to measures to be taken by the EC in general and very often these measures are therefore related to the competences of the Community. [123]

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*. Therefore, I would disagree with Mr. Maduro as the legal bases of art.60 and 301 EC Treaty would be enough for the implementation of the measures directed to individuals as it will have an indirect effect on the third country because of international nature of the economics. [124] I also agree with the CFI in accepting art.60, 301 and 308 EC Treaty as the cumulative bases of the contested regulation. As a consequence thereof, art.308 EC Treaty should be added as an additional bases 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

[122] **ECKES**, p. 76-78
[123] **CURTAIN**, Deirdre and **DEKKER**, Ige F., " The EU as a 'Layered' International Organization: Institutional Unity in Disguise", in '*The Evolution of EU Law*' edt.by CRAIG, Paul and DE BURCA, Graine, 1999, Oxford University Press, pp.83-136 at p.107-108
[124] see **BULTERMAN** for the same approach p.763

distortion of competition between MS 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.

B) CFI's Findings on Art.249 EC Treaty

Another argument which has been alleged only in the *Yusuf Case* concerns art.249 EC Treaty regarding the general applicability of the regulations. According to the applicant as the regulations prescribe sanctions against individuals, it is against the art.249 EC Treaty because it lacks general application which derives from the general principle of equality under the law. Moreover, method of action as consisting of laying down a legislative provision by means of a list is also contrary to the principles of lawfulness and legal certainty. [125] Applicants also stated that inclusion of their names to the contested regulation is only the consequence of existence of their names in the Sanctions Committee's list without any objective determination and precise reason for their inclusion; however, defendants stated that contested regulation indeed is of general application. [126]

According to CFI, although person and entities names are listed in the regulation, this has no effect on general applicability of the regulation, as the legislative nature of a measure is not called in question by the fact of possibility to determine more or less precisely the number or even the identity of the persons whom it applies at any given time, as long as such application takes effect by virtue of an objective legal or factual situation determined by the measure in question in relation to its purpose. [127] Furthermore, since it prohibits anyone to make available funds or economic resources to

[125] Yusuf para.181
[126] Yusuf para.182-183
[127] Yusuf para.185

certain persons and direct and individual concerns raised under art.230 (4) EC Treaty will not affect the general nature of that prohibition which is effective *erga omnes*; therefore, the CFI rejected this allegation of the applicant. [128]

Although, the ECJ has not always adopted the same approach towards on deciding whether a challenged measure is in the form of a regulation having direct and individual concern [129], in *Calpak Case*[130], measure applied to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner. [131] In the appeal decision agreed with CFI as Annex I of the contested regulation is amended by the removal or addition of the names as the fact remains that the persons to whom it is addressed are determined in the general and abstract manner. [132]

Therefore, I do agree with the CFI that the regulation has general application as it concerns anyone who makes funds or economic resources available to certain persons as the list open to changes and removals. So, inclusion of name list does not affect the general application of the regulation.

C) Judicial Review of the UN Security Council Resolutions by the Community Courts

The regulations in concern, are contested on mainly for three reasons by the applicants; firstly, the lack of competence of the Council and Commission to adopt the Regulations, secondly, infringement of the Article 249[133] of EC Treaty and finally the

[128] Yusuf para.186-189
[129] **CRAIG**, Paul and **DE BURCA**, Graine, '*EU Law: Text, Cases, and Materials*',2003, 3rd Edition, Oxford University Press, p.493
[130] Cases 789 and 790/79, *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA v. Commission*, [1980], ECR 1949
[131] **CRAIG/DE BURCA**, p.494
[132] The Appeal para.242
[133] Argument concerning the general application of the Regulations under art.249 EC Treaty contested only in Yusuf case, para.181-188

breach of the fundamental rights of fair hearing, respect for property -in this respect the principle of proportionality- and effective judicial review and remedy. Thus, in these judgments the CFI was asked to annul Council and Commission Regulations which has been deemed by the Court as an indirect review of the SC Resolutions that has given rise to the contested regulations and considered to be out of the ambit of its judicial review. [134]

However, in order to come to that conclusion or in other words to decide on whether there are any breaches of the fundamental rights to annul the Regulations, the CFI first needed to make a decision on its scope of judicial review[135] and has to rule on to what extent it is bound and it can review the SC Resolutions, with the obligations and rights derived from the Charter and the constitutional treaties for itself and its MS. Hence, to explain the mere facts about the above mentioned questions, the CFI considered necessary to explain the relationship between the international legal order under UN and the domestic or Community legal order which is the basically determining the mere facts about the primacy of the UN and its SC decisions or in other words defining the hierarchy of norms in European legal order again. [136]

1) Legal Status of the Charter and SC Resolutions in the International Legal Order

The Court started its arguments by accepting the fact that from the stand point of international law, the obligations of the MS of the UN under the Charter prevails over every other obligation even above the obligations deriving from the EC Treaty and ECtHR. [137] Thus, to support its assumption it invoked many treaty provisions from the EC Treaty, the Charter and as well as the principles of customary international law.

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[134] Kadi para. 225
[135] Kadi para.176
[136] **LAVRANOS** Nikolas, " Judicial Review of UN Sanctions by the Court of First Instance", *European Foreign Affairs Review* 11,2006, Kluwer Law International, pp.471-490, p.478
[137] Kadi para.181

According to the ruling, the rule of primacy, above all derives from customary international law rule created under the Vienna Convention on the Law of the Treaties[138] (the 'VCLT') of 23 May 1969. The VCLT has an effect on any treaty that is the constituent instrument of an international organization and any treaty adopted with in international organization[139]. The VCLT states that a party may not invoke the provisions of its internal law as the justification for its failure to perform a treaty. [140]

Secondly, maybe the most controversially, the CFI stated[141] that the primacy of the Charter is expressly implied at art.103 of the Charter according to which;

'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.'

When it is read in conjunction with art.30 of the VCLT, art.103 of the Charter will be applicable to the treaties containing rules conflicting with the Charter even though they were concluded before the Charter, in other words, any rule against the Charter accepted by the MS of the UN by any regional, multilateral or bilateral agreement will be void regarding the conflicting measures. According to the Court, this primacy extends to the SC resolutions, as UN Members agreed to accept and carry out the decisions of the SC with art.25 of the Charter which is consistent with the ICJ

[138] In many ICJ Cases articles of the VCLT accepted as codifying existing customary international law, for detailed information about which articles accepted as customary international please check; Fisheries Case, Federal Republic of Germany v. Iceland, 1973, ICJ Reports; *Danube Dam Case*, Hungary v. Slovakia, 1997, ICJ Reports; *Namibia Case*, Legal Consequences for the Continued Presence of South Africa in Namibia (South West Africa)notwithstanding Security Council Resolution 276 (1970), 1971,ICJ Reports
For more information about the VCLT please see; **GUNDUZ**, Aslan, '*Milletlerarası Hukuk: Temel Belgeler, Ornek Kararlar*', Beta, 4th Edition,2000, p.181-218; **DIXON**, Martin and **McCORQUODALE**, Robert, '*Cases and Materials on International Law*',3rd Edition, Blackstone Press Limited, 2000, pp.58-108
[139] VCLT art.5
[140] VCLT art.27; On the other hand, it should be kept in mind that the main task of modern international law is to reach a consensus on the definition of human rights on universal level with an adequate enforcement mechanism against its violations, therefore endorsement of art.27 VCLT would be feasible only to the extent that there is an assurance that a certain level of protection of human rights is guaranteed.
[140] Thus, when we look at applicability of art.27 of VCLT to human rights issues, we can think that in case of a lack of protection of human rights in a certain level, in our case international level, national laws can be used as an excuse to perform an obligation deriving out of an international treaty.
[141] Kadi para.183

decision on the *Lockerbie Case*. [142] *Lockerbie Case* is very important as it is a decision in which ICJ decided on primacy of SC Resolutions besides any other obligation even though it is out of a treaty provision. [143] Therefore, as the obligations of the Parties deriving out of SC Resolutions taken under Chapter VII in that respect shall prevail over any of their obligations under any international agreement. [144]

2) ***Legal Status of the Charter and SC Resolutions in the Community legal order***

Moreover after setting forth the legal justification points under international law the CFI checked Community law for any other legal grounds. Therefore, according to the first paragraph of art.307 of the EC Treaty which also supports the obligation of the MS under the Charter, as the EC Treaty provisions shall not affect the rights and obligations arising from the agreements concluded before 1 January 1958 or before accession with one or more third countries. [145] Furthermore, at this point it worth to mention that in *Cento-Com Case*[146] the ECJ held that national measures contrary to the common commercial policy provided under art.133 EC Treaty could be justified under art.307 of the EC Treaty, if the MS concerned performing an obligation under the Charter or a SC resolution. [147]

In addition to that the CFI calls attention to art.297 EC Treaty which regulates the fact that MS shall consult each other to take together necessary steps to prevent the functioning of the common market to be affected by the measures which MS are called

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[142] *Lockerbie Case*, Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United States of America, 1992, ICJ Reports available at: http://www.icj-cij.org/docket/files/88/7131.pdf accessed on: 23.10.2008

[143] *Lockerbie Case* para.40-45; For detailed information please see: **MATHESON** Michael J, "ICJ Review of Security Council Decisions", *George Town University International Law Review*, January 2004,available at: http://findarticles.com/p/articles/mi_qa5433/is_200401/ai_n21353198/pg_5?tag=artBody;col1 accessed on: 23.10.2008

[144] Kadi para.184 (emphasis added)

[145] Kadi para.185; The only MS that has not been a member of the UN before became a member was Federal Republic of Germany and please check for the details for the membership of Federal Republic of Germany, Kadi para.187 and Yusuf .237

[146] Case C-124/95, *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England*, [1997] ECR I-81 hereinafter 'the *Centro-Com Case'*

[147] Kadi para.191, Yusuf para.241

upon to carry out the obligations raised for the purpose of maintaining peace and international security. [148]

Be that as it may, as MS's responsibility to fulfil their obligation under the Charter follows from art.297 and the first paragraph of art.307 of the EC Treaty[149], it should be kept in mind that, assuming that even if CFI finds the Regulations and Resolutions in concern void for some reason, MS would be able to invoke their rights under art.297 which contains a reserve of sovereignty clause, therefore they will still be able to regulate the Resolutions under the obligations for the purpose of maintaining international peace and security. [150] Therefore, for the Community a way to remain in charge would be precluding the application of art.297 and 307 EC Treaty by endowing resolutions with primacy over even primary European law, albeit this does not seem compatible with the European constitutional history and will have a diverse effect on established Community legal hierarchy. [151]

After reasoning the primacy of the UN Resolutions in the EC legal order, the Court needed to justify the grounds for the implementation of the resolutions on the EC level. At this point the CFI emphasized the fact that the Community is neither directly bound by the Charter nor required to accept and carry out the decisions of the SC under art.25 of the Charter as it is not a member of the UN, or addressee of the resolutions, or the successor to the rights and obligations of the MS for the purpose of public international law. [152] Nonetheless, as the MS could not derogate more powers than they posses or withdraw from their obligations to third countries under the Charter as all the MS were the members of the UN before concluding Treaty establishing European Economic Community, the Community must be considered to be bound by the obligations under the Charter in the same way as its MS and the Community is under the duty of not impeding the performance of the obligations of MS which stem from the Charter. [153] The CFI supported this view by underlining the fact that under art.48/2 of

[148] Kadi para.188
[149] Kadi para.193-196
[150] **CANOR**, p. 172-173
[151] **KARAYIGIT**, p. 397
[152] Kadi para.192
[153] Kadi para.197

the Charter, the SC decisions shall be carried out by the members of the UN directly and through their action in the appropriate international agencies of which they are members.[154] Therefore, under the light of the facts mentioned above about rules derived from international and Community law for the supremacy of the Charter, according to CFI, the powers necessary to fulfil the obligations of the MS have been transferred to the Community in order to exercise those powers to that end. [155]

Nevertheless, the CFI also added that, the EC is not bound by the Charter under general international law but by the virtue of the EC Treaty itself. [156] The Court supported this idea by the analogy driven out of the ECJ case law together with the EC Treaty provisions. Thus, with an analogy to the ruling of the ECJ in *International Fruit Company Case*, MS could not withdraw from their obligations by concluding another treaty[157] and under the EC Treaty as the Community has assumed powers previously exercised by MS in the area governed by the Charter, the provisions of that Charter have binding effect on the Community. [158] It should be kept in mind that this ruling was concerning the relation between the GATT and the Community therefore the treaty and agreement provisions having entirely related to the economics and trade. However, the CFI applied the same conditions to an issue where fundamental human rights at stake. Therefore under the light of these facts, by regarding the position of EEC within the GATT, the Court postulated a functional succession of the EU into the UN obligations of the MS.[159] Therefore, the CFI reached to the conclusion that the Community should follow the obligations under the Charter and allow the necessary means for the full performance of these obligations by the very treaty establishing it[160] and therefore the Community was required to give effect to the SC resolutions within the sphere of its powers.

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[154] Kadi para.199
[155] Kadi para.198
[156] **BULTERMAN**, p.765
[157] Case 21-24/72, *International Fruit Company v. Producktschap voor Groenten en Fruit*, 1972, ECR 1219, para.11; Kadi, para.201
[158] Case 21-24/72 *International Fruit Company Case* para.18; Kadi para.202
[159] **NETTESHEIM**, Martin, "UN Sanctions against Individuals- A Challenge to the Architecture of European Union Governance", *WHI-Paper 1/07*, p.19 available at: http://www.grakov-berlin.de/documents/Veroeffentlichungen/un_sanctions_against_individuals.pdf accessed on: 23.10.2008
[160] Kadi para.204

As a final point, the CFI has changed one of the main principles of EC law which is the supremacy[161] and declared that the Community legal order is a legal order not independent from UN and not governed by its own rules of law.[162] From the very beginning of the existence of the EEC, in *Van Gend Loos Case*[163] by contrast with ordinary international treaties, the ECJ has emphasized that the EEC created its own legal system. Also in its famous *Costa/ENEL Case*[164] stated that the Community constitutes a new legal order in international law which leads to the fact that EC law must be regarded as a separate legal order that does not belong to the international or national legal order because of its *sui generis* structure which is also not subordinate to international law. [165] The Community legal order rather 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. [166] In other words, in respect to EU's relationship with international organizations, case law emphasizes that Community participation in agreements setting up their institutions must not affect the autonomy of the Community legal order. [167] Also in *International Handelsgesellschaft Case*, the Court stated that as the law stemming from the Treaty is an independent source of law, however because of its very nature, it cannot be overridden by rules of national law, and the validity of a community measure or its effect within a MS cannot be affected.[168] Therefore, the conclusion that can be reached from these previous cases is that the Court accepted the independency of the Treaty over any national law and its separate entity.

However, by these decisions, the CFI explicitly states that the obligations flowing directly from the Charter, resolutions created by the SC and individual decisions concerning a specific person by the SC Sanctions Committee enjoy the same

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[161] For more information about direct effect and Supremacy in EC Law please see: **DE WITTE**, Bruno, "Direct Effect, Supremacy, And The Nature Of The Legal Order", p. 177-213 in The Evolution of EU Law, edt.by Paul Craig/Grainne De Burca, Oxford University Press,1999
[162] Kadi para.208; **LAVRANOS** p.478-479
[163] *Case 26/62, NV Almemene Transporten Expeditie Onderneming v. Nederlandse administratie der Belastingen*, [1963], ECR 1
[164] Case 6/64, *Costa Flaminio v. ENEL*, [1964], ECR 585, CMLR 425
[165] **HOWE**,Martin, "The European Court: The Forgotten Powerhouse Building The European Superstate", *Institute of Economic Affairs*, 2004, Blackwell Publishing, p.17-21 at p.17
[166] **LAVRANOS**, p.479 (emphasis added)
[167] **EECKHOUT**, p.206
[168] *Internationale Handelsgesselschaft v. Einfuhr und Vorratsstelle Getreide*,1970, ECR, para.3

supremacy over any type of community law. [169] The concept of primacy over any other law obligation is an exceptionally strong constitutional term, which is belonging to EC law and cannot easily be transferred one to one into the UN system, as its transfer even into EU law (second and third pillar issues) is highly disputed. [170] Also it can be said that, the CFI with these decisions developed an approach which can be either interpreted as a deliberate and wise step towards an adjustment of the Union's constitutional law to the changed demand of international security policy or as a questionable usurpation of competences. [171] However, the Court is unaware of the implications of its seemingly unconscious transfer of an internally functional model to a triangular relationship in which UN SC resolutions stand above the Community legislations and having a same effect in Community legal order and national legal orders.[172]

D) Judicial Review of Measures with Regard to the Fundamental Human Rights

1) The Scope of the Judicial Review

Under this heading the scope of the review of the legality of SC Resolutions and implementing measures that the CFI carried out shall be examined. It should be implied that the attitude of the CFI in this part of the judgment would be assessed separately for each breach under the light of raised discussions amongst scholars.

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[169] **ECKES**, p.81

[170] **ECKES**, p.81; In the appeal ECJ stated that SC Chapter VII Resolutions could not be subject to judicial review of its internal lawfulness, same with regard to its compatibility with the norms of jus cogens, and therefore to that extend enjoyed immunity from jurisdiction. However, as Community is based on law neither its MS nor its institutions can avoid review of conformity of their acts with the EC Treaty. Moreover, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement a issue, and not to the latter as such.(para.280-286)

[171] **NETTESHEIM**, p.17-18

[172] **NETTESHEIM**, p. 22; However the triangular system established by the CFI in these judgments also criticized as it is still trapped in monism by finding that the acts of SC can only be judged against *jus cogens* for more details please see: **von BOGANDY**, Armin, " Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law", *International Journal of Constitutional Law*, July-October 2008, pp.397-413

a) The CFI's Assessment on *Jus Cogens*: Right to review or the Limit of the Review

The applicants brought this action under art.230 of the EC Treaty which regulates the review of lawfulness of regulations or decisions, is of direct and individual concern with the allegation of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule relating to its application, or misuse of powers. [173] At this point, the CFI preferred to assess whether there is any structural limits imposed by *general international law* or by *the EC Treaty* itself regarding its judicial review on the subject matter. [174]

The CFI, before asserting its decision about the issue, firstly underlined the fact that the EC is based on the rule of law, as neither its MS nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions; also judicial control is a general principle of law that is a part of the common constitutional traditions of the MS and which is as well laid down in art.6 and 13 of the ECtHR. [175]

It shall be reminded that the contested regulation was adopted in the light of Common Position 2002/402 that constitutes the implementation at the Community level, of the obligation placed on the MS of the Community, stemming from SC Resolutions 1272 (1999), 1333 (2000) and 1390 (2002). [176] Therefore, the institutions claimed that they have no discretionary power in the context of the Resolutions because of their circumscribed powers and no power for alteration as they acted persistent with SC Resolutions. [177] As a consequence thereof, review of legality of the regulations having

[173] Kadi para.211
[174] Kadi para.212 emphasis added
[175] Kadi para.209-210
[176] Kadi para.213
[177] Kadi para.214

regard to the fundamental rights or general principles of Community law will lead to indirect review of the lawfulness of the Resolutions; therefore annulment of the Regulation shall mean indirectly that the SC Resolutions are infringing their fundamental rights. [178] As the Court's review ought to be confined, on the one hand, to assert whether the rules on formal and procedural requirements and jurisdiction imposed in this case on the Community institutions were observed and, on the other hand, to assert whether the Community measures at issue were appropriate and proportionate in relation to the SC Resolutions which they put into effect. [179] However, limitation of the jurisdiction was found necessary by the Court as a corollary to the principles identified above about the relationship between the international legal order under the UN and the Community legal order. [180] In this aspect, determination of the concept of threat to international peace and security and the measures required to maintain or re-establish them is solely the responsibility of the SC and through Sanctions Committee by a binding decision under art.48 UN Charter to freeze funds of certain individuals or entities. [181]

The Court also decided that it has no jurisdiction, either on the basis of international law or on the basis of Community law, to review indirectly the lawfulness of such a decision according to the standard of protection of fundamental rights as recognized by the Community legal order. [182] The Court concluded as such firstly because, such jurisdiction would be incompatible with the undertakings of the MS under the UN Charter, especially art.25, 48 and 103 thereof, and also with art.27 of VCLT. [183] Secondly, such a jurisdiction would be contrary to provisions of the EC Treaty, especially art.5, 10 and 297 EC Treaty, and art.5 of the Treaty on EU, in accordance with which the Community judicator is to exercise its powers on the conditions and for the purposes provided for by these provisions and moreover, such jurisdiction would be incompatible with powers of the Community and the CFI, as they should be exercised in

[178] Kadi para.215-216, Yusuf para.267
[179] Kadi para.217
[180] Kadi para.218
[181] Kadi para.219-220
[182] Kadi para.221
[183] Kadi para.222

compliance with international law. [184] Additionally, under art.307 EC Treaty and art.103 UN Charter infringement references of fundamental rights protected by Community law or of the principles of that legal order, cannot affect the validity of a SC measure or its effect in the territory of the Community, as the Court is obliged to interpret and apply those measures in a manner compatible with the MS's obligations under the UN Charter.[185] However, as AG Maduro stated as well, it should be kept in mind that the powers retained by the MS in the field of security policy must be exercised in a manner consistent with Community law. According to the Court's ruling in *ERT Case* it may be assumed that, to the extent that their actions fall within the scope of Community law, MS are subject to the same Community rules for the protection of fundamental rights as the Community institutions themselves; therefore in such a case MS could not possibly adopt the same measures – as long as those measures came within the scope of Community law – without acting in breach of fundamental rights as protected by the Court. Thus, the argument based on Article 307 EC is of indirect relevance only. [186]

On the other hand, although no human rights treaty is directly binding upon the EU and its institutions, the CFI and ECJ normally rely on the ECtHR, common constitutional traditions of the MS when reconstructing general principle in the field.[187] However, the attitude of the Court, regarded as change in its *jurisprudence*, since ECJ in *Bosphorus Case* [188] did not restrict itself and so without hesitation reviewed implementing regulation of SC Resolution, in the light of fundamental rights and common constitutional principles. [189] However, the Court in *Yusuf* and *Kadi Cases* stated that it is empowered to check the lawfulness of the resolutions of the SC in question, indirectly with regard to *jus cogens*. [190] Therefore before moving forward to

[184] Kadi para.223
[185] Kadi para.224-225
[186] Opinion of AG Maduro para.30
[187] **PORRETTO**, Gabriele, "The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection" in '*Fresh Perspective on the 'War on Terror*'', edt. by Miriam Gani and Penelope Mathew, ANU E-Press, 2008, pp. 235-268 p. 246
[188] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS*, '*Bosphorus Case*', 1996 E.C.R. I-3953, paras. 11-18.
[189] **PECH**, Laurent, "Trying to Have it Both Ways- On the First Judgments of the Court of First Instance Concerning EC Acts Adopted in the Fight against International Terrorism", *Irish Human Rights Review*, Vol.1, 2007, para.11; **BULTERMAN**, p.766-767
[190] Kadi para.226

evaluation of the judgments, it is necessary to give some details about the concept of *jus cogens*.

b) What Is *Jus Cogens* And Its Relation With Fundamental Human Rights?

(i) Definition of *Jus Cogens*

Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by use of terms like 'fundamental' or, in respect to rights, 'inalienable' or 'inherent' and in the recent past some eminent options have supported the view that certain overriding principles of international law exists, forming a body of *jus cogens*.[191] *Jus cogens*[192] is the technical name given to the basic principles of international law, which states are not allowed to contract out of, 'peremptory norms of general international law'[193] and originated solely as a limitation on the international freedom of contract. [194]

The major distinguishing feature of *jus cogens* norms is their indelibility or in other words their peremptory nature which is accepted and recognized by the international community of states as a whole and only can be modified by the formation of a subsequent customary rule of contrary effect. [195] The idea of making provisions on international *jus cogens* part of an official codification of the law of the treaties originated from Lautherpacht's First Report on the Law of the Treaties of 1953, which

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[191] **BROWNLIE**, Ian, "*Principles of Public International Law*", 3rd Edition, 1979, Clarendon, pg.512

[192] *Jus cogens* (j<<schwa>>s koh-jenz), n. [Latin "compelling law"] 1. A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted. • A peremptory norm can be modified only by a later norm that has the same character. Cf. JUS DISPOSITIVUM. [Cases: International Law Key Number graphic 1. C.J.S. International Law §§ 2-4.] 2. Civil law. A mandatory rule of law that is not subject to the disposition of the parties, such as an absolute limitation on the legal capacity of minors below a certain age. -- Also termed (in sense 2) peremptory norm; Black's Law Dictionary accessed online through Westlaw on:10.08.2008

[193] **MALANCZUK**, Peter, '*Akehurst's Modern Introduction to International Law*', 7th Revised Edition, 1997, Routledge, p.57

[194] **SHELTON**, Dinah, " Normative Hierarchy in International Law", *AJIL*, Vol.100, No.2,2006, pp.291-323 at p.297

[195] **MALANCZUK** p.58

has been edited by Sir Gerald Fitzmaurice and Sir Humphrey Waldock and they introduced the concept of inconsistency with a general rule or principle of international law having a character of *jus cogens.* [196]

The only references to peremptory norms in international texts are found in art.53 of 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." [197]

During the preparatory work on art.53 VCLT no agreement was possible on which international norms belong to *jus cogens*[198] 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*. [199]

In order to acquire the quality of *jus cogens* it is generally recognized that firstly a norm must pass the normative tests for rules of 'general international law' and secondly, such a norm must be 'accepted and recognized' as a peremptory norm by the international community of states as a whole; however, the requirement of the acceptance and recognition 'as a whole' should not be interpreted to mean the recognition by all the essential components of the international community, as then it will establish a very strict threshold for this particular type of law-making, which is almost like call for unanimity among all the important elements of the modern

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[196] **SCHWELB**, Egon, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", *AJIL*, Vol.61, No.4, 1967,pp. 946-973 at p.949
[197] VCLT art.53
[198] **MALANCZUK,** p.58;
[199] **DANILENCO**, Gennady M., "International Jus Cogens: Issue of Law-Making", *EJIL*, Vol.2, No.1, 1991, pp.42-65 online Access at p.http://www.ejil.org/journal/Vol2/No1/art3-01.html#TopOfPage accessed on:20.07.2008

international community that an opposition would prevent the emergence of a rule of *jus cogens.* [200]

Since its inclusion in the VCLT *jus cogens* has been a source of controversy as it had been largely developed by international legal scholars on the issue of how peremptory norms come into being. [201] Therefore, after the adoption of the VCLT, the literature has abounded in claims that additional international norms constitute *jus cogens* such as all 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, the duty to assassinate dictators, self-determination and little evidence has been presented to demonstrate how and why the preferred norm has become *jus cogens*. [202] However, certain provisions of *jus cogens* are the subject of general agreement, including the rules to use force by states, self-determination, and genocide. Additionally, existence of a customary international law before a rule of *jus cogens* would strengthen the acceptance and recognition by the international community[203] and the better view appears to be that a rule of *jus cogens* can be derived from custom and possibly from treaties, but probably not from other sources. [204] For example in the *Nicaragua Case* the ICJ clearly proceeded on the assumption that the peremptory rule prohibiting the use of force was based not on some exotic source, but on the two most commonly used and established sources of law, namely treaty and custom. [205] Additionally, only treaties of a truly universal nature establishing general international law may produce peremptory rules; but in practice treaties seem to be able to contribute to the development of general norms of *jus cogens* only with the help of the customary process. [206] However, while the existence of *jus cogens* in international law is an

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[200] **DANILENCO**, p. http://www.ejil.org/journal/Vol2/No1/art3-02.html#TopOfPage
[201] **BIANCHI**, "Human Rights and The Magic of Jus Cogens", *EJIL*, 19, 2008, pp.491-508 p.492 *hereinafter* **BIANCHI III**
[202] **SHELTON**, p.303
[203] **DIXON**,Martin and **McCORQUODALE**,Robert, ' *Cases and Materials on International Law* ', 3rd Edition, 2000, Blackstone Press Limited, p.96
[204] **MALANCZUK**, p.58
[205] **DANILENCO**, p. http://www.ejil.org/journal/Vol2/No1/art3-02.html#TopOfPage
[206] **DANILENCO**, p. http://www.ejil.org/journal/Vol2/No1/art3-03.html#TopOfPage

increasingly accepted proposition, its exact scope and content remains an open question as there is not a precise list of human rights norms with a peremptory character. [207]

(ii) *Jus Cogens* - Human Rights Relationship

Before moving into the details of the relationship between *jus cogens* and fundamental human rights, it would be beneficial to give some details about the evolution and content of international human rights. [208]

International human rights law, in the sense we know today, starts with the Charter of the UN. According to art.1(3) UN Charter, 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" which is not surprising, considering that it was drafted in the aftermath of World War II, the Holocaust, and the murder of millions of innocent human beings; however contrary to this background, the Charter did not impose any concrete human rights obligations on the UN member states. [209] When the vagueness of human rights notion in art.55 and 56 UN Charter, read together with the non-intervention clause in art.2(7) of the UN Charter, tended for years to hinder serious UN action in confronting human rights violations. [210] Human rights provisions of the UN Charter, despite the fact that their vagueness did prove to have important consequences as the UN Charter had internationalized the concept of human rights which means that member states were deemed to have assumed some international obligations relating to human rights and no longer validly claim that human rights as such were essentially domestic in character.[211] In other words, one of the accomplishments of the UN has

[207] **CAPLAN**, Lee M., "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory", *AJIL*, Vol.97, No.4, 2003,pp.741-781 p.772
[208] **BUERGENTHAL**, Thomas, "The Evolving International Human Rights System", *AJIL*, Vol.100, No.4, 2006, pp.783-807
[209] **BUERGENTHAL**, p.785-786
[210] **BUERGENTHAL**, p.786
[211] **BUERGENTHAL**, p.787

been to consolidate the principle that human rights are a matter of international concern that the international community is entitled to discuss. [212]

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. [213] 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. [214] Additionally, the term of fundamental rights, which inspired the development of international human rights, originated in national constitutions as it is commonly used. [215]

Be that as it may, from the perspective of the SC, while having the power under Chapter VII of the UN Charter to adopt binding resolutions and to order enforcement measures, including economic sanctions and military action and after the Cold War SC has also exercised its powers in situations of massive violations of human rights. [216] Also, in the international discourse on the accountability of the international organizations it is generally recognized that they are indeed bound by the customary law

[212] **MERON**, Thedore, "On a Hierarchy of International Human Rights", *AJIL*, Vol.80, No.1, 1986, pp.1-23 p.13
[213] **BUERGENTHAL,** p.787
[214] **MERON**, p.5
[215] **MERON,** p. 8
[216] **BUERGENTHAL**, p.790

of human rights.[217] Therefore, by the means of many human rights instruments such as resolutions, declarations, and conventions, the UN contributed to the protection of human rights which are together with the human rights provisions of the UN Charter, laid the normative foundation of the contemporary international human rights revolution and inspired the lawmaking processes that created the European, inter-American, and African human rights systems which are dealing with human rights violations very effectively.[218]

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. [219]

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 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 ECtHR 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.[220]

When the domestic application of the states analyzed, on the one hand a large number of countries, particularly in Europe and Latin America, consider many provisions of various human rights treaties, especially those guaranteeing civil and

[217] **BOTHE**, Michael, " Security Council's Targeted Sanctions Against Presumed Terrorists: The Need to Comply with Human Rights Standards", *Journal of International Criminal Justice*, July 2008, pp.541-555 p.544
[218] **BUERGENTHAL**, p.791
[219] **BUERGENTHAL**, p.791-792; However as the ambit of all three regional human rights protection system far beyond this paper, only the European protection system would be analyzed.
[220] **BUERGENTHAL**, p.793-795

political rights such as the European and American Conventions and the International Covenant on Civil and Political Rights to be self-executing in character and directly applicable in their domestic law; conversely on the other hand in some countries integration is required for treaty measures to be effective through legislation. However, foregoing national constitutional developments hold great importance for the protection of human rights and they try to ensure effective implementation of internationally guaranteed human rights by giving direct applicability capacity to international human rights treaties and the decisions of international tribunals in their domestic law. [221]

Consequently, the question should be asked that can a right whose derogation is permitted by an international human rights agreement be regarded as *jus cogens* in light of the statement of the principle of jus cogens in art.53 VCLT[222] or vice a versa? Firstly, while most non-derogable rights are of cardinal importance, some derogable rights may be of equal importance and also be reminded that international community as a whole has neither established a uniform list of non-derogable rights nor ranked non-derogable rights ahead of derogable rights unless it has a status of a peremptory norm of international law recognized. [223] For example, the ICJ in *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda*, in tackling the argument advanced by Congo that the Rwandan reservation to Article IX of the Genocide Convention should be considered null and void as it was contrary to the peremptory prohibition of genocide, however held that the peremptory character of an international rule may not provide a basis for the jurisdiction of the Court, which is always grounded in the consent of the parties. [224] The cardinal point in this decision is that the ICJ finally decided to give express recognition to *jus cogens,* at least for the prohibition of genocide, although the peremptory nature of a rule cannot be used to trump the consent requirement to establish the jurisdiction of the Court. [225] Therefore, although a fundamental human right can be accepted as a *jus cogens* norm this might not be enough to override other principles such as state consent.

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[221] **BUERGENTHAL**, p.806
[222] **MERON**, p.16
[223] **MERON**, p.16
[224] **BIANCHI III**, p.503
[225] **BIANCHI III**, p.503

If we look at to the *Yusuf* and *Kadi Cases,* this part of the judgments are open to many questions regarding the *jus cogens* judicial review of the SC Resolutions by the CFI and whether human rights constitutes *jus cogens* or not. It should be underlined that the CFI's willingness to make a review of compatibility of SC Resolutions from the point of fundamental human rights that constitutes *jus cogens* is rather pioneering. The world courts are rather being in an abstaining position most of the times in need of a judicial review under *jus cogens*, which is mostly the side effect of the ambiguity of the scope of *jus cogens* as mentioned above. Although, especially after 90's[226] judicators started to act more courageous[227] in defining the *jus cogens* norms of fundamental rights. Moreover, human rights' coming into being as general rules of international law would not occur through the medium of customary law-making and its reliance on state practice but rather by general principles, established by a process similar, but not entirely analogous, to the one that leads to custom which required general acceptance and recognition and it would rather result from a variety of manifestations 'in which moral and humanitarian considerations find a more direct and spontaneous "expression in legal form". [228] For example the Inter-American Court of Human Rights stated in one of its decisions by moving beyond the VCLT, that "by its definition" and its development, *jus cogens* is not limited to treaty law, so decided that non-discrimination principle as a *jus cogens* norm, being "intrinsically related to the right to equal protection before the law, which, in turn, derives directly from the oneness of the human family and is linked to the essential dignity of the individual."[229] It also added that the principle belongs to *jus cogens* because the whole legal structure of national and international public order rests on it and it constitutes a fundamental principle that permeates all laws.[230]

Mostly, the main problem of acceptance of fundamental human rights as *jus cogens* is the immunity of the States on the issue as they usually accepts these matters

[226] **BIANCHI III**, p.493
[227] According to Bianchi such an action qualified as constituting an international public order; **BIANCHI III**, p.499
[228] **BIANCHI III**, p.493
[229] **SHELTON**, p.309
[230] **SHELTON**, p.309-310

as matters in their exclusive discretion as a sovereign state. However, the ECHR in *Al-Adsani Case* concluded that the peremptory character of the international prohibition of torture should overrule the immunity claims although the qualification of torture as *jus cogens* was not called in question during the procedures. [231]

Besides the regional courts' courageous judgments, ICJ acted more cautiously in interpreting fundamental human rights or any *jus cogens* norm although it is the first name comes to mind in preservation of international law. For example, in addition to its definition and limited review in *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda Case* as mentioned above ICJ preferred to create a phrase as "intransgressible principles of humanitarian law" to avoid referring the norm as *jus cogens* in its *Advisory Opinion on the Legality of Use of Nuclear Weapons Case*.

Therefore, the initiative spirit of the CFI could be admirable on indirect review of SC Resolutions from the *jus cogens* perspective, however some scholars also argued that the CFI does not need to search for the answer in far but should look at itself first although 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 AG Maduro, there is no need to depart from usual interpretation of fundamental rights and the standard of protection afforded ought not to change as 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. [232] Additionally, *Pech* states that *jus cogens* review is perilous in practice and not necessary as the Court ought to apply clearly identified and demanding EC legal standards in order to carry out genuine judicial review like in *Bosphorus* Case 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. [233] Moreover, in the appeal ECJ stated the obligations imposed by an international agreement cannot have the effect of

[231] **BIANCHI III**, p.501
[232] AG Maduro para.44-46
[233] **PECH,** para.11

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[234].

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.

2) ***Evaluation of the Alleged Breaches of Human Rights***

The Court, after deciding on its power to review SC Resolutions indirectly and implementing measures directly under *jus cogens* norms it 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.

[234] The Appeal para.285

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 have 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[235]. However, applicants in the *Yusuf Case* preferred to plea breach of their right to make use of property protected by the Community legal order. [236] However, this difference in the bases of the allegations did not affect the reasoning of the Court at all 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. [237] 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. [238] After underlining that fact, the Court made a reference to art.17 of the Universal Declaration of Human Rights[239], for the

[235] Kadi para.234
[236] Yusuf para.285
[237] Yusuf para.290
[238] Yusuf para.291
[239] Universal Declaration of Human Rights, UN General Assembly, 10 December 1948

right to own property alone or in association with others which should not be deprived arbitrarily. [240] 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*[241]; however this is not the matter in these cases. [242]

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. [243] 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. [244]

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*. [245] 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

[240] Yusuf para.292
[241] Yusuf para.293; Kadi para.242
[242] Yusuf para.294; Kadi para.243
[243] Yusuf para.295-302
[244] Yusuf para.303; Kadi para.252
[245] **TOMUSCHAT** p.547; **PECH** para.14

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. [246]

b) Right to be Heard/ a Fair Hearing

First of all, regarding the alleged right 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 heard by the Council in connection with the contested regulation's adoption. [247]

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. [248] 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

[246] AG Maduro para.46-47
[247] Yusuf para.305; Kadi para.254
[248] Yusuf para.306-308

direct hearing by the Sanctions Committee as administrative procedure as such is in conformity with the complexity of the decision making process. [249] 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. [250] 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 militate against it. [251] 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. [252]

The Court's assessment on right to be heard by the Council before the adoption of the 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. [253] 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

[249] Yusuf para. 309-315
[250] Yusuf para.318
[251] Yusuf para.320
[252] Yusuf para.321; Kadi para.275
[253] Yusuf para.325

circumstances. [254] 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. [255]

Regarding this part of the decision there is no consensus between scholars on Court's evaluation about the rights' *jus cogens* character. While *Pech* states that the Court accepted that right to have a fair hearing does not constitute a rule of *jus cogens*[256], *Hudson* states that the Court assumed right to have a fair hearing constitutes *jus cogens.* [257] Actually Court by not making an explicit reference as it did in right to have property and by making references from Community law, *de facto* left this right out of *jus cogens*. Moreover, the de-listing procedure is regarded onerous and the outcome of the decision depending on the petitioned state and designating state is far from being a mechanism for review with effective instruments. [258] Furthermore, even though there is a chance to have small changes in de-listing procedure, individuals are still deprived from the opportunity of their views to be heard before an independent and impartial body, where equality of arms exits. [259] Therefore, the Court made an erroneous decision by rejecting both applicants' allegations.

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

[254] Yusuf para.327-328
[255] Yusuf para. 329-331; Kadi para.276
[256] **PECH** para.15;
[257] **HUDSON,** Andrew, "Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights", *Berkley Journal of International Law* 25, 2007, pp.203-227 p.216
[258] **HUDSON** p.220
[259] **HUDSON** p.222; **LAVRANOS** p.483

Charter. [260] 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 resolutions. [261] 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. [262]

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. [263] Therefore, immunity of SC decisions is justified by the nature and the legitimate objective pursued by them. According to the Court re-examination process in certain periods and the very substance of the procedure is an adequate protection of the right in concern under *jus cogens*. [264] Thus, Court dismissed the arguments of the applicants. [265]

Firstly, as *Karayigit* stated, restrictive measures at stake may cause harm to individuals and entities that were suspected but no way responsible for the international terrorism and the intelligence reports causing their inclusion to the list cannot be deemed as an accurate evidence and the conformation of that fact can be found in Yusuf *Case*, as some of original applicants were removed from the list. [266] Secondly,

[260] Kadi para.277
[261] Kadi para.278-280
[262] Kadi para.281-283
[263] Kadi para.284-288
[264] Kadi para.289-290
[265] Kadi para.292; Yusuf para.347
[266] **KARAYIGIT** p.398-399

according to the *Bulterman*, the reasoning of the Court is not easy to follow as the immunity of jurisdiction enjoyed by the resolution is not relevant to the case as there was no legal remedy available to them at UN level to challenge the decision[267] but an intergovernmental consultation. [268] According to *Tomuschat*, UN SC resolutions should enjoy immunity with regard to assessment of its discretion for determining the scope of the resolutions under Chapter VII or in other words determining what is threat to international peace and security and what measures shall be taken for the preservation[269]. However, because of the executive nature of the acts in concern no matter what type of foreign and security policy interest are at stake, immunity in such a situation cannot be accepted, as only the individuals are the true holders of those rights. [270]

Therefore, Court's assessment on the issue is deficient as it rendered its decision as no breach of the right under the guise of immunity and necessity of the taken measures for international peace and security and it jeopardized its position as the protector of fundamental rights in the Community legal order while it is so obvious that there is not any body or institution existing for the protection of the right at stake.

[267] **BULTERMAN** p.772; **KARAYIGIT** p.399
[268] AG Maduro para.51
[269] **TOMSCHAT** p.550-551
[270] **KARAYIGIT** p.399

III) OTHER EUROPEAN COURTS' POSSIBLE ASSESSMENTS

A) Other Judgments of European Community Courts Regarding the Implementation of SC Resolutions

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.

Firstly, many cases were litigated in courts of the Community regarding the implementation of UN SC Resolutions or actions taken at Community level in fight against terrorism. The *Bosphorus Case*[271] 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. [272] 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 *bona-fide*, and Bosphorus Airways operated the aircrafts for its charter operations, flying between Turkey and various EU Member States as well as Switzerland. [273] In April 1993 one of the aircraft of the Bosphorus Airways was flown to Dublin Airport for the

[271] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS*, 1996 E.C.R. I-3953, paras. 11-18.
[272] **CONOR**, p. 140
[273] **EECKHOUT**, Piet, *"External Relations of the European Union: Legal and Constitutional Foundations*", Oxford Uni. Press, 2004,p.426

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. [274] The UN SC Resolution 820 was implemented in the Community legal order by Regulation 990/93. [275] The EC Regulation 990/93 is based on former Art. 113 EC Treaty[276] 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:

'[…]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 […]'.[277]

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.' [278]

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. [279]

The *Bosphorus Case* established a number of important principles, firstly the '*sanction*' Regulations in particular those adopted as implementation of the UN SC Resolutions must be interpreted literally, in light not only of their own wording but also

[274] **EECKHOUT,** p.426-427
[275] **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)
[276] Current art.133 EC Treaty
[277] **CONOR,** p.141
[278] **CONOR**, p.141
[279] **CONOR**, p.155

in light of the corresponding resolution. [280] Secondly, uniform application is clearly paramount, as it is one of the main rationales for EC involvement in the adoption of sanctions. [281] Thirdly, maybe most importantly this case also put the legal status of the UN SC 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. [282]

The ECJ in the *Ebony Case*[283] again reviewed the implementation of UN SC Resolution within the Community by a EC Regulation. [284] 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. [285]

Moreover, in *Centro-Com Case*[286] the implementation of UN SC 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 was the issue. With preliminary ruling under article 234 of the EC Treaty the ECJ was asked

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[280] **EECKHOUT,** p.428
[281] **EECKHOUT**, p.428
[282] **EECKHOUT**, p.428
[283] Case C-177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others*, Eb*ony Case*', [1997] ECR I-1111; [1997] 2 C.M.L.R. 24 (ECJ)
[284] **EECKHOUT,** p.428
[285] **EECKHOUT,** p.430
[286] Case C-124/95 *Reg. v HM Treasury*, '*Centro-Com Case*', [1997] Q.B. 683; [1997] ECR I- 81 (ECJ)

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. [287] 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 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. [288] 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. [289] And unfortunately, the Court showed more interest in promoting Community interests than protecting individual rights. [290]

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 UN SC 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 UN SC Resolutions, the most recent case-law related to implementation of UN SC 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*[291] and *Hassan*[292] *Cases* and some are still pending

[287] **EECKHOUT,** p.432
[288] **EECKHOUT,** p.435
[289] **EECKHOUT,** p.432
[290] **CONOR**, p.182
[291] Case T-253/02, *Chafiq Ayadi vs.Council of the European Union*, 12 July 2006, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0253:EN:HTML accessed on: 12.08.2008

like in *Othman.* [293]On the other hand in *OMPI Case*[294], CFI preferred to punish human rights violations as the Council was deciding inclusion of the names in the list but not the UN Sanctions Committee[295] because of the margin of discretion matter, since in this case, the Council has full competence for making the list.

B) The National Courts of the Member States

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 fulfilment 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 'no 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 *jurispuridence* 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*[296] an international obligation cannot in anyway diminish the existing protection of basic rights available against States'

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[292] 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:12.08.2008

[293] 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:068:0013:0013:EN:PDF accessed on: 12.08.2008

[294]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:EN:HTML accessed on:12.08.2008

[295] **RADUCU** p.12; for more details on different terrorist lists please see: **TAPPEINER**

[296] Judgment of 12 October 1993, the German Bundesverfassungsgericht , *Brunner Case*, 89, VBerfGE 155

powers.[297] Also as the Italian Constitutional Court has taken reservation as to the supremacy of EU law over their national constitution in *Frontini Case*[298] , 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.[299] However, on the side of the legitimacy of the SC Resolutions national courts probably would act more cautious like in *Al-Jedda Case* as the English Court of Appeal did.[300]

C) European Court of Human Rights

National courts probably would not be the only judicial authority acting against the CFI's judgments. As all MS of EC are also member of the Council of Europe and party to the ECtHR and accepted the jurisdiction of ECHR, it should be mentioned that although individuals many times claimed the collective responsibility of MS in the name of the Community acts as *Bosphorus Case*[301] showed, it settled its case law that as long as the equivalent level of protection of human rights assured, the ECHR would refrain itself from the issue. However in case of manifesting deficiency and 'as long as' principle is breached with insufficient level of protection of human rights, the ECHR will review indirectly Community acts.[302] Also in *Waite and Kennedy Case*, in which applicants had brought proceedings against their employer European Space Agency before a German court that refused jurisdiction because of immunity of international organizations under German law and Waite and Kennedy brought this issue in front of ECHR claiming that the refusal of the German Court to offer legal protection amounted

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[297] **KARAYIGIT** p.401-402
[298] **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:12.07.2008 ; Frontini v. Ministero delle Finanze, [1974], 2, CMLR 372-
[299] **KARAYIGIT** p.401
[300] **BIANCHI III**, p.913 (emphasis added)
[301] *Bosphorus Havayollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, Application No: 45036/98, ECHR, 30 June 2005
[302] **RADUCU** p.15; **LAVRANOS** p.489

to a breach of art.6 of ECtHR. [303] Although ECHR accepted granting immunity to international organizations could lead to an infringement of the individual's right of access to a court, unless mitigated by reasonable alternative means to protect the protected rights effectively and therefore total deprivation from the rights is still rejected. [304] Moreover, in the *Matthews Case*[305] ECHR stated that states must comply with their obligations on human rights in accordance with ECtHR which comprises right to have an effective judicial remedy and fair trail, even though those rights transferred to other organizations under public international law such as by the EC Treaty. [306]

Consequently, even though CFI played on the safe side and avoided review of sanctions with common constitutional values of the MS or supranational constitutional principles, in the light of the case law of the MS, there would be high possibility of a review according to the constitutional values of the MS if this case especially would be brought to justice in Germany or Italy. [307] Moreover, if ECJ had not overruled CFI's judgment on the subject matter or so if the Community did not fulfil 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.

[303] **BULTERMAN** p. 771
[304] **KARAYIGIT** p.339
[305] *Matthews v.the UK*, Application No: 24833/94, ECHR, 18 February 1999
[306] **TAPPEINER** p.122
[307] **KARAYIGIT** p.402

IV) CONCLUSION

In this dissertation some insight information about the implications of the *Kadi* and *Yusuf* judgments in Community law has been given. Although many has changed after the Appeal decision of ECJ, it is still important to evaluate every impact of the decisions as it has many different implications on international, national and in on the Community level.

In this dissertation, after giving short background information about the cases firstly, some information has been given regarding the UN, SC, Sanctions Committee and their acts that are relevant to the case. Secondly, the competence of the Council to adopt the contested regulation based on SC Resolutions is evaluated. Although many different arguments presented on the issue by the applicants, scholars and AG Maduro, in accordance with the CFI's findings it should be accepted that the cumulative basis of the art.60, 301 with 308 EC Treaty establishes the legal basis of the contested regulation as it is the only way to give an accurate base to the contested regulation when no other option presented by the constitutional treaties and there is a need to preserve the coherence in free movement of capital. Therefore, by finding adequate legal bases for the SC Resolutions having effect on individuals and entities legitimized the Community legislation. However, having a legitimate base for an action does not always guarantee a legitimate outcome. This assumption is also supported by many scholars with different reasons for both of the cases. Although they have accepted the power of Community with various reasons, they all meet at one point, they all one way or another found CFI's decision inadequate. In this perspective I also think that, although Court legitimized the

bases of the Community action by using treaty provisions, by not making a complete legal review based on legal provisions, it caused unjust results because treaty provisions will create adequate protection if they were applied as a whole.

Furthermore, the competence of the Court has been reviewed on the adopted UN SC Resolution based regulation in concern. The Court by going out of the ordinary course firstly evaluated the primacy of UN Charter and its obligations from international and community law perspective. The important point is by doing so CFI explained why such an action has been taken in the Community level; however, this explanation raised questions regarding the place of UN SC Resolutions in the Community legal order. The most important question amongst them is whether such an action in Community level has changed the established legal hierarchy or not. After a very arguable reasoning, the Court preferred setting aside the previously accepted hierarchy of norms in the Community and modified the legal order where the UN Charter and SC decisions were put above the Community legislations. It should be kept in mind that the reasoning of the CFI has threatened independency of the EC Treaty over national laws and its unique separate entity which has been taken many years to establish. Auspiciously, CFI's arguments are not welcomed by ECJ and changed and although ECJ accepted the Charter's primacy in international law it did not recognized its primacy under Community law as the primacy at the level of Community law would not extend to primary law, in particular to the general principles of which fundamental rights form part.

However, if we assume that CFI's reasoning were accepted by ECJ, the outcome of such a situation would have serious consequences. To be more specific, during its many years of *jurispuridence* the Community Courts by creating a doctrine called supremacy has generated a *sui generis* structure. The result of such a doctrine is the creation of autonomous legal formation where Community acts enjoying primacy over national laws with an internal autonomy and acting supranational as a result of its external autonomy. Especially, in relations with international organizations, Community Courts gave judgments to protect Community autonomy. However, in the light of the CFI's judgments, distribution of competences shifted in Community legal which caused

loss of its self-contained structure and UN SC Resolutions gained supremacy and direct effect in Community legal order.

In the dissertation, this section is followed with assessment of CFI's judicial scope of review of SC Resolutions with evaluation of the alleged breaches of fundamental rights. At this point when the judgment of the Court assessed, under the given information about the *jus cogens* and fundamental human rights, it can be seen that, although the initiative nature of the decision, a judgment based solely on *jus cogens* norms is not adequate. The Court should have preferred to make a review under community norms as well as the *jus cogens*, thus, it might have been helpful to preserve its *sui generis* nature. It is important because although CFI dared to make a compatibility review at least under *jus cogens*, it has superseded its own common constitutional norms which include customary international law rules as well as *jus cogens* norms.

Consequently, the alleged breaches of the fundamental rights have been assessed under the scope of *jus cogens*. Firstly, on the right to respect for property and principle of proportionality besides the CFI's no breach assessment under *jus cogens*, it should be underlined one more time that the freezing of assets for several years without a predictable time limit is against the peaceful enjoyment of property and not proportionate even though they were taken for the prevention of negative effects of terrorism on international peace and security. Therefore, even though bases of limitation on the right can be acceptable, by not taking into account the consequences of contested resolution, CFI applied the law to the facts poorly. Secondly, on the right to have fair hearing, it should be stated that the Court made a mistake by rejecting applicants' allegations, since the procedure laid out by the SC Resolutions is not enough for the protection of the right, the way of remedy seeking is not an effective mechanism and it is not presenting an independent and impartial body for fair hearing.

Regarding the right to have effective judicial remedy, although applicants have been able to bring the action before the CFI under art.230 EC Treaty or to apply to national courts in case of arbitrary act of the national bodies for delisting procedure,

immunity enjoyed by UN SC Resolutions under Community legal order is still unacceptable even with a justification of preservation of international peace and security.

In the final part of the dissertation the possible assessments by other European Courts are taken into account with regard to their case law in addition to the ECJ assessment on CFI judgments. Therefore, when it comes to evaluating the position of the UN SC Resolution in Community legal order, the past case-law showed us that the ECJ preferred relatively abstaining position. However it is almost impossible at this time for ECJ to have an abstaining position as it has been asked to make decision on the position defined by CFI in the Appeal. If it preferred to agree with the CFI's decision other European courts, national courts of the MS or ECHR would raise its voice to aforementioned violations in fundamental human rights.

In light of assessments made above, the world wide petrifying effects of the terrorism and its harmful consequences on the international peace and security would not be enough to justify disregarding the violations of fundamental human rights in any perspective. As it has been highly criticized in the academic sphere, after AG Maduro's decision in accordance with the scholars, showed that the discussions made for years had a positive outcome in taking ECJ's attention to the issue. In addition to this, besides the discussions between scholars, ECJ is disturbed from the new created legal hierarchy by CFI as it is highly keen on its prerogatives.

Additionally, although radical changes presented by ECJ's decision after almost three years, CFI's decision can be considered having negative executive perspective which still also has positive effects. Firstly, it has created some time for scholars to draw attention to the seriousness of the issue. Secondly, each year SC lightened its restrictive measures and changed accepted faults in the existing system. Thirdly, as the terrorizing effects of 9/11 and other consequent terrorist acts are getting lessened day by day, the victimized position of the listed persons and entities has been strengthened. It should be kept in mind that changes in the decision of ECJ after CFI's judgments at least showed a positive manner by an '*European Court*' in respect to protection of fundamental human rights.

It is a mere fact that the Community Courts have always been highly political in their approach to the 'interpretation' of Community treaties and other EC measures which leaded the court to create doctrines of direct effect and supremacy by looking at the purpose rather than the text. Therefore, CFI while deciding on the scope of its jurisdiction did not act initiatively enough, as it was done by the ECJ before on different issues in several decisions when deciding on the EC's competence. In other words, by not going beyond the wording of rules and by rejecting to include the judicial review of the SC resolutions through Community perspective, CFI lost an important opportunity to create a world-wide norm in the field of protection of human rights.

However, it is impossible not to have doubts as the matter at stake concerns international peace provider and human rights protector UN acts, which need surgeon hands to have a crystal cut outcome. Thus, ECJ hopefully changed this hands-off policy and in the light of Community values and law find a way out from CFI's erroneous decision without infringing any international obligations.

On the other hand, another fact to be kept in mind that ECJ's judgment is finalized almost three years after its appealed and after seven years it was filed. Many things have changed between ECJ's judgment and CFI's judgement, and although terrorism still has a place in international agenda it has lost its terrifying power for most of the MS. Although CFI's decision is a misleading guideline regarding the protection of fundamental human rights, I think the outcome of the ECJ's decision might have been parallel to CFI's positioning if the appeal would have been finalized a couple of years ago and ECJ would have chosen to take an effective action against terrorism rather than protecting fundamental human rights.

As final words, it should not be forgotten that you can be either an institution that protects fundamental human rights or not. There is no scaling as a semi protector or so and so protector of fundamental rights as fundamental human rights protection is very important and delicate that it seeks total commitment in protection. They need a higher scale of protection because the rights in stake are vital for the survival of human

dignity and adequate protection of persons. Therefore, these judgments determined also the future protection limits in Community territory which also underlines the importance of the result of appeal in ECJ. Therefore, the Community once again showed that it does not want to be called as deficient protector of fundamental rights but rather as a protector and defender of the preservation of fundamental rights. It should be kept in mind that the Community's actions to fulfil the requirements laid down by the ECJ in three months period still has a very important role in the protection of the human rights.

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