



FACULTY OF LAW  
University of Lund

Karin Engström

Towards a Normative Superiority  
of EU Human Rights Norms?  
- An Analysis of the Emerging EU Human  
Rights Hierarchy in the Light of *Kadi and Al  
Barakaat*

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Supervisor: Xavier Groussot

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# Summary

The legal status of EU human rights norms is not clearly defined. The initial goals of the European Community were primarily of economic nature, and social and political rights were merely welcomed as secondary effects of the single market aim. Human rights concerns were at the end of the Second World War reserved for the Council of Europe and the founding of the European Convention on Human Rights and Fundamental Freedoms.

Over the past decades, the importance of human rights protection within the EU legal order has however increased, and is now defined in Article 6 of the Treaty of the European Union as one of the founding principles of the EU. This development, which is almost exclusively based on the case law of the European Court of Justice (ECJ), has now been codified in the yet non-binding European Charter of Fundamental Rights and Freedoms (ECFR).

In the much-debated *Kadi and Al Barakaat* judgment given by the ECJ on 3 September 2008, the status of EU human rights norms was once again at issue, this time in an international context. The appellants whose names had been included in a United Nations Security Council (UNSC) sanctions list, claimed that the EC regulation that was adopted in order to give effect to the UNSC resolution to which the list was annexed, breached several of their human rights, specifically their right to be heard, the right to effective judicial protection and the right to property.

The case raises a number of interesting legal and political issues, but in essence it concerns the normative hierarchy of EU law versus International law and, effectively, the apprehension of the United Nations as a potential threat to EU human rights.

While the Court of First Instance (CFI), notably cautious not to challenge the primacy of the UN Charter, considered that the political sensitivity of the case made it unfit for judicial review and subsequently settled for only a marginal review of the contested regulations' compliance with *jus cogens*, the ECJ firmly established that the effects of international obligations within the Community is to be determined by the Community Courts, by reference to Community law and with human rights as a benchmark.

The judgment obviously reaffirms the status of the EU human rights norms as a fundamental principle of the EU legal order, and in my opinion, it is possible that the terminology used by the Court in its judgment can be interpreted as to elevate those norms to yet another level of normative superiority that trumps even International law I case of a conflict.

# Sammanfattning

Det är inte helt självklart vilken rättslig status skyddet för mänskliga rättigheter åtnjuter inom EU:s rättsordning. De ursprungliga målen med de Europeiska Gemenskaperna var primärt av ekonomisk natur, och sociala och politiska rättigheter välkomnades enbart som bieffekter av syftet med den inre marknaden. Mänskliga rättigheter var vid andra världskrigets slut reserverat för Europarådet och arbetet med antagandet av Europakonventionen för grundläggande mänskliga fri- och rättigheter.

Under de senaste årtiondena har dock betydelsen av skydd för de mänskliga rättigheterna ökat och finns nu definierat i Artikel 6 i EU-fördraget som en av Unionens grundläggande principer. Denna utveckling, som nästan uteslutande har vuxit fram genom EG-domstolens praxis finns nu kodifierad i EU:s ännu icke bindande stadga för de mänskliga fri- och rättigheterna.

I det mycket omdebatterade fallet *Kadi och Al Barakaat* som avgjordes den 3 september 2008 ifrågasattes den rättsliga statusen för de mänskliga rättigheterna inom EU återigen av domstolen, den här gången i ett internationellt sammanhang. Klagandena, vars namn inkluderats i en sanktionslista upprättad av FN:s Säkerhetsråd, hävdade att den EG-förordning som antagits för att ge effekt åt Säkerhetsrådets resolution och den lista som fanns bifogad till resolutionen, bröt mot flera av deras mänskliga rättigheter, mer precist deras rätt att yttra sig, rätten till en verksam domstolsprövning samt rätten till respekt för den egna egendomen.

Fallet ger upphov till en mängd intressanta juridiska och politiska frågor men handlar huvudsakligen om normhierarki och EU-rätt vs Internationell rätt, och faktiskt, uppfattningen av FN som ett potentiellt hot mot mänskliga rättigheter inom EU.

Medan Förstainstansrätten, uppenbarligen noga med att inte utmana FN-stadgans företräde framför all annan lagstiftning, ansåg att fallet var för politiskt känsligt för prövning i domstol och därför nöjde sig med att undersöka den omtvistade förordningens överrensstämmelse med *jus cogens*, så fastslog EG-domstolen bestämt att effekterna av internationella åtaganden inom Gemenskapen skall avgöras av EG-domstolarna utifrån EU-rätten och med yttersta hänsyn till EU:s mänskliga rättigheter.

Domen återbekräftar skyddet för de mänskliga rättigheterna som en grundläggande princip i EU:s rättsordning och det är enligt mig möjligt att tolka domstolens terminologi så att den till och med upphöjer dessa normer till en översta nivå i normhierarkin som står över även den internationella rätten för de fall då de båda rättsordningarna hamnar i konflikt med varandra.

# Preface

*“It is when the cannons roar that we especially need the laws... Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and 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 fights 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”*

- Aharon Barak,  
former President on the Supreme Court of Israel<sup>1</sup>

I would like to thank my supervisor Xavier Groussot whose contagious passion for EU law not only inspired me to write this thesis, but also made me embrace an area of law that has come to truly fascinate me. His encouragement and support have been of invaluable importance for the writing of this thesis. I would also like to thank Carl Fahleryd for invaluable support and precious friendship.

Karin Engström

Lund, 15 December 2008

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<sup>1</sup> Opinion of Advocate General Poiares Maduro delivered on 16 January 2008 (1) in Case C-402/05 P, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, para. 45.

# Abbreviations

CFI	Court of First Instance
ECFR	Charter of Fundamental Rights for the European Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
TEU	Treaty Establishing the European Union
TEC	Treaty of the European Community
ToL	Treaty of Lisbon
UN	United Nations
UNSC	United Nations Security Council



# 1 Introduction

On 3 September 2008 the European Court of Justice published its long awaited ruling on the joined *Kadi* and *Al Barakaat* cases on appeal from the Court of First Instance<sup>2</sup>. Both cases originate from the aftermath of the terrorist attacks on the World Trade Center in New York in 2001. Mr Kadi of Saudi Arabia and Al Barakaat International Foundation based in Sweden, were included on the United Nations Security Council's list of persons or entities suspected to be associated with Usama bin Laden and the Al Qaeda-network and therefore were subjected to so called "smart sanctions" or "targeted sanctions" pointed directly at individuals, in these cases freezing of assets, in order to prevent direct or indirect financing of future terrorist attacks by Al- Qaeda and the Taliban.

In order to comply with and carry out the UN sanctions regime, the EU Council adopted Regulation 881/2002 based on an EU common position, which imposed a freezing of Mr. Kadi's and Al Barakaat's assets. Up until the date of the judgment, Mr. Kadi has had no access to his funds within the EU, save for certain basic expenses, and he has been unable to run his business on European territory. Moreover, Mr. Kadi has received no information as on how long the sanctions against him will be in force, and his abilities to contest the inclusion of his name on the list or to influence the process have been notably limited. No international legal mechanism for reviewing the legitimacy of the blacklisting exists. The UN Security Council offers but a diplomatic possibility for appeal, and the only real possibility for Mr Kadi to become de-listed is through diplomatic negotiations in the Security Council carried out by his government, which, of course, presupposes the Saudi government's conviction of his innocence.

The undeniably controversial cases have attracted numerous speculations from a variety of disciplines about the outcome of the cases on appeal before the ECJ. Not only are the issues politically sensitive in several aspects, especially because of the global insecurity and fear in the wake of the 9/11 attacks, but they also dissect legal technicalities in EU law and put the hierarchy of international vs. regional norms to the ultimate test. The core issue, legal or political, is the protection of human rights and the extent to which limitations of human rights can be made in the name of international peace and security.

The blatant absence of legal safeguards for the individual's human rights protection in the process of combating terrorism has initiated a debate on the legality of targeted sanctions and, seen in the context of globalization and an international legal order in transformation due to the increasing need of global solutions for transnational problems, the cases also raise issues on the legitimacy of international law. This development opposes the traditional

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<sup>2</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, judgment of 3 September 2008, not yet reported.

conception that international law results exclusively from state-consent, save for institutions such as *jus cogens* and obligations with *erga omnes* effects. Effectively, the cases raise the classic question within EU law of *monism* vs. *dualism*, i.e. which approach to adopt when implementing international law into national or regional legal orders. For the EU, the cases have coerced the ECJ to once and for all take position on the dignity of human rights protection and its validity versus other international agreements, such as the UN Charter and the UN Security Council resolutions. The paradox in this case lies in the apprehension of the UN, the classical guardian of world peace and individual's rights, as a potential threat to human rights.

On 18 December 2001, Mr. Kadi brought an action against the Council and the Commission under Article 230 of the EC Treaty claiming that the regulation which provided for the freezing of his assets should be annulled insofar it concerned him, and that the regulation constituted a breach of three of his human rights; first, the right to a fair hearing, second: the right to respect for property and the principle of proportionality and third: the right to an effective judicial review.

The CFI, when examining its scope of review of legality of the regulation, simply referred to the priority of international law and the absence of a margin of appreciation in the implementation of the resolution at hand, and the fact that the EU and its Member States are obligated to fulfil their international obligations in the area of Community competences according to Article 103 of the UN Charter, Article 307 and 10 (the principle of loyalty) of the EC Treaty. The only scope of review left for European Courts, it was argued by the CFI, is the compatibility of the resolution with *jus cogens*. Since no breach against *jus cogens* was found by the Court, the case was dismissed.

On appeal, in accordance with Advocate General Maduro's opinion of January 2008, the European Court of Justice however set aside the judgment of the First Instance Court and annulled the contested regulation insofar as it concerned the appellants.

The judgment is euro-centric and the reasoning behind it leaves little or no guidance on the relationship between the EU legal order and the UN legal order from the viewpoint of International law, nor does it offer suggestions for how Member States are to conciliate their obligations under the UN Charter with their membership of the Union. The Court does, however, demonstrate "constitutional trust" and accentuates the importance of the principles of protection for human rights and commitment to the rule of law. The Court also refers to the yet non-binding ECFR and the "constitutional principles of the EC Treaty".

## 1.1 Subject and Purpose

The overall purpose of this essay is to examine the development of the protection for human rights within the EU legal order, and to determine its current status in the light of the *Kadi and Al Barakaat* judgment. My hypothesis is that the EU human rights protection regime, which at the outset was more of a secondary effect of the primary goals of economic nature of the European cooperation and as more of a consequence of other purposes than a basis for legitimacy of its own, has over the past decades emerged to become an autonomous legal argument which is now the benchmark for all international cooperation for the EU. The *Kadi and Al Barakaat* judgment seems to confirm this hypothesis and refines the EU approach towards international law and international agreements. However, the case does not offer a full solution to the very complex relationship between the EU legal order and International law, nor does it exonerate the EU Member States from their obligation to comply with international law in general and the UN Charter in particular. The question of the scope of EU judicial review of UN measures remains contested, and the cases have raised a debate on an international level on how the legality of UN measures are to be abided by in order to guarantee the effectiveness of measures taken in the quest to maintain international peace and security whilst assuring compliance with fundamental human rights. Thus, the first question I aim to examine is;

1. To what extent is the EU and its Member States bound by international law and how far does the duty to implement and apply UN Security Council resolutions stretch from an international point of view? How are EU Member States to conciliate their obligations under international law on one hand and EU law on the other? What options does the *Kadi and Al Barakaat* judgment leave for Member States who are bound by both, in case of a conflict?

The importance of the European Convention on human rights is also interesting in this context. In previous case law, the Strasbourg Court has settled for an “equivalent protection” when assessing the compatibility of other international agreements with the system of protection provided for under the Convention. Therefore, I also aim to examine the following issues:

2. Assuming that the ECJ would have followed the reasoning of the CFI instead, would a claim before the Strasbourg Court have gained the applicants? How would the equivalence test fall out in the present case, and how would the *Bosphorus*-judgment affect the outcome?

3. What is the normative status of fundamental human rights in the EU legal order? Does the ECJ-judgment in *Kadi and Al Barakaat* strengthen the normative status and importance of human rights in a) the EU legal order, b) the International legal order? Can we speak of a constitutional hegemony of EU human rights law?

## 1.2 Method

In this thesis I aim to make a legal analysis of the development of the protection for human rights in the EU and the dignity of EU human rights law in an international perspective. The facts in *Kadi and Al Barakaat* presented the ECJ with those problems and compelled the Court to take a standing. Thus, I adopt a problem-oriented approach, focusing on *Kadi and Al Barakaat*, in order to carry out a wider legal examination. I apply a legal, dogmatic method, which means a description and analysis of the traditional sources of law (see 1.6).

It must be emphasized that the political nature of the issues at hand in the case renders a strictly legal analysis unsatisfactory. In fact, the line of cases regarding anti-terrorist measures are a great demonstration of how political influences affect the legal sphere, and that is what, in my opinion, makes this area of law so interesting. However, the descriptive chapters, 2-4, in which I give an account of the EU law and international law as legal systems, are described *de lege lata*. The chapters following the description of the *Kadi and Al Barakaat* case are presented *de lege ferenda* and aim to analyse the effects of the case in a wider context.

## 1.3 Outline

In Chapter 2 I give an account of the development of human rights law within the EC legal order from a spill over effect of the economic goals of the EEC to a general principle upon which the European Union is founded. This chapter also contains a brief presentation of the yet non-binding Charter of Fundamental Rights and Freedoms and human rights concerns within the pillar of EU Common Foreign and Security Policy (CFSP).

The parallel system of protection developed in the Council of Europe, i.e. the European Convention of Human Rights and Fundamental Freedoms is described in the following chapter. The initiating parts describing the rights protected and how they can be subjected to limitations, are followed by an analysis of settled case law on the relationship between the two legal systems, primarily the *Matthews* case and the *Bosphorus* case. A proper understanding of the reasoning of the Strasbourg court in those cases will be essential in order to comprehend the analysing parts of this essay and it is also important to understand the influence of the ECHR on the judicial task of the ECJ.

In Chapter 4 I give an account of the legal relationship between the EU legal order and the UN and explain why the EU is bound to comply with the UNSC resolutions. The binding nature of UN measures can be seen from two different aspects in this case, from an EU point of view and from the UN point of view under the international legal order.

The following chapter will show how the CFI and the ECJ chose differently between those two ways of approaching the binding nature of the UN measures at hand. Chapter 5 is dedicated to a thorough review of the CFI-rulings in *Kadi* and *Yusuf and Al Barakaat*, the opinion of AG Maduro in *Kadi*, and ultimately the ECJ-ruling in the joint cases of *Kadi and Al Barakaat* on appeal.

The legal analysis of the case follows in chapters 6,7 and 8. Chapter 6 is dedicated to the issues of primacy and competence to review, whereas Chapter 7 dissects the rationale of effective judicial protection and its importance for the outcome of the case. In Chapter 8 I speculate about the effects of the case in the EU- and the international legal orders with particular focus on the hierarchy of norms and constitutional hegemony.

In Chapter 9 I attempt to briefly summarize my findings and to connect them with the purposes in Chapter 1.1.

## 1.4 Delimitations

This text presupposes basic knowledge of the legal framework of the EU and its institutions. No extensive analysis will be given of the implementation system nor the enforcement of EU acts.

Human rights in the EU/EC legal order has both an internal and an external dimension. Although this thesis examines the relationship between EU law and international law and therefore has an external aspect to an extent, I will not give further account of membership requirements or other external policies. CFSP will be afforded only a brief presentation as the inter-pillar debate is complex enough to amount to an essay of its own.

Although the *Kadi and Al Barakaat* ruling is ground-breaking in many ways, several other cases, before EU courts as well as national courts and ECtHR are interesting in this context, and they offer more extensive analyses on important notions at hand in the *Kadi and Al Barakaat* case.<sup>3</sup> However, I have chosen to thoroughly review only the cases I find most important for the purpose and aim of this thesis, due to its limited scope.

I would also like to add that this thesis focuses on human rights within the EU legal order and how those rights relate to international agreements such as, in this case, The UN Charter. There is a lot more to be said about the background of the case of *Kadi and Al Barakaat*, of the political efforts made after the 9/11 attacks, the war on terror and about the reasoning behind targeted sanctions and how the UNSC is organized. The scope of this thesis

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<sup>3</sup> See e.g. Case C-355-/04 *Segi v Council* [2007] ECR I-1657, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] II-4665, Case C-17/98 *Emesa Sugar v Aruba* [2000] ECR I-665 and Case T-253/02 *Ayadi v Council* [2006] ECR II-2139.

allows only for the necessities for a correct apprehension of the legal analysis.

## 1.5 Definitions

'Human rights' and 'fundamental rights' will be used interchangeably in the text but are not substantively distinguished. The term 'fundamental rights' is perhaps typically used in the context of EU/EC law, whereas 'human rights' is more associated with the substantive rights under the ECHR. In this essay, fundamental rights seem more suitable for entities, such as Al Barakaat, where the perception of 'human' seems rather misleading.

The abbreviations for the European Union and the European Community, 'EU' and 'EC', will also be used interchangeably.

## 1.6 Materials

I have mainly examined primary sources of law, such as Treaties (e.g. TEC, TEU, CFR and the UN Charter), Conventions (ECHR, VCLT) and ECJ and ECtHR case-law for the descriptive parts of my text. AG Maduro's opinion in *Kadi* has also been of essential importance for my analysis.

For the describing *de lege lata* the legal systems of human rights protection within the EU and under the ECHR I have had great use of books written by prominent legal experts such as Tridimas, Craig and De Burca, Claire and Ovey and my supervisor, Groussot. For the analysis of the case and the analysis *de lege ferenda* I have exclusively used articles from either well renowned authors or articles published in reliable, scholarly periodicals.

## 2 The Protection of Human Rights in EC Law – an Historical Overview

The European movements arising simultaneously after the Second World War were spontaneous reactions to the atrocities committed on European soil against human dignity and democracy over the preceding centuries. The foundation of the Council of Europe in 1949 and the drafting of the European Convention on Human Rights and Fundamental Freedoms in 1950 were perhaps the most significant and immediate incitements for the protection of human rights. The goals of the EEC, however, were primarily of economic nature and none of the three original EC treaties contain any provisions concerning respect for human rights, save for vague references in the preamble of the Rome Treaty to the preservation of peace and liberty.

The legal importance of the protection of human rights within the Community legal order has increased over the years and now holds the estimable status of a general principle. According to Article 6 TEU, the Union is founded on the principle of respect for human rights and fundamental freedoms. A principle, as Groussot describes it, is “a general proposition of law of some importance from which concrete rules derive”.<sup>4</sup> Within EC law, general principles serve as bottom lines with gap-filling functions<sup>5</sup>, which is very well illustrated in the case of human rights protection. A study of the development of human rights protection in the EU legal order also exemplifies the creation of general principles in national or supranational legal systems in general.

### 2.1 ECJ Case Law

The development from a primarily economic community to a union founded on the principle of respect for human rights and fundamental freedoms is almost exclusively based on ECJ case law and is closely connected with the persuasion of the direct effect (*van Gend en Loos*<sup>6</sup>) of EC law and the supremacy of EC law over domestic law (*Costa v. ENEL*<sup>7</sup>). Those two principles enable individuals to directly invoke Community law before national courts in order to contest violations of their human rights. The question of whether EC law could trump even human rights protected in the constitutions of the Member States eventually became inevitable and forced the Court to develop a human rights dimension to EC law.

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<sup>4</sup> Groussot, Xavier, *Creation, Development and Impact of the General Principles of Community Law: Towards a jus communae europeum?*, Lund University, 2005, p. 1

<sup>5</sup> Groussot, p. 40.

<sup>6</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1.

<sup>7</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

### **2.1.1 From *Stork* to *Internationale Handesgesellschaft* – Human Rights as a General Principle of EC law**

In *Stork*<sup>8</sup> the Court explicitly and firmly declared itself unbound by provisions of human rights protected in the constitutions of the member states. Rather than lack of commitment to this area of law, the court was cautious not to subordinate EC law to the laws of the Member States. However, a groundbreaking step was taken in *Stauder*<sup>9</sup> in 1969 where the Court in a claim for the protection of human dignity as a human right, claimed critical importance over an implementation of an EC provision which required the identity of beneficiaries of butter coupons to be revealed. The classic key-quotation from the judgment - “the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court”<sup>10</sup> – clearly indicates a definite change of approach arguing that the protection of human rights henceforth is to be included in the idea of general principles of EC law<sup>11</sup>.

This new approach was confirmed and admitted greater importance in *Internationale Handesgesellschaft*<sup>12</sup> where the Court even considered that the respect for human rights “forms an *integral part* of the general principles of Community Law protected by the Court of Justice” (my italics). Once again the Court, however, emphasizes the supremacy of EC law over national constitutions, in this case the German principle of proportionality. In *Internationale Handesgesellschaft* the Court refines the *Stauder* formula, revealing that fundamental rights are not only formulated and protected by the ECJ, they also fall within the scope of general principles.<sup>13</sup>

### **2.1.2 From *Nold* to *Hauer* – Sources of the Rights Protected**

The importance of the Courts’ judgment in *Internationale Handesgesellschaft* is twofold in this context. Apart from elaborating on the understanding of human rights protection as a general principle which must be protected within the framework and the structure of the Community, the Court additionally established that the constitutions of the Member States

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<sup>8</sup> Case 1/58 *Stork v High Authority* [1959] ECR 17.

<sup>9</sup> Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

<sup>10</sup> *Ibid*, para. 7

<sup>11</sup> According to Groussot, the *Stauder* case represents the starting point of what was has now become the Charter of Fundamental Rights, Groussot, *supra note* 4, p. 73

<sup>12</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>13</sup> Groussot, p. 74



serve as *inspiration* for the Court in its definition of such rights. Thus, while stressing the supremacy of EC law over any human rights provision protected in the constitution of a Member State, the Court reassures the Member States that their constitutional values are respected under EC law<sup>14</sup>. The Courts' emphasis on supremacy of EC law in the judgment signals a determination of an autonomy of general principles under EC law, inspired by – but independent from – the legal cultures and traditions of the Member States<sup>15</sup>.

The first step towards the establishment of the Community's own standards for protection of human rights was made in *Nold*<sup>16</sup>. In addition to the common national constitutional traditions the Court found itself bound to use international human rights agreements to which the Member States are signatories as sources of inspiration for defying general principles of EC law. The Court stated that such treaties can “supply guidelines which would be followed within the framework of Community law”<sup>17</sup>.

### 2.1.2.1 ECHR

Among the international human rights documents referred to by the Court in *Nold*, the ECHR is of particular importance and has influenced the Court's judgments in many aspects over the years<sup>18</sup>. The influence of ECHR over EC law is also explicitly manifested in treaty provisions. It is mentioned in the preamble of the Single European Act<sup>19</sup> and Article 6(2) of the TEU contains the following formulation:

“The Union shall respect fundamental rights, *as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms* signed in Rome on 4 November 1950 and as they result from the *constitutional traditions common to the Member States*, as general principles of Community law.” (My italics)

The Court is not, however, formally bound by the ECHR and is not a party to the Convention, but merely turns to the articles in the Convention for inspiration on how to interpret the general principles of EC law.

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<sup>14</sup> Tridimas, Takis, *The General Principles of EC Law*, Oxford University Press, New York, 1999, p. 205.

<sup>15</sup> Craig, Paul and De Búrca, Gráinne, *EU Law, Text, Cases and Materials*, 4<sup>th</sup> edition, Oxford University Press, Oxford, 2008, p. 383.

<sup>16</sup> C-4/73 *Nold* [1974] ECR 491.

<sup>17</sup> *Ibid*, para. 13. See also Craig and De Búrca, p. 383.

<sup>18</sup> EC legislation concerning e.g. powers of Member States to restrict free movement and rights against sex discrimination are expressions of influence from general principles contained in the ECHR, see Craig and De Búrca p. 384.

<sup>19</sup> “DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, *in the Convention for the Protection of Human Rights and Fundamental Freedoms* and the European Social Charter, notably freedom, equality and social justice.” (My italics.)

Strategically, the Court thereby stipulates the exclusive right to draw the interpretative boundaries and is able to go both below and beyond the ECHR and can continue to claim the autonomy and supremacy of EC law<sup>20</sup>. The debate on the EU's contingent accession to the ECHR will be further described below (3.3).

### 2.1.2.2 Other Regional and International Documents

Occasionally the Court refers to other regional and international documents when deciding on fundamental rights issues, such as the European Social Charter of 18 November 1961<sup>21</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>22</sup> The importance of the UN Charter in this context was a crucial issue in the *Kadi* and *Al Barakaat* cases as we shall see below.

### 2.1.2.3 National Constitutional Traditions

Albeit less frequently, the Court also draws on national constitutional traditions, as opposed to international human rights documents, in its interpretative task<sup>23</sup>. The Court is thereby able to assess 'common ground' or a 'common approach' among the Member States on more loose grounds than the strict wording of the ECHR. A particular right does not have to be protected in every national constitution and the Court rarely makes explicit reference to one particular constitutional tradition. This way of assessing a common constitutional approach obviously leaves the Court a certain space for securing the supremacy of EC law over national constitutions. In *Hauer*<sup>24</sup> the interpretative importance of national constitutional traditions were explained in the following manner:

“The right to property is guaranteed in the Community legal order in accordance with the *ideas common to the Constitutions of the Member States*, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights...”<sup>25</sup>

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<sup>20</sup> Craig and De Búrca, *supra note* 15, p. 384.

<sup>21</sup> Case C-149/77 *Defrenne* [1978] ECR 1365.

<sup>22</sup> Case C-249/96 *Grant* [1998] ECR I-621.

<sup>23</sup> See quotation from *Nold* in 2.1.2.1.

<sup>24</sup> Case C-44/79 *Hauer* [1979] ECR 3727. See also Craig and De Búrca, p. 386-388.

<sup>25</sup> *Ibid*, para. 17.

## 2.2 The Charter of Fundamental Rights and Freedoms

The initiative to draft an own “bill of rights” for the European Union came as a result of the long-drawn discussion on whether the EU should accede to the ECHR or not. In 1999 the European Council launched the idea and in December 2000 the EU Charter of Fundamental Rights was politically approved by the Member States at the European Council summit in Nice. The legal effect of the Charter was at the outset intimately connected with the entering into force of the Constitutional Treaty, in which the Charter was incorporated, along with a number of amendments, as Part II of a three-Part Constitutional Text. The Charter was drafted as if it were to have legal effect, and it would have been ‘the binding centrepiece of a European Constitution’<sup>26</sup> had the Constitutional Treaty been ratified as anticipated in 2005.<sup>27</sup>

In the wake of the constitutional failure the status of the Charter has remained uncertain albeit important.<sup>28</sup> During the re-negotiations leading up to the draft of the Lisbon Treaty, the Charter served as a non-binding form of legal guidance on the interpretation of fundamental rights that are protected as a part of EU law. As an attempt to address what appeared to be reluctance towards “constitutionality” of EU law among the Member States, the role of the Charter earned a less prominent position in the Lisbon Treaty (ToL)<sup>29</sup>. It was simply annexed to the Treaty text, but it was still to be binding.

The future status of the Charter remains contested after the Irish referenda. Suffice it to say that it remains an important interpretative tool for the EU institutions. In *European Parliament v. Council*<sup>30</sup> the Court acknowledged in its judgment that the Charter re-affirms the general principles of EU law and that it “shows the importance of the rights it sets out in the Community legal order”.<sup>31</sup>

The Charter is divided into seven chapters and is created as a consolidated overview of all references and obligations to respect fundamental rights and freedoms under EU law. The first six chapters provide for the protection of different groups of rights, where the foundational rights (right to life,

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<sup>26</sup> Craig and De Búrca, *supra note 15*, p. 413.

<sup>27</sup> Due to the negative outcome of the French and Dutch referenda the Constitutional Treaty was not ratified.

<sup>28</sup> Craig and De Búrca, p. 417

<sup>29</sup> In order to put an end to the “post-constitutional crisis” Europe was suffering from after the French and Dutch referenda, the German presidency sought an agreement on a ‘New’ Reform Treaty. On 19 October 2007, this Treaty was adopted during the informal European Council of Lisbon. On 13 December 2007 the representatives of the 27 Member States of the European Union signed this ‘New’ Reform Treaty, also called The Treaty of Lisbon (ToL). Ireland, however, voted no in a referendum and the ToL never entered into force.

<sup>30</sup> Case C-540/03 *European Parliament v. Council* [2006] ECR I-5769.

<sup>31</sup> Craig and De Búrca, p. 418

freedom from torture etc.) are contained in the first chapter. The seventh and final chapter contains the so-called *horizontal clauses*, which are the general provisions of the Charter. This chapter spells out e.g. the scope and applicability of the Charter and its relationship to other legal instruments. Article 52(3) is specifically related to the ECHR and promotes a harmony between the provisions of the two documents with the ECHR as a floor, a minimum level of protection, with the possibility for the EU to adopt a more extensive protection<sup>32</sup>. Article 53 refers to other international agreements as well as the ECHR *and* national constitutions:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

## 2.3 Human Rights and the CFSP

The Union’s commitment to human rights protection is stated in Article 11 TEU: “The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be: /.../- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”. Express commitment to the UN Charter is also made in the same article: “/.../-- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter, /.../- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter...”

This Article governs the Council’s mandate to define the principles and general guidelines for the Common Foreign and Security Policy (CFSP). CFSP decisions fall under the second pillar of the Union, and according to Title V of the TEU, it is the Council that decides upon the common strategies of the EU, including joint actions and common positions for the Member States. The fact that it is the European Council that defines the principles of and general guidelines for the common foreign and security policy, accentuates the political character of the measures taken under the second pillar.

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<sup>32</sup> “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

What is important in this context is that the ECJ lacks jurisdiction over CFSP-matters, due to the intergovernmental character of second pillar measures.<sup>33</sup> Both joint actions and common positions are non-legislative in the sense that they don't regulate directly rights and obligations of individuals. However, this prevailing opinion is contested in the light of targeted sanctions, and was of particular focus in *Kadi and Al Barakaat* as seen below. The absence of judicial review by the EU courts is said to make CFSP measures a "no-man's land" between EC and International law.<sup>34</sup>

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<sup>33</sup> TEU Article 46.

<sup>34</sup> Eeckhout, Piet, "Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations", Europa Law Publishing, Leuven, 2005, p. 20.

# 3 The Relationship between EU and the ECHR

The ECHR was adopted in the wake of the Second World War by the Council of Europe, and was designed to provide means to prevent human rights violations such as seen during the war, and to protect states from communist subversion. Those main concerns are reflected throughout the wordings of the Convention, in which referrals to values and principles that are necessary in a democratic society are constantly made.<sup>35</sup>

Although intimately connected, the ECHR is structurally independent from the EU legal order, and the ECtHR in Strasbourg is the only court competent to review compliance by its signatories.

## 3.1 Structure of the ECHR and the Rights Protected

Articles 2-18 of The European Convention on Human Rights and Fundamental Freedoms contain substantive rights and freedoms, e.g. the right to a fair trial (Article 6). The rights protected in the Convention are not hierarchically divided which means that no right is given priority over another in case of a conflict. Some of the articles are however constructed in a manner that allows balancing of conflicting interests. The rights are divided into two categories: qualified and unqualified. Qualified rights are e.g. the right to respect for family and private life in Article 8 and the protection of property in Protocol 1. These rights are specified in the Convention but each such article also states the conditions for allowing state interference in order to secure certain interests. Unqualified rights are e.g. the right to liberty and security in Article 5 and the right to a fair trial in Article 6. The unqualified rights can, as a general rule, be interfered with under certain conditions given in Article 15. Some of these rights are however to be regarded as non-derogable, meaning that they can never be compromised with under any circumstances. The prohibitions against torture in Article 3 and slavery in article 4 belong to this category of rights.<sup>36</sup>

According to Article 1 of the Convention, the High Contracting Parties must "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Section 1 contains a declaration of the rights and freedoms protected in the Convention, Articles 2-18. The formulation in Article 1 transforms this declaration into obligations for the

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<sup>35</sup> Ovey, Claire and White, Robin, C.A., *Jacobs & White, the European Convention on Human Rights*, 4th edition, Oxford University Press, New York, 2006, p. 2.

<sup>36</sup> *Ibid*, p. 6-7.

States that are signatories to the Convention.<sup>37</sup> Once ratified, domestic law must give full effect to the rights guaranteed by the Convention, and it is up to the Member States to implement its guarantees by different methods. The role of the Court of Human Rights is subsidiary to the institutions of the national legal systems, meaning that complaints cannot be brought to the Strasbourg Court until all efforts to resolve the dispute within the national legal system has been undertaken. The obligation to give full effect to the Convention and the fact that the Court does not regard itself as a court of appeal for the decisions of institutions within the national legal order are manifestations of the basis for the overall approach of the Convention; the principles of *solidarity* and *subsidiarity*.<sup>38</sup>

Moreover, the Convention can have no retroactive effect and enters into force on the date of ratification. Only in cases where a continuing violation is at hand can an application relate back to an event earlier than the entry into force in respect of the State against which an application is brought.<sup>39</sup>

## 3.2 Limitations to the Rights Protected

As mentioned above, the rights protected in the Convention can under certain circumstances be subjected to limitations and/or derogations by the State. Article 15 provides a possibility for the State to take measures derogating from its obligations under the Convention in time of war or other public emergency threatening “the life of the nation”. Derogations must, according to the article, be strictly required by the exigency of the situation and consistent with the States’ other obligations under national law. The absolute, non-derogable rights are exceptions to this possibility and they can never be interfered with according to the Articles’ second paragraph.

Articles 8-11 contain listings of express limitations in their second paragraphs and a built-in assessment system for when an interference or a limitation to the right at hand can be justifiable. This is a manifestation of a need to balance the interests of the community against the interests of the individual.<sup>40</sup> Article 18 states that ‘the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.’ As a consequence, the Court interprets exceptions to the Convention rights narrowly<sup>41</sup>.

In order for a limitation to one of the Convention articles to be justifiable, it must fulfil three criteria. The Court asks itself these questions in the following order.

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<sup>37</sup> Ovey and White, *supra note* 35, p. 18.

<sup>38</sup> *Ibid*, p. 18.

<sup>39</sup> *Ibid*, p. 21-22.

<sup>40</sup> *Ibid*, p. 219.

<sup>41</sup> *Ibid*, p. 222.

1. Is the interference in accordance with, or prescribed by law?
2. Is the aim of the limitation legitimate? (Does it fit one of the expressed aims in the article at hand)
3. Is the limitation necessary in a democratic society?<sup>42</sup>

The legitimate aims (2) set out in the Convention provisions are exhaustive, meaning that no other aims can justify a limitation of any kind. Examples of specified legitimate aims are interests of national security, interests of public safety and the protection of the rights or freedoms of others. Only the minimum interference with the right which ensures the legitimate aim will be allowed<sup>43</sup>. The principle of proportionality is essential also when the Court decides on whether a limitation is necessary in a democratic society. This task includes showing that need to interference is required due to a *pressing social need* and that the action taken (i.e. the interference) to correspond to this pressing social need was proportionate. This requires a balancing between the severity of the restriction put on the individuals' right against the importance of the public interest.

### **3.2.1 Margin of Appreciation**

When applying the proportionality-test as described above, the Contracting State enjoys a certain, but not unlimited, margin of appreciation. The doctrine of margin of appreciation is used extensively by the Court and serves to create a space for the Court to avoid imposing obligations on the Contracting States they had not been able to foresee when ratifying the Convention. The essence of the margin of appreciation is that the court will not interfere with actions taken within the State's margin of appreciation, and it presupposes that the Contracting States are in better position than the judges to decide on an emergency threatening the life of the nation, a pressing social need and the nature and scope of the actions (derogations) necessary to address it.<sup>44</sup>

The width of the margin is, however, under supervision of the Court and will vary according to the circumstances, the right at hand and the presence or absence of *common ground* among the States parties to the Convention. The situation in the State at hand, its moral or ethical values and religion will also affect the scope of the margin<sup>45</sup>. National security is an area where States enjoy a wide margin of appreciation, based on the fact that many lives may be at stake and that information preceding such a decision generally is highly sensitive.<sup>46</sup> The difference between the principle of proportionality

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<sup>42</sup> Ovey and White, *supra* note 35, p. 222.

<sup>43</sup> *Id.*

<sup>44</sup> *Ibid.*, p. 53.

<sup>45</sup> See e.g. *Handyside v. United Kingdom*, regarding the value protection of morals vs. the freedom of expression in Article 10 ECHR. A wide margin of appreciation was given to UK in order to determine the appropriate measures for the protection of sexual morals, with certain regard taken to the specific circumstances of the State. Judgment of 7 December 1976, series A, No. 24; (1979-80) 1 EHRR 737.

<sup>46</sup> Ovey and White, p. 237.



and the doctrine of margin of appreciation is explained by Ovey and White in the following manner: “It would seem that the margin of appreciation goes to the legitimacy of the aim of the interference in meeting a pressing social need, whereas the doctrine of proportionality concerns the means used to achieve that aim.”<sup>47</sup>

### 3.3 The Accession Debate

Prior to the drafting of the ECFR, the accession of the EC/EU to the ECHR was suggested as an alternative to such a bill of rights, in order to strengthen the human rights protection within the Community.<sup>48</sup> This suggestion turned into a debate that has persisted for many decades and still not been solved. Despite the adoption of the ECFR, arguments are still being presented in favour of an accession.<sup>49</sup> The majority of the arguments are based on the scepticism towards the EU’s role as a human rights guardian and the ECJ’s trustworthiness as a human rights court, or perhaps rather, a greater confidence in the Strasbourg Court to determine human rights issues.<sup>50</sup> Perhaps of greatest importance, an accession is expected to prevent interpretative conflicts between the two courts.<sup>51</sup>

The Constitutional Treaty was designed to both incorporate the entirety of the Charter into the second part of the Treaty, and also provided for an accession to the ECHR. The current status of the issue is that an accession would be legally possible from the ECHR point of view, but the non-ratification of the Constitutional Treaty makes an accession dependent of an amendment to the TEC or TEU in order to be legally possible.<sup>52</sup>

### 3.4 EU and ECHR – overlapping systems for Human Rights Protection?

When applying provisions of EC legislation that are based on protection for human rights, Member States and EU institutions are bound by the general principles of EC law<sup>53</sup> and fall under the revision of the ECJ. An accession of the EU to the ECHR would have meant that the EU institutions would also be subject to the review jurisdiction of the European Court of Human Rights.

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<sup>47</sup> Ovey and White, *supra note* 35, p. 240.

<sup>48</sup> Lindfelt, Mats, *Fundamental Rights in the European Union – Towards Higher Law of the Land? A Study of the Status of Fundamental Rights in a Broader Constitutional setting*, Åbo Akademi University Press, Åbo, 2007, p. 89.

<sup>49</sup> See e.g. A.G. Toth, “The European Union and Human Rights: The Way Forward”, *Common Market Law Review* 34: 491-529, 1997.

<sup>50</sup> Craig and De Búrca, *supra note* 15, p. 418-419.

<sup>51</sup> *Ibid*, p. 419.

<sup>52</sup> *Ibid*, p. 420.

<sup>53</sup> *Ibid*, p. 395.

The Strasbourg Court is competent to review any action taken by any State party to the Convention, but will not, in the absence of an EU accession to the ECHR, admit complaints brought directly against the EU. However, the ECtHR has increasingly taken on *indirect* claims against EU acts brought against one or all Member States.<sup>54</sup> The accession debate may have turned cold but the question of who is the final arbiter of fundamental rights in Europe is still disputed, especially after the ECJ's ruling in *Kadi* and *Al Barakaat*. If the ECJ would have come to the same conclusion as the CFI it is very possible that the applicants would have brought a claim under the ECHR in order to have their rights protected. Speculations on what the outcome of such a claim would be is perhaps not necessary but highly interesting in this context.

In the absence of an accession of the EU to the ECHR the relationship between the two have grown rather complex. The ECtHR applies the doctrine of *equivalent protection* when assessing possible breaches against the Convention articles by its Contracting Parties. The method was elaborated in the *Bosphorus* case, but the foundations were laid in the *Matthews* case.

### **3.4.1 Matthews v. United Kingdom**

Denise Matthews<sup>55</sup> was a UK citizen living in Gibraltar. The Community Act establishing the rules for direct elections to the European Parliament provided in Annex II that the UK would apply the provisions only in respect of the UK, in which Gibraltar (a dependent territory of the UK) was not included. Mrs. Matthews complained to the ECtHR that the refusal to let her vote constituted a breach of her rights under article 3 of the First Protocol on free elections. The Court found that the suggested violation stemmed from primary EU law rather than national British law. Although the ECtHR lacks competence to review EU legal acts, the Court came to the groundbreaking conclusion that the UK was responsible for a breach of Mrs. Matthews rights under the Convention because the essence of her right to vote had been violated. The Court found that the Contracting Parties are responsible for granting the rights of the Convention even when they create an international organization such as the EU and transfer power to it. Moreover, the Court said that it will consider complaints of violations by acts of international organizations of the rights guaranteed by the Convention where no other judicial body claims the competence to such a review.<sup>56</sup>

The judgment clearly demonstrates the Courts' standpoint that EU acts will not evade the review of the ECtHR with the simple argument that the EU is

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<sup>54</sup> Craig and De Búrca, *supra* note 15, p. 420.

<sup>55</sup> *Matthews v. United Kingdom*, Judgment of 18 February 1999; (1999) 28 EHRR 361.

<sup>56</sup> Ovey and White, *supra* note 35, p. 30

not a contracting party to the Convention. The member States will be held responsible for securing the rights provided for in the Convention.

### **3.4.2 'Bosphorus Airways' v. Ireland**

The most important case in this context and on the competence of the ECtHR to review EU acts is undoubtedly the *Bosphorus*-ruling<sup>57</sup> against Ireland in June 2005. The case raises issues of many aspects of EU law and international law including CFSP, UN sanctions and human rights protection. Due to the complexity of the case a thorough recital of the factual background is required.

In the light of the civil war in the former Federal Republic of Yugoslavia (FRY) in the early nineties the United Nations set out a series of sanctions towards the FRY in order to resolve the conflict and prevent escalating violence. In order to implement this sanctions regime the EC Council adopted Regulation 990/93, which in its 8<sup>th</sup> article<sup>58</sup> provided for freezing of assets and impoundment of FRY property.

Bosphorus Hava Yollari Turizm (Bosphorus), a Turkish airline company, had leased an aircraft from the national airline of the FRY which was confiscated by Irish authorities in 1993 relying on the EC Regulation. Bosphorus brought a complaint before the Irish High Court claiming that the relevant authority, the Irish Ministry for Transport, for the seizing of the aircraft for which the applicant had received no compensation. According to Bosphorus, the confiscation was a violation of the applicants' right to respect for property and that the seizure constituted an excessive burden leading to a significant financial loss for the company.

The High Court held that the Regulation was not applicable at all in the case at hand because the Turkish company was not held nor controlled by a person or undertaking in the FRY. On appeal, the Irish Supreme Court turned to the ECJ for a preliminary ruling.

The ECJ held in its judgment of July 30 1996 that: "As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as

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<sup>57</sup> *'Bosphorus Airways' v. Ireland* (App. 45036/98), judgment of the Grand Chamber of 30 June 2005.

<sup>58</sup> "All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] shall be impounded by the competent authorities of the Member States. Expenses of impounding vessels, freight vehicles, rolling stock and aircraft may be charged to their owners."

inappropriate or disproportionate.”<sup>59</sup> Thus, the ECJ found that the EC Regulation was indeed applicable on the case, although the Court found that it did not infringe the applicant’s right to respect of property nor the principle of proportionality.

Bosphorus eventually brought its claims to the ECtHR in order to have the impoundment reviewed on grounds of Article 1 of Protocol 1 of the ECHR – the right to have property respected. In its judgment, the Court begins with a summary of recent ECJ case law on fundamental rights and accentuates the increasing importance of human rights protection in EU law and how the ECHR has come to have great influence in the scrutiny of fundamental rights in the ECJ judgments. The Court once again establishes that respect for fundamental rights has become a condition of the legality of Community acts<sup>60</sup>.

Consequently, the Court comes to the following conclusion: “State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered *at least equivalent* to that for which the Convention provides” (italics added). By ‘equivalent’ the Court means ‘comparable’.<sup>61</sup>

The Court goes on: “If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was *manifestly deficient*. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights [...]”<sup>62</sup> (My italics).

The Court went on surveying the EU’s procedural mechanisms of control ensuring the observance of its human rights standards, i.e. the possibility to action against EU institutions and Member States for non-compliance with Treaty obligations (current articles 230, 232, 241 and 226-228 of the TEC).<sup>63</sup> The Court concluded that “...the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, ‘equivalent’ to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community”, and the Court comes to the

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<sup>59</sup> *Bosphorus*, para. 54.

<sup>60</sup> *Ibid*, paras. 73-75.

<sup>61</sup> *Ibid*, para. 155.

<sup>62</sup> *Ibid*, para. 156.

<sup>63</sup> *Ibid*, para. 161.

conclusion that there was no dysfunction in the EU's control system such as to rebut that presumption in the case at hand. Therefore, it could not be said that the applicant's Convention rights was manifestly deficient and the presumption of compliance had not been rebutted and the impoundment of the aircraft did not violate Bosphorus' right to respect for property.<sup>64</sup>

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<sup>64</sup> *Bosphorus*, para. 166.

# 4 The Relationship Between EU and the UN

The United Nations was founded on 24 October 1945 as an assembly of states striving to achieve global peace and security and to promote and protect human rights and dignity. The UN has 192 members, including all EU Member States. It is the task of the UN Security Council (UNSC) to maintain world peace and to prevent threats against international security<sup>65</sup>. The UNSC has 15 members, 5 permanent (France, China, Russia, Great Britain and the USA) and 10 temporary members with a two year mandate. The competences of the UN and its organs are regulated in the UN Charter, signed by all UN Members at San Francisco, USA, on 26 June 1945.

The relationship between the UN and the EU is rather complex and must be explained from the viewpoint of both International law and EU law. In *Kadi and Al Barakaat*, the question of which viewpoint to take was the core issue.

## 4.1 The Binding Nature of the UN Charter

Article 27 of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT) consolidates the primacy of the UN Charter over the domestic laws of the States, deriving from customary international law. In the UN Charter, Article 103 expresses that its provisions takes precedence also over other international agreements and extends even to posterior agreements<sup>66</sup>. In the event of a conflict between the obligations stemming from the UN Charter on one hand and any membership of an international agency on the other, the UN Charter will, subsequently, prevail. The Charter of the United Nations therefore takes precedence over every other obligation under domestic law or of international treaty law, e.g. the EU Treaties, and for those that are members of the Council of Europe, even and their obligations under the ECHR.<sup>67</sup>

This obviously causes problems for the EU Member States, who are all signatories to the UN Charter but concurrently bound by Article 6(2) TEU, stating that human rights are protected as general principles of EC law. The

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<sup>65</sup> According to Article 24(1) of the Charter of the United Nations, the members of the UN 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.

<sup>66</sup> See Article 30 of VCLT and the *Nicaragua case* (according to the judgment from the International Court of Justice, all regional, bilateral and multilateral agreements entered into by the parties must always be subjected to the provisions under Article 103 of the UN Charter).

<sup>67</sup> Bulterman, Mielle, *Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities*, *Leiden Journal of International Law*, 19 (2006), pp. 753-772, p. 765.

Member States as well as the institutions of the Union must respect this imperative and it is enforceable before the Community Courts. No provision of the TEC or the TEU abrogates the application of human rights, not even in the endeavour to comply with international law or, as in this case, UNSC Resolutions.

Another dimension to the dilemma is posed by Article 307 TEC, which expressly permit the Member States to breach EU law by stating that all agreements concluded before acceding to the EU between one or more member states and one or several third states shall not be affected by the provisions of the EC Treaty. This seemingly creates a getaway possibility for Member States having difficulties to conciliate multiple agreements. Taken in conjunction with Article 297 TEC, which contains further provisions for the rule of primacy in Article 307, this means that the Member States may leave unapplied any provision of Community law, if it is liable to impair the proper performance of their obligations under the UN Charter.<sup>68</sup> However, Article 6 TEU and the principle of loyalty under Article 10 also pose limitations to the applicability of Articles 307 and 297.

Therefore, the primacy of the UN Charter in Article 103 is contested as far as the EU and its Member States are concerned. According to Tridimas and Gutierrez-Fons, Article 307 can merely be regarded as to impose a best effort obligation, seeking to minimize breaches to the integrity of the Community legal order caused by pre-existing international obligations. It cannot be interpreted as to give “supra-constitutional” status to e.g. UNSC resolutions.<sup>69</sup>

## 4.2 The binding nature of UNSC sanctions

The supremacy of the UN Charter applies also to resolutions of the UNSC, according to Article 25 of the UN Charter, providing for the members of the UN to accept and carry out the decisions of the UNSC in accordance with the Charter. Furthermore, in accordance with Article 48(2) of the Charter, the decisions of the UNSC for the maintenance of international peace and security “shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members”. According to case law the Community must respect international law when exercising its powers and EC law must be interpreted in the light of relevant international rules of law.<sup>70</sup>

If international peace and security is deemed to be threatened under Article 39 of the Charter, the UNSC can order states to undertake measures, or

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<sup>68</sup> Karayigit, Mustafa T., *The Yusuf and Kadi Judgments: The Scope of the EC Competences in Respect of Restrictive Measures*, Legal Issues of Economic Integration, 33(4): 2006 pp 379-404, p. 387.

<sup>69</sup> Tridimas, Takis and Gutierrez-Fonz, Jose A., *EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?* Fordham International Law Journal, p. 21-22. Electronic copy available at: <http://ssrn.com/abstract=1271302>.

<sup>70</sup> Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, para. 199.

sanctions, based on Chapter VII of the Charter, Articles 40, 41 and 42, the latter containing provisions for military action. Non-military sanctions are traditionally known as e.g. trade embargos or economic embargos, directed against a particular state or entity. There are also provisions for use of so-called ‘targeted sanctions’, which are usually assumed to include freezing of financial assets, flight bans etc., directed towards individuals. The design of the targeted sanctions, or ‘smart sanctions’ as they are also called, were considered especially functional in order to address certain persons suspected to support the Al-Qaeda network financially in a direct or indirect manner, and a ‘blacklist’ based on a resolution was drawn up by the sanctions committee<sup>71</sup>.

The nomination of possible targets is, rather arbitrarily according to some, based on intelligence gatherings from states with an interest in the matter, expert panels established by the Sanctions Committee, and public sources.<sup>72</sup> In the case of terrorist suspects, secret intelligence must be assumed to lie behind a substantial part of the blacklistings, which would imply a possibility that the crucial information may never even have been presented before the sanctions committee, or perhaps it hasn’t been established at all which state lies behind the information presented before the Committee.<sup>73</sup>

The dilemma of the relationship between the EU, its Member States and the UN of course extends to UNSC Resolutions. In *Kadi and Al Barakaat* the ECJ was put in the awkward position to decide what to do when a UNSC Resolution in fact didn’t measure up to EU standards of human rights protection. As we shall see, the CFI and the ECJ approached the issue from two different angles.

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<sup>71</sup> Cameron, Iain, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, *Nordic Journal of International Law*, 72: pp. 159-214, 2003, p. 160-161.

<sup>72</sup> *Ibid.*, p. 165.

<sup>73</sup> *Id.*



# 5 *Kadi* and *Al Barakaat* – EU Human Rights Protection Put to the Test

On 3 September this year, the ECJ gave its long awaited ruling on the joined *Kadi* and *Al Barakaat* cases on appeal from the CFI. The applicants both argued before the CFI that Regulation No 881/2002 adopted by the Council in order to comply with the UN Security Councils resolutions which obligated all members of the UN to freeze the funds and assets of persons or entities suspected to be associated with Usama bin Laden, Al-Qaeda or the Taliban network, should be annulled. They both claimed that the Council was not competent to adopt the contested regulation and that it infringed several of their human rights in particular their right to be heard and their right to judicial review. The almost identical background and legal issues of the two cases allows for them to be examined jointly.

## 5.1 Background and Facts

In order to address the fact that the Taliban regime continuously sheltered and trained terrorists on Afghan territory and in order to obstruct planning of terrorist acts, the UN Security Council adopted **Resolution 1267** on 15 October 1999. The resolution reaffirmed the UNSC's conviction that the suppression of international terrorism was essential for the maintenance of international peace and security, and urged all States to, amongst other things, freeze funds and other financial resources controlled directly or indirectly by the Taliban. A special Sanctions Committee was established for the monitoring of the implementation of the Resolutions provisions throughout the States.

In order to comply with the resolution, Common Position 1999/727/CFSP was adopted on November 1999, containing provisions for certain restrictive measures against the Taliban, and in February the year after, the Council adopted Regulation No 337/2000 concerning a flight ban and a freeze of funds for the Taliban. The regulation was adopted on the basis of Articles 60 and 301 TEC.

On 19 December the UNSC adopted yet another resolution, 1333(2000), which demanded strengthening of the restrictive measures previously imposed under resolution 1267, and most importantly, an instruction for the Sanctions Committee to keep a list of individuals and entities suspected to be associated with Usama bin Laden.

In order to implement that resolution, the Council adopted on the basis of Articles 60 and 301 TEC Regulation No 467/2001 which in its first Annex listed the persons, entities and bodies affected by the sanctions.

On 8 March, the Sanctions Committee published a list of the entities which, and the persons who must be subjected to the freezing of funds pursuant to UNSC **Resolution 1267** (1999). On 17 and 19 October 2001, as a response to the Al-Qaeda attacks on the World Trade Centre in New York on September 11 that year, the Sanctions Committee published a new addition to its list of March 2001, including the name of Yassin Abdullah Kadi and Barakaat International Foundation.

By Commission Regulations No 2062/2001 of 19 October 2001 and 2199/2001 of 12 November 2001, Kadi and Al Barakaat were added to the list annexed to Regulation 467/2001.

On 27 May 2002 Regulation 467/2001 was replaced by **Council Regulation 881/2002** (the contested regulation), which was based on Articles 60, 301 and 308 TEC, imposing certain specific restrictive measures directed against certain persons and entities suspected to support terrorism and therefore should have their assets frozen. The names of Kadi and Al Barakaat were annexed to the new regulation.<sup>74</sup>

According to Article 2a of Regulation No 561/2003 (adopted in order to comply with Resolution 1452 [2002] which contained a number of exceptions to the freezing of funds imposed by Resolution 1267, and amending the contested regulation) the only exceptions to the freezing of the applicants' funds are for basic expenses, costs for legal aid and certain extraordinary expenses. The Sanctions Committee must first approve the exceptions.

## 5.2 The Applicant's Grounds

The two applicants brought actions before the CFI against the Council and the Commission seeking annulment of Regulation the contested regulation as far as it concerned them.<sup>75</sup> The grounds of the claims were basically the same as before the CFI.

In support of his claims, Kadi has put forward three grounds of annulment<sup>76</sup>, alleging infringements of his human rights; i.e. right to a fair hearing, breach

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<sup>74</sup> See *Kadi*, "background to the dispute", paras. 10-36.

<sup>75</sup> Case T-315/01 *Kadi* and Case T-306/01 *Yusuf and Al Barakaat v Council and Commission* [2005] ECR II-3533.

<sup>76</sup> A fourth ground was originally put forward, alleging that the defendant institutions were incompetent to adopt Regulations 467/2001 and 2062/2001 because those regulations were adopted on basis of articles 60 and 301 TEU. According to the applicant, those articles contain provisions for the Community to interrupt or reduce its relationship with states, not to freeze individuals' assets. This ground was however annulled by the applicant, due to the

of the right to respect for property and of the principle of proportionality, and third, breach of the right to effective judicial review<sup>77</sup>.

Al Barakaat for its part based its claims before the ECJ on three grounds of annulment, of which only two will be given account of in this context<sup>78</sup>, namely first the alleged incompetence of the Council to adopt the contested regulation on basis of Articles 60 and 301 and 308 TEC, and second, the alleged breach of Al Barakaats fundamental rights. The rights referred to by the applicants in *Yusuf and Al Barakaat* are in general the same as in *Kadi*<sup>79</sup>.

Both applicants deny any association with the Taliban, Al-Qaeda or Usama bin Laden.

Concerning the alleged infringements of certain fundamental rights, both *Kadi* and the applicant's in *Yusuf and Al Barakaat* reminds the Court of the development of human rights protection in ECJ case-law<sup>80</sup> and that the protection for human rights now form an integral part of the Community legal order, a legal order independent from the United Nations, governed by its own rules of law<sup>81</sup>.

*Kadi* argues that his right to a fair hearing is severely impaired by the contested regulation due to the fact that it enables the Council to freeze the funds of the target of the sanction indefinitely, without giving him the opportunity to formally express his views on the correctness and relevance of the evidence used against him<sup>82</sup>.

Regarding the respect for property and the principle of proportionality, *Kadi* complains of the fact that he has been unable to carry out his business since he was subjected to the asset freeze, and he states that "the contested regulation permits his funds to be frozen solely on the basis of the inclusion of his name in the list drawn up by the Sanctions Committee, although the Community institutions have not the slightest power to assess the available evidence or the considerations which might justify such a measure and there has been no weighing-up of the interests concerned."<sup>83</sup>

Lastly, *Kadi* argues that the right to effective judicial review constitutes a general principle of Community law but that in this case the contested regulation does not provide any opportunity for such a review because he

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fact that Regulation 467/2001 was later replaced by the contested regulation, which was based on articles 60 TEC, 301 TEC and 308 TEC. See *Kadi* para. 60.

<sup>77</sup> *Kadi*, para 59.

<sup>78</sup> The third ground for annulment presented by Al Barakaat was an alleged infringement of Article 249 TEC.

<sup>79</sup> Case T- 306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*, [2005] ECR II-3533, para. 190.

<sup>80</sup> Reference to *Nold* is made in *Kadi*, para.138 and in *Yusuf and Al Barakaat* para. 190 along with a reference to *Internationale Handelsgesellschaft* and *Stauder*.

<sup>81</sup> *Kadi*, paras. 138-140.

<sup>82</sup> *Ibid.*, paras. 141-143.

<sup>83</sup> *Ibid.*, paras. 144-145.

has at no point been offered to demonstrate the falsity of the allegations against him nor been provided with an opportunity to dispute the freezing of his assets. The fact that the Council claims that it has no discretion (margin of appreciation) in the matter to take any action to investigate the correctness of the decision to freeze his assets and that it is required to act on the instructions of the United Nations, does not justify an abdication of the Community institution's responsibility to respect the applicant's human rights.<sup>84</sup> The applicants in *Yusuf and Al Barakaat* adopt a similar argumentation, adding that the information behind the decision to include their names on the UNSC's list (and subsequently on the list annexed to the contested regulation) is obscure and was never reviewed by the defendant institutions before the adoption of the contested regulation<sup>85</sup>.

The possibility to bring proceedings before the CFI does not, according to Kadi, satisfy the right to effective judicial review if the Court declares itself unable to investigate the merits of the action. "In order to satisfy the requirements of effective judicial review the Court ought either to investigate the validity of the evidence produced before it or strike down the regulation in question on the ground that it provides no legal basis for an investigation of that kind."<sup>86</sup> The applicants in *Yusuf and Al Barakaat* claim that the right to a judicial review is a general principle of EC law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR. That right implies, according to the applicants, the right to access to effective legal proceedings before an independent and neutral judicial body, conditions which the Council and the Commission fail to satisfy.<sup>87</sup>

The applicants in *Yusuf and Al Barakaat* also maintain that the duty to accept and carry out the decisions of the UNSC in Article 25 UN is not an absolute obligation, nor is Article 103 of the UN Charter binding for matters outside public international law and does not preclude the members of the UN to have regard to their own laws<sup>88</sup>.

### **5.2.1 The Defendant's Grounds**

The defendant institutions, The Council and the Commission, when presenting their grounds in the two cases, depart from a general reference to the primacy of the UN Charter. Articles 24(1), 25, 41, 48(2) and 103 of the Charter bind the Community to international law in the same way as the Member States of the United Nations are bound by it. This means for the Community institutions that their powers in this area are limited and that they have no discretion in the implementation of - and therefore cannot alter the content of - the UNSC resolutions. Any international or domestic rule of

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<sup>84</sup> *Kadi*, paras 156-152.

<sup>85</sup> *Yusuf and Al Barakaat*, para 191.

<sup>86</sup> *Kadi*, para. 152.

<sup>87</sup> *Yusuf and Al Barakaat*, paras 192-193.

<sup>88</sup> *Ibid.*, para. 201.

law liable to prevent such implementation must therefore, in their opinion, be disregarded.<sup>89</sup>

The obligations imposed on a member of the United Nations under Chapter VII of the UN Charter will prevail over every other international obligation to which the member might be subject. If a member were able to alter the contents of a UNSC resolution with reference to legal engagement elsewhere hindering its implementation, the effectiveness of the resolution could not be maintained<sup>90</sup>. The main argument laid down by the defendant institutions is therefore that although the Community itself is not a member of the UN, it is required to, when exercising its competences, fulfil the obligations imposed on its member states as a result of their membership in the UN.

As regards the applicants' claimed violations of their fundamental rights, the Council argues that "when the Community takes measures for purposes reflecting the desire of its Member States to perform their obligations under the Charter of the United Nations, it necessarily enjoys the protection conferred by the Charter and, in particular, the 'effect of legality'." This effect justifies a temporary suspension of human rights in time of emergency according to the Council.<sup>91</sup> According to the Council in *Yusuf and Al Barakaat*, the Community, when adopting measures to help fulfilling the obligations of its member states, enjoys protection conferred on it by the UN Charter, in particular the effect of legality, even when fundamental rights are jeopardized<sup>92</sup>.

Only if the institutions committed a manifest error in the implementation of the obligations laid down by the UNSC resolution could a claim of jurisdiction come to question; anything beyond that limit would "cause serious disruption to the international relations of the Community and its Member States [...] and would be liable to undermine one of the foundations of the international order of States established after 1945"<sup>93</sup>. Thus, UNSC measures cannot be challenged at EU level and any review by the Court on the consistency of the contested regulation with the human rights of the applicant is precluded, the defendant institutions argue.

Should the Court however decide to fashion a full examination of the three alleged grounds of annulment presented by the applicant, the defendant institutions deny that the contested regulation is violating human rights. A 'fair hearing' mechanism cannot, according to the Council and the Commission, be carried out by those institutions because of their lack of competence to investigate, their lack of discretion as far as the facts are concerned, and because of their simple obligation to implement the

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<sup>89</sup> *Kadi*, para. 153-175 and *Yusuf and Al Barakaat* para 206.

<sup>90</sup> *Yusuf and Al Barakaat* para. 208.

<sup>91</sup> *Kadi*, para. 161 and also in *Yusuf and Al Barakaat* para. 207.

<sup>92</sup> *Yusuf and Al Barakaat*, paras. 212 and 216.

<sup>93</sup> *Kadi*, para. 162.

measures adopted by the UNSC in order to ensure international peace and security.

The right to respect for property is not an absolute right and the limitations to that right can, in this case, be justified by public interest. The measures taken in this case are not disproportionate when considering the aim of the measures taken: to ensure that individuals' assets cannot be used to promote terrorism.

As far as the argument of effective judicial review is concerned, the Council and the Commission refers to the applicants possibility to bring action under Article 230 and the possibility to approach the UNSC through the authorities of his/its home country (the UNSC will not regard the application of an individual).

## 5.3 The CFI-judgment

The judgments in *Kadi* and *Yusuf and Al Barakaat* were delivered by the Court of First Instance on the same day, 25 of September 2005. In both cases the Court decided to rule first on the argument that the Council lacked competence to adopt the contested regulation and then goes on to rule on the grounds of annulment based on the alleged breach of the applicants' fundamental rights<sup>94</sup>

### 5.3.1 *Alleged Lack of Competence to Adopt the Contested Regulation*

Although not presented as a ground for annulment in *Kadi*, the Court found the matter of competence to be of public policy and that it could therefore be raised by the Court of its own motion<sup>95</sup>. In *Yusuf and Al Barakaat*, the applicants argued that the Council exceeded its competence in the adoption of the contested regulation on the basis of Articles 60, 301 and 308<sup>96</sup>. Articles 60 and 301 allow, according to the applicants (including *Kadi*<sup>97</sup>) for the adoption of sanctions directed only against third countries, not against individuals. Recourse to Article 308 does not grant the Council such powers either, since the contested regulation does not seek to attain any objective of the TEC under the first pillar, but CFSP objectives under the second pillar.<sup>98</sup>

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<sup>94</sup> *Kadi*, para. 63.

<sup>95</sup> *Ibid.*, para. 61.

<sup>96</sup> *Yusuf and Al Barakaat*, para. 84.

<sup>97</sup> *Kadi*, para. 83.

<sup>98</sup> *Ibid.*, paras. 84-85.

Articles 60 TEC<sup>99</sup> and 301<sup>100</sup> TEC do not, according to the Courts' findings, in themselves constitute a sufficient legal basis for the adoption of the contested regulation<sup>101</sup>. Because the UNSC provided for sanctions against Usama bin Laden and the Al-Qaeda network rather than the entire Taliban regime, there was no sufficient link between the sanctions to be taken and the territory or governing regime of a third country, and therefore, in the absence of such a connection, Articles 60 TEC and 301 TEC did not constitute a sufficient legal basis for the adoption of the contested regulation in the Courts' view<sup>102</sup>.

However, the Court follows the opinion of the Council and relies on Article 308 in conjunction with Articles 60 and 301 to accredit the Council the necessary competence. Articles 60 and 301 TEC are, according to the Court "wholly special provisions of the EC Treaty" under which action by the Community can be required in order to attain objectives of the Union, such as the implementation of a common position. But, additional recourse to Article 308 TEC<sup>103</sup> is necessary because it gives the Community the required competence to adopt a regulation relating to a Union CFSP aim (in this case the battle against the financing of international terrorism), and, as a consequence, to impose financial sanctions on individuals, regardless of whether they have any connection with the territory or governing regime of a third country.<sup>104</sup>

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<sup>99</sup> Article 60 (1) TEC: "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..."

<sup>100</sup> Article 301 TEC: "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."

<sup>101</sup> *Yusuf and Al Barakaat*, para. 133.

<sup>102</sup> *Kadi*, paras 92-97.

<sup>103</sup> Article 308 TEC: "If action by the Community should prove necessary, to attain, in the course of the operation in 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."

<sup>104</sup> According to the Court, "...recourse to Article 308 EC, in order to supplement the powers to impose economic and financial sanctions conferred on the Community by Articles 60 EC and 301 EC, is justified by the consideration that, as the world now stands, states can no longer be regarded as the only source of threats to international peace and security. Like the international community, the Union and its Community pillar are not to be prevented adapting to those new threats by imposing economic and financial sanctions not only on third countries, but also on associated persons, groups, undertakings or entities engaged in international terrorist activity or in any other way constituting a threat to international peace and security. [134] It is therefore apparent that, by having recourse in the circumstances of this case to the additional legal basis of Article 308EC, the Council has not widened the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and activities of the Community." *Kadi*, paras 133-134 and also *Yusuf and Al Barakaat*, paras. 158-169.

### **5.3.2 Alleged Breach of the Applicants' Human Rights**

Concerning the relationship between the international legal order under the United Nations and the domestic or Community legal order, the Court starts by stating that the EU Member States are all signatories to the UN Charter and are therefore bound by its provisions according to customary international law, VCLT and ECJ and ICJ case law. By transferring powers to the Community, the Member States automatically manifest a will to also bind the Community by the obligations entered into by them under the UN Charter, and it is therefore evident, according to the Court, that Article 301 of the TEC has the purpose to “provide a specific basis for the economic sanctions that the Community, which has exclusive competence in the sphere of the common commercial policy, may need to impose in respect of third countries for political reasons defined by its Member States in connection with the CFSP, most commonly pursuant to a resolution of the Security Council requiring the adoption of such sanctions.”<sup>105</sup> Therefore, the Court argues, the provisions of the UN Charter have a binding effect even for the Community insofar as Member States have assumed powers to the Community<sup>106</sup>.

Consequently, the Court goes on, the Community may not infringe the obligations imposed on its Member States by the UN Charter or hamper their performances towards the UN, but it is in fact bound to adopt all measures possible to enable its Member States to fulfil their obligations under the UN Charter. Therefore, the Court sums up, it was by virtue of the TEC itself that the Community was required to give effect to the UNSC resolutions concerned, and the applicant’s argument, to see the EC legal order as independent from the United Nations, must be rejected<sup>107</sup>.

The Court goes on to examine its scope of review of legality and recalls that the contested regulation was adopted in the light of a common position (220/402) as a means to implement the EU Member States obligation under the UN Charter to give effect to the sanctions against Usama bin Laden. Therefore, the EU institutions had no discretion nor could they change the content of the resolutions or set up any mechanism capable of giving rise to such changes.

A review of the EC regulation would indirectly mean a review of the original UNSC resolution, and to annul the contested regulation would mean that the Court would declare that the UNSC resolution itself was infringing the human rights of individuals as protected by the EC legal order. The Court explains that the task of determining what constitutes a threat to international peace and security and the measures required to maintain them

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<sup>105</sup> *Kadi*, para. 202.

<sup>106</sup> *Yusuf and Al Barakaat*, paras. 231-259.

<sup>107</sup> *Kadi*, paras 180-208 and *Yusuf and Al Barakaat*, para. 247.



is exclusive for the UNSC and therefore precludes the review of national or EU courts.<sup>108</sup>

The Court finishes by stating that “it must therefore be considered 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. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.”<sup>109</sup>

However, the Court *does* find itself competent to review the resolutions’ compatibility with *jus cogens* norms<sup>110</sup>. A *jus cogens* norm is described in Article 53 VCLT as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Examples of *jus cogens* norms are e.g. the prohibition against torture and slavery. In the Court’s recognition, the only limit to the binding effect of the UNSC’s resolution would be if the UNSC would have failed to observe the *jus cogens* norms, and if it could be found that the resolution was contrary to any *jus cogens* norm, the resolution would not be binding for the Member States of the United Nations, and consequently, nor for the Community.<sup>111</sup> After careful assessments of the three alleged breaches of the applicant’s human rights, the Court found no incompatibilities with *jus cogens*.

The Court dismissed the action.

## 5.4 The Opinion of Advocate General Maduro

On January 16 2008 the Advocate General M. Poires Maduro presented his opinion on the *Kadi*-case in which he suggests that the ECJ rule in favour of the applicant.

### 5.4.1 *Alleged Lack of Competence to Adopt the Contested Regulation*

A.G. Maduro shares the opinion of the Commission, namely that Articles 60 and 301 alone constituted a sufficient legal basis for the adoption of the

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<sup>108</sup> *Kadi*, paras. 209-219.

<sup>109</sup> *Ibid.*, para. 225.

<sup>110</sup> *Yusuf and Al Barakaat*, para. 278.

<sup>111</sup> *Kadi*, para. 230.

contested regulation. Nothing in the wording of those articles precludes an interpretation including sanctions against individuals. “To exclude economic relations with individuals or groups from the ambit of ‘economic relations with ... third countries’ would be to ignore a basic reality of international economic life: that the governments of most countries do not function as gatekeepers for the economic relations and activities of each specific entity within their borders.”<sup>112</sup> According to Maduro, Article 308 cannot be interpreted as a ‘bridge’ between CFSP in the second pillar and the first (Community) pillar in order to include economic relations with individuals in the acceptable means to achieve the objectives permitted by Article 301 EC.<sup>113</sup>

### **5.4.2 Alleged Breach of the Applicants’ Human Rights**

Regarding the EC Court’s jurisdiction to determine whether the contested regulation breaches human rights, Maduro starts by dealing with the relationship between the international legal order and the legal order of the Community and recalls the landmark ruling in *Van Gend en Loos* in which the Court explained that the EC Treaty had established a *new legal order*, within which states as well as individuals have immediate rights and obligations. The EC legal order is, thus, autonomous and separated from the public international law. The independence of the municipal legal order from the international legal order does not, however, preclude interaction between the two. On the contrary, the Community strives to conform with international law in both interpretation and application, and the Community institutions take careful judicial notice of the obligations by which the Community is bound on the international stage.

The core argument of AG Maduro’s opinion is, however, that the effects of international obligations within the Community is to be *determined by the Community Courts, by reference to Community law*. The legal basis for the adoption of an international agreement must be EU law and not the conditions set by that international body. Maduro refers to a number of cases where the Court has repeatedly confirmed this point of view, and where international agreements have been denied effect in the Community legal order because of the fact that it was concluded in breach of the duty of loyal cooperation or because it infringed a general principle of EC law.<sup>114</sup> “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. [...] Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the

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<sup>112</sup> Maduro, para. 13.

<sup>113</sup> *Ibid.*, para. 15.

<sup>114</sup> Maduro, para. 23.

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.”<sup>115</sup> (My italics.)

The main question at hand in the current case is thus, according to the Advocate General, whether the Community legal order grants “supra-constitutional status” to UNSC sanction regimes and that they therefore should be immune from judicial review. With a reference to the *Bosphorus* case, he establishes that the Court in that case never before seemed to be bothered with the issue of its competence to review. No supra-constitutional status can be drawn from Article 307 TEC either, as suggested by the UK (allowed as an intervener in the case). According to Maduro, the importance of Article 307 TEC can only be indirect, since it would be irreconcilable with both Article 6(1) TEU<sup>116</sup> and Article 49 TEU<sup>117</sup> to interpret Article 307 in a manner that would enable national authorities to use the Community to circumvent fundamental rights. This would run counter to established case law in which respect for human rights are firmly safeguarded.<sup>118</sup>

Instead, Maduro continues, “the obligations under Article 307 EC and the related duty of cooperation flow in both directions: they apply to the Community as well as to the Member States.”<sup>119</sup> The Member States are, according to that duty, required to exercise their powers and responsibilities in the UN in accordance with general principles of EU law. Particularly those belonging to the UNSC have an obligation to prevent, as far as possible, the adoption of decisions in that body that are liable to run counter to general principles of EU law.

The Court’s reluctance to review the UNSC resolution due to its politically sensitive character and the fact that the Court finds itself without discretion to do so, is not correct in Maduro’s view. “The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means that it remains the duty of the Courts to assess the lawfulness of measures that may conflict with other interests that are equally

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<sup>115</sup> Maduro, *supra note 1*, para. 24.

<sup>116</sup> Article 6(1) spells out the principles upon which the Union is founded: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.

<sup>117</sup> Article 49 is a conditional clause for membership in the European Union. Membership requires respect and commitment to the principles set out in 6(1) TEU.

<sup>118</sup> Maduro makes particular reference to Case 294/83 *Les Verts v. European Parliament* [1986] ECR 1339 and Case C-112/00 *Schmidberger* [2003] ECR I-5659, see Maduro, para.31.

<sup>119</sup> *Ibid.*, para. 32.

of great importance and with the protection of which the courts are entrusted.”<sup>120</sup>

Having said this, Maduro makes sure to accentuate that the possibility to limit individuals’ rights under certain, extraordinary circumstances must exist, but this should not mean that those cases should be absolutely immune from judicial review, nor that the review should be marginal, as suggested in this case. “On the contrary...” Maduro suggests, ...”when the risks to public security are believed to be extraordinarily 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. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance.”<sup>121</sup> Therefore, Maduro concludes, the CFI was competent to review the contested regulation in the light of fundamental rights and should have considered the applicant’s plea of whether his human rights have been breached by the contested regulation.

Instead of referring the case back to the CFI, Maduro recommends that the ECJ make use of the possibility to settle the issue once and for all. In his opinion, the arguments that an extraordinary standard of review and less stringent criteria for the protection of human rights should apply in cases where international peace and security are at stake, cannot be upheld. Nor is the CFI’s conclusion that only a review on compatibility with *jus cogens* justifiable in this case justifiable. They are rather expressions of the Court’s fear to concern itself with politically sensitive issues and to upset the international mechanisms to combat terrorism, in Maduro’s view. But at the same time as the Community must pay respect to institutions such as the UN and the UNSC and as far as possible strive to conciliate their interests, the Court cannot “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. Respect for other institutions are meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them.”<sup>122</sup> Therefore, Maduro continues, nothing in the present case calls for a different exercise of judicial review by the Court in the case at hand, only the weight given to the aims of the balancing between the fundamental rights and the aims for the restriction may require specific needs in the case of combating international terrorism.

Maduro goes on to separately examine the alleged breaches of the applicant’s human rights, although he recognizes that these rights are closely connected in this case. According to Maduro, the severity of the sanctions against Mr. Kadi (having all of his financial assets within the Community frozen for an unlimited time, with no adequate means for him to challenge the accusations against him) would increase the importance of procedural safeguards and for the authorities to properly justify such measures and demonstrate their proportionality. In the absence of such

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<sup>120</sup> Maduro, *supra* note 1, para. 34.

<sup>121</sup> *Ibid.*, para. 35.

<sup>122</sup> *Ibid.*, para. 44.

safeguards, an infringement of the appellant's peaceful enjoyment of property is definitely at hand. In the case of the right to be heard, Maduro criticizes the Community institutions for not having offered the appellant to express his views on whether the sanctions against him are justified. The de-listing procedure available to the appellant before the UNSC offers no real consolation at this point, especially since it does not provide the appellant with sufficient information on which the decision against him was based. In that sense, argues Maduro, the right to be heard is intimately connected with the right to effective judicial review. The absence of administrative safeguards significantly hampers the appellant's right to effective judicial protection, which is an important right within the EC human rights catalogue.

A.G. Maduro concludes: "had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order."<sup>123</sup> Since this is not the case, and since the only de-listing possibility remains with the UNSC, which is a diplomatic organ, it must be held that the right to judicial review has not been secured, and therefore, the Community institutions cannot abdicate such a review when implementing UNSC resolutions into the Community legal order. Maduro finds all three of the applicant's grounds for annulment are fulfilled and suggest that the ECJ set aside the CFI judgment.

## 5.5 The ECJ-judgment

On appeal, the two cases were joined on account of the connection between them, and the parties put forward generally the same grounds as before the CFI. Ahmed Ali Yusuf however had abandoned the appeal which, consequently, was brought by Al- Barakaat alone<sup>124</sup>.

### 5.5.1 *The Alleged Lack of Competence to Adopt the Contested Regulation*

The Court came to the same conclusion as the CFI – the contested regulation was correctly adopted on the basis of Articles 60 and 301 TEC in conjunction with Article 308 – but for reasons different from those established by the CFI. Opposing the opinion of the Advocate General, the Court confirmed that article 308 was in fact necessary for the accurate adoption of the contested regulation, but not because it possessed the ability to widen the scope of the Community competences beyond the TEC, but because it permits for an extension of the limited ambit *rationae materiae* of articles 60 and 301 to include individuals and not only states. The provisions

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<sup>123</sup> Maduro, *supra note 1*, para. 54

<sup>124</sup> *Kadi and Al Barakaat*, para. 119.

for community competence embodied in those two articles are, the Court contends, expressions of an implicit, underlying Community objective, namely that “of making it possible to adopt such measures through the efficient use of a Community instrument”.<sup>125</sup> This, the Court contended, was such a Community objective for the purposes of which Article 308 could be used<sup>126</sup>.

### **5.5.2 The Alleged Breach of the Applicants’ human rights**

In its findings, the Court, rather harshly, dismisses the reasoning of the CFI in its conclusion that it follows from principles governing the relationship between international law under the UN and the Community legal order that the contested regulation, as it is designed to give effect to a resolution adopted by the UNSC under Chapter VII of the UN Charter, and therefore cannot be subjected to judicial review by Community Courts, except for compatibility with *jus cogens* norms, and therefore enjoy immunity from jurisdiction<sup>127</sup>. In its judgment, the Court recalls the commitment by the Community to the rule of law and respect for fundamental rights, which form an integral part of the general principles of law and whose observance the Court ensures and, for that purpose, inspiration is drawn from the constitutional traditions common to the Member States and other international agreements of which the ECHR is of special significance. The Court also accentuates human rights as a benchmark for the lawfulness of Community acts and that measures incompatible with respect for human rights are unacceptable in the Community.<sup>128</sup> “It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty”.<sup>129</sup>

The Court also denies the argument that the sanctions adopted under Chapter VII of the UN Charter leave no implementation choices and that the primacy of the UN Charter prejudices any legal review of Community measures intended to give effect to such sanctions at Community level.<sup>130</sup> It is true, the Court confirms, that Article 307 and 297 contain provisions for derogations from primary EU law, but those provisions cannot be understood as authorizations for derogations from the principles of liberty, democracy and respect for human rights and fundamental freedoms as

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<sup>125</sup> *Kadi and Al Barakaat*, para. 216.

<sup>126</sup> The reasoning of the Court is further analyzed and criticized in Tridimas and Gutierrez-Fons, *supra note* 69 p. 9-18.

<sup>127</sup> *Kadi and Al Barakaat*, para. 280

<sup>128</sup> *Ibid.*, para. 284.

<sup>129</sup> *Ibid.*, para. 285.

<sup>130</sup> *Ibid.*, para. 299.

enshrined in Article 6(1) TEU as a foundation of the Union.<sup>131</sup> Therefore, the Court finds that the review by the Court of the validity of Community acts in the light of human rights must be “considered to be the expression, in a community based on the rule of law, of a *constitutional guarantee* stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.”<sup>132</sup> (My italics).

### 5.5.2.1 Effective Judicial Protection and the Right to be Heard

Referring to former case law<sup>133</sup> the Court recalls that *effective judicial protection* is a general principle of Community law and that it has been enshrined in articles 6 and 13 of the ECHR, and Article 47 of the EU Charter of Fundamental Rights<sup>134</sup>. Effective judicial protection in this case comprises the Community authority in question to communicate the grounds of the adding the names of the person and entity concerned to the sanctions list in order to enable the right to bring action against such a listing and the right to defence.<sup>135</sup>

The right to defence includes in particular the *right to be heard*. The Court recognizes that communication prior to the adding of the names to the list would jeopardize the effectiveness of the sanctions, it is the task of the Community judicature to apply, in the course of the judicial review it carries out (and from which the restrictive measures cannot escape), techniques which accommodate both the legitimacy security concerns about the nature and sources of information taken into account in the adoption of the act concerned and the need to accord the individual sufficient measure of procedural justice.<sup>136</sup> “Because the Council neither communicated to the applicants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view n that respect known to advantage. Therefore, the appellants’ rights of defence, in particular the right to be heard, were not respected.”<sup>137</sup> Having regard to the relationship between the right of defence and the right to effective judicial protection, the Court comes to the conclusion that the principle of effective judicial protection was infringed.<sup>138</sup>

### 5.5.2.2 The Right to Property

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<sup>131</sup> *Kadi and Al Barakaat*, para. 303.

<sup>132</sup> *Ibid.*, para. 316.

<sup>133</sup> The Court refers to *Les Verts*, *Ibid.*, para. 281.

<sup>134</sup> *Ibid.*, para. 335.

<sup>135</sup> *Ibid.*, para. 336.

<sup>136</sup> *Ibid.*, para. 344.

<sup>137</sup> *Ibid.*, para. 348.

<sup>138</sup> *Ibid.*, para. 352.

The Court commences by stating that the right to property is one of the general principles of EU law, but that it is not absolute, in the sense that it can be subjected to restrictions under certain conditions. In the assessment of the scope of the right, account is to be taken in particular to Article 1 of the First Additional Protocol to the ECHR which enshrines that right.<sup>139</sup> The Court gives account of the assessment of proportionality established by ECtHR case-law and the necessity of striking a fair balance between the interests of the individual and the demands of public interest. In this procedure, a wide margin of appreciation is accorded the legislature.<sup>140</sup>

The general interest as fundamental to the international community as to fight by all means the threats to international peace and security posed by acts of terrorism, the freezing of funds, financial assets and other economic resources of persons and entities identified by the Sanctions Committee as being associated with Usama bin Laden, members of Al- Qaeda and the Taliban regime cannot per se be regarded as disproportionate according to the Court.<sup>141</sup> However, the Court goes on, Article 1 of the First Additional Protocol to the ECHR comprises a procedural requirement, namely to afford the person concerned by the restriction a reasonable opportunity of putting his case before competent authorities. Since the adopting institutions failed to abide by this procedural recourse in a situation in which the restriction of Kadi's property rights must be regarded as significant, the imposition of the restrictive measures upon him constituted an unjustified restriction of his right to property.<sup>142</sup>

The Court therefore came to the conclusion that the contested regulation, in so far as it concerns the appellants, must be annulled. However, according to Article 231 TEC, the contested regulation and the list in Annex I will be maintained for a period of three months in order to allow the Council to remedy the infringements.<sup>143</sup>

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<sup>139</sup> *Kadi and Al Barakaat*, paras. 355 and 356.

<sup>140</sup> *Ibid.*, para. 360.

<sup>141</sup> *Ibid.*, para. 365.

<sup>142</sup> *Ibid.*, para. 370.

<sup>143</sup> *Ibid.*, paras. 372 and 375.



## **6 The Questions of Primacy and the Competence to Review – an Aspectual Analysis**

The judgment presented by the ECJ in *Kadi and Al Barakaat* illustrates the complexity of international law and how a State, by surrendering parts of its sovereignty for the benefit of international associations, can find itself in a conflict between two or more agreements to which it has avowed commitment. The hierarchy of the norms governing the conflicting agreements are not necessarily easily established, despite well-formulated provisions of primacy. As shown by the different approaches taken by the CFI and the ECJ, the relationship between the international legal order and the EU legal order in this case, depends on from which aspect the case is viewed upon.

An aspectual analysis can also be applied to the very core issue of the case, namely the one of balancing individuals' rights to effective judicial protection and property with public interest to combat terrorism and to maintain international peace and security. The targeted sanctions in this case have had a severe and crippling effect of Mr. Kadi's life, both economically as his assets have been frozen, and personally, as he has been pointed out as a suspected terrorist. On the other hand, a person's reputation and economical ruin may seem to be a petty sacrifice on the altar of international peace and security.

The ECJ judgment in *Kadi and Al Barakaat* does not provide a 'solution' the complex relationship between the international legal order and emerging regional legal orders such as the EU, nor does it provide for a universal definition of respect for human rights. The Court rather chooses the viewpoint from which it decides to assess the issues at hand, and a correct analysis of the case must therefore be made from different aspects.

### **6.1 The Relationship Between the International Legal Order under the United Nations and the Community Legal Order**

“For decades now, lawyers have been struggling with the rivalry between the Community legal order and the domestic legal orders of the Member States. After protracted and acrimonious fights, which are by no means

definitively settled, the principle of primacy of Community law over national law was established and consolidated. All of a sudden, another competitor enters the stage, namely the United Nations, which, in a limited field, is also empowered to issue decisions which are binding on the Member States of the world organization and require full compliance.”<sup>144</sup>

The decade-long hierarchical struggle Tomuschat is referring to in this quotation is obviously the reluctance demonstrated by certain EU Member States to subordinate its constitutions to the absolute precedence of EC law. The schoolbook example is the so called *Solange I and II*- cases in which the German Constitutional Court initially refused to accept the supremacy of EC law, a refusal based on the argument that the court protected certain fundamental rights which weren't equally protected within the Community legal order. Thus, the court decided, even if it is not competent to assess the validity of EC legal acts, that it could declare Community acts inapplicable if they infringe fundamental rights as defined in the German constitution. In the second judgment, *Solange II*, the Constitutional Court instead decided that it would not exercise its self-claimed jurisdiction, “so long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights....”<sup>145</sup>

The similarities with the dilemma in *Kadi and Al Barakaat* are striking. First, the wordings of the court echoes in the definition of the *equivalence test* fashioned by the Strasbourg court in *Bosphorus*, which will be further examined below. Second, the CFI in *Kadi*, when arguing that even if fundamental rights were the benchmark for Council measures the concerned rights were not violated in this case, adopts a monistic approach with a priority of international law. Simply concluding that pursuant to rules of general international law (in particular Article 103 of the UN Charter and Article 27 of the VCLT) and specific TEC provisions (Article 307) Member States may and in fact *must* leave unapplied any provision of Community law that prevents them from performing in accordance with their obligations under the UN Charter. It has been argued that the CFI came to this conclusion in order to avoid a ex-post approval of the *Solange*-judgment, which implicitly doubted the European Court's effectiveness in human rights protection.<sup>146</sup> The only remedy the CFI considers itself able to offer the applicants, is an indirect review of the lawfulness of the UNSC resolutions with regard to *jus cogens*.

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<sup>144</sup> Tomuschat, Christian, “Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*; Case T-315/01 *Yassin Abdullah Kadi v. Council and Commission*”, CML Rev. 2006 pp. 537-551, p. 537.

<sup>145</sup> The relationship between EC law and national legal orders is obviously more complex than presented here and is not limited to fundamental rights issues. For a more thorough review, see e.g. Lindfeldt, *supra* note 48, p. 56 and forward.

<sup>146</sup> The applicability of the *Solange*-doctrine was the issues in one line of discussion at the introductory conference of the newly founded PhD program at the law faculty of Berlin's Humboldt University. Ley, Isabelle, “Legal Protection against the UN-Security Council between European and International Law: A Kafkaesque Situation? Report on the fall Conference of the Graduate Program”, 8 German Law Journal No. 3, 2007, p. 7.

One of the first articles on the *Kadi and Al Barakaat* judgment of 3 September is written by Professor Tridimas and Research Fellow Gutierrez-Fons and was published in Fordham International Law Journal. The authors describe the ECJ judgment as “euro-centric rather than internationalist”<sup>147</sup> and, thus, underlining the dualist approach taken by the Court on appeal. That approach has generally been welcomed in legal doctrine. It established that the effect of international obligations within the Community legal order must be determined by reference set by Community law, and Articles 224 and 307 can never be interpreted as to give a *carte blanche* for Member States derogate from human rights provisions in EC law for the benefits of their international obligations.<sup>148</sup> In fact, Tridimas and Gutierrez-Fons argue, under no circumstances may the Community depart from its founding principles, of which respect for human rights and fundamental freedoms have a certain status in the light of Article 6(1) TEU.<sup>149</sup>

The Court’s ruling on this point is very much in accordance with the opinion of AG Maduro in *Kadi*, in which he states that “...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 international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”<sup>150</sup>

## **6.2 The Scope of the Review of Legality by the European Courts of Security Council Resolutions and Implementing Community Acts**

The fact that the CFI restricted itself to an indirect review of the UNSC resolution’s accordance with *jus cogens* raised a lot of criticism among legal experts and the court was accused of adopting the *jus cogens*-review in order not to wake the “Strasbourg bear”, i.e. provoke critique by the European Court of Human rights.<sup>151</sup> In the words of Piet Eeckhout, the careful *jus cogens*-review carried out by the CFI “...somewhat sweetens the pill of denial of jurisdiction. It is however obvious that *jus cogens* does not offer the same standard of review as do general principles of Community law.”<sup>152</sup>

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<sup>147</sup> Tridimas and Gutierrez-Fons, *supra note* 69, p. 38.

<sup>148</sup> See e.g. Eeckhout, Piet, “External Relations of the EU and the Member States Competence, Mixed Agreements, International Responsibility and Effects of International Law” General Report, FIDE 2006 National Reports, 2006, pp. 275-317 p. 308-309.

<sup>149</sup> Tridimas and Gutierrez-Fonz, pp. 21-22.

<sup>150</sup> Maduro, *supra note* 1, para. 24.

<sup>151</sup> See e.g. Ley, *supra note* 146, p. 7.

<sup>152</sup> Eeckhout, FIDE, p. 310.

The ECJ distinguished in its judgment between reviewing the lawfulness of an international agreement and reviewing of an EC measure intended to give effect to international agreement at issue, and found itself competent to do the latter. As an autonomous legal order with the rule of law as its spine, EU courts must ensure the full review of the lawfulness of all EC acts using fundamental rights, which form an integral part of the general principles of Community law, as a benchmark. UNSC resolutions are not exonerated from such a review only because they are intended to help the Member States fulfil their international obligations.

### **6.3 The Effects of the Annulment of the Contested Regulation for the Member States**

Another interesting aspect of the judgment of ECJ judgment is the effect of the annulment of the contested regulation for the EU Member States. The annulment means that the Member States suddenly find themselves in breach of their obligations under the UN Charter. At the same time, they have just been reminded of the superior weight attributed of the norms of the protection of human rights in the EU legal order and to the rule of law. How are the Member States to conciliate their obligations under the UN Charter with their membership in the EU?

It can of course be argued, and is done so by professor Cameron, that the primary responsibility of the Member States in the case of *Kadi and Al Barakaat*, was prior to the adoption of the resolution in the UNSC. When the Member States were acting jointly in the UNSC, they bear with them any responsibility they might have under constitutional or international human rights norms, such as EU norms for the protection of human rights.<sup>153</sup> This responsibility was also emphasized by AG Maduro, who stated that the Member States are, required to exercise their powers and responsibilities in the UN in accordance with general principles of EU law, particularly those belonging to the UNSC have an obligation to prevent, as far as possible, the adoption of decisions in that body that are liable to run counter to general principles of EU law.<sup>154</sup> But pointing out what the Member States *should* have done does not solve the case at hand, nor does it entirely prevent similar situations to occur in the future.

According to Tridimas and Gutierrez-Fons, the Member States must adopt new legislation in order to transpose the UNSC Resolution. This can be done through means of national legislation or at Community level.<sup>155</sup> The authors convincingly argue that the Community competence to adopt CFSP

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<sup>153</sup> Cameron, *supra note* 71, p. 179.

<sup>154</sup> Maduro, *supra note* 1, para. 32. This duty is also codified in Article 19(2) TEU which requires EU states that are permanent UNSC members to ensure the defence of the positions and interests of the Union.

<sup>155</sup> Tridimas and Gutierrez-Fons, *supra note* 69 p. 41

measures is possibly available also for the Member States, but that if taking advantage of that possibility, the Member States would probably have to comply with the human rights provisions set out in the EU legal order, as they would be acting within the scope of Community law.

In the absence of a Community measure it is open to the Member States to take implementing measures under Articles 297 and 60(2) TEC to adopt measures which, although affecting the functioning of the common market, may be necessary for the maintenance of international peace and security, Maduro argues.<sup>156</sup>

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<sup>156</sup> Maduro, *supra* note 1, para. 30.

## 7 Effective Judicial Protection and Due Process in *Kadi and Al Barakaat*

In its judgment, the ECJ intimately connects its competence to review with the protection of human rights and in particular, the right to effective judicial review, or rather, the lack of such a review in the UN sanctions system. This is also suggested as a reason for review, perhaps particularly strong in a case where political pressure to disregard individual rights is strong, by AG Maduro in his opinion on *Kadi*.<sup>157</sup> The argument used by the CFI for minimal review, that the fight against terrorism is a political question unfit for the Court to determine is thus, in the AG's opinion, contradictory.

The Court is faced with an argument brought by the Commission based on the *Solange*-doctrine, suggesting that as long as the individuals or entities subjected to the sanctions are offered "an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever."<sup>158</sup> This argument, although denying that the re-examination before the Sanctions Committee would give rise to general immunity,<sup>159</sup> brought the Court to investigate the means to approach the Sanctions Committee and to evaluate the remedies offered to the persons and entities subjected to the sanctions. The Court concluded in this aspect that the de-listing procedure available to the persons or entities on the sanctions list before the Sanctions Committee is in essence diplomatic and does not present a real opportunity of asserting the applicants' rights. Therefore, "...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 fundamental rights..."<sup>160</sup>. Thus, the lack of judicial review at the UN level strengthens the impetus for such a review at the EU level.

Consequently, the Court finds itself obligated to examine the claims put forward by Mr Kadi and Al Barakaat with regard to breach of the rights to defence, in particular the right to be heard and the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.<sup>161</sup>

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<sup>157</sup> Maduro, *supra note 1*, paras. 34 and 35.

<sup>158</sup> *Kadi and Al Barakaat*, para. 319.

<sup>159</sup> *Ibid.*, para. 321.

<sup>160</sup> *Ibid.*, para 316.

<sup>161</sup> *Ibid.*, para 333.

## 7.1 The Right to Defence and the Right to be Heard

So what is effective judicial protection? According to Groussot, it is a fundamental right perceived as a principle of *due process*<sup>162</sup>. A similar definition is given by the ECJ, describing it as a “general principle of Community law...” and referring to Articles 6 and 13 of the ECHR which contain provisions for respectively right to a fair trial/access to court and the right to effective legal remedy. Reference is also made to Article 47 of the ECFR.<sup>163</sup> Articles 47 and 48 of the ECFR enshrine certain due process rights, which are often characterized as *rights to defence*. All rights to defence are not necessarily general principles of EC law, but they do, due to settled case-law, correspond to fundamental principles of Community law. For example, the right to certain procedural guarantees, such as of access to files, have been recognized as intending to protect the rights of the defence and to ensure in particular that the *right to be heard* is exercised effectively.<sup>164</sup>

As regards the rights of the defence and the right to be heard in the case(s) at hand, the effectiveness of judicial review means, in the Court’s opinion, that the Community authority in question is bound to communicate the grounds on which the name of a person or entity in the list forming Annex I to the contested regulation to the person or entity concerned so far and as swiftly as possible in order to make possible the exercise of their right to bring an action.<sup>165</sup> Under Article 6 ECHR what matters is *equality of arms*, i.e. a reasonable opportunity to present ones case – including evidence – under equal conditions for both parties.<sup>166</sup>

The ECJ however agrees with the CFI regarding the rights of the defence and in particular the right to be heard, the Community authorities could not be required to communicate those grounds nor could they hear the applicants before their names were entered in that list, for such prior communication would be liable to jeopardise the effectiveness of the sanctions imposed by the regulation.<sup>167</sup> But the Court pointed out that the regulation at issue provides no procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the list, either at the same time as, or after, that inclusion.

The Council’s failure to communicate constituted, according to the ECJ, a violation of the applicant’s right to of defence and in particular their right to

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<sup>162</sup> Groussot, *supra note 4*, p 312.

<sup>163</sup> *Kadi and Al Barakaat*, para. 335. By referring to the yet non-binding Charter the ECJ in the opinion of Tridimas and Gutierrez-Fonz, entrenches a “resent tendency to view its provisions as a legitimate source of inspiration despite the fact that, formally, it has no binding force.” Tridimas and Gutierrez-Fonz, p. 36.

<sup>164</sup> Groussot, p. 312-313.

<sup>165</sup> *Kadi and Al Barakaat*, para. 336.

<sup>166</sup> Ovey and White, *supra note 35*, p. 176.

<sup>167</sup> *Kadi and Al Barakaat*, paras. 338-339.

be heard. Further, since no evidence was presented before the Court, it was deprived from a proper possibility to investigate the correctness of the asset freeze, meaning that it could not exercise review and ultimately could not fulfil the applicant's right to effective judicial protection.<sup>168</sup> The fact that the Council never even informed Mr Kadi and Al Barakaat of the evidence adduced against them, meant that Mr Kadi and Al Barakaat were also denied the right to a legal remedy<sup>169</sup>.

## 7.2 The Right to Effective Judicial Protection

At the heart of the right to effective judicial protection lies the “rule of law” upon which the Union is founded according to Article 6(2) TEU.<sup>170</sup> It has been established in ECJ case-law that the right to challenge a measure before the Court is inherent in the rule of law. It is also reflected in the constitutional traditions common to the Member States and laid down in Articles 6 and 13 of the ECHR.<sup>171</sup> Case-law has also shown that there exists a strong relationship between the principle of effective judicial protection and the principle of effectiveness (*effet utile*) which has served the ECJ as an argument in order to permeate the constitutional development of EC law.<sup>172</sup>

The CFI, once again stressing the unconditional (save for *jus cogens*-review) primacy of UNSC Chapter VII-measures, accepted in its judgment that limitations to the right to access to court/right to effective judicial protection could be subjected to limitations, and that the limitations in the case of *Kadi and Al Barakaat* were justifiable. It also accentuated the fact that the concerned persons and entities had recourse to a diplomatic system for challenging of the listings sufficiently compensated for the insufficient remedies at international level.

The ECJ however, did not accept any intrusion on the right to effective judicial protection. Although not explicit in the judgment, the Court seems to agree with AG Maduro's opinion that the lack of an independent tribunal at a UN level increases the incitement for judicial review at EU level. “Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order.”<sup>173</sup> Maduro, thus, gives an expression of a reasoning similar to the equivalence-

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<sup>168</sup> Tridimas and Gutierrez-Fons, *supra note* 69, para. 37.

<sup>169</sup> *Kadi and Al Barakaat*, para. 349.

<sup>170</sup> Lenaerts, Koen, “The Rule of Law and the Coherence of the Judicial System of the European Union”, *Common Market Law Review*, 44: pp. 1625-1659, 2007, p. 1625.

<sup>171</sup> More on the *Johnston*-judgment in Groussot, p 336-337.

<sup>172</sup> Groussot, p. 340. The argument of effectiveness was crucial in the Court's argument in *Van Gend en Loos*.

<sup>173</sup> Maduro, para. 54.



test utilized in the *Bosphorus* case. The importance of that case in this context will be further analysed below.

It must be mentioned in this context, that the principle of effective judicial protection has been much debated in doctrine regarding the rules on *locus standi* rules under Article 230(4) TEC. The main question is whether proceedings before national courts satisfy the requirement for effective judicial protection for individual applicants, and whether the alleged absence of judicial protection at national level, under the procedure of preliminary rulings in Article 234 TEC, could give reason for a reform of the standing rules. A more extensive analysis of the issue is both superfluous and too space-demanding in this context.<sup>174</sup>

### **7.2.1 Link Between Right to Property and the Right to Judicial Review**

The general principle of effective judicial protection may be qualified as a "hybrid principle"<sup>175</sup> between a fundamental right and a procedural right. This is explained by AG Maduro in *Kadi*, stating that "procedural safeguards at the administrative level can never remove the need for subsequent judicial review. Yet, the absence of such administrative safeguards has significant adverse affects on the applicant's right to effective judicial review".<sup>176</sup>

This correlation between procedural requirements and judicial review is further demonstrated in the Court's ruling on the part of the case concerning alleged violation of the right to property. Even though the freezing of funds was deemed to be proportionate in this case, the restriction put upon Mr. Kadi was unjustified because he was denied the procedural requirement inherent in Article 1 of the First Additional Protocol to the ECHR to put his case to judicial review. Consequently, the ECJ linked the standards of due process incorporated in the right to property with the right to judicial review.<sup>177</sup>

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<sup>174</sup> For further reading on *locus standi*, Groussot refers on p. 342 to the opinion of AG Jacobs in *Union de Pequenos Agricultores* and the judgments in both Case *Union de Pequenos Agricultores v. Council* [1999] ECR II-3357 and Case T-177/01 *Jégo-Quééré v. Commission* [2002] ECR II-2365. See also Lenaerts.

<sup>175</sup> Groussot, p. 311.

<sup>176</sup> Maduro, para. 51.

<sup>177</sup> Tridimas and Gutierrez-Fons, p. 39.

### 7.3 Would the CFI-ruling Pass the Equivalence Test Before the ECtHR?

There are many interesting comparisons to be made between the two courts' rulings in *Bosphorus* and the ECJ's *Kadi and Al Barakaat*-judgment. Not only was the EU court faced with the issue of whether or not UNSC measures could be subjected to their judicial review, the ECtHR had to determine whether Ireland implemented the contested regulation in accordance with human rights, particularly the right to respect for property. The ECtHR settled for Ireland's compliance with the "equivalence-doctrine", meaning, as outlined above, that the ECtHR would abstain from judicial review as long as the relevant organisation - the EU and its Member States in this case - is furnished with a system for the protection of fundamental rights.

Now, what is interesting in this context is the scope of the equivalence test and the "checks and balances" constituting the test. According to the ECtHR, the equivalence test scrutinizes not only the substantive guarantees offered but also the mechanisms controlling their observance.<sup>178</sup> The ECtHR especially examined the different provisions for procedural guarantees for the individual's right in the TEC, claiming that the effectiveness of substantive rights depends on the mechanisms controlling their compliance.<sup>179</sup> Although the ECtHR recognized that the individual's possibility to access the ECJ is rather limited under the TEC (see above, about the *locus standi*), it found that the combination of procedural rights provided for in the TEC, e.g. the right to bring claim for damages and the preliminary reference procedure. Thus, the ECtHR declared the combined possibilities for individuals to recourse to Community as well as domestic courts as equivalent to the ECHR standards for protection on human rights.

The question is, if the ECJ would have upheld the internationalist approach adopted by the CFI in *Kadi* and *Yusuf and Al Barakaat*, is it likely that the ECtHR would have abstained from review had the case been brought before it? The presumption of equivalent protection can be rebutted only if the other legal system is suspected to be "manifestly deficient" according to the ruling in *Bosphorus*.

The legality of the measures taken in order to achieve the aims requires a fair balance to be struck between the severity of the restriction of the individual's right and the importance of the public interest at hand. In this balancing, States are granted a wide margin of appreciation according to ECHR rationale.

Interference with Article 6 ECHR is allowed only under the circumstances provided for in Article 15 ECHR, and "public emergency threatening the

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<sup>178</sup> *Bosphorus*, para. 155.

<sup>179</sup> *Ibid.*, para. 160.

life of the nation” is one of the circumstances. Even though the fear of terrorism can probably constitute a threat serious enough to trigger Article 15, it must be emphasized that the right to a fair hearing and all the procedural rights embodied in Article 6 must be subjected to a stricter scrutiny when striking a fair balance than the right to respect for property. Several cases show that the ECtHR refused to accept that access to court can be completely blocked for reasons of national security.<sup>180</sup>

It must also be emphasized that the impoundment of the property concerned in *Bosphorus* was a sanction directed towards a State (but which came to affect a legal person, a company), not an individual. Iain Cameron convincingly argues in this matter that since the sanction is of quasi-criminal nature, an increased amount of relevant evidence should be required, as well as a stricter test of proportionality of the sanctions.

It is not far-fetched to envisage that the ECtHR in the case of *Kadi and Al Barakaat* would distrust the capability of the diplomatic procedure established before the Sanctions Committee to sufficiently protect fundamental human rights, especially those connected to the right to effective legal protection. It must be recalled that the ECtHR in *Matthews* signalled a strong impetus for the Contracting Parties to guarantee the rights of the Convention even when they create an international organization and transfer power to it. Moreover, the Court said that it will consider complaints of violations by acts of international organizations of the rights guaranteed by the Convention where no other judicial body claims the competence to such a review. A mere review of the equivalence with *jus cogens* can scarcely be considered equivalent or even comparable to the standards of ECHR.<sup>181</sup>

## **7.4 Can Terrorism be Defeated without Human Rights Violations? – What Can Be Done?**

In Cameron’s view, the present lack of a system for judicial review of the legality of targeted sanctions is unsustainable and he calls for an objective review mechanism, either the implementing state or the Member States acting collectively in the Security Council to approve the intelligence operations.<sup>182</sup> “The interposition of a judge between the executive and the individual also provides a degree of quality control on the targeting process”<sup>183</sup>, he argues. Having established the connection between the rule

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<sup>180</sup> Cameron, p. 193.

<sup>181</sup> Eckes, Christina, “The Judicial Review of European Anti-Terrorism Measures- The Yusuf and Kadi Judgments of the Court of First Instance”, *European Law Journal*, Vol. 14, No. 1, 2008, pp. 74-92, p. 90.

<sup>182</sup> Cameron, p. 191.

<sup>183</sup> *Ibid.*, p. 169.

of law and the right to judicial review, it is evident that every legal system should be responsible for the exercise of its powers.

At which level would we place this judge? Cameron is sceptical to an in-house mechanism for review in the UNSC.<sup>184</sup> Instead he suggests for a number of changes to be made in the blacklisting procedure at UNSC level, and would prefer an obligation at national level to allow appeals on the merits.<sup>185</sup>

It is evident that the present situation cannot be upheld. ECJ:s ruling in *Kadi and Al Barakaat* was the first step in the right direction. The war on terror must be carried out with an unconditional devotion to the rule of law. The evidence thresholds for imposing sanctions against individuals must be raised and every person or entity affected by a sanction must be presented with an opportunity to present its case before a fair and independent judicial body that is based on respect for the rule of law and fundamental human rights principles.

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<sup>184</sup> Cameron, *supra note* 71, p. 208.

<sup>185</sup> *Ibid.*, p. 205.

## 8 Constitutional Hegemony - Towards a Normative Superiority of Certain Human Rights Norms?

In the initiating chapters of this thesis I have given account of how the judicial protection for human rights in the EU legal order has grown from a spill-over effect of economic co-operation to a general principle upon which the Union is founded. The advancement in the human rights area in ECJ case-law has also been drafted in the Unions own Charter of Fundamental Rights and Freedoms, which is still non-binding but serves as inspiration for the Court. I have also described the parallel system of protection under the ECHR, and the relationship between the Strasbourg Court and the EU Courts.

While abiding a solution to the adoption of the Lisbon Treaty and in the wake of the “constitutional crisis” the Union allegedly suffered after the failure of the Constitutional Treaty, which would both have made the Charter of Fundamental Rights binding, the ECJ in *Kadi and Al Barakaat* in my opinion take the status of human rights norms to yet another level.

Tridimas and Gutierrez-Fons speak of “constitutional confidence”<sup>186</sup> demonstrated by the Court when referring in its judgment to the rule of law as a founding principle of the Union. By determining that the effect of international obligations must be determined by reference to conditions set by Community law, the ECJ established the “constitutional hegemony” of EU law. The authors are comparing the Courts finding that not even UNSC resolutions can trump the application of protection of fundamental human rights (no provision of the TEC abrogates that application), with the principle of the US Supreme Court that “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution”.<sup>187</sup>

In my opinion, I believe that Tridimas and Gutierrez-Fons have made an important notion, even though I doubt that constitutional hegemony in the EU legal order can be attributed with the same conviction of sovereignty as the US Supreme Court wishes to express. In its judgment the Court repeatedly concerns itself with emphasizing that the review of lawfulness to be ensured by the Community judicature applies to the Community act intended to give effect to the UNSC resolution, and not to the resolution as such.<sup>188</sup> Thus, the Court doesn’t seek to subordinate the legal system of the

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<sup>186</sup> Tridimas and Gutierrez-Fons, p. 35.

<sup>187</sup> Ibid., p. 64-65.

<sup>188</sup> *Kadi and Al Barakaat*, para. 286.

UN, but rather to elevate the importance of the protection for fundamental human rights. "...[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the *constitutional principles* of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty."<sup>189</sup> (My italics.)

What does the Court mean by "constitutional principles" and what normative status would such a principle have within the EU legal order respectively under International law?

## 8.1 Constitutionalism – a Normative Superiority of EU Human Rights Norms in the EU Legal Order?

The concept of "constitutionalism" is obviously a broad one and the constitutional debate that has been carried out in the EU in the recent years is complex and cannot be sufficiently dissected here. However, it is relevant to speak of constitutionalism in terms of the human rights development we have seen in ECJ case law and especially in the case of *Kadi and Al Barakaat* where so many references to constitutionalism are made in the judgment and in doctrine.

Suffice it to say that constitutionalism in Europe assumes that the term "constitution" is not exclusive for the legal order of a sovereign state. It rather refers to a set of structural and substantive norms that are fundamental for the Community as a whole. In his dissertation, Mats Lindfeldt, (Lic. Pol.Sc at Åbo Akademi University in Finland) presents an excellent description of the development and status of EU fundamental rights, focusing on the adoption of the ECFR. He finds that the increased importance attached to human rights is not only seen as a prerequisite to the legality of Community acts, but that it also has a potential to contribute to the legitimacy of the entire "European project".<sup>190</sup> He rightly argues that the CFR "was not drafted and adopted in a total lacuna or to fill a complete judicial gap for the protection of fundamental rights within the legal order of the Community." The ECJ case-law on human rights protection had already gained "constitutional recognition" as human rights protection was included as one of the founding principles of the Union in Article 6(2) TEU.<sup>191</sup>

As the architect of fundamental rights doctrine within the EU legal order, reference to "constitutional principles" by the ECJ has traditionally implied fundamental substantive norms, notably human rights norms, of the national

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<sup>189</sup> *Kadi and Al Barakaat*, para. 285.

<sup>190</sup> Lindfeldt, *supra note* 48, p. 14.

<sup>191</sup> *Ibid.*, p. 15.

constitutional orders of the Member States, international treaties and conventions that the Member States are signatories to.<sup>192</sup> However, in *Kadi and Al Barakaat*, the ECJ refers to the ‘constitutional principles of the EC Treaty’ which, of course, opens up for speculations about whether the Court (pre)maturely leads the way towards a Constitution for Europe and perhaps launches the idea a set of autonomous constitutional principles.

If the *Kadi and Al Barakaat* judgment can be said to elevate the status of certain human rights norms to the normative superiority of “constitutional principles”, this would obviously reverse the relationship to the original four freedoms in the sense that the realization of economical goals will hereinafter have a secondary position to human rights considerations and not the other way around.

Lindfeldt is also of the belief that fundamental rights “will soon occupy a significant and prominent place within the *constitutional* framework of the EU”,<sup>193</sup> although he bases his hypothesis on the contingent incorporation of the ECFR. He comes to the same conclusion though, when stating that “what can reasonably be expected is that economic freedoms, which traditionally have been considered as the cornerstone of the EU legal order, will be tested and weighed against fundamental rights.”<sup>194</sup> Unfortunately, Lindfeldt does not elaborate much on the status of those fundamental rights in an international setting, outside the EU.

## 8.2 Normative Conflicts Between International Legal Systems

Assuming that the right to be heard, the right to effective judicial protection and the right to property are in fact to be granted constitutional status within the EU legal order; what is the normative status of such rights in the hierarchy of international value system? How does it relate to other national, regional and functional systems of law outside the EU jurisdiction? This part of the analysis will obviously be of merely speculative nature.

In this context, the CFI-judgment in *Kadi*, and the review on grounds of compatibility with *jus cogens*, would merit attention for its approach to international law. The ECJ-judgment was in essence euro-centric and offered only a limited perspective of the effects of the judgment in the international legal order. What is interesting, and this is also discussed in Tridimas and Gutierrez-Fons’ article, is that the CFI does not hesitate to adopt a broad understanding of the concept of *jus cogens*, encompassing under it all the rights pleaded by Mr. Kadi. Thus, the CFI considered that only an arbitrary deprivation of property might be regarded as contrary to *jus*

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<sup>192</sup> Lindfeldt, *supra note* 48, p. 3.

<sup>193</sup> *Ibid.* p. 294.

<sup>194</sup> *Id.*

cogens,<sup>195</sup> the right to be heard before the Sanctions Committee was acceptably restricted given what was at stake<sup>196</sup>, and the lack of an independent international court to fulfil the right to an effective judicial protection was not contrary to *jus cogens* due to the fact that that right is not absolute and can be restricted when the international community is faced with threats to peace and security.

Thus, while erring in not subjecting the contested regulation to a full judicial review and by using *jus cogens* to justify a lower level of review in order not to offend the UNSC, the CFI still recognized the pleaded rights as part of a set of human rights which represent universal values. Without going further into exactly what rights *jus cogens* encompasses, the fact that the CFI is not denying that the rights pleaded before it can be part of the most rudimentary set of norms of the international community that is *jus cogens*, obviously ought to send certain signals to the international society.

Although it would be rather naïve to suggest that the *Kadi and Al Barakaat* rulings challenge the scope of *jus cogens*, this line of reasoning still opens up the question whether normative conflicts between different international regimes (e.g. human rights protection versus binding obligations pertaining to peace and security) can be resolved by acknowledging the normative superiority of (certain) human rights norms? No easy answer can be found to that question and the ruling in *Kadi and Al Barakaat* contains normative hierarchy instructions designed only for the EU and its institutions to follow.

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<sup>195</sup> *Kadi*, para 241, *Yusuf*, para 293.

<sup>196</sup> *Kadi*, paras. 257-258.



## 9 Concluding Remarks

The overall purpose of this essay is to examine the development of the protection for human rights within the EU legal order, and to determine its current status in the light of the *Kadi and Al Barakaat* judgment. In this chapter I will shortly sum up my findings and reconnect them with the questions posed in the introductory chapter of my thesis (1.1).

1. The binding nature of the UN Charter and UNSC resolutions does not work one way. The Member States are bound by the Charter according to the principle of primacy stated in Article 103 of the UN Charter and Article 27 of the VCLT. Their duty to give effect to such measures is, from an international point of view, limited only by customary international law and norms with *erga omnes* effect.

The duty for the EU to give effect to UNSC resolutions is complex and can be seen both from an internationalist and an euro-centric point of view. EU's commitment to the UN Charter is expressed in Article 11 TEU but the Union and its institutions are not parties to the Charter. However, the CFI in *Kadi and Al Barakaat* considered that the EU can be said to be *indirectly* bound by the Charter through its Member States. The duty to protect fundamental rights and freedoms in Article 6 TEU and the duty of loyal cooperation are, however, still to be respected by both EU and its member States. EU Member States are required to, even when acting in the UNSC, promote the respect for human rights as defined in the EU legal order.

Furthermore, the Member States are all signatories to the ECHR and are also to guarantee the rights protected in it. ECtHR has increasingly adopted an indirect review also of EU legal acts.

The Court's reasoning in *Kadi and Al Barakaat* is euro-centric and does not elaborate on the effect of the annulment of the contested regulation for the Member States, nor how they are to remedy the fact that they will all be in breach of their obligations under the UN Charter.

2. Assuming that the ECJ would have come to the same conclusion as the CFI, it is definitely interesting to speculate about how a claim before the ECtHR would fall out, especially in the case of *Kadi*, where severe infringements of the absolute right to a fair hearing and the non-absolute right to property, are imposed on an individual. In *Bosphorus* the ECtHR abstained from review with reference to the principle of equivalent protection, emphasizing especially that the procedural rights protected under the TEC offered sufficient legal protection. However, the circumstances in *Bosphorus* are distinguishable from those in the case of *Kadi* and the ECtHR explicitly expressed in *Matthews* that it will consider complaints of violations by acts of international organizations of the rights guaranteed by

the ECHR where no other judicial body claims the competence to such a review.

3. It has been argued that human rights principles within the EU legal order are about to be elevated to a higher legal status than any other set of principles. The human rights development seen in ECJ case law, the adoption of the ECHR and the debate on accession to the ECHR in order to sufficiently safeguard their protection are all evidence of such tendencies. In *Kadi and Al Barakaat*, ECJ ruled that certain human rights norms would even trump the implementation of a UNSC resolution into the EU legal order. EU Human rights norms have become the ultimate benchmark for all measures taken by EU institutions, its Member States when acting within the area of the Union and for all the Union's partaking in international cooperation.

In my opinion, the ECJ thereby elevates certain human rights norms to a hierarchical superiority and takes the Union one step further towards constitutional hegemony of human rights norms. While abiding the entering into force of the Treaty of Lisbon, the Court recollects the founding values and principles of the Union and demonstrates constitutional trust with human rights norm as its centrepiece.

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