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The *Kadi* case

The European Court of Justice and its duty to preserve the law

Analysing the balance between the fight against terrorism and protecting fundamental rights in the European legal order by the Community courts.

Erasmus University Rotterdam
Faculty of Law
September 2009

Author:
Vicky Maeijer, 287631

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CONTENTS

II. ABBREVIATIONS

AG	Advocate General
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
EC	European Community
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
UN	United Nations
UNSC	United Nations Security Council

Chapter 1 Introduction

'..It is when the canons roar we especially need the laws.. .'[1]

I. The Kadi case

On 3 September 2008, the European Court of Justice delivered its long-awaited judgement in *Kadi* and *Al Barakaat*[2] on appeal from the Court of First Instance. The ECJ's strong and convincing reasoning is the continuation from the idea of the EC as an autonomous legal order. The judgement is important for a number of reasons. In the *Kadi* case the ECJ built on its settled jurisprudence, and delivered an important judgement on the relationship between Community law and international law and on the issue of external action by the Community. The ECJ also makes important pronouncements of principle in relation to the competence of the Community and the scope of fundamental rights protection under Community law.

The ECJ held that the Community has competence to adopt economic sanctions not only against States but also against individuals. It also held that United Nations Security Council Resolutions are binding only in international law and cannot take precedence over the Community's internal standards for the protection of fundamental rights. On the basis of those findings, the ECJ reversed the judgement of the CFI under appeal and annulled the contested Regulation which implemented a UNSC Resolution.

The CFI and the ECJ commenced their analysis from totally different points. According to the CFI it follows from Article 103 of the UN Charter[3] that UN law enjoys legal supremacy over any domestic or international treaty law, including the EC Treaty and that such supremacy is confirmed by the EC Treaty itself.[4] The contested

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[1] Supreme Court of Israel, HCJ 769/02 (2006) *The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al.*, Para. 61 and 62.

[2] Joined Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 September 2008.

[3] Article 103 Charter of the United Nations: '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.'

[4] 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1: 65-88.

EC Regulation constitutes an implementation, at Community level, of the obligation placed on the EU Member States, qua UN members, to give effect to UN sanctions. The EC is thus bound to execute these UN obligations.[5] Furthermore, the CFI argued[6] that *'in accordance with the first paragraph of Article 307 EC*[7]*, 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'* The AG and the European Court of Justice did not agree with the CFI's reasoning. The ECJ emphasised that the EC must respect international law.[8] However, it found that although international agreements take precedence over acts of secondary Community law, EC primary laws take precedence over international law and over EC measures implementing international obligations.[9]

After accepted subordination of EC law to binding Resolutions of the UN Security Council the CFI ruled that it was only empowered to check, indirectly, the validity of the EC Regulations based on UNSC Resolutions in question with regard to *jus cogens*. This approach leads to a problematic conclusion for those concerned on fundamental rights issues; in relation to the right to property the Court said that the provisional nature of the measure and the possibility for state appeal to the UN Sanctions Committee the freezing of the assets did not violate *jus cogens* norms.[10] In similar vein the CFI ruled that neither the right to a fair hearing nor the right to judicial process had been violated.[11]

Both the AG and the ECJ came to a different conclusion, they concluded that the contested Regulation infringes Community fundamental rights, namely the right to be heard, the right to judicial review, and the right to property. This led the ECJ to the

[5] Para. 213 *Kadi* CFI.
[6] Para. 185-188 *Kadi* CFI and Para. 235-238 *Yusuf and Al Barakaat* CFI.
[7] Article 307 EC Treaty: 'The rights and obligations arising from agreements concluded before 1 January 1958 of, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'.
[8] Para. 291-297 *Kadi* ECJ.
[9] Para. 305-308 *Kadi* ECJ.
[10] Para. 242 *Kadi* CFI.
[11] Para. 261-268 and 274 *Kadi* CFI.

conclusion that the contested Regulation, in so far as it concerned the appellants, had to be annulled.

The ECJ's judgement in *Kadi* shows how the European Community relates to the world beyond its borders. Already in its very early days, the ECJ was determined to establish and safeguard the unique nature of the EC legal order. Since then, the ECJ has been refusing to treat the European legal order as a mere international treaty operating solely under traditional public international law. Now in *Kadi* the ECJ shows that it is more preoccupied with reiterating the autonomy and constitutional credentials of Community law, than reiterating respect for international obligations.

II. Structure of the thesis

The purpose of the present thesis is to analyze the judgements of the CFI and the ECJ. The *Kadi* case shows us that it is important that even in times when the risks to public security are believed to be extraordinary high such as is the case in relation to the fight against terrorism, the Courts need to take seriously their duty to preserve the law and fundamental rights. We will see that the CFI and the ECJ both take this duty up in their own ways. In this thesis I want to find out how the Community courts, in the *Kadi* dispute, fulfil their duty to preserve the law. How do they find a balance between the fight against terrorism and protecting the fundamental rights in the European legal order, even if this fight against terrorism legislation is based on UN obligations? To find an answer to these questions the following topics will be analysed separately.

The Chapter 2 will look at the factual background to the judgements and provide a general overview of the discussion about the legal basis of the contested Regulation. The Chapter 3 will provide an analysis of the approach of the CFI with regard to the relationship between UN law and EC law. After discussing in Chapter 4 the development of the autonomous legal order, in Chapter 5 I will consider the protection of fundamental human rights. In Chapter 6 the consequences of the annulment are set out, and finally, Chapter 7 brings us to the conclusion.

Chapter 2
Legal basis of the Contested Regulation

The fight against terrorism is one of the greatest challenges the world is facing today. Therefore the UN Security Council had adopted several Resolutions based on Chapter VII of the UN Charter. Those Resolutions were also implemented at EU level. The first part of this Chapter will look at the factual background of the fight against terrorism and the afford made by the UN Security Council to tackle this problem, by adopting UNSC Resolutions, that lies at the heart of the *Kadi* case.

The second part turns to a more fundamental question raised in *Kadi*. Before the Courts could start with there analysis of the questions raised by Mr. Kadi and Al Barakaat they had to be sure that the following question could be answered positively: was the EC competent to adopt restrictive measures against non-state actors? And, whether a correct legal basis was used? Chapter 2 will provide a general overview of this important discussion in the *Kadi* case. My analysis on this point will proceed as follows: first I will describe the factual background of the judgements and then I will briefly present the approach of the CFI, AG and the ECJ.

I. Factual background: the fight against terrorism and sanctions against individuals

The members of the United Nations (UN) have charged the UN Security Council (UNSC) with *'primary responsibility'* for maintaining international peace and security[12] and have agreed to carry out its decisions in accordance with the UN Charter.[13] Combating terrorism has been a key priority on the agenda of the UN for decades.[14] Terrorism is considered as a common threat to all states and people, which requires

[12] Article 24 (1) Charter of the United Nations: 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'
(2): 'In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.'
[13] Article 25 Charter of the United Nations: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'
[14] See, for more details, the UN specific counter-terrorism activities available at: http://www.un.org/terrorism

an international response. Therefore, the UNSC has adopted several Resolutions based on Chapter VII of the UN Charter.

Before the collapse of the Taliban regime, the UNSC adopted Resolutions 1267 (in 1999)[15] and 1333 (in 2000)[16] concerning Afghanistan. These measures were intended to interrupt or reduce economic relations with a third country (Afghanistan), and they required all Member States of the UN to freeze the funds and other financial resources owned or controlled by the Taliban and their undertakings.

After the collapse of the Taliban regime the UNSC adopted two further Resolutions[17], aiming no longer at the fallen regime but rather directly at Osama Bin Laden, members of the Al-Qaeda network, and the Taliban. Since the Taliban no longer controlled the government of Afghanistan, the Resolutions in question targeted solely non-state actors. Those Resolutions were also implemented at EU level.[18] The Regulations[19] were adopted on the legal basis of Articles 60[20], 301[21] and 308[22] EC.

By Resolution 1267 the UNSC furthermore decided to establish a Sanctions Committee, also known as *'the Al-Qaeda and Taliban Sanctions Committee'*. The UN Security Council gave the Sanctions Committee the task to maintain a list of individuals and entities associated with Al-Qaida, Osama bin Laden, the Taliban and other individuals, groups, undertakings and entities ('the Consolidated List'). Any

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[15] Security Council Resolution 1267 (1999), 15 October 1999.
[16] Security Council Resolution 1333 (2000), 19 December 2000.
[17] Security Council Resolution 1390 (2002) of 28 January 2002 and Security Council Resolution 1453 (2002) of 24 December 2002.
[18] Council Common Position 2002/402/CFSP of 27 May 2002 and Council Common Position 2003/140/CFSP of 27 February 2003.
[19] Council Regulation (EC) No 881/2002 of 27 May 2002 and Council Regulation (EC) No 561/2003 of 27 March 2003.
[20] Article 60 (1) EC Treaty: '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'.
[21] Article 301 EC Treaty: 'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on the 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.'
[22] Article 308 EC Treaty: 'If action by the Community should prove necessary to attain, in het 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'.

State may request the Sanctions Committee to add and to delete names from the Consolidated List.[23]

On 19 October 2001 the names of Mr. Kadi and Al Barakaat were added to the Consolidated List, without any prior notice been given to them. The UN Resolutions had been implemented by the European Union. First, a Common Position was adopted under the Second Pillar (the Common Foreign and Security Policy; CFSP) indicating that the UN sanctions were to be implemented by the EU, rather than its Member States. Second, the financial sanctions were to be effected by a Community Regulation under the First Pillar (the EC Treaty). In this case their names were included in an annex to EC Regulation No 881/2002. Mr. Kadi and Al Barakaat, both denying any association with terror, brought proceedings before the Court of First Instance on the basis of Article 230 (4) EC[24], which gives individuals (limited) legal standing to challenge the lawfulness of a Community act before the CFI. Neither the CFI nor the ECJ have jurisdiction to judge the validity of the EU Regulation; however, Mr. Kadi and Al-Barakaat could seek the annulment of the Community Regulation alleging breach of their fundamental rights, namely, the right to a fair hearing, the right to respect property, and the right for effective judicial review. This case went first to the CFI, from which it was appealed to the ECJ.

II. Is the EC competent to adopt restrictive measures against non-state entities?

The question of the appropriate legal basis for the adoption and implementation of smart sanctions by the Community is highly controversial. Both the CFI and the ECJ tried to come up with a mechanism that would enable the EC to act in this field.

All agreed that the measures could be adopted. Both the CFI and the ECJ found that the contested sanctions could be adopted on the combined legal basis of Articles 301[25], 60[26] and 308[27] EC but reached that result on the basis of different reasoning.

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[23] Website of the United Nations, http://www.un.org/sc/committees/1267/information.shtml.
[24] Article 230 (4) EC Treaty: 'Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a Regulation or a decision addressed to another person, is of direct and individual concern to the former.'
[25] Article 301 EC Treaty, see note 21.
[26] Article 60 EC Treaty, see note 20.
[27] Article 308 EC Treaty, see note 22.

64 A.G. Maduro opined that Articles 301[28] and 60[29] EC provided sufficient legal basis for the measure. The reasoning of the Courts and the AG brings up some questions.

29 The legal basis used under EC law for the adoption of sanctions against third countries is Article 301 EC, and Article 60 EC is used as an additional basis when the 1 measures relate to the movement of capital and payments. Article 308 EC allows the institutions to act with a view to attaining one of the objectives of the Community, despite the lack of a specific provision conferring on them the necessary power to do 1 so. Recourse to this provision as the legal basis for a Community measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question

14 According to the CFI the Articles 60 EC and 301 EC did not, in themselves, constitute 13 a sufficient legal basis allowing for the adoption of the contested Regulation. Article 60(1) EC provides that the Council, in accordance with the procedure provided for in Article 301 EC, may *'as regards the third countries concerned'* take the necessary urgent measures on the movement of capital and payments. Article 301 EC expressly permits action by the Community to interrupt or reduce, in part or completely, economic relations *'with one or more third countries'*.[30]

14 The fact that those provisions authorise the adoption of 'smart sanctions' not only vis-à-vis a third country as such but also vis-à-vis the rulers of such a country and the individuals and entities associated with them or controlled by them, directly or 13 indirectly, does not give grounds for considering that those individuals and entities may still be targeted when the governing regime of the third country in question has disappeared. In such circumstances, there in fact exists no sufficient link between those individuals or entities and a third country.[31]

13 According to the CFI Article 308 EC did not on its own constitute an adequate legal basis for the adoption of the Regulation either.[32] However, the CFI accepted that a

[28] Article 301 EC Treaty, see note 21.
[29] Article 60 EC Treaty, see note 20.
[30] Para. 95 *Kadi* CFI.
[31] Para. 96 *Kadi* CFI.
[32] Para. 98 *Kadi* CFI.

combination of all three can sustain the contested Regulation; the Articles 60 and 301 EC provide a general 'bridge' between the EU objectives and the EC Treaty, whereby the Community may act to advance the CFSP objectives of the Union. If the specific Community powers insufficient to serve these purposes, the Community may resort to Article 308 EC as an 'additional' legal basis to serve the CFSP objectives.[33]

However, according to AG Maduro it is not necessary to bring Article 308 EC into play. In the AG's view, economic relations with third countries are inextricably intertwined with economic relations with individuals and groups within that third country.[34] Article 301 EC[35] should not be read to demand a connection between a county's governing regime and the targeted individual or group residing or operating within that country at all.[36]

Both the CFI and the ECJ saw that recourse to Article 308 EC[37] was necessary, albeit on different grounds.

The ECJ sided with the CFI on the limitations of Articles 60 and 301 EC, and also agreed that Article 308 EC could not, alone, serve as the legal basis to implement the smart sanctions regime. However, the ECJ disagreed with the CFI that Article 308 EC could serve as a general bridge. Furthermore, an action under Article 308 EC can only be undertaken in order to attain one of the objectives of the Community which cannot be regarded as including the objectives of the CFSP.[38] Despite the above, the ECJ found that Article 308 EC[39] was correctly included in the legal basis of the contested Regulation.

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[33] 'The United Nations, he European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', Daniel Halberstam and Eric Stein, Common Market Law Review 46: 13-72, 2009.

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

[35] Article 301 EC Treaty, see note 21.

[36] Para. 13-14 Opinion AG *Kadi*.

[37] Article 308 EC Treaty, see note 22.

[38] 'EU law, international law and economic sanctions against terrorism: The judiciary in distress?', Takis Tridimas and Jose A Gutierrez-Fons, p.9.

[39] Article 308 EC Treaty, see note 22.

The ECJ reasoned that, although Articles 60[40] and 301[41] EC authorised only sanctions against states, recourse to Article 308 EC[42] could be made to extend their limited ambit *ratione materiae*, provided that the other conditions for its applicability were satisfied. Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, Articles 60[43] EC and 301[44] EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.[45]

The ECJ also found that the second condition of Article 308 EC, namely that the measure must relate to the operation of the common market, was fulfilled: *'Implementing restrictive measures of an economic nature through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because such measures by their very nature offer a link to the operation of the common market, that link constituting another condition for the application of Article 308 EC.'*[46] According to the ECJ, this reasoning made it possible to adopt the contested Regulation on the basis of Articles 60, 301 and 308 EC.

After the collapse of the Taliban regime the measures were no longer directed at the fallen regime but targeted rather directly non-state actors. And therefore the first set of legal questions that arose in *Kadi* concerned the competence of the Community to adopt and implement smart sanctions directed against suspected terrorists. Both the CFI and the ECJ tried to come up with a mechanism that would enable the EC to act in this field. Contrary to the AG, both Courts found this mechanism in the combined legal basis of Articles 301, 60 and 308 EC.

[40] Article 60 EC Treaty, see note 20.
[41] Article 301 EC Treaty, see note 21.
[42] Article 308 EC Treaty, see note 22.
[43] Article 60 EC Treaty, see note 20.
[44] Article 301 EC Treaty, see note 21.
[45] Para. 226 *Kadi* ECJ.
[46] Para. 229 *Kadi* ECJ.

Chapter 3

Exploring the approach of the CFI: Rule of primacy

The origins of *Kadi* and *Al Barakaat* lie in counter-terrorism Resolutions adopted by the UN Security Council, as set out in the previous Chapter. The aim in this Chapter is to explore the approach of the CFI with regard to the relationship between UN law and Community law. As we will see in this discussion, this approach is problematic. The ruling of the CFI promotes respect for international law, however in my opinion the ruling does not fit in the system of public international law and Community law.

I. The approach of the Court of First Instance in Kadi and Al Barakaat: Supremacy of international law

The CFI begins by identifying two independent sources of primacy of the Member States' obligations under the UN Charter. First the CFI ruled[47] that under customary international law, as codified in the Vienna Convention on the Law of Treaties[48], a party to a treaty cannot invoke the provisions of internal law as a justification for its failure to perform a treaty obligation.[49] With regard to the relationship between the UN Charter and the domestic law of the Member States, the rule of primacy is derived from the principles of customary international law.

Second, with regard to the relationship between the UN Charter and international treaty law, the rule of primacy is expressly laid down in Article 103 of the UN Charter[50]. This Article provides for the primacy of UN Members' Charter obligations over any other international agreement. According to the International Court of Justice[51], all regional, bilateral and even multilateral, arrangements that the parties may have made must be made always subject to the provisions of Article 103 of the Charter of the United Nations[52], and, thus, to the obligations of the UN Member

[47] Para. 181-182 *Kadi* CFI.
[48] Article 27 Vienna Convention on the law of Treaties: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.'
[49] Para. 232-233 *Al Barakaat* CFI.
[50] Article 103 Charter of the United Nations, see note 3.
[51] Judgement of 26 November 1984, delivered in the case concerning military and paramilitary activities in and against Nicaragua, *Nicaragua v. United States of America*, ICJ Reports, 1984, p.392, paragraph 107.
[52] Article 103 Charter of the United Nations, see note 3.

States towards the UN.[53] That primacy of the UN action extends to decisions contained in Resolutions adopted by the UN Security Council, in accordance with Article 25 of the UN Charter[54], under which the Members of the United Nations have agreed to accept and carry out the decisions of the UNSC.[55] As we shall see below, EC law itself, according to the CFI, echoes this primacy of UN obligations.[56]

The approach to the primacy of the UN obligations raises a lot of questions in the Community context, for example: can it be seriously claimed that the EC is an organ bound by the UNSC and that it would trespass the UNSC prerogatives if it reviewed the Community's implementing measures? I think that it is important to keep in mind that *'unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter*[57]*. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law.'*[58] As such, it could be argued that the EC is not bound by UN obligations under the UN Charter. As discussed in the next paragraph the CFI, however, held it to be bound by UN law, by virtue of the EC Treaty itself.

With more particular regard to the relations between the obligations of the Member States of the Community by virtue of the Charter of the United Nations and their obligations under Community law it may be added that Article 307 (1) EC[59] seeks to preserve the binding effect of international agreements concluded by Member States before they assumed obligations under the EC Treaties.[60] The CFI pointed out that at the time when they concluded the EC Treaty, the Member States were bound by their

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[53] Para. 233 *Al Barakaat* CFI.
[54] Article 25 Charter of the United Nations, see note 13.
[55] Para. 184 *Kadi* CFI.
[56] 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order.', Daniel Halberstam and Eric Stein, Common Market Law Review, Feb2009, Vol46, Issue 1, p.13-72.
[57] Article 25 Charter of the United Nations, see note 13.
[58] Para. 192 *Kadi* CFI.
[59] Article 307 (1) EC Treaty, see note 7.
[60] 'EU law, international law and economic santions against terrorism: The judiciary in distress?', Takis Tridimas and Jose A Gutierrez-Fons.

obligations under the UN Charter.[61] And, therefore, also the Community must respect these obligations.

3 This reasoning brings the CFI to the conclusion that:

'Pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations.'[62]

2 107 After having generally dismissed an immediate international obligation on the part of the Community to implement UN Security Council decisions, because the Community is not a member of the United Nations, the CFI then proceeds to 'communitarize' that duty.[63]

12 The CFI argued that *'the Community must considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it.'*[64] It came to this conclusion on the basis of the previous approach taken by the ECJ to the relationship of the international order, using by analogy the ECJ's judgement in *International Fruit Company* where it was 37 held that the GATT was binding on the EEC.[65] Therefore, the CFI concluded that in so far as under the EC Treaty the Community had assumed powers previously exercised by Member States in the area governed by the UN Charter, the provisions of that Charter have the effect of binding the Community.[66] The CFI correctly applied 71 *International Fruit Company* in *Kadi* and this leads to the conclusion that on the basis of the EC Treaty itself and previous case law of the ECJ, the CFI could do very little.

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[61] Para. 185-189 *Kadi* CFI.
[62] Para. 190 *Kadi* CFI.
2 [63] 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order.', Daniel Halberstam and Eric Stein, Common Market Law Review, Feb2009, Vol46, Issue 1, p.13-72.
[64] Para. 193 *Kadi* CFI.
[65] Joined Cases 21-24/72 *International Fruit Company* (1972) *ECR* 1219, 12 December 1972.
[66] Para. 203 *Kadi* CFI.

The consequence of this binding nature of the UN Charter is that,[67] first, the Community may not infringe the obligations imposed on its Member States by the Charter or impede their performance and, second, that in the exercise of its powers it is bound to adopt all the measures necessary to enable its Member States to fulfil those obligations.[68] In short, according to the CFI, the substance of the Charter obligations is the same for the Community as for the Member States.[69]

On basis of this the CFI accepted the subordination of EC law to binding Resolutions of the UN Security Council, which would suggest that the CFI could hardly then proceed to review the Resolution in question with principles of EC law, even principles concerning protection for fundamental human rights.[70] And, indeed, the CFI expressly confirmed this point and ruled that review of the lawfulness according to the standard protection of fundamental rights cannot be justified either on the basis of international law or on the basis of Community law.[71]

According to the CFI such jurisdiction to review would be incompatible with the obligations of the Member States under the UN Charter and it would be contrary to provisions both of the EC Treaty and of the Treaty on the European Union. It would also be incompatible with the principle that the Community's powers and, therefore, those of the CFI itself, must be exercised in compliance with international law.[72] The Court concluded this section of the judgement with the words that: *'the Resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law.'*[73]

In light of the principle of the primacy of UN law over Community law, the claim that the CFI has jurisdiction to review indirectly the lawfulness of decisions of the UN

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[67] Para. 204 CFI Kadi.
[68] 'Community Terrorism Listings Fundamental Rights, and UN Security Council Resolutions', Piet Eeckhout, EUConst., Volume 3, Issue 2, June 2007, p.183-206.
[69] 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order.', Daniel Halberstam and Eric Stein, Common Market Law Review, Feb2009, Vol46, Issue 1, p.13-72.
[70] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 01/09.
[71] Para. 221 *Kadi* CFI.
[72] Para. 222-223 *Kadi* CFI.
[73] Para. 225 *Kadi* CFI.

Security Council according to the standard of protection of fundamental rights as recognised by the Community legal order, cannot be justified either on the basis of international law or on the basis of Community law.[74]

First, such jurisdiction would be incompatible with the undertakings of the Member States under the Charter of the United Nations, especially Articles 25[75], 48[76] and 103[77] thereof, and also with Article 27[78] of the Vienna Convention on the Law of Treaties. Second, it would be contrary to provisions both of the EC Treaty, especially Articles 5[79], 10[80], 297[81] EC and the first paragraph of Article 307[82] EC, and of the Treaty on European Union, in particular Article 5[83] TEU; in accordance with which the Community judicature is to exercise its powers on the conditions and for the purposes provided for by the provisions of the EC Treaty and the Treaty on European Union.[84] It would, what is more, be incompatible with the principle that the Community's powers and, therefore, those of the CFI itself, must be exercised in compliance with international law.[85]

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[74] Para. 221-223 *Kadi* CFI.

[75] Article 25 Charter of the United Nations, see note 13.

[76] Article 48 (1) Charter of the United Nations: 'The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by the Members of the United Nations or by some of them, as the Security Council may determine'.
(2) 'Such decisions shall be carries out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

[77] Article 103 Charter of the United Nations, see note 3.

[78] Article 27 Vienna Convention on the Law of Treaties, see note 48.

[79] Article 5 EC Treaty: 'The Community shall acts within the limits of the powers conferred upon by this Treaty and of objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'.

[80] Article 10 EC Treaty: 'Member States shall take all appropriate measures, whether general of particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'.

[81] Article 297 EC Treaty: ''Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member States may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.

[82] Article 307 EC Treaty, see note 7.

[83] Article 5 EU Treaty: ' The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaty establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the provisions of this Treaty'.

[84] Para. 223 *Kadi* CFI.

[85] Para. 221-223 *Kadi* CFI.

This raises questions such as 'do the Member States or the Community have an international legal obligation to implement UNSC sanctions that would violate principles of Community law?'. According to the CFI it looks like the Member States have that obligation, because it found that it has no competence to review, even indirectly, their lawfulness in the light of Community law. Does Article 103 UN Charter[86] in conjunction with Article 307 EC[87] really prevent the CFI from exercising its basic task of determining whether the law is observed as Article 220 EC[88] requires it to do? As pointed out above, under Article 307 EC[89], in so far as under the EC Treaty the Community has assumed powers previously exercised by the Member States in the area governed by the Charter of the UN, the provisions of that Charter have the effect of binding the Community.[90]

However, as will be explained further in Chapter 4 the CFI did accept that UNSC Resolutions must observe the fundamental peremptory provisions of *jus cogens*[91] and proceeded to examine whether the contested sanctions complied with them. International law permits the interference in that there exists one limit to the principle Resolutions of the UN Security Council having binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.[92] The CFI seems to see the Community as functionally succeeding the Member States in their obligation to implement the UN Security Council resolution.

By this construct, the CFI sought to reach a golden balance; *'It affirmed the primacy of the UN Charter over Community law whilst subjecting the UN Security Council to principles endogenous to the legal system of which it stands.'*[93]

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[86] Article 103 Charter of the United Nations, see note 3.
[87] Article 307 EC Treaty, see note 7.
[88] Article 220 EC Treaty: 'The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.'
[89] Article 307 EC Treaty, see note 7.
[90] Para. 203 *Kadi* CFI and Para. 253 *Yusuf and al Barakaat* CFI.
[91] De concept of *jus cogens* will be discussed in Chapter 5.
[92] Para. 230 *Kadi* CFI.
[93] 'EU law, international law and economic sanctions against terrorism: The judiciary in distress?', Takis Tridimas and Jose A Gutierrez-Fons.

II. Sanctions through the lens of the CFI

104 The decision in *Kadi* can also be contrasted with earlier case law by the CFI itself. In December 2006 the CFI annulled an EC Council Decision declaring a legal entity a terrorist organisation and freezing its assets.[94] The CFI found that the listed could not exercise their rights of defence, that they were not even notified of their listing or 74 informed of the underlying reasons, and that they could not exercise their right to an 18 effective judicial remedy.[95] The CFI concluded that the contested Decision[96] did not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant's right to a fair hearing was not observed.[97] Furthermore, even the Court was not, even at this stage, in a position to review the 36 lawfulness of that decision[98], because *'neither the written pleadings of the different parties to the case, nor the file material produced before the Court, enable it to conduct its judicial review, since it is not even in a position to determine with certainty, after the close of the oral procedure, exactly which is the national decision referred to in Article 1(4) of Common Position 2001/931, on which the contested decision is based'*.[99] This ruling was later confirmed by the CFI in the cases of *Sison*[100] and *al-Aqsa*[101].

In *OMPI*[102], *Sison*[103] and *al-Aqsa*[104] the CFI fully reviewed autonomous EU sanctions against individuals and annulled the contested measures for breaching general principles of EU law. Despite certain differences[105] between sanctions based on UN lists (*Kadi* and *Al Barakaat*) and those based on EU-managed lists (*OMPI*, *Sison* and *al-Aqsa*) the argument is made that, since the adoption procedure of both types of European sanctions against individuals is nearly identical, the conclusion that it infringes fundamental rights is transferable. The CFI's rulings concerning UN-based

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88 [94] Case T-228/02, *Organisation des Modjahedines du people d'Iran v. Council and UK* (hereafter *OMPI*), CFI 12 December 2006.
[95] Para. 91, 114, 109, 138, 110 and 152 *OMPI* CFI.
[96] Decision 2002/460.
[97] Para. 173 *OMPI* CFI.
[98] Para. 173 *OMPI* CFI.
[99] Para. 166 *OMPI* CFI.
[100] Case T-47/03, *Sison v. Council*, CFI 11 July 2007.
[101] Case T-327/03, *al-Aqsa v. Council*, CFI 11 July 2007.
[102] Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council and UK,* 12 December 2006.
37 [103] Case T-47/03, *Sison v. Council,* 11 July 2007
[104] Case T-327/03, *al-Aqsa v. Council,* 11 July 2007.
[105] See Chapter 5, Para. II The concept of targeted sanctions; two different types, p.36-37.

sanctions must be read that a prevailing obligation under the UN Charter justifies a restriction of fundamental rights which otherwise would not be possible under EU law.[106]

The CFI justified this difference in its approach with the lack of discretion of the EU institutions when adopting sanctions against those identified by the UN: the UN sanctions list enjoys primacy and binds all EU institutions including the Courts. By contrast, the listing proposal by a Member State is not, in itself, binding on the Community. Consequently, the CFI held[107] that the Council takes a discretionary decision both for the initial listing and the decision to keep someone listed when it adopts autonomous sanctions.[108]

III. The Security Council as a supreme, unfettered, legislature

At first sight the ruling seems to fit in the system of public international law and Community law. However, does such an assessment, as described above, withstand closer scrutiny?

Having respect for international law does not have to lead to the approach of the CFI, which consists of declaring that a listing in an EC Regulation cannot be reviewed in the light of general principles of Community law. This respect which the CFI pays to the implementation of UN obligations has been called remarkable.[109] The CFI does not sufficiently explain what the binding nature of the UN Charter is. To say that the Charter is binding is not equivalent to excluding judicial review of a Regulation on the basis of the Union's primary law.

Is this dimension of the binding nature of the UN Charter a proper basis for excluding judicial review of the Regulation in issue? The CFI considered that the Community may not infringe the obligations imposed on its Member States by the Charter or

[106] 'Sanctions against Individuals – Fighting Terrorism within the European Legal Order', Christina Eckes, European Constitutional Law Review, 4: 205-224, 2008.
[107] Para. 161 *Sison* CFI, Art 1(4) and (6) of Council Common Position 2001/931, 27 December 2001.
[108] 'Sanctions against Individuals – Fighting Terrorism within the European Legal Order', Christina Eckes, European Constitutional Law Review, 4: 205-224, 2008.
[109] 'Community Terrorism Listings Fundamental Rights, and Security Council Resolution', Piet Eeckhout, EuConst, Volume 3, Issue 2, June 2007.

impede their performance. It is not however clear in what way judicial review of a Regulation which implements a UNSC Resolution would breach that principle.[110]

The CFI's approach promotes respect for international law. The CFI's decisions may be seen to ensure that UN Resolutions are always heeded and respected, even in the special case of their implementation through an EC Regulation; and even in the special case of the Community which is not bound by the UN Charter as a matter of international law.[111]

The CFI appears to translate the conflict rule of Article 103 UN Charter[112] (and the provision in Article 25 UN Charter[113] according to which UN members agree to accept and implement UN Security Council Resolutions) into a principle of absolute primacy of Resolutions over all other law, be it international, Community, or domestic law.[114] Does this best fit the international legal system? This principle of absolute primacy turns the UN Security Council into a global supreme legislature, unfettered by any international law constraints.[115]

I think that a declaration whether the contested UNSC sanctions complied with rules of *jus cogens*, which are strongly suggested to be the limits of its competences, is a much more fundamental decision than a decision on the compatibility with European law could have been. Whatever creative argument the Court had used, at the end of the day the fact remains that the EC/EU is not a member of the UN and therefore not formally bound by UNSC Resolutions, at least not in the same way as the Member States that are also Member States of the UN. As I have cited above[116] the approach of the CFI risks turning the UN Security Council into a supreme, unfettered legislature.

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[110] 'Community Terrorism Listings Fundamental Rights, and Security Council Resolution', Piet Eeckhout, EuConst, Volume 3, Issue 2, June 2007.
[111] 'Community Terrorism Listings Fundamental Rights, and Security Council Resolution', Piet Eeckhout, EuConst, Volume 3, Issue 2, June 2007.
[112] Article 103 Charter of the United Nations, see note 3.
[113] See Article 25 Charter of the United Nations, see note 13.
[114] 'Community Terrorism Listings Fundamental Rights, and Security Council Resolution', Piet Eeckhout, EuConst, Volume 3, Issue 2, June 2007.
[115] 'Community Terrorism Listings Fundamental Rights, and Security Council Resolution', Piet Eeckhout, EuConst, Volume 3, Issue 2, June 2007.
[116] See note 115.

Chapter 4

Development of the autonomous legal order

'Two ships in the night or in the same boat together?'[117]

Until *Kadi*, the story of European constitutionalism had largely focused on establishing the Community's legal order as autonomous from those of the Member States. Since the very early days, the ECJ has been refusing to treat the European legal order as a mere international treaty operating solely under traditional public international law.[118] In *Kadi* and *Al Barakaat* the CFI and in the previous case-law the ECJ itself have adopted an internationalised approach; they have simply accepted the primacy of the international legal order over the EC legal order. As we will see the ECJ, in *Kadi*, was more preoccupied with reiterating the autonomy and constitutional credentials of Community law, than reiterating respect for international obligations.[119] The Chapter 3 aims at exploring the development of the notion of the autonomous legal order and looks in that perspective at the approaches of the AG/ECJ.

I. Establishing the autonomous nature of the EC legal order

In 1963 the European Court of Justice ruled in *Van Gend en Loos* that the Community constitutes *'a new legal order of international law'*, for the benefit of which the States have limited their sovereign rights and that the then EEC Treaty *'is more than an agreement which merely creates mutual obligations between the Contracting States'*.[120] This judgement is one of the most important judgements in the development of the Community legal order.

One year later, the ECJ delivered another path-braking judgement. In *Costa v. ENEL* the ECJ established that *'the law stemming from the Treaty'* is *'an independent source of law'* with '*special and original nature' and that 'by contrast with ordinary*

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[117] 'Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case', Joris Larik, EU Diplomacy Papers, 3/2009.

[118] 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1:65-88.

[119] 'Terrorism and the ECJ: Empowerment and democracy in the EC legal order', Takes Tridimas, European Law Review, 2009, 34(1), 103-126.

[120] Case 26/62 *Van Gend en Loos* (1963) ECR 1, 5 February 1963.

international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply'.[121]

Consequently, European integration has been undergoing an unprecedented process of constitutionalization, whereby its legal order has been elevated from a set of traditional, horizontal legal arrangements binding sovereign States into a vertically integrated, quasi-federal, sui generis legal regime, conferring enforceable rights on legal entities.[122]

II. Opinion of the Advocate General Maduro in Kadi[123] *and Al Barakaat*[124]

The AG Maduro considered in his opinion that the judgements in *Al Barakaat* and *Kadi* do not fit in the case-law of the ECJ on the protection of fundamental rights, on judicial review and on the force of international law.[125]

He started his analysis with the landmark ruling in van *Gend en Loos*[126], in which the Court affirmed the autonomy of the Community legal order, rather than from the principle of respect of international obligations. From this point, he continued that this did not mean that the Community's municipal legal order and the international legal order pass each other like ships in the night. The application and interpretation of Community law is also guided by the presumption that the Community wants to honour its international obligations.[127] As Joris Larik says it in its article: '*..common threats such as international terrorism as well as human rights violations rather paints the picture of us all sitting in the same boat together after all*'.[128]

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[121] Case 6/64 *Costa v. ENEL* (1964) ECR 685, 15 July 1964.
[122] 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1:65-88.
[123] Opinion of Advocate-General Poiares Maduro delivered on 16 January 2008 in Case C-402/05.
[124] Opinion of Advocate-General Poiares Maduro delivered on 23 January 2008 in Case C-415/05.
[125] Case 294/83 *Les Verts v. Parliament*, 23 April 1986, Para. 23 and Opinion 2/94 re *Accession to the ECHR* [1996] ECR I-1759,29 March 1996, Para. 34.
[126] Case 26/62 *Van Gend en Loos* (1963) ECR 1, 5 February 1963.
[127] Para. 24 Opinion of AG *Kadi*.
[128] 'Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case', Joris Larik, EU Diplomacy Papers, 3/2009.

What is remarkable is the clarity that we find in the Opinion of the AG with references to the *'municipal legal order'*[129] and to giving *'municipal legal effect'*[130], with which the AG (and also the ECJ) defend the primacy of the European legal order vis-à-vis international law. However, the UNSC Resolutions still need to be implemented, in the words of the AG: *'The application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments. The Community Courts therefore carefully examine the obligations by which the Community is bound on the international stage and take judicial notice of those obligations.'*[131] In the next paragraph he argued that it are the Community Courts who determine the effect of international obligations within the Community legal order by reference to conditions set by Community law. The Community legal system alone decides on how to implement the international obligations, international law is not directly received by the Community legal system.

The AG referred to the ECJ's previous case-law[132] on the effect of international obligations within the Community legal order and concluded that all these cases have in common that, 'although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty. It would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.[133]

Some writers argue that both the AG and the ECJ (as we shall see below) managed largely to avoid the fundamental question of the Community's legal obligations under principles of public international law. Without addressing whether the EC is bound to implement the UN Security Council Resolution to freeze individuals' assets, the AG

[129] Para. 22 Opinion AG *Kadi.*
[130] Para.23 Opinion AG *Kadi.*
[131] Para. 22 Opinion AG *Kadi.*
[132] Para. 23 Opinion of AG Kadi; The AG refers to *Parliament v Council* (Joined cases C-317/04 and C-318/04, 2006) of 30 May 2006 and *Commission and Germany v. Council* (Case C-122/95, 1998) of 10 March 1998.
[133] Para. 23 Opinion of AG *Kadi.*

and the ECJ focussed solely on the question whether such implementation could be asked to ignore fundamental rights at the Community level.[134]

III. The internal, constitutional law perspective of the ECJ

The reasoning of the ECJ concerning the relationship between the EU and the UN legal order consists of two parts: in the first the Court focused on the internal order of the Community, assessing the constitutional principles on which it is based; in the second part it examined how these can be reconciled with its international law obligations.

In the first part of its judgement the ECJ, following the AG[135], adopted a diametrically opposite approach from that of the CFI: the ECJ did not begin by mentioning Article 103 of the UN Charter[136] and the primacy of international law, but it underlined the principle that the Community is based on the rule of law.[137] And that *'neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC 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'*[138]. The ECJ then turned to the ruling *van Gend en Loos* and argued that an international agreement cannot effect the allocation of powers fixed by the Treaties or the autonomy of the Community legal system.[139]

It then proceeded by stressing that the respect for fundamental rights, which *'form an integral part of the general principles of law'*,[140] is a condition for the lawfulness of Community acts.[141]

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[134] 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order.', Daniel Halberstam and Eric Stein, Common Market Law Review, Feb2009, Vol46, Issue 1, p.13-72.
[135] Para. 21 and further Opinion AG *Kadi*.
[136] Article 103 Charter of the United Nations, see note 3.
[137] Para. 281 *Kadi* ECJ.
[138] Para. 281 *Kadi* ECJ.
[139] Para. 282 *Kadi* ECJ.
[140] Para. 283 *Kadi* ECJ.
[141] Para. 284 *Kadi* ECJ.

Thus, the ECJ, by referring to three constitutional principles of the EC law, namely the rule of law, the autonomy of the Community legal order and the respect for fundamental rights, reached the conclusion in its first part of its analysis that an international agreement cannot prejudice the constitutional principles of the EC Treaty. In particular the ECJ emphasised the principle that all Community acts must respect fundamental rights, a principle the observance of which is for the Court to review in the framework of the complete system of legal remedies established by the EC Treaty.[142]

In the second part of its judgement, the ECJ turned to examine what this means in terms of the international obligations of the EC. According to the ECJ,[143] Article 307 EC[144] may not grant UNSC Resolutions with a *'supra-constitutional'* status and render Community measures implementing UN law from judicial review.[145] According to the Court there is no derogation permitted from the principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law, which are laid down in Article 6 (1) TEU[146]. These principles form part of the very foundations of the Community legal order.[147]

In paragraph 326 the ECJ stated that: *'It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested Regulation, are designed to give effect to the Resolutions adopted by the SC under Chapter VII of the Charter of the United Nations.'*[148]

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[142] 'Case-note on Joined Cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*', Maria Tzanou, German Law Journal, Vol.10 No.02.

[143] Para. 304 Kadi ECJ.

[144] Article 307 EC Treaty, see note 7.

[145] EU Law, international law and economic sanctions against terrorism: the judiciary in distress?, Takis Tridimas and Jose A Gutierrez-Fons p. 22.

[146] Article 6 (1) EU Treaty: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

[147] Para. 303-304 *Kadi* ECJ.

[148] Para. 326 *Kadi* ECJ.

Arguably, the ECJ judgement is not very accommodating to the primacy of the UN. It accepted that special importance must be attached to UNSC Resolutions, but doubted that immunity for judicial review could be attributed to such Resolutions as a matter of international law. In paragraphs 298 and 299 the ECJ pointed out that the Charter does not impose the choice of a particular model for the implementation of UNSC Resolutions and leaves the Member States free to decide on this implementation. Therefore it did not exclude judicial review of the internal lawfulness of the contested Regulation under EC law. The Court drew a very important distinction between the UNSC Resolutions on the one hand, and the EC Regulations that implement them on the other. The thrust of the ECJ judgement is that the EC Courts are able to conduct a comprehensive judicial review of EC measures implementing UNSC Resolutions, however, this does not mean that they can conduct a direct judicial review of such Resolutions or any other binding decisions attributed to a UN organ.[149]

Therefore, according to the ECJ, the review does not apply to the lawfulness of the UN Resolutions as such, but only to the implementing Community measures.[150] It is arguable that even this indirect form of review is inappropriate because the UN Security Council Resolutions relate to highly sensitive security issues that should not be amenable for judicial review, or that this form of review can possibly result in inconsistent interpretations of UN Security Council measures and in conflicting normative findings.[151] This indirect review could also have negative implications for the United Nations order in terms of legitimacy, coherency, uniformity and unity, and thereby even underpinning the primary authority of the UN Security Council to safeguard international peace and security.[152]

The ECJ did not give a direct answer to the question whether an EC Regulation implementing a UNSC resolution might be given immunity from EC judicial review if the sanctions system set up by the resolution offered sufficient guarantees of judicial

[149] 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1: 65-88.
[150] Para. 286-287 *Kadi* ECJ.
[151] Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1: 65-88.
[152] 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1: 65-88.

protection. Paragraph 321 seems to suggest general immunity from jurisdiction for UNSC measures would be inappropriate, the Court argues that *'the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community'.*[153]

In next paragraph the Court says that such immunity would in any case be unjustified because the fact remains that the procedure before the Sanctions Committee does not offer guarantees of judicial protection and is still in essence diplomatic and intergovernmental and the persons or entities concerned have no real opportunity to assert their rights and the Sanctions Committee is taking its decisions by consensus, which each of its members having a right of veto.[154] This reasoning makes it difficult to know whether the ECJ intended by these paragraphs to hint that certain UNSC Resolutions might enjoy immunity from review if they did provide sufficient guarantees of protection.

IV. Keep the peace, do not change the world order

Traditionally, the UN Security Council has dealt with classical intergovernmental, diplomatic and political issues pertaining to peace enforcement and war prevention. The UNSC was expected to *'keep the peace and not to change the world order'.*[155] Probably no one envisaged that the UNSC would exercise general law-making functions. Since the 1990's the UN Security Council's role has been expanding dramatically. And this increased UN activity has not always leaded to increased accountability.

The move from pursuing measures against States to adopt smart sanctions is a manifestation of such a change. By adopting Resolutions of a general character the UNSC is in fact acting as a quasi-legislature, judiciary and executive. To make it more complicated this authority is exercised in a legal regime that does not have a comprehensive system of separation of powers and checks and balances. This state

[153] Para. 321 *Kadi* ECJ.
[154] Para. 322- 323 *Kadi* ECJ.
[155] Judge Fitzmaurice of the ICJ 1971.

of affairs places the UNSC in a position in which it might impinge on individuals' human rights.[156]

The problem remains that the UN sanctions regime does not provide for any meaningful venue for (administrative or judicial) review which could ensure compliance with international human rights law. With regard to their listing or de-listing, individuals have no *locus standi* before the UNSC or the Sanctions Committee. It is also not possible to challenge such decisions before the International Court of Justice. The ICJ cannot even deliver any advisory opinion on their behalf, because only the General Assembly and the UNSC may request[157] such an opinion.[158] Nor can applicants expect to obtain comprehensive review in the ECHR legal order or in their national courts, in particular courts of the EU Member States.

According to Gráinne de Bùrca it would have been an obvious route for the ECJ to borrow from the *Bosphorus*[159] approach of the European Court of Human Rights (ECtHR) on the relationship of the Community law with the European Convention on Human Rights (ECHR), where the ECtHR argued that as long as (*Solange* test) the ECJ/CFI provide for a level of fundamental rights protection that is not *'manifestly deficient'*, the ECtHR will not review Community acts or domestic acts implementing EC law. This way the ECJ could have conferred provisional immunity from review on UNSC measures where the levels of due process and basic rights protection provided by the UNSC could be considered sufficient.[160]

The *Behrami* and *Saramati*[161] cases show us the attitude of the ECtHR towards the UN Charter. In these cases the ECtHR had the opportunity to explore the relationship between the Convention and international law. In Chapter five we will take a closer

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[156] 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1: 65-88.

[157] Article 96 (1) Charter of the United Nations: 'The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any Legal question.'

[158] 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1: 65-88.

[159] *Bosphorus Airways v. Ireland*, Appl. 45036/98, judgement of the ECtHR 7 July 2005.

[160] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 01/09, p.36.

[161] Para. 148-149 Joined cases *Behrami* and *Behrami v. France* (71412/01), and Saramati v. France, Germany and *Norway* (78166/01) (2007) 45 EHRR SE10.

look at these judgements, for this moment it is enough to know that the ECtHR rejected the possibility of an approach like in *Bosphorus* towards organs of the UN, and also rejected the possibility of exercising jurisdiction over acts of States which were carried out on behalf of the UN.

The foregoing brings me to the end of this Chapter, this last paragraph I will use to argue in favour of indirect review, like it is pursued by the European Court of Justice. There is, to be sure, some justified concern that even indirect review of UNSC Resolutions might have a *'destabilizing effect'* on the international legal system by suggesting the possibility of second-guessing the UNSC and by jeopardizing the uniform application of sanctions.[162] But the state of affairs, as it is today under the UN sanctions regime, appears to be highly problematic. Concerning the serious deficits of the UN system as regards to observance of the fundamental rights of the individuals, it would be very dangerous to accept an unconditional submission of the EC to its decisions.[163] I think that indirect review will assist the EU in addressing the expanding competences of the UN Security Council. In my view, at least until such time the UN has clearly articulated and secured its human rights obligations, regional and national courts are in a position to review indirectly UNSC measures.

In numerous points the ECJ stressed in *Kadi* that it respects international law, and that the Court has jurisdiction to review a Community measure and under no circumstances a UNSC resolution.[164] The ECJ did not disregard or ignore the UNSC but the ECJ sent out a clear message that it is the Community's judicature constitutional role to uphold the law and the protection of fundamental rights within the EC legal order.[165]

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[162] 'The United Nations, The European Union, and the King of Sweden: economic sanctions and individual rights in a plural World order', Daniel Halberstam and Eric Stein, Common Market Law Review 46, 13-72, 2009.

[163] 'Case-note on Joined cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*', Maria Tzanou, German Law Journal, Vol. 10 No. 02.

[164] Para. 291 *Kadi* ECJ and Para. 300 *Kadi* ECJ.

[165] 'Case-note on Joined cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*', Maria Tzanou, German Law Journal, Vol. 10 No. 02.

Chapter 5

The protection of fundamental human rights

When the members of the UN Security Council decided to tackle the problem of terrorism in the international forum of the UN through the establishment of a 'blacklist' and the concept of economic sanctions against individuals, they did not provide for the corresponding opportunities of review for the persons concerned by these listings. Since targeted sanctions have a significant impact on individuals, the question arises whether the UN Security Council and the subsequently established Sanctions Committee have to respect certain human rights standards such as the right of due process when implementing the sanctions regime.[166] Another issue that needs to be addressed is how far States are obliged to apply such sanctions irrespective of their human rights obligations derived either from general international law or specific human rights treaties to which they are parties. First we will look at the Sanctions Committee and its guidelines.

I. Guidelines of the Sanctions Committee

The UN Security Council decided that it was necessary to establish a Sanctions Committee which is responsible for administering the Consolidated List of terrorist suspects and deciding on listings and de-listings. This Sanctions Committee is composed of representatives of all UN Security Council Members.

The Consolidated List consists of four sections (altogether running into 74 pages):

- A. Individuals associated with the Taliban (142)
- B. Entities and other groups and undertakings associated with the Taliban (none)
- C. Individuals associated with Al-Qaeda (256)
- D. Entities and other groups and undertakings associated with Al-Qaeda (111 entities).[167]

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[166] 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law For the Protection of Individuals', Clemens A. Feinugle, German Law Journal, November 2008.

[167] Website of the United Nations, http://www.un.org/sc/committees/1267/consolist.shtml, on 1 September 2009.

The names of Mr. Kadi and Al Barakaat can be found on respectively p. 57 (Section C) and p. 64 (Section D) of the Consolidated List.

QI.Q.22.01. Name: 1: YASIN 2: ABDULLAH 3: EZZEDINE 4: QADI
Name (original script): ياسين عبد الله عز الدين قاضي
Title: na **Designation:** na **DOB:** 23 Feb. 1955 **POB:** Cairo, Egypt **Good quality a.k.a.: a)** Kadi, Shaykh Yassin Abdullah **b)** Kahdi, Yasin **c)** Yasin Al-Qadi **Low quality a.k.a.:** na **Nationality:** Saudi Arabian **Passport no.: a)** Passport number B 751550 **b)** Passport number E 976177, issued on 6 Mar. 2004 , expiring on 11 Jan.2009 **National identification no.:** na **Address:** na **Listed on:** 17 Oct. 2001 (amended on 23 Apr.2007) **Other information:** Jeddah, Saudi Arabia.

QE.A.32.01. Name: AL-BARAKAT INTERNATIONAL
A.k.a.: Baraco Co. **F.k.a.:** na **Address:** Box 2923, Dubai, United Arab Emirates **Listed on:** 9 Nov.2001 (amended on 25 Jul. 2006) **Other information:** na

Consolidated list on 1 September 2009.

Above: Copy of their entries

The way in which this List is incorporated into the municipal legal systems of the UN Member States varies considerably.[168] In some countries the Consolidated List is directly incorporated into national law on the basis of the special status of UNSC Resolutions.[169] In most countries, however, an act of incorporation is required to make the List part of the domestic legal order. At the level of the European Union the Resolutions were needed to be implemented into the Union and Community legal order, and with regard to the counter-terrorism measures that lie at the origins of *Kadi* and *Al Barakaat*, the Council adopted two Regulations at the Community level.[170] These EC Regulations form an integral part of the laws of EU Member States and as such any sanction is in force in the EU Member States from the moment that the EC implementing Regulations enter into force.[171]

[168] 'Security Council's Anti-terror Resolutions and their Implementation by Member States', Andrea Bianchi, Journal of International Criminal Justice, 2006.
[169] See for example the Report of the Republic of Angola pursuant to paragraph 6 of SC Res. 1455 (2003) UN Doc. S/AC.37/2003/(1455)/3 at 4. The Republic of Angola considers SC Res. Adopted under Chapter VII as a subsidiary source of international law.
[170] Council Regulation (EC) No 881/2002 of 27 May 2002 and Council Regulation (EC) No 561/2003 of 27 March 2003.
[171] 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review, 14 (2009) 1: 65-88.

Section 7 of the Committee's guidelines[172] sets out the procedure for the submission of delisting requests; it says that any individual(s), groups, undertakings, and/or entities on the Consolidated List, may submit a petition for de-listing. The petitioner may ask the government of his citizenship or his residence for a review and that government must ask the designating government for more information. If, in the ensuing consultations, the governments fail to agree, the matter goes before the Sanctions Committee which meets in private and acts by consensus. In the de-listing submission, the petitioner needs to provide justification for the de-listing request, offer relevant information and request support for the de-listing.

Until 2006 there was no provision for an individual to have direct contact with the United Nations. The individual was dependent entirely on the readiness of his/her State to press a case in the exercise of diplomatic protection. Responding to the criticism on the de-listing procedure, in December 2006, the Security Council directed the Secretary General to establish "a focal point" within the Secretariat to receive petitions for de-listing for the first time directly from individuals or groups.[173] The resulting focal point procedures, however, do not allow for the individual to participate either in person or through a personal representative or legal counsel in the process of re-evaluation, nor do they require the UN or any government to provide the petitioner with any information other than the status and disposition of the delisting request.[174]

As of 12 August 2009, statistics relating to the Focal Point process are as follows:

- Total number of de-listing request received by the Focal Point: 14
- De-listed 3 individuals and 12 entities.[175]

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[172] Website of the United Nations, Committee's Guidelines, http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

[173] 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order.', Daniel Halberstam and Eric Stein, Common Market Law Review, Feb2009, Vol46, Issue 1, p.13-72.

[174] 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order.', Daniel Halberstam and Eric Stein, Common Market Law Review, Feb2009, Vol46, Issue 1, p.13-72.

[175] Website of the United Nations http://www.un.org/sc/committees/dfp.shtml :Total number of de-listing requests received by the Focal Point: 14 (including a request from one individual together with 12 entities; another individual together with 1 entity; second requests from two individuals; and a third request from one individual) . Of those, number of de-listing requests that have been processed completely: 11 (including a request from one individual together with 12 entities; and second requests from two individuals, one of whom subsequently submitted a third request); and number of de-listing requests that are still in process: 3 (including a

The current sanctions regime affects the fundamental rights of individuals and entities by targeting them and their assets, resulting in infringement of the freedom of movement and the right to property.[176] Therefore, the sanctions regime provides for exemptions from imposed sanctions due to listing. Exemptions can be granted from the imposed travel ban[177] and there are exemptions allowed with regard to frozen funds or other financial assets or economic resources to cover 'basic expenses' or 'extraordinary expenses' of the targeted individuals.[178] The above set out procedure raises questions with regard to the considerable tension with international as well as domestic conceptions of fundamental rights and the lack of 'judicial review' of UN Security Council actions. This issue will be discussed in the following paragraphs. First we will look at the concept of targeted sanctions.

II. The concept of targeted sanctions; two different types

One of the measures which the UN Security Council has at its disposal for the maintenance of international peace and security are economic sanctions as prescribed in Article 41 UN Charter. According to that Article the Security Council may:

'(…) decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.'

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request from one individual together with 1 entity; a second request from one individual; and a third request from one individual). Of the ten de-listing requests that have been processed completely, number of individuals and/or entities de-listed by the Committee: 2 individuals and 12 entities.
Of the ten de-listing requests that have been processed completely, number of individuals and/or entities that remain on the List: 7 individuals

[176] 'Targeted sanctions and accountability of the United Nations Security Council', Finnur Magnusson, University of Vienna, June 2008.

[177] Resolution 1333 (2000), 19 December 2000, Para. 11: exemptions are possible in case of '(…) humanitarian need or on the grounds that the flight promotes discussion of a peaceful resolution of the conflict in Afghanistan, or is likely to promote Taliban compliance with this resolution or with resolution 1267 (1999)'.

[178] Resolution 1452 (2002), 20 December 2002, Para. 1(a)–1(b) States that par. 4(b) of resolution 1267 (1999) and Para. 1 and 2(a) of resolution 1390 (2002) do not apply to funds and other financial assets determined to be:
(a) Necessary for basic expenses (payments for foodstuff, medicines etc.)
(b) necessary for extraordinary expenses

This Article serves as tool where there is a breach of international rules by individual States. On many occasions the UNSC has decided on or recommended economic sanctions which have entailed the breaking off economic relations, embargoes on imports and exports, the blocking of financial operations, as well as other sanctions.[179] These sanctions were imposed at authoritarian regimes which acted in violation of international law. The rationale for imposing economic sanctions has been that in this way the regime controlling the state would be forced to comply with the will of the Security Council – representing the international community – but not to punish the innocent people living in the state in question.[180]

However, the effects of these economic sanctions, such as the distortion of economic activity, have serious consequences not only for the States targeted, but, in particular their civilian population. The inability to affect directly the individuals responsible for the violation of international law brings up questions like the ethical basis and legal limitation. As a result of these questions initiatives have been taken up to make the sanctions regime more targeted.

These concerns entailed initiatives and meetings between government officials and international experts concerning a possible reform of the UN sanctions regime and can be divided in three stages. The first stage, the so-called Interlaken process[181], took place in 1998-1999 and addressed targeted financial sanctions. The Bonn-Berlin process[182] was the second stage, which took place in 1999-2000, in that were discussed the design and implementation of arms embargoes and travel and aviation related sanctions. The third stage, also known as the Stockholm process[183], took place in 2002-2003. The Stockholm process focused on how the sanctions

[179] 'Targeted Sanctions and accountability of the United Nations Security Council', Finnur Magnusson, June 2008, University of Vienna, p.6.
[180] 'Targeted Sanctions and accountability of the United Nations Security Council', Finnur Magnusson, June 2008, University of Vienna, p.7.
[181] Website of SECO (State Secretariat for Economic Affairs): http://www.seco.admin.ch/themen/00513/00620/00639/index.html?lang=en
[182] Website of SECO (State Secretariat for Economic Affairs): http://www.seco.admin.ch/themen/00513/00620/00639/index.html?lang=en
[183] Website of SECO (State Secretariat for Economic Affairs): http://www.seco.admin.ch/themen/00513/00620/00639/index.html?lang=en

addressed in the Interlaken and the Bonn-Berlin processes could be implemented and monitored.[184]

Both the United Nations and the European Union have adopted restrictive measures against natural and legal persons. The European Union in particular has adopted two types of sanctions:

1) individual sanctions implementing lists of terrorists suspects drawn up by the UN Sanctions Committee (*Kadi* and *Al Barakaat*)[185]
2) and sanctions based on EU-managed lists[186] *(OMPI, Sison and al-Aqsa)*

In the former case, the European Union faithfully copies lists of names drawn up by the UN Sanctions Committee. The second type of sanctions are based on autonomous EU lists, the EU Member States independently identify terrorist suspects, who are then listed and sanctioned by the EU.

The UN sanctions regime that lies at the heart of *Kadi* and *Al Barakaat* is more or less the outcome of the initiatives to make the sanctions more targeted. These sanctions are directly targeted at persons and entities directly associated with Osama Bin Laden, members of the Al Qaeda network and the Taliban.

III. The UNSC as a Machiavellian prince?

The question whether international human rights standards bind the UN Security Council in its action has been a matter of continuous debate.[187] One can say that there are two main positions: one arguing that the UN Security Council is not – at least when acting under Chapter VII – bound by the respect for human rights provisions because its functioning is underpinned by the interest in maintaining international peace and security. This view may be supported by UN drafters' aims

[184] 'Targeted Sanctions and accountability of the United Nations Security Council', Finnur Magnusson, June 2008, University of Vienna, p.7.
[185] Council Regulation (EC) 881/2002, implementing SC Resolution 1267 (1999), 27 May 2002.
[186] Council Common Position 2001/931/CFSP, 27 December 2001; Council Regulation (EC) 2580/2001, implementing SC Resolution 1373 (2001), 27 December 2001.
[187] 'Security Council's Anti-terror Resolutions and their implementation by Member States', Andrea Bianchi, Journal of International Criminal Justice, 2006 and 'Targeted Sanctions and the accountability of the United Nations Security Council', Finnur Magnusson, University of Vienna, June 2008.

and goals. The world was just emerging from World War II and the framers intended to form a functioning UN Security Council with central decision-making powers; if you look at Article 1 of the UN Charter[188] then you see that it mentions human rights concerns only after the maintenance of international peace and security, which is the first purpose listed.[189]

The second position takes the view that the UN Security Council is bound by international human rights in all its actions, including Chapter VII. Although not a party to the respective human rights instruments, the UN must respect the UN Charter which grants, inter alia, a right to due process and a right to a fair trial.[190] An important argument to support this view is that Article 24 (2) UN Charter[191] obliges the Security Council to act in accordance with the purposes of the UN and that Article 1 UN Charter[192] explicitly mentions the respect for human rights as one of these purposes. Another argument in favour of this position is that the UN, by contributing to the development of international human rights law, created the legitimate expectation that the UN itself will observe standards of due process.[193]

The first position, which denies that the UN Security Council is bound by international human rights, disregards the possibility that a historical perspective might be inappropriate where the UN Security Council targets individuals with sanctions. As explained above, a development has taken place whereby economic sanctions are not only used against States but also against individuals. These targeted sanctions

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[188] Article 1 Charter of the United Nations (1): ' To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might led to a breach of the peace'. (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen universal peace.' (3) 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

[189] 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law For the Protection of Individuals', Clemens A. Feinugle, German Law Journal, November 2008.

[190] 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law For the Protection of Individuals', Clemens A. Feinugle, German Law Journal, November 2008.

[191] Article 24 (2) Charter of the United Nations, see note 12.

[192] Article 1 Charter of the United Nations, see note 188.

[193] 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law For the Protection of Individuals', Clemens A. Feinugle, German Law Journal, November 2008.

are designed to reduce 'collateral damage' aiming to coerce regimes without imposing major harm on ordinary citizens.[194] However, they do have a significant impact on the individuals and entities targeted. This development, of the UN being able to adopt norms that directly bind individuals, was probably not foreseen when the Charter was drafted.

Whatever may have been the intentions of the founding fathers in 1945, I do not think that the UN Security Council was meant to be the sole judge of its own legitimacy like a Machiavellian prince who could do no wrong.[195] Procedural rights such as access to documents and the right to a fair hearing are inseparably interlinked with the right to effective judicial protection. An individual is increasingly a subject of international law, and thus must be guaranteed certain fundamental rights through this effective judicial protection. Ideally, international law itself should organize such protection, where it is lacking municipal courts have to step into the breach by applying domestic constitutional standards of protection of fundamental rights.[196]

IV. From the magic of jus cogens to full review with regard to fundamental rights

The different starting points of the CFI, the AG and the ECJ determined the intensity of their fundamental rights inquiry. The CFI reasoned that the primacy of the UN Charter prevented review of the contested Regulation on the basis of EC standards, and proceeded to assess whether the Regulation complied with the principles of *jus cogens*. The AG and the ECJ subjected the sanctions to full review on the basis of EC standards.

According to the CFI, EC fundamental rights do not apply in international law. The primacy of the UN Charter prevented review of the contested Regulation on the basis of EC standards. The CFI found that it was only empowered to check the lawfulness of the Resolutions of the UN Security Council in question with regard to *jus*

[194] 'Case-note on Joined Cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*', Maria Tzanou, German Law Journal, Vol. 10 No. 02., see also the website of State secretariat for economic affairs (SECO), www.smartsanctions.ch

[195] 'The United Nations, The European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order', Daniel Halberstam and Eric Stein, CML Rev 46, 13-72, 2009.

[196] 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit', Piet Eeckhout, European Constitutional Law Review, 3: 183-206, 2007.

cogens,[197] because jurisdiction to review indirectly the lawfulness of a the decision of the UN Security Council, through its Sanctions Committee that funds of certain individuals or entities must be frozen – a decision that is binding on the Members of the United Nations, in accordance with Article 48 of the UN Charter[198] - cannot be justified either on the basis of international law or on the basis of Community law.[199] First, such jurisdiction would be incompatible with the undertakings of the Member States under the Charter of the United Nations and second, such jurisdiction would be contrary to provisions both of the EC Treaty and of the Treaty on European Union.[200] The CFI followed a broad understanding of *jus cogens*, encompassing under it all the rights pleaded by the applicants. In paragraph 238[201] the CFI concluded that there is no infringement of the applicants' fundamental rights, and that the measures were therefore valid. The measures in question pursue an objective of fundamental public interest for the international community. The CFI argued that the freezing of funds is a temporary precautionary measure which does not affect the substance of the right of property in their financial assets but only the use thereof.[202]

Furthermore, the CFI ruled that neither the right to a fair hearing nor the right to judicial process had been violated. The CFI emphasized the possibility for the applicant to petitioning his government to approach the Sanctions Committee with a view to requesting his de-listing[203] and concluded that even though he had no opportunity to make his view known on the correctness and relevance of any of the facts on the basis of which his funds were frozen, this would not violate any right to a fair hearing once the Security Council or the Sanctions Committee have considered that there were international security grounds that militate against granting such.[204] With regard to access to judicial remedy, the CFI ruled that the lack of judicial remedy is not in itself contrary to *jus cogens*, because the right to access to the courts is not an absolute right. At times of public emergency which threatens the life of the nation there may be measures taken that are derogating from that right.[205] And that in any

[197] Para. 221-226 *Kadi* CFI.
[198] Article 48 Charter of the United Nations, see note 76.
[199] Para. 220-221 *Kadi* CFI.
[200] Para. 222-223 *Kadi* CFI.
[201] Para. 238 *Kadi* CFI and Para. 289 *Al Barakaat* CFI.
[202] Para. 27-251 *Kadi* CFI.
[203] Para. 261-268 *Kadi* CFI.
[204] Para. 274 *Kadi* CFI and Para. 328-329 *Al Barakaat* CFI.
[205] Para. 343-345 *Al Barakaat* CFI.

case the procedure set up by the Sanctions Committee to allow for a petitioned government to apply to it to re-examine a case was a reasonable method of protecting the applicants' rights.[206]

V. A closer look at jus cogens

Is the UNSC bound by *jus cogens*? The answer to this question is not provided by the UN Charter, nor has it been answered by the ICJ. Only recently, in *Congo/Rwanda*[207], has the ICJ explicitly recognised the existence of norms of *jus cogens*.[208] Ad hoc judge Dugard observes: *'It has been suggested that a UN Security Council resolution will be void if it conflicts with a norm of jus cogens'*. That the norms apply to the UNSC thus is not as self-evident as the CFI suggests it to be, because the concept of *jus cogens* is far from clear, it is applied only very rarely.

I think that the answer to the question whether the UNSC is bound by *jus cogens* is to be answered positive. Everybody, state or entity, is bound by *jus cogens*. The problem here is more the issue of defining *jus cogens*.

According to Article 53 Vienna Convention on the Law of Treaties *'A Treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community and 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.'*

The concept of *jus cogens* is far from clear. Some authors find the basis of jus *cogens* on the moral conscience and beliefs of mankind.[209] Understood that way, it is linked to postulates of natural law according to which, in establishing their contractual

[206] Para. 290 *Kadi* CFI.
[207] Case concerning Armed Activities on the Territory of Congo (*Democratic Republic of the Congo v. Rwanda*), judgement of 3 February 2006, General List No.126.
[208] 'Fundamental Rights and the United Nations Sanctions Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities', Mielle Bulterman, Leiden Journal of International Law, 19 (2006), p.753-772.
[209] 'International *jus cogens*: Issues of Law-Making', G. Danilenko, European Journal of International law, 2 (1991), p.42-66.

relationships, States do not act in absolute freedom but are bound by fundamental principles deeply-seated in the international community. Other authors, relying on the definition laid down in the Vienna Convention on the Law of Treaties, argue that *jus cogens* needs to be accepted and recognised by the international community as a whole.[210] Article 53 (2) of the Vienna Convention can be interpreted in different ways:

- As a condition for unanimity where all States must give their acceptance and recognition of the rule by 'the international community as a whole'.
- As a majority rule where a number of States would fashion rule binding upon a dissenting minority.
- As an achievement of a genuine consensus among all essential components of the modern international community.

The opinions differ which specific human rights have been elevated to the level of *jus cogens*. In *Kadi* the applicant alleged that the contested Regulation had breached the right to a fair hearing, the right to property and the right to effective judicial review; these rights have long been recognised as fundamental in the Community legal order, but it is by no means obvious that they can be considered as *jus cogens*. As said in the previous section, the CFI did not accept this. This is because the measures in question pursued an objective of fundamental public interest for the international community.

The CFI adopted a very deferential approach towards the UN Security Council, with the result that it fails to protect the fundamental rights of the individuals. The fact that the CFI engaged in a judicial review with regard to *jus cogens* cannot call this finding into question. In the reasoning of the CFI, the function of *jus cogens* was not to exclude rights which would otherwise be applicable but to lower substantially the degree of judicial scrutiny by pushing well back the threshold of review.[211]

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[210] 'EU law, international law and economic sanctions against terrorism: The judiciary in distress?', Takis Tridimas and Jose A Gutierrez-Fons, p.29.
[211] 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order', Takis Tridimas, E.L. Rev. 2009, 34 (1), 103-126.

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[211] 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order', Takis Tridimas, E.L. Rev. 2009, 34 (1), 103-126.

Furthermore, the Court of First Instance was not asked to rule on the legality of the actions of the UN Security Council. And if we accept that full review of the contested Regulation would amount to an indirect review of the underlying resolution, the CFI's approach is not the solution; it would place the Court of First Instance in a position which the International Court of Justice has refused on itself[212] up to this point.[213]

VI. The AG and the ECJ as guardians of fundamental rights in the EC legal order

In the view of the AG compliance with fundamental rights as protected within the EC legal order is a condition for the legality of EC acts, including EC Regulations which implement binding UN Security Council Resolutions. He also made an interesting suggestion that in particular the Member States belonging to the UN Security Council would have to act in such a way as to prevent, as far as possible, the adoption of decisions that are liable to enter into conflict with the core principles of the Community legal order.[214] The claim that a measure is necessary for the maintenance of international peace and security cannot operate as to silence the general principles of Community law and deprive individuals of their fundamental rights.[215]

The Advocate General recognised that there can certainly be extraordinary circumstances that may justify restrictions on individual freedom that would be unacceptable under normal conditions.[216] However, on the contrary, *'when the risks to public security are believed to be so extraordinary high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. In those circumstances the courts should fulfil their duty to uphold the rule of law with increased vigilance'.*[217]

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[212] *South West Africa case*, order no. 1 of 26 January 1971, (1971), ICJ Rep 3 at 45; 'the court does not posses powers of judicial review or appeal in respect to the decisions taken by the United Nations organs concerned'.
[213] Judicial review of European Anti-Terrorism Measures – The *Yusuf* and *Kadi* judgements of the Court of First Instance', Christina Eckes, European Law Journal, Vol.14, No 1, January 2008, pp.74-92.
[214] Para. 32 Opinion AG *Kadi*.
[215] Para. 34 Opinion AG *Kadi*.
[216] Para. 35 Opinion AG *Kadi*.
[217] Para. 35 Opinion AG *Kadi*.

He argued[218] that even though the international antiterrorism context required a court to be mindful of its limitations, and in appropriate circumstances to recognize the authority of institutions within other legal orders which might be better placed to weigh particular interests, the Court *'cannot, in deference to the views of those institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect'*.[219] Given the consequences for the person concerned and the severity of the interference in his property rights, together with the absence of any opportunity to be heard the AG concluded that the claims were well founded and that the EC Regulation should be annulled so far as affecting the appellants.[220]

The ECJ also found that the right of defence, in particular the right to be heard and the right to effective judicial review, were breached by the EC implementation. The ECJ ruled that the right to effective judicial protection is a general principle of Community law. The EC infringed the applicants rights of defence by not providing for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned and for hearing of those persons, either at the time of that inclusion or later.[221]

According to the settled case law, the right to property is one of the general principles of Community law. It is not, however, an absolute right. That right may be restricted for public interest objectives, but that restrictions must be proportional and it must be a tolerable interference.[222] The implementing EC measures were found[223] to advance the legitimate and fundamental general interest of the international community, namely the fight against the threats posed by acts of terrorism, and as such they could be in principle justified.[224] However the ECJ ruled that the contested Regulation was adopted without furnishing any guarantee to put the case to the competent authorities, in a situation were the restriction on the property rights was significant,

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[218] Para. 44 Opinion AG *Kadi*.
[219] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 01/09, p.33.
[220] Para. 55 Opinion AG *Kadi* and Para. 55 Opinion AG *Al Barakaat*.
[221] Para. 335-353 *Kadi* ECJ.
[222] Para. 354-355 *Kadi* ECJ.
[223] Para. 366 *Kadi* ECJ.
[224] 'Judicial Review by the European Court of Justice of UN 'smart sanctions' Against Terror in the *Kadi* dispute', Guy Harpaz, European Foreign Affairs Review 14: 65-88, 2009.

having regard to the general application and actual continuation of the freezing measures.[225]

The European Court of Justice began its analysis by referring to the principle of effective judicial protection as a general principle of Community law stemming from the constitutional traditions common to the Member States, and also enshrined in Articles 6[226] and 13[227] of the ECHR and in Article 47[228] of the Charter of Fundamental rights of the EU.[229] The ECJ in its approach focused primarily on the protection of those fundamental rights by the Community legal order. It did not disregard the security concerns of the international community, but it took seriously its duty *'to preserve the rule of law'*[230] by acting as guardian of fundamental rights within the EC legal order.[231] You could argue that the ECJ should have applied international human rights standards rather than domestic or European ones, but I think that that would possibly create the same problems that arose with the interpretation and application of *jus cogens* by the CFI.

The Advocate General's opinion and the judgement of the ECJ both look to the domestic legal order of the Community for the Regulation of both the relationship with international law as well as the fundamental rights protection that govern all Community action. As the Advocate-General puts it: *'The duty of the European Court*

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[225] Para. 369-370 *Kadi* ECJ.

[226] Article 6 European Convention on Human Rights (1): ''In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of the juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

[227] Article 13 European Convention on Human Rights: 'Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity.'

[228] Article 47 Charter of Fundamental rights of the EU: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent an impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

[229] Para. 335 *Kadi* ECJ.

[230] Para. 45 Opinion AG *Kadi.*

[231] 'Case-note on Joined Cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities'*, Maria Tzanou, German Law Journal, Vol. 10 No. 02.

of Justice is to act as the constitutional court of the municipal order that is the Community'.[232]

VII. Missed opportunity of a direct cross-system dialogue?

It must be kept in mind what these cases are essentially about, namely upholding the very basic principles of law, also in international affairs. It simply cannot be right that an individual's assets are frozen for several years, through an executive decision which cannot be reviewed by a judge, or in any judicial-type proceedings. That is why the euro-centric approach of the ECJ is, in my opinion, preferable from the point of view of fundamental rights. It is also good to mention that it is important that internally a legal system must uphold its own fundamental rights protection standards.

Although each path taken leads to some remarkably strong assertions of judicial review and the protection of rights, each also misses an important opportunity to engage in a cross-system direct dialogue on international human rights with the United Nations.[233] The CFI, by applying the norms of *jus cogens*, searches for fundamental rights norms in public international law, while the AG and the ECJ exclusively apply the Community's own principles of fundamental rights. It is arguable that none of these opinions takes an approach that seriously engages international human rights law.

The CFI took the save path, legitimate, from the point of view of the upholding of international law, however, from the point of view of the individual and general principles of fundamental rights, this was not the best option. The CFI judgement largely capitulates to the universal in virtual disregard of human rights.[234] The restriction of the scope of review to *jus cogens* takes back with one hand what it

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[232] Para. 37 Opinion AG *Kadi.*

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

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

gives with the other, as that largely indeterminate concept covers not more than a handful of egregious violations.[235]

The AG and the ECJ avoid the debate about international human rights law by considering only the fundamental rights of the Community legal order. The ECJ conducted its communication with the United Nations from an exclusively European perspective. Both the AG and the ECJ review the lawfulness of the Community Regulation to the realm of Community law, while eschewing the idea that this would have implications for the UNSC resolution.[236] The ECJ specifically rejected the idea that Community courts have jurisdiction to rule on the latter question, even if only confined to review of *jus cogens*.[237]

The judicial strategy adopted by the ECJ was an inward-looking one, which eschewed engagement in international dialogue. In its judgement the Court simply noted that the UN Charter leaves it to the Member States to decide how to transpose UNSC Resolutions into their legal order.[238] Arguably there were other judicial strategies available. If the ECJ would have followed his own consideration in paragraph 298 of its judgement, were the ECJ considered that the UN Charter leaves it to the Member States to decide how to transpose UNSC Resolutions into their legal order, this would have provided a doctrinal route by which the ECJ could have reached the same substantive result even while adopting an internationally-engaged approach which drew directly on principles of international law instead of emphasizing the particularism of Europe's fundamental rights.[239] By failing to do so, the ECJ lost an important opportunity to contribute to a dialogue about due process as part of customary international law, which would be of relevance for the international community as a whole and not just the European Union.[240]

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[235] 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', Daniel Halberstam and Eric Stein, Common Market Law Review 46: 13-72, 2009.
[236] Para. 286 *Kadi* ECJ.
[237] Para. 287 *Kadi* ECJ.
[238] Para. 298 *Kadi* ECJ.
[239] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 2009, p.37.
[240] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 2009, p.37-38.

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[239] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 2009, p.37.
[240] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 2009, p.37-38.

Although the ECJ avoids a direct conflict with the UNSC, I think the approach by this Court is preferable above the approach of the CFI. At the end of the day, the importance is to be found in whether or not the Court has found a mechanism to ensure that fundamental rights are observed within the Community legal order even in times when '*the risks to public security are believed to be extraordinary high*'.[241] The Community judiciary has to find a balance between, on the one hand, the overriding interests of public security and, on the other hand, the rights of the individual. The importance of the ECJ's judgement in *Kadi* is to be found in the role of the judiciary within the EC legal order, which established itself as the constitutional guardian of fundamental rights.[242] This commitment to the protection of fundamental rights has to be applauded.

[241] Para. 35 Opinion AG *Kadi*.
[242] 'Case-note on Joined Cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*', Maria Tzanou, German Law Journal, Vol. 10 No. 02.

Chapter 6
Consequences of the annulment

The European Court of Justice came to the conclusion that *'it follows from all the foregoing that the contested Regulation, so far as it concerns the appellants, must be annulled'*.[243] However, the annulment of the Regulation with immediate effect could seriously and irreversibly prejudice the effectiveness of the restrictive measures imposed by the Regulation, because in the interval preceding its replacement by a new Regulation Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again[244] or they could use their funds to fund terrorism.

However, it also could not be excluded that the imposition of those measures on the appellants may for all that prove to be justified. The ECJ decided that the effects of the contested Regulation must be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms. The effects of the contested Regulation, so far as it concerns the appellants, were maintained for a period that could not exceed three months running from the date of delivery of this judgement.[245] The annulment of the Regulation itself, however, raises a number of issues.

First, what is the precise scope of the ruling - would it be possible for the Council to refuse the disclosure of evidence to Mr. Kadi and Al Barakaat on security grounds? Second, might there be a possibility of a claim in damages following the annulment of the Regulation? Can *Kadi* be seen as the *Solange* decision of the ECJ?

I. Scope of the ruling

The first question, what is the level of protection of procedural rights, is not answered by the judgement. The ECJ declared that the Council had to communicate

[243] Para. 372 *Kadi* ECJ.
[244] Para. 373 *Kadi* ECJ.
[245] Para. 374-376 *Kadi* ECJ.

inculpatory evidence to the appellants, it also recognised the limiting effect of overriding considerations pertaining to security and the Community's international relations. On that ground, I would expect that certain evidence may be withheld from the parties concerned or that the Council may be required to disclose it to the Court with a view to the latter determining whether it should be communicated to the applicants.[246]

The Community institutions responded to the ECJ's judgement and two Commission Regulations[247] were issued in this respect. The first states that *'the Commission will communicate the grounds on which this Regulation is based to the individuals concerned, provide them with the opportunity to comment on these grounds and review this Regulation in view of the comments and possible available additional information'.*[248]

The second Regulation states that in order to comply with the judgement of the ECJ the Commission communicated the narrative summaries of reasons provided by the UN Al-Qaida and Taliban Sanctions Committee to Mr. Kadi and to Al Barakaat International Foundation. It also gave them the opportunity to comment on these reasons in order to make their point of view known. After considering the comments received, the Commission adopted a new Regulation added the two applicants to the list before the expiry of time period prescribed by the ECJ.[249]

The question that arises is whether the above-mentioned Regulations can be regarded as appropriate compliance with the ECJ's ruling? It does not seem that the process requirements the Court asked for are being met, so the answer is probably

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[246] 'EU law, international law and economic sanctions against terrorism: The judiciary in distress?', Takis Tridimas and Jose A Gutierrez-Fons, p.40.

[247] Commission Regulation (EC) No. 1190/2008 of 6 November 2008 amending for the 100th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaida network and the Taliban, OJ L 299/03 of 8.11.2008 and Commission Regulation (EC) No. 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaida network and the Taliban, OJ L 322/25 of 2.12.2008.

[248] Commission Regulation (EC) No. 1190/2008 of 6 November 2008 amending for the 100th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaida network and the Taliban, OJ L 299/03 of 8.11.2008.

[249] Commission Regulation (EC) No. 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama Bin Laden, the Al-Qaida network and the Taliban, OJ L 322/25 of 2.12.2008.

negative. As the Regulation provides, Mr. Kadi and Al Barakaat received *'narrative summaries of reasons'* and were given the opportunity to comment on them. Based on this, they were placed back on the List. However, it should be kept in mind that compliance of the EC institutions with the ECJ's ruling is probably a very difficult task, because the sanctions are decided at the UN level, and therefore the EU institutions cannot have more information than the UN is willing to provide, and as we have seen is that being limited only to the narrative summary of reasons.[250] On the other hand, the Member States provide the UN the information, so the question could be asked whether it will be a better solution to place the Member States under the duty to divulge more information to the EC.

Mr. Kadi brought a new challenge, which is now pending in the CFI. Hopefully, that challenge will tell us more about the scope of procedural rights.[251]

II. Claim in damages

The European Court of Justice found that *'..it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected'*.[252] It is possible that such use of language might well open the door for a claim in damages by the appellants.

Under Articles 288(2)[253] and 235[254] EC Treaty, and under established case law[255], Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the

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[250] 'Case-note on Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities', Maria Tzanou, German Law Journal, Vol. 10 No. 02.

[251] CFI, 'Action brought on 26 February 2009 – Kadi v Commission', Case T-85/09, *Official Journal of the European Union*, C 90, 18 April 2009, p. 37.

[252] Para. 334 *Kadi* ECJ.

[253] Article 288 (2) EC Treaty: 'In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.

[254] Article 235 EC Treaty: 'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment'.

[255] C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* (2000) ECR I-5291, 4 July 2000.

obligation resting on the Community and the damage sustained by the injured parties.[256] The concept of serious violation must be understood as a manifest and clear disregard of the limits of discretionary powers.[257]

It is questionable whether the threshold of seriousness would be met in this case. The adoption of the contested Regulation does not appear to exceed manifestly and gravely the limits of the Council's discretion given the importance of anti-terrorist policies, and the fact that the ECJ had never before examined the effect of UNSC Resolutions in the EC legal order and their effects of fundamental rights. Furthermore, there has to be a direct causal link between the breach of the obligation resting on the Community and the damage sustained by the injured parties; the establishment of a causal link would not be straightforward but would not be impossible. Since the actions were adopted to comply with UNSC Resolutions, failure to heed would expose the Member States to liability under international law, it might be arguable that any loss suffered by the claimants would be attributable not to the EC but to the UN.[258]

However, this would not really fit in the express statement of the ECJ in *Kadi* that the UN Charter does not impose on its Member States the choice of a particular model for implementations of UNSC Resolutions; they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member State of the United Nations. Furthermore, the UN Charter leaves the Member States of the United Nations a free choice among the various possible models for transposition of those Resolutions into their domestic order.[259]

III. Is Kadi the Solange decision of the ECJ?

This brings me to the more fundamental question with regard to the decision of the ECJ. From the previous Chapter we have seen that the ECJ did not seek to engage

[256] Para. 42 C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* (2000) ECR I-5291, 4 July 2000.
[257] Para. 41-46 C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* (2000) ECR I-5291, 4 July 2000.
[258] 'EU law, international law and economic sanctions against terrorism: The judiciary in distress?', Takis Tridimas and Jose A Gutierrez-Fons, p.40, see footnote 137.
[259] Para. 298 *Kadi* ECJ.

in a dialogue with the UN Security Council. But, more importantly, does it mean that the ECJ 'threatened' the UNSC that if it does not provide for an adequate protection of fundamental rights then the ECJ will assume this role? It is possible to characterise *Kadi* as the *Solange* decision of the ECJ?

The basis for the Solange jurisprudence can be found in a series of decisions by the German Federal Constitutional Court[260] where the Federal Constitutional Court reserved the competence to exercise its jurisdiction with regard to Community law if it was not satisfied with the protection of fundamental rights within the EC legal order. In the first *Solange* judgement in 1974 the Court considered that it was necessary to conduct a second review of the Community legislation in the light of fundamental rights guaranteed by the Basic Law *so long as* the Community legal order lacked a democratically elected parliament with legislative powers of scrutiny and a codified catalogue of fundamental rights.

In 1986, after considering the case law of the ECJ, the *Bundesverfassungsgericht*, declared that an additional review of Community legislation in the light of the fundamental rights guaranteed by the Basic Law was no longer necessary *so long as* the case law of the Court of Justice continued to afford the level of protection found.[261]

It is very arguable whether the ECJ employed such a conditionality approach vis-à-vis the Security Council. In *Kadi* the ECJ certainly referred to the re-examination procedure before the Sanctions Committee and found that it did not offer the necessary safeguards: *'..the fact remains that the procedure before the Committee is still in essence diplomatic or intergovernmental, the persons or entities concerned have no real opportunity of asserting their rights..'*.[262]

However, in my view the Court did not explicitly adopt a *Solange* argument, that international law has primacy as long as it complies with fundamental Community

[260] BverfG 37, 327 *Solange I* of 17 December 1970, BverfG 73, 339 *Solange II* of 22 October 1986 and BverfG 89, 115 *Maastricht- Urteil* of 12 October 1993.
[261] 'Constitutional Law of the European Union', Koen Lenaerts and Piet van Uffel, Second Edition 2005, p.684-685.
[262] Para. 323 *Kadi* ECJ.

norms. The ECJ eschewed the dialogic approach of the German Constitutional Court which engaged directly with the ostensibly conflicting international regime.

Perhaps this argument can be found in the reasoning of the AG who argues that *'.. as the system governing the functioning of the United Nations now stands, the only option available to individuals who wish to have access to an independent tribunal in order to obtain adequate protection of their fundamental rights is to challenge domestic implementing measures before a domestic court..*[263] and *'..[H]ad there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists'.*[264]

The choice of the ECJ not to borrow from the *Solange* approach seems to be carefully chosen. It seems to have been deliberately calculated by the Court as an opportunity instead to emphasize the autonomy, authority and separateness of the European Community from the international legal order.[265]

If I am correct in reading that the ECJ rejects the possibility of *Solange,* then this judgement is not an invitation to a dialogue, but strictly a one-way communication. By rejecting the *Solange* approach, the Court insists on the European protection of Europe's particular version of rights. Furthermore, the ECJ gently but firmly suggests that it would behove the UN to accept the ECJ's interpretation of the UN Charter and make way for the ECJ's protection of rights.[266]

IV. Lessons from Strasbourg

In this context it is interesting to look at the cases brought for the ECtHR and the approach of the Court because it differs from the other two European Union courts in

[263] Para. 38 Opinion AG *Kadi.*
[264] Para. 54 Opinion AG *Kadi.*
[265] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 01/09, p.60.
[266] 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', Daniel Halberstam and Eric Stein, Common Market Law Review 46: 13-72, 2009.

cases of indirect challenges brought before them against the UN Security Council action.

An important case to mention here is *Bosphorus*[267]; the impugned act involved the seizure of an aircraft by Irish authorities acting in order to implement an EC Regulation which in turn was adopted to implement a UNSC resolution. Neither the EC nor the EU is a party to the ECHR, however the ECtHR agreed to rule on a human rights challenge brought against Ireland which was implementing mandatory EC and EU legislation. The ECtHR adopted an approach to enable it to hear indirect challenges against an international organization which is not a party to the Convention. In short, the approach of the ECtHR is to say[268] that insofar as the EU maintains a functioning system of human rights protection which is at least equivalent to that provided by the ECHR, the ECtHR will presume that the EU measures are compatible with the Convention, unless there is evidence of some dysfunction in the control mechanisms or a manifest deficiency in the protection of human rights.[269] In the Court's view the protection of Bosphorus Airways' Convention rights was not manifestly deficient, as consequence the presumption of Convention compliance had not been rebutted and the impoundment of the aircraft did not violate the Convention rights.

More recently, the Court had the opportunity to explore the relationship between the Convention and international law in *Behrami* and *Saramati*[270] which arose from the Kosovo conflict of 1998 – 1999. The ECtHR held that the actions of the armed forces of States acting pursuant to UN Security Council authorizations are attributable not to the States themselves, but to the United Nations because the acts of both KFOR and UNMIK were under *'ultimate control'* of the UN. The ECtHR then proceed to examine the implications of this finding for its jurisdiction, and more generally the relationship between the Convention and the UN acting under Chapter VII of its Charter.

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[267] *Bosphorus Airways v Ireland*, Appl. 45036/98, judgement of the ECtHR 7 July 2005.
[268] Para. 18-21, *Bosphorus Airways v Ireland*, Appl. 45036/98, judgement of the ECtHR 7 July 2005.
[269] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 2009, p.37-38.
[270] Joined cases *Behrami* and *Behrami v. France* (71412/01), and *Saramati v. France, Germany and Norway* (78166/01) (2007) 45 EHRR SE10, 31 May 2007.

The first and most obvious point noted by the Court was that the UN is not a contracting party to the ECHR. However, as we have seen above, the ECtHR has been faced with an analogous situation in *Bosphorus*, in *Behrami* and *Saramati* the Court rejected the possibility of adopting such a similar approach towards organs of the UN as it held with regard to the EC and rejected the possibility of exercising jurisdiction over acts of States which were carried out on behalf of the UN. In *Behrami* and *Saramati* the Court held that, since operations established by UNSC Resolutions are fundamental to the mission of the UN and rely for their effectiveness on support from Member States, the Convention cannot be interpreted in a manner which would subject acts of the Contracting Parties covered by such Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court.[271] The Court also argued that if it were to exercise such review, it would effectively be imposing conditions on the implementation of a UNSC Resolution which were not provided within the Resolution itself.

It has been said that the real heart of the judgement and the reason underlying the adoption of these conclusions seems to be the ECtHR's desire[272] to avoid an open conflict with the UN Security Council and to defer the *'organization of universal jurisdiction fulfilling its imperative collective security objective'*.[273]

V. And now what?

The decision of the ECJ marks the role of judiciary when human rights suffer in the 'war against terror'. As AG Maduro noted: *'this is precisely when courts ought to get involved, in order to ensure that the political necessities of today not become the legal realities of tomorrow'.*[274] Well, *Kadi* proves that the Community judiciary is involved.

The question still remains what are the steps to be taken in order to fully comply with the ECJ's judgement. For me, it seems that the answer to this is to be found at the

[271] Para. 148-149 Joined cases *Behrami* and *Behrami v. France* (71412/01), and Saramati v. France, Germany and *Norway* (78166/01) (2007) 45 EHRR SE10.
[272] Para. 151 *Behrami* ECtHR.
[273] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 01/09, p.21.
[274] Para. 45 Opinion AG *Kadi*.

UN level rather than at the EU level. The UNSC has to establish a procedure were it provides guarantees for an independent judicial review that will examine the listings and de-listings and to which an individual has access. If this is not possible due to the nature of the information at issue, then it seems that there is only one solution left: the abolition of the Sanctions Committee and its terrorist listing, and the adopting of smart sanctions by each State individually, to guarantee the fundamental rights of the persons listed.

Interesting to know in this context is that the UN Monitoring Team in its latest report[275] of May 2009 took note of the *'long awaited decision*[276] of the ECJ, calling it *'arguably the most significant legal development to affect the regime since its inception'*.[277] The Monitoring Team also closely followed its aftermath and will *'anxiously await the outcome of Mr Kadi's new challenge'*[278], which could *'give rise to new and more difficult issues'*.[279] Thus, just as the ECJ demonstrated awareness of what is going on outside of the European Union, the UNSC seems to be equally closely following what is happening inside of the EU.[280]

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[275] UN Security Council, Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999), ninth report of the Monitoring Team, S/2009/245, 13 May 2009.

[276] UN Security Council, Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999), ninth report of the Monitoring Team, S/2009/245, 13 May 2009, para.9.

[277] UN Security Council, Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999), ninth report of the Monitoring Team, S/2009/245, 13 May 2009, para.9.

[278] UN Security Council, Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999), ninth report of the Monitoring Team, S/2009/245, 13 May 2009, para.20-23.

[279] UN Security Council, Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999), ninth report of the Monitoring Team, S/2009/245, 13 May 2009, para.22.

[280] 'Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case', Joris Larik, EU Diplomacy Papers, 3/2009.

Chapter 7
Conclusion

I. The present structure of the (de-) listing procedure falls terribly short in providing a mechanism for judicial review

The UN Security Council finds itself alongside the rest of the World combating a devious, elusive and above all unexpected opponent: global terrorism. Therefore the UN Security Council adopted several Resolutions based on Chapter VII of the UN Charter. These measures were, in the first place, targeted at the Taliban and their undertakings. After the Taliban regime collapsed the UN Security Council regime targeted no longer the fallen regime but rather directly non-state actors. The UNSC has been struggling to adopt itself to these new surroundings. Imposing sanctions by itself is not the most critical of the problems, if, first, the decision is made in a manner that appears reasonable, and, second, that a well functioning mechanism exists to which the blacklisted subject can appeal.[281] The focal point procedure as it exists today does not allow the individual to participate in person or through a personal representative or legal counsel in the process of re-evaluation, nor do they require the UN or any other government to provide the petitioner with any information other than the status and disposition of the delisting request.[282] This structure of the (de-) listing procedure falls terribly short in providing a mechanism for judicial review and therefore can, in my opinion, only be considered as unacceptable.

II. Bright spots shimmering in the dark

Therefore, I am very glad that there are some bright spots shimmering in the dark. As discussed in Chapter 3 the Court of First Instance provided for a first remedy by deeming itself competent to review the EC measures implementing UN Security Council measures on basis of their conformity with provisions of *jus cogens*. The CFI came to this conclusion because it had accepted the subordination of EC law to binding Resolutions of the UN Security Council, and after that it could hardly proceed

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[281] 'Protecting Human Rights in the War on Terror: Challenging the Sanctions Regime Originating from Resolution 1267 (1999), Steven Dewulf and Didier Pacquée, Netherlands Quarterly of Human Rights, Vol. 24/4, 607-640, 2006, p.636.
[282] See Chapter 4 p.35.

to review the Resolution in question with the principles of EC law.[283] International law thus permits the interference in that there exists one limit to the principle Resolutions of the UN Security Council having binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. However, as we have seen in Chapters 3 and 5 that this remedy does not provide for a solution; furthermore, despite the fact that this reasoning was problematic it can also be contrasted with earlier case law by the CFI itself in relation to pure Community measures.[284] As concluded in Chapter 3 the approach of the CFI of giving absolute primacy of Resolutions over all other law risks turning the UN Security Council into a global supreme legislature, unfettered by any international law constraints.[285]

The ECJ´s judgement in *Kadi* is the continuation from the idea of the EC as an autonomous legal order. Already in 1963 the ECJ ruled in *Van Gend en Loos* that the *'Community constitutes a new legal order of international law'*[286] and in *Kadi* that *'an international agreement cannot effect the allocation of powers fixed by the Treaties or the autonomy of the Community legal system.'*[287] By contrast with the CFI, the ECJ in *Kadi* was more preoccupied with reiterating the autonomy and constitutional credentials of Community law. The CFI adopted a more internationalised approach; the Court simply accepted the primacy of the international legal order over the EC legal order.

Furthermore, the judgement of the ECJ in *Kadi* represents a strong commitment to fundamental rights and the rule of law, as we have seen in Chapter 5. The ECJ underlined the principle that the Community is based on the rule of law. And that respect for fundamental rights is a condition for the lawfulness of Community acts.[288] AG Maduro summarised this as follows: *'Measures which are incompatible with the observance of human rights … are not acceptable in the Community'.*[289] By contrast

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[283] 'The European Court of Justice and the International Legal Order after *Kadi*', Gráinne de Búrca, Jean Monnet Working Paper 01/09.
[284] See Chapter 3, p. 20.
[285] See Chapter 3, p. 23.
[286] Case 26/62 Van Gend en Loos (1963) ECR 1, 5 February 1963.
[287] Para. 282 *Kadi* ECJ.
[288] Para. 284 *Kadi* ECJ.
[289] 'The Kadi case: Rethinking the Relationship between EU law and International law?', Albert Posch, The Columbian Journal of European Law Online, Vol.15, 2009.

with the CFI, the ECJ provided for full review of the lawfulness of the implementing Community measures.

However, as been shown in Chapter 4 the European Court of Justice did not disregard or ignore the UN Security Council, in numerous points the Court stressed that it respects international law and that the Court has jurisdiction to review a Community measure and under no circumstances a UNSC resolution[290], but it send out a clear message that it is the Community's judicature constitutional role to uphold the law and the protection of fundamental rights within the EC legal order.[291]

The principles of the autonomy of the Community legal order, the rule of law and of the protection of fundamental rights are not new in the Court's case law. However, the ECJ's position vis-à-vis the UN legal order is remarkable; the ECJ showed respect but not deference.[292] As discussed in Chapter 3, the CFI showed deference by ruling that in even in the special case of the Community which is not bound by the UN Charter as a matter of international law, the UN Resolutions always have to be heeded and respected. In Chapter 4 we have seen that the ECJ showed respect to the UN legal order drawing a very important distinction between the UNSC Resolutions on the one hand, and the EC Regulations on the other. The ECJ's analysis on the relationship between the Community legal order and its relationship with the UN contains some core constitutional principles like the rule of law and the protection of fundamental rights. However, in the heart of the ECJ's reasoning lies the distinction drawn between UNSC resolutions and its implementing measures at EC level. The thrust of its judgement is that the EC Courts will not question the former, but that they will conduct a comprehensive review of the latter. [293]

[290] Para. 291 *Kadi* ECJ and Para. 300 *Kadi* ECJ.
[291] 'Case-note on Joined cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*', Maria Tzanou, German Law Journal, Vol. 10 No. 02.
[292] Case-note on Joined cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*', Maria Tzanou, German Law Journal, Vol. 10 No. 02.
[293] Para. 291 *Kadi* ECJ and Para. 300 *Kadi* ECJ.

I will end this conclusion with the words were I started with in the Introduction:

7 *'It is when the canons roar that we especially need the laws … Every struggle of the state – against terrorism or any other enemy – is conducted according to the rules of law. There is always law which the state must comply with. There are no 'black holes'. … The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fight in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.*[296]

42 [296] Supreme Court of Israel, HCJ 769/02 (2006) *The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al.*, Para. 61 and 62.

III. TABLE OF EUROPEAN UNION INSTRUMENTS AND DOCUMENTS

Consolidated Version of the Treaty Establishing the European Community (consolidated version in accordance with the Treaty of Nice) , Nigel Foster, 'Blackstone's EU Treaties & Legislation 2008-2009'.

Consolidated Version of the Treaty on European Union (consolidated version in accordance with the Treaty of Nice), Nigel Foster, 'Blackstone's 'EU Treaties & Legislation 2008-2009'.

Council Common Position 2001/931/CFSP, 27 December 2001, OJ L 344/93, 28.12.2001

Council Common Position 2002/402/CFSP, 27 May 2002, OJ L 139/4, 29.5.2002

Council Common Position 2003/140/CFSP, 27 February 2003, OJ L 53/62, 28.2.2003

Council Regulation (EC) No 2580/2001, 27 December 2001, OJ L 344, 28.12.2001

Council Regulation (EC) No 881/2002, 27 May 2002, OJ L 139, 29.5.2002

Council Regulation (EC) No 561/2003, 27 March 2003, OJ L 82/1, 29.3.2003

Commission Regulation (EC) No 1190/2008, 6 November 2008, OJ L 299, 8.11.2008

Commission Regulation (EC) No 1190/2008, 28 November 2008, OJ L 322/25, 2.12.2008

IV. TABLE OF INTERNATIONAL INSTRUMENTS AND OTHER DOCUMENTS

Charter of fundamental rights of the European Union, OJ 2000 C364/1, Nigel Foster, 'Blackstone's EU Treaties & Legislation 2008-2009' .

Charter of the United Nations 1945, Joost P.J. van Wielink, 'Jurisprudentie en documentatie international publiekrecht', Tweede druk, Boom Juridische Studieboeken

97 European Convention on Human Rights, website of the Council of Europe; http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG , 4.11.1950.

Security Council Resolution 1267 (1999), 15 October 1999, Website of the United Nations; http://www.un.org/sc/committees/1267/

Security Council Resolution 1333 (2000), 19 December 2000, Website of the United Nations; http://www.un.org/sc/committees/1267/

Security Council Resolution 1390 (2002), 28 January 2002, Website of the United Nations; http://www.un.org/sc/committees/1267/

Security Council Resolution 1452 (2002), 20 December 2002, Website of the United Nations; http://www.un.org/Depts/dhl/resguide/scact2002.htm

Security Council Resolution 1453 (2002), 24 December 2002, Website of the United Nations; http://www.un.org/Depts/dhl/resguide/scact2002.htm

Vienna Convention on the Law of Treaties 1969, Joost P.J. van Wielink, 'Jurisprudentie en documentatie international publiekrecht', Tweede druk, Boom Juridische Studieboeken

V. TABLE OF CASES

Court of First Instance

Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council*, 21 September 2006, (2006) ECR II-3533

Case T-315/01, *Kadi v Council and Commission*, 21 September 2006, (2006) ECR II-3649

Case T-228/02, *Organisation des Modjahedines du people d'Iran v. Council and UK*, 12 December 2006, (2006) ECR II-04665

Case T-47/03, *Sison v. Council*, 11 July 2007, (2007) ECR II-00037

Case T-327/03, *al-Aqsa v. Council*, 11 July 2007, (2007) ECR II-00079

European Court of Justice

Case 26/62 *Van Gend en Loos*, 5 February 1963, (1963) ECR 1

Case 6/64 *Costa v. Enel*, 15 July 1964, (1964) ECR 1269

Joined cases 21-24/72 *International Fruit Company*, 12 December 1972, (1972) ECR 1219

Case 294/83 Les *Verts v. Parliament,* 23 April 1986, (1986) ECR 1339

Case C-122/95 *Commission and Germany v. Council*, 10 March 1998, (1998) ECR 1-973

C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission*, 4 July 2000, (2000) ECR I-05291

Joined cases C-317/04 and C-318/04 *Parliament v Council*, 30 May 2006, (2006) ECR 1-04721

Joined Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 September 2008

Opinions of Advocate General

Opinion 2/94 re *Accession to the ECHR*, 29 March 1996, ECR 1-1759

Opinion AG Maduro *Kadi* C-402/05, 16 January 2008

Opinion AG Maduro *Al Barakaat* C-415/05, 23 January 2008

European Court of Human Rights

Bosphorus Airways v Ireland, Appl. 45036/98, 7 July 2005, ECHR 2005-VI

V. TABLE OF CASES

Court of First Instance

Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council*, 21 September 2006, (2006) ECR II-3533

Case T-315/01, *Kadi v Council and Commission*, 21 September 2006, (2006) ECR II-3649

Case T-228/02, *Organisation des Modjahedines du people d'Iran v. Council and UK*, 12 December 2006, (2006) ECR II-04665

Case T-47/03, *Sison v. Council*, 11 July 2007, (2007) ECR II-00037

Case T-327/03, *al-Aqsa v. Council*, 11 July 2007, (2007) ECR II-00079

European Court of Justice

Case 26/62 *Van Gend en Loos*, 5 February 1963, (1963) ECR 1

Case 6/64 *Costa v. Enel*, 15 July 1964, (1964) ECR 1269

Joined cases 21-24/72 *International Fruit Company*, 12 December 1972, (1972) ECR 1219

Case 294/83 Les *Verts v. Parliament,* 23 April 1986, (1986) ECR 1339

Case C-122/95 *Commission and Germany v. Council*, 10 March 1998, (1998) ECR 1-973

C-352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission*, 4 July 2000, (2000) ECR I-05291

Joined cases C-317/04 and C-318/04 *Parliament v Council*, 30 May 2006, (2006) ECR 1-04721

Joined Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 September 2008

Opinions of Advocate General

Opinion 2/94 re *Accession to the ECHR*, 29 March 1996, ECR 1-1759

Opinion AG Maduro *Kadi* C-402/05, 16 January 2008

Opinion AG Maduro *Al Barakaat* C-415/05, 23 January 2008

European Court of Human Rights

Bosphorus Airways v Ireland, Appl. 45036/98, 7 July 2005, ECHR 2005-VI

Joined cases *Behrami* and *Behrami v. France*, and *Saramati v. France, Germany and Norway*, 31 May 2007, 45 EHRR SE10

German Federal Constitutional Court

BverfGE 37, 327 *Solange I*, 17 December 1970, website of the Institute for Transnational law at the University of Texas: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/toc.php

BverfGE 73, 339 *Solange II*, 22 October 1986, website of the Institute for Transnational law at the University of Texas: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/toc.php

BverfGE 89, 115 *Maastricht- Urteil*, 12 October 1993, Dr. Ingo Winkelmann, 'Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. October 1993', Volume 25 of the series 'Tübinger Schriften zum Staats- und Verwaltungsrecht', Berlin; Duncker & Humblot 1994.

International Court of Justice

South West Africa case, 26 January 1971, Website of the ICJ; http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=nam&case=53&k=a7

Nicaragua v. United States of America, 26 November 1984, Website of the ICJ; http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nus&case=70&k=66

Democratic Republic of the Congo v. Rwanda, 3 February 2006, Website of the UN Refugee Agency; http://www.unhcr.org/refworld/docid/43fb2f784.html

Supreme Court of Israel

HCJ 769/02 *The Public Committee Against Torture in Israel et. Al. v. The Government of Israel*, 14 December 2006, available at: http://elyon1.court.gov.il/eng/home/index.html

VI. TABLE OF LITERATURE

Bianchi Andrea, 'Security Council's Anti-terror Resolutions and their Implementation by Member States', 2006, Journal of International Criminal Justice, 1 of 30.

Bulterman Mielle, 'Fundamental Rights and the United Nations Sanctions Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities', 2006, Leiden Journal of International Law 19 , p.753-772.

Búrca de Gráinne, 'The European Court of Justice and the International Legal Order after *Kadi*', 01/09, Jean Monnet Working Paper.

Cuyvers Armin, 'Tussen Scyllii en Charybdii: terrorisme, rechtsbescherming en de verhouding tussen rechtsordes in *Kadi*', Maart 2009, Ars Aequi nr. 3, p.155-164.

Danilenko G., 'International jus cogens: Issues of Law-Making', 1991, European Journal of International law, 2, p.42-66.

Dewulf Steven, 'Protecting Human Rights in the War on Terror: Challenging the Sanctions Regime Originating from Resolution 1267 (1999), 2006, Netherlands Quarterly of Human Rights, Vol. 24/4, p. 607-640.

Eckes Christina, 'Judicial review of European Anti-Terrorism Measures – The *Yusuf* and *Kadi* judgements of the Court of First Instance', January 2008, European Law Journal, Vol.14, No 1, pp.74-92.

Eckes Christina, 'Sanctions against individuals – Fighting terrorism within the European Legal Order', June 2008, European Constitutional Law Review, Volume 4, Issue 2, p.205-224.

Eeckhout Piet, 'Community Terrorism Listings Fundamental Rights, and UN Security Council Resolutions', June 2007, European Constitutional Law Review, Volume 3, Issue 2, p.183-206.

Feinäugle Clemens A., 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law For the Protection of Individuals', November 2008, German Law Journal.

Flinterman Cees, 'Mensen zonder Rechten? De Veiligheidsraad, terrorismeverdachten en rechtsbescherming', Maart 2008, Ars Aequi nr. 3, p.210-213.

Halberstam Daniel, 'The United Nations, the European Union, and the King of Sweden: Economic sanctions and individual rights in a plural world order.', February 2009, Common Market Law Review, Vol46, Issue 1, p.13-72.

Harpaz Guy, 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* dispute', 2009, European Foreign Affairs Review, 14 (1), p. 65-88.

Landon Thomas Jr., 'A Wealthy Saudi, Mired in Limbo Over an Accusation of Terrorism', 13 December 2008, The New York Times.

12 Larik Joris, 'Two Ships in the Night or in the Same Boat together? Why the European Court of Justice Made the Right Choice in the Kadi Case', 3/2009, EU Diplomacy Papers

Lavranos Nikolaos, 'Judicial Review of UN Sanctions by the Court of First Instance', 2006, European Foreign Affairs Review 11: p. 471-490.

Lenaerts Koen, 'Constitutional Law of the European Union', Second Edition 2005, p.684-685.

Magnusson Finnur, 'Targeted Sanctions and accountability of the United Nations Security Council', June 2008, University of Vienna.

12 Posch Albert, 'The *Kadi* case: Rethinking the Relationship between EU law and International law?', 2009, The Columbian Journal of European Law Online, Vol.15.

Report of the Republic of Angola pursuant to paragraph 6 of SC Res. 1455 (2003) UN Doc. S/AC.37/2003/ (1455)/3.

Tridimas Takis, 'EU law, international law and economic sanctions against terrorism: The judiciary in distress?', 2009, Fordham International Law Journal, No.11.

Tridimas Takis, 'Terrorism and the ECJ: Empowerment and democracy in the EC Legal order', 2009, European Law Review, 34(1), p. 103-126.

Tzanou Maria, 'Case-note on Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of European Union & Commission of European Communities', 2009, German Law Journal, Vol.10, No.2.

UN Security Council, Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999), ninth report of the Monitoring Team, S/2009/245, 13 May 2009

Vleck William, 'Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice', 2006, European Foreign Affairs Review 11, p.491-507.

Websites

Website of the United Nations:

Resolution 1267: http://www.un.org/sc/committees/1267/information.shtml

Consolidated list: http://www.un.org/sc/committees/1267/consolist.shtml

Committee'sGuidelines:

http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

Focal point for de-listing: http://www.un.org/sc/committees/dfp.shtml

Counter-terrorism activities: http://www.un.org/terrorism

Website of SECO (State secretariat for economic affairs): www.smartsanctions.ch